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THE TAX EXILE PROBLEM

PhD in Law
2015

Charles Garavan

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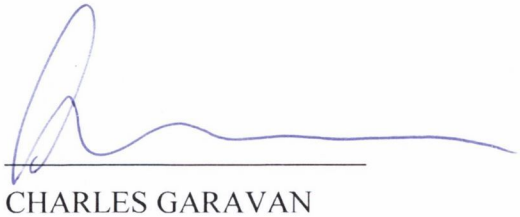
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CHARLES GARAVAN

25 MAY 2015

SUMMARY

This work examines the benefit theory and ability to pay theories of taxation and the theory of economic allegiance in the context of questions of justification of taxation and identification of taxpayers. The theories are examined in their original forms and in the way in which they have evolved over time, and are compared with theories of jurisdiction and of allegiance. The work also examines the jurisdictional limits of direct taxation in Great Britain and Ireland, in particular the choice and definition of connecting factors such as nationality, residence, source and domicile, and the way in which they have evolved and changed from their earliest forms, with a particular emphasis on whether they connote a long-term or short term connection of an individual to a country. The ability of the taxation theories already outlined to adequately describe taxation as it existed in practice is assessed, and the question of whether these theories informed or were affected by major changes in the jurisdictional scope of direct taxation at key points in its evolution is analysed. The nature and extent of the tax exile problem is analysed using publicly available secondary materials and records released in response to freedom of information requests by the author, and an assessment of the scale of the problem is attempted. The public discourse surrounding the issue is examined using parliamentary debates, media reports and other sources is also analysed in this regard. Ireland's legislative response to the tax exile problem to date is critically analysed from the perspectives of its effectiveness and its ability to balance identified competing policy goals.

The principal findings of the work are that theories of justification and identification of taxpayers were fixed in the eighteenth century and are outdated and in need of re-examination; that the benefit theory of taxation is not an appropriate theory for identifying taxpayers as members of a society for tax purposes and neither explains, nor can form the basis for, taxation based on residence, though it may be appropriate for explaining taxation based on source. The work further finds that that until 1803 all direct taxation in Great Britain and Ireland was based on two connecting factors: nationality and residence (in the case of aliens). The income tax of 1803 was revolutionary in a way that appears not to have been previously appreciated, as it was the first tax to be levied on the basis of residence and source, and the first to impose tax on non-resident aliens. The work finds that when Ireland introduced its statutory

definition of residence in 1994, it abandoned all forms of long-term connection to Ireland in favour of the purely short-term connecting factor of physical presence. This was, and is, unique among OECD countries, and made the test of residence both straightforward and objective, but also manipulable. The work finds that the extent of the tax exile problem has been significantly overstated in the public discourse and the likely number of tax exiles is relatively small. Finally, work concludes that neither domicile nor citizenship are appropriate connecting factors for direct taxation in Ireland considering its long history of net outward migration, and that Ireland's responses to the tax exile problem have been ineffective and theoretically incoherent.

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ABBREVIATIONS

AC	Appeal Cases
ACT	Advance corporation tax
AD	Anno Domini
AG	Attorney General
AMRF	Approved minimum retirement fund
ARF	Approved retirement fund
B	Baron of the Exchequer
Bos & Pul	Bosanquet & Puller's Common Pleas Reports
Bott	Bott's Poor Law Cases
Bulst	Bulstrode's King's Bench Reports
Burr SC	Burrow's Settlement Cases
CA	Court of Appeal (United Kingdom)
Cald	Caldecott's Reports of Cases Relative to the Duty and Office of a Justice of the Peace
CAT	Capital acquisitions tax
CATCA	Capital Gains Tax Consolidation Act 2003
CB	Chief Baron of the Exchequer
CC	Circuit Court
CGT	Capital gains tax
Ch	Chancery division
CJ	Chief Justice
CJKB	Chief Justice of the King's Bench
CJEU	Court of Justice of the European Union
CLR	Commonwealth Law Reports
Co Rep	Coke's Reports
Cromp & Jerv	Crompton & Jervis' Exchequer Reports
CSO	Central Statistics Office
DIRT	Deposit interest retention tax
DTA	Double taxation agreement
DWT	Dividend withholding tax
EEA	European Economic Area

ECR	European Court Reports
EEC	European Economic Community
EET	'Exempt, Exempt, Tax' method of pensions taxation
EU	European Union
FDI	Foreign direct investment
FOI	Freedom of Information
HC	High Court
HL	House of Lords of the United Kingdom
HLC	House of Lords Cases
HMRC	Her Majesty's Revenue and Customs
HWI	High Wealth Individual
IDA	Industrial Development Authority
ILRM	Irish Law Reports Monthly
ILTR	Irish Law Times Reports
IRC	Internal Revenue Code (US)
IRS	Internal Revenue Service (US)
IR	Irish Reports
IRC	Inland Revenue Commissioners
ITR	Irish Tax Reports
JCT	Joint Committee on Taxation
JIC	Justis Irish Cases
KB	King's Bench Division
Kelyng J	Sir John Kelyng's Crown Cases 1662-1669
KS	King's Sergeant
LCB	Lord Chief Baron
LJ	Lord Justice
LJC	Lord Justice Clerk (Scotland)
LJJ	Lord Justices
LP	Lord President (Scotland)
LR	Law Reports
MR	Master of the Rolls
MP	Member of Parliament (UK)
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union

OPS	Occupational pension scheme
P	President of the High Court (Ireland)
	Probate Divorce and Admiralty Division (UK)
PAYE	Pay As You Earn system of tax collection by deduction at source
Price	Price's Exchequer Reports
PRSA	Personal retirement savings account
PRSI	Pay related social insurance
RTE	*Raidió Teilifís Éireann*, the Irish national broadcasting company
Saund	Saunders' Reports
SC	Supreme Court
Sc & Div	Law Reports – Scotch and Divorce Appeals
SDCA	Stamp Duties Consolidation Act 1999
SI	Statutory Instrument
SSAP	Small self-administered pension scheme
STC	Simon's Tax Cases
SWCA	Social Welfare Consolidation Act 2005
TC	Tax Cases
TCA	Taxes Consolidation Act 1997
TD	Teachta Dála (member of the lower house of the Oireachtas)
TIEA	Tax Information Exchange Agreement
UK	United Kingdom
UNTS	United Nations Treaty Series
US	United States
USC	Universal social charge
VAT	Value-added tax
VATCA	Valaue-Added Tax Consolidation Act 2010

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An Act for the releif of His Majesty's Army and the Northern Parts of the Kingdom (16 Char I c 2) (1640)

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An Ordinance for the speedy raising and levying of Money for the maintenance of the Army Raised by the Parliament, And other great Affairs of the Commonwealth, by a Weekly Assessement upon the Cities of London and Westminster, and every County and City of the Kingdom of England, and Dominion of Wales (24 February 1643) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) vol I, 85-100)

An Ordinance for the speedy raising and levying of money throughout the whole Kingdom of England, and dominion of Wales for the relief of the Commonwealth, by taxing such as have not at all contributed or lent, or not according to their Estates and Abilities (7 May 1643) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) vol I, 145-155)

An Ordinance for Raising and maintaining of Forces for the defence of the Kingdom, under the Command of Sir Thomas Fairfax, Knight (17 February 1645) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) vol I, 614-626)

An Ordinance For raising of Twenty thousand pounds a Moneth for the Relief of Ireland (16 February 1648) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) vol I, 1072-1105)

An Act For Raising Ninety thousand pounds per Mensem, For the Maintenance of the Forces raised by Authority of Parliament, for the Service of England and Ireland, For Six Months, from the 25th of March, 1649 to the 29th of September, 1649 (7 April 1649) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) vol II, 24-57)

Assessment upon England at the Rate of Sixty Thousands Pounds by the Month for three Months (1656) (Henry Scobell, *A Collection of Acts and Ordinances of General Use Made in the Parliament Begun and Held at Westminster the Third Day of November, Anno 1640 and Since* (Henry Hills and John Field 1658) Anno 1656, c 12, p 423)

An Act for the speedy provision of money for disbanding and paying off the forces of this Kingdom both by Land and Sea (12 Char II c 9) (1660)

An Act for granting unto the Kings Majesty twelve hundred and threescore thousand pounds to bee assessed and levied by an assessment of threescore and

ten thousand pounds by the month for eighteene months (13 Char II, Session 2, c 3) (1661)

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An Act for establishing an additional Revenue upon His Majestie His Heires & Successors for the better support of His and theire Crown and Dignity (14 Char II c 10) (1662)

Poor Relief Act 1662 (An Act for the better Relief of the Poor of this Kingdom 14 Char II c 12)

An Act for raising Moneys by a Poll, and otherwise towards the Maintenance of the present War (18 & 19 Char II c 1) (1667)

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An Act for granting a Subsidy to his Majesty for Supply of his Extraordinary Occasions (22 & 23 Char II c 3) (1671)

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An Act for raising Money by a Poll and otherwise to enable His Majesty to enter into an actual War against the French King and for prohibiting several French Commodities (29 & 30 Char II c 1) (1678)

s 9

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An Act for Reviving and Continuance of several Acts of Parliament therein mentioned (1 Jam II c 17) (1685)

An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (1 Will & Mar sess 2 c 2) (1688)

An Act for Granting an Aid to Their Majesties of the Sum of Sixteen hundred fifty one thousand seven hundred and two pounds eighteen shillings towards the Carrying on a Vigorous War against France (3 Will & Mar c 5) (1691).

An Act for the better Explanation and supplying the Defects of the former Laws for the Settlement of the Poor (3 & 4 Will & Mar c 11) (1691)

An Act for granting to Their Majesties an Aid of Four Shillings in the Pound for One yeare for carrying on a vigorous War against France (4 Will & Mar c 1) (1692)

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An Act for granting to His Majesty several Rates or Duties upon Houses for making good the Deficiency of the clipped Money (7 & 8 Will & Mar c 5) (1695)

An Act for granting an Aid to His Majesty as well by a Land Tax as by several Subsidies and other Duties payable for One Year (8 & 9 Will III c 6) (1696)

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An Act for granting to His Majesty the sum of One Million four hundred eighty four thousand & fifteen Pounds one Shilling eleven Pence three Farthings for disbanding Forces paying Seamen and other Uses therein mentioned (9 Will III c 10) (1697)

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An Act for granting to His Majesty a further Subsidy of Tunnage and Poundage towards raising the Yearly Sum of Seven hundred thousand Pounds for the Service of His Majesty's Household & other Uses therein mentioned during His Majesties Life (9 Will III c 23) (1697)

An Act for granting to His Majesty an Aid by a Quarterly Poll for One Year (9 Will III c 38) (1697).

An Act for granting to His Majesty the Sum of One Million four hundred eighty four thousand and fifteen one Shilling eleven Pence three Farthings for disbanding the Army providing for the Navy and for other necessary Occasions (10 Will III c 9) (1698)

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An Act for granting an Aid to Her Majesty by diverse Subsidies and a Land Tax (1 Anne c 6) (1702)

An act for granting to Her Majesty several Subsidies for carrying on the War against France and Spain (1 Anne, Session 2, c 17) (1702)

Union with Scotland Act 1706 (An Act for an Union of the Two Kingdoms of England and Scotland 6 Anne c 11)

Union with Scotland (Amendment) Act 1707 (An act for rendering the Union of the Two Kingdoms more entire and complete 6 Anne c 40)

Foreign Protestants Naturalization Act 1708 (7 Anne c 5)

An Act for continuing Part of the Duties upon Coals, Culm and Cinders, and granting new Duties upon Houses being twenty Windows or more, to faise the Sum of fifteen hundred thousand Pounds, by way of a Lottery, for the Service of the year one thousand seven hundred and ten (8 Anne c 4) (1709)

British Nationality Act 1730 (4 Geo 2 c 21)

An Act for repealing the several Rates and Duties upon Houses, Windows and Lights; and for granting to His majesty other rates and Duties upon Houses, Windows or Lights; and for raising the Sum of four millions four hundred thousand Pounds by Annuities, to be charged ont eh said Rates or Duties (20 Geo II c 3) (1747)

Legacy Duties Act 1796 (An Act for repealing certain Duties on Legacies and Shares of Personal Estates, and for grating other Duties thereon, in certain cases 36 Geo III c 52)

An Act for granting to His Majesty an Aid and Contribution for the Prosecution of the War (38 Geo III c 16) (1798)

Land Tax Perpetuation Act 1798 (An Act for making perpetual, subject to Redemption and Purchase in the manner therein stated, the several Sums of Money now charged in Great Britain as a Land Tax for on Year, from the twenty fifth Day of March One thousand seven hundread and ninety eight 38 Geo III c 60)

An Act to repeal the Duties imposed by an Act, made in the last Session of Parliament, for granting an Aid and Contribution for the Prosecution of the War; and to make more effectual Provision for the like Purpose, by granting certain Duties upon Income, in lieu of the said Duties (Duties upon Income Act 1799) (39 Geo III c 13)

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An Act for the better ascertaining and collecting the Duties granted by several Acts passed in the last session of Parliament relating to the Duties on Income, and to explain and amend the said Acts (39 & 40 Geo III c 49) (1800)

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The Union with Ireland Act 1800 (An Act for the Union of Great Britain and Ireland 39 & 40 Geo III c 67)

The Act of Union (40 Geo III c 38) (1800) (Ireland)

An Act for repealing the Duties on Income; for the effectual Collection of Arrears of the said Duties, and accounting for the same; and for charging the Annuities specifically charged thereon upon the Consolidated Fund of Great Britain (42 Geo III c 42) (1802)

An Act for granting to His Majesty, until the sixth day of May next after the Ratification of a Definitive Treaty of Peace, a Contribution on the Profits arising from Property, Professions, Trades, and Offices (43 Geo III c 122) (1803)

An Act for granting to His Majesty additional Duties in Great Britain, on the Amount of Assessments to be charged on the Profits arising from Property, Professions, Trades and Offices (45 Geo III c 15) (1805)

An Act for granting to His Majesty, during the present War, and until the Sixth day of April next after the Ratification of a Definitive Treaty of Peace, further additional Rates and Duties in Great Britain on the Rates and Duties on Profits arising from Property Professions Trades and Offices; and for repealing an Act passed in the Forty-fifth Year of His present Majesty, for repealing certain Parts of an Act made in the Forty-third Year of His Present Majesty, for granting a Contribution on the Profits arising from Property Professions Trades and

Offices, and to consolidate and render more effectual the Provisions for collecting the said Duties (46 Geo III c 65) (1806)

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Superannuation Act 1834 (An Act to alter, amend, and consolidate the Laws for regulating the Pensions, Compensations, and Allowances to be made to Persons in respect of their having held Civil Offices in His Majesty's Service 4 & 5 Will IV c 24)

An Act for granting to Her Majesty Duties on Profits arising from Property, Professions, Trades, and Offices, until the Sixth Day and April One thousand eight hundred and forty-five (Income Tax Act 1842) (5 & 6 Vict c 35)

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An Act for granting to Her Majesty Duties on Profits arising from Property, Professions, Trades, and Offices (Income Tax Act 1853) (16 & 17 Vict c 34)

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Statutory Instruments

Aliens (Exemption) Order 1935, SI 80/1935

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art 9(2)

art 10(1)

art 11(1)

art 17

art 22(2)

art 22(3)(a)

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art 9(1)

art 10(1)

art 11(1)

art 11(5)

art 17

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Art 4(3)

Double Taxation Relief (Taxes on Income) (Pakistan) Order 1974, SI 260/1974

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art 13(5)

art 13(6)

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para 14(h)

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art 18

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para 27(e)

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art 1(4)

art 4(1)

art 16(2)

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art 4(1)

art 10(2)

art 11(2)

art 12(2)

art 24

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Art 4(3)

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Double Taxation Relief (Taxes on Income) (Republic of Macedonia) Order 2008, SI 463/2008

Double Taxation Relief (Taxes on Income and Capital Gains) (Republic of Turkey) Order 2008, SI 501/2008

Double Taxation Relief (Taxes on Income) (Malta) Order 2008, SI 502/2008

art, 10

art 11

art 12

art 13(6)

art 22(5)

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Double Taxation Relief (Taxes on Income and Capital Gains) (Kingdom of Bahrain) Order 2010, SI 24/2010

Double Taxation Relief (Taxes on Income and on Capital) (Republic of Belarus) Order 2010 SI 25/2010

Double Taxation Relief (Taxes on Income) (Republic of f) Order 2011, SI 16/2011

Double Taxation Relief (Taxes on Income) (Hong Kong Special Administrative Region) Order 2011, SI 17/2011

art 10

art 11

art 12

Double Taxation Relief (Taxes on Income) (Montenegro) Order 2011, SI 18/2011

Double Taxation Relief (Taxes on Income) (Kingdom of Morocco) Order 2011, SI 19/2011

Double Taxation Relief (Taxes on Income and Capital Gains) (United Arab Emirates) Order 2011, SI 20/2011

Double Taxation Relief (Taxes on Income) (State Of Kuwait) Order 2011, SI 21/2011

Double Taxation Relief (Taxes on Income) (Republic of Singapore) Order 2011, SI 34/2011

art 10

art 11

art 12

art 13(6)

Double Taxation Relief (Taxes on Income and on Capital) (Republic of Armenia) Order 2012, SI 21/2012

Double Taxation Relief (Taxes on Income and on Capital) (Federal Republic of Germany) Order 2012, SI 22/2012

art 13(6)

Double Taxation Relief (Taxes on Income and Capital Gains) (Republic of Panama) Order 2012, SI 25/2012

Double Taxation Relief (Taxes on Income) (Kingdom of Saudi Arabia) Order 2012, SI. 26/2012

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Double Taxation Relief (Taxes on Income and Capital Gains) (Arab Republic of Egypt) Order 2013, SI 27/2013

Double Taxation Relief (Taxes on Income and Capital Gains) (State of Qatar) Order 2013, SI 28/2013

Double Taxation Relief (Taxes on Income and on Capital) (Swiss Confederation) Order 2013 SI 30/2013

Double Taxation Relief (Taxes on Income and on Property) (Republic of Uzbekistan) Order 2013, SI 31/2013

Malta

Chapter 123 of the laws of Malta, Income Tax Act

art 2(1)

art 4(1)(g)

art 5

art 56

art 56(23)

High Net Worth Individuals - EU/EEA/Swiss Nationals Rules, SL 123.129

art 2

art 4

Malta Retirement Programme Rules, SL 123.134

art 2, art 4, art 5

Malaysia

Income Tax Act (*Akta Cukai Pendapatan*) 1967

s 3

s 6

s 7

sch 1 pt 1

Real Property Gains Tax Act (*Cukai Keuntungan Harta Tanah*) 1976

s 2(1), s 3

Netherlands

General Tax Act (*Algemene wet inzake rijksbelastingen*)

art 4(1)

Norway

General Tax Act of 26 March 1999 no 14 (*Lov om skatt av formue og inntekt*)

§ 2-1

Portugal

Tax Code: Income and Gains of Individuals (*Código do Imposto sobre o Rendimento das Pessoas Singulares*) (Law No 442-A/88)

art 11

art 16(1)

art 16(6)

art 16(7)

art 18(1)

art 81

Singapore

Income Tax Act (Cap 134)

s 2(1)

s 10

Switzerland

Federal Direct Tax Law (*Loi fédérale sur l'impôt fédéral direct*) RS 642.11

art 3

art 14

art 16(3)

Federal Law on the Harmonisation of Direct Taxation in the Cantons and Communes (*Loi fédérale sur l'harmonisation des impôts directs des cantons et des communes*) RS 642.14

art 6

art 7(4)(b)

United Kingdom – since 1922

Finance Act 1926 (UK) (16 & 17 Geo V c 22)

sch 2, pt 2

Finance Act 1949 (UK) (12 & 13 Geo VI c 47)

s 27

s 28,

s 29

Income Tax Act 1952 (UK) (15 & 16 Geo VI and 1 Eliz II c 10)

s 122(1)(b)

Finance Act 1956 (UK) (4 & 5 Eliz II c 54)

s 10

Finance Act 1962 (UK) (10 & 11 Eliz 2 c 44)

s 10

Finance Act 1965 (UK)

s 20

s 42(7)

Income and Corporation Taxes Act 1970 (UK)

s 49

Income and Corporation Taxes Act 1988 (UK)

Taxation of Chargeable Gains Act 1992 (UK)

s 10A

s 12

Finance Act 1993 (UK)

s 208

Finance Act 1998 (UK)

s 127

Income Tax (Trading and Other Income) Act 2005 (UK)

s 831(4).

Income Tax Act 2007 (UK)

s 56(3)

pt 14 ch 1A

s 809C

s 809H

s 832(1A)

s 832(1B)

Finance Act 2008 (UK)

s 24(4)

s 25

s 70(2)

sch 7

Finance Act 2009 (UK)

sch 1

Finance Act 2013 (UK)

s 218

s 219

sch 45 para 7

sch 45 para 8(6)

sch 45 para 10

sch 45 para 15

sch 45 para 16

sch 45 para 22

sch 45 para 23

sch 45 para 25

sch 45 para 33

sch 45 para 34

sch 45 para 35

sch 45 para 37

sch 45 para 38

sch 46 pt 1 para 2

United States

Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, 80 Stat. 1541 (1966)

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub L No 104–208, 110 Stat. 3009-546 (1996)

American Jobs Creation Act of 2004, Pub L No 108-357, 118 Stat. 1571 (2004)

Heroes Earnings Assistance and Relief Tax (Heart) Act of 2008, Pub L No 110-245, 122 Stat 1624 (2008)

United States Code

8 USC

§1101(15)

§ 1182(a)(10)(E)

§ 1184(b)

26 USC

§ 1

§ 2(d)

§ 877(a)

§ 877(e)

§ 877(g)

§ 877A

§ 6039G

§ 7701(b)(1)(A)(i)

§ 7701(b)(3)(A)

§ 7701(b)(3)(B)

INTRODUCTION

Now that which angers men most, is to be taxed above their neighbours.

Sir William Petty, *A Treatise of Taxes and Contributions*
(First published 1662, 3rd edn, Obediah Blagrave 1685) 14

This work is about the problem of tax exile in Ireland, an issue that has become a matter of significant public controversy in the last decade.[1] However, despite the prevalence of discussions of the topic in the political and public discourse, the issue has attracted virtually no academic scrutiny, nor has there been any systematic investigation of the nature or extent of the tax exile problem. One of the aims of this work is to make a modest contribution toward remedying this lacuna, and towards disabusing some misunderstandings and misstatements about the problem that appear to have become widespread.

As is the case in all other member states of the European Union (EU) and Organisation for Economic Cooperation and Development (OECD), Ireland imposes tax on individuals based on both *residence* and *source*: individuals who are resident in Ireland are, broadly speaking, subject to tax on all sources of income and gains regardless of where they arise, while non-residents are taxed on income and gains that have an Irish source only. If an individual who is resident in Ireland for taxes purposes ceases to be so resident, he or she will cease to be subject to Irish taxation on non-Irish sources of income and gains, and may also be able to limit (in some cases very

[1] The chairperson of the Revenue Commissioners has been questioned about the issue on four separate occasions before the Public Accounts Committee and once before the Joint Committee on Finance and Public Service, it has been the subject of proposed amendments to the Finance Bill in each year from 2004 to 2012, it has been the subject of over seventy parliamentary questions and references in the Dáil and Seanad during the debate of other Bills, it formed part of the submissions to, and the report of, the Commission on Taxation in 2009, there have been Revenue audits and investigations into the residence status of certain High Wealth Individuals (HWIs), it has been included in the pre-budget submissions of various bodies over a number of recent years, there have been legislative amendments to the tax code including the introduction of an entirely novel charge on domiciled individuals with significant assets in Ireland, addressing the issue was one of the commitments in the programme for government of the current administration, there was a public consultation on the rules for residence for tax purposes as a result of the issue in 2012, in late 2012 a Labour party poll identified tax exiles as a key budget issue for voters, the interdepartmental Tax Strategy Group recommended amending the definition of residence for the purposes of income tax and CGT to address the issue in 2013 and those proposals have been brought to the cabinet (but not yet implemented), and the issue has been the subject of frequent comment in the mainstream media.

significantly) his or her exposure to tax on Irish source income and gains. 'Residence' is legally defined for tax purposes in the Irish tax code, and the essence of tax exile is, it is suggested, in ceasing to fall within the terms of this definition.

Taxation is a topic that crosses many academic disciplines from politics and economics to sociology and even philosophy, and the phenomenon of tax exile is no different in this regard. However, the question of how residence, or other connecting factors, are defined for taxation purposes is predominantly a legal one. An examination of the connection of individuals to Ireland for tax purposes in the context of the tax exile problem opens the door to wider legal issues, some of which are either unresolved or in need of re-examination. These include the theoretical principles upon which connection to a country for tax purposes is defined, the nature of the connecting factors used and how these connecting factors came to be chosen and to be defined in the way in which they have been. Tax exile, it is submitted, is a useful lens through which to examine such questions, and such an examination can inform an investigation into the nature of the tax exile problem and possible solutions to it.

Although the focus of much of the current debate on taxation centres on the taxation of multinational corporations, with the OECD publishing a report and an action plan on base erosion and profit shifting, the European Commission's proposals on a common consolidated corporate tax base before the Council and the Commission carrying on investigations in to the nature of the tax arrangements of multinationals in Ireland and the Netherlands, the taxation of individuals in multi-jurisdictional settings is no less important. This is particularly so as regards questions of fairness in the tax system, an issue central to the tax exile problem.

While at the corporate level questions of fairness generally concern the competing tax claims of countries over the right to tax the income of multinationals, the tax exile problem is at its heart a question about fairness between individuals. The quotation at the opening of this chapter points out that it angers people to be taxed above their neighbours. Multinational companies like Microsoft and Google are not your neighbours, but the people who work for them are. A re-examination of the theoretical basis of how the connection to individuals is defined for tax purposes may

be opportune, lest the underlying principles become wedded to theoretical and policy decisions that are more, or only, appropriate to the taxation of corporate bodies.

Outline

This work begins with an outline of the nature of the tax exile problem. The meaning of the term 'tax exile' is discussed, as is an aspect of the phenomenon that has emerged strongly from the public discourse in Ireland: that belief that tax exiles remain significantly connected to Ireland even though they are not resident for tax purposes. The constituent elements of the problem, and the various competing policy goals that must be balanced in seeking to solve it are identified and the nature of the problem is analysed in the context of the connecting factors used in Irish taxation and the extent to which their definition has contributed to the tax exile problem is discussed. None of this work has previously been carried out.

Secondly, the various forms of theory of taxation are categorised according to the type of question that each is designed to, or is capable of, addressing, and what are termed theories of the *identification* of taxpayers are argued to be the most important in the context the tax exile problem, though theories of the *justification* for the imposition of taxation are also relevant. The benefit theory, the ability to pay theory and the theory of economic allegiance are examined from the perspective of questions of identification and justification, and the earliest form of these theories, and their evolution, is also analysed. The influence of broader political and philosophical theories of the connection of the individual to the state or society are considered only briefly in the context of their measurable effect on the form of theories of taxation as they evolved. The extent to which theories of identification and justification correspond with theories of allegiance and jurisdiction is also examined, an issue that curiously appears to have been ignored by other commentators. An alternative version of the benefit theory of taxation, referred to as the membership theory of taxation and original to the present author, is outlined and its effectiveness as a theory of justification, and in particular as a theory of identification of taxpayers is analysed and assessed.

Thirdly, this work examines the jurisdictional limits of direct taxation in Great Britain and Ireland, in particular the choice and definition of connecting factors such as nationality, residence, source and domicile, and the way in which they have evolved and changed from their earliest forms. This is an area that, with the exception of the recent work of Peter Harris, has received scant academic attention. These connecting factors are categorised according to whether they measure short-term or long-term connection to the country imposing the tax, and the introduction of Ireland's statutory definition of residence is examined closely in this regard. Surprisingly, given its importance, the introduction of this definition has not previously been academically examined in the context of its choice, or definition, of connecting factors.

Only income tax and capital gains tax (CGT) are examined, and since the focus of the work is on tax exiles, the taxation of corporations is not considered. The question of whether taxation theory adequately accounts for direct taxation (both national and, to a limited extent, local) in practice is considered, as is the extent to which taxation theory informed, explains or was affected by major changes in the jurisdictional scope of direct taxation at key points in its evolution.

Fourthly, the extent of the tax exile problem is considered. The emergence of the issue in the public discourse is examined, and the public statements of the extent of the problem are critically analysed using publicly available material and material obtained in response to requests to Revenue and the Department of Finance pursuant to the Freedom of Information (FOI) Acts. None of this work has previously been carried out.

Finally, Ireland's legislative response to the tax exile problem to date is considered from the perspective of its effectiveness in solving the problem and in balancing of the policy goals already identified. The extent to which theoretical aspects of the problem were considered or were of influence in framing these solutions is assessed, again making use of material obtained in response to FOI requests, and the solutions are analysed according to the theories of identification and justification previously outlined. Future proposed solutions and possible solutions to the problem are then considered.

Methodology

Standard legal research methodology is employed, though extensive use is made of secondary materials such as parliamentary debates, material obtained in response to FOI requests and comments in the mainstream media so as to map the elements of the problem as they have emerged from the public discourse. It is this discourse that has informed the legislative approach to solving the problem and which is critically appraised. The focus is on the law and legal theory of the United Kingdom and Ireland, though the theories of American writers are also examined. Comparisons are made with the legal provisions of other countries, including the United States in certain instances, though a comparative analysis is neither attempted nor intended and the focus is on the issue of tax exile in an Irish context. The examination of the history of taxation theory and the connecting factors used in direct taxation in Great Britain and Ireland is of deliberately narrow focus, and wider historical, economic and political aspects of these taxes, though no doubt important in their own right, are ignored for the purposes of this work.

Main arguments

The key contentions of this work are first, that the obligation to bear direct taxation is an incident of membership of the society upon which that tax is levied, and to which the benefits of the public spending financed by that taxation accrue, and that the connecting factors used in taxation are in effect measures of membership of society for this purpose. The categorisation of individuals as resident or non-resident is therefore in reality a categorisation of those individuals as members or non-members of the society in question for tax purposes.

Secondly, it is argued that that the current definition of residence of individuals in the Irish tax code does not represent an accurate measure of membership of Irish society for tax purposes, and that this inaccuracy has facilitated the creation of the tax exile problem and lies at the heart of the perceived inequity that results from it: that individuals who are alike in that they bear the same level of connection to Ireland, and are therefore all members of Irish society with an obligation to finance that society

through the payment of direct taxation, are not being treated alike because one group is being taxed on a worldwide basis and the other on a source basis only.

Thirdly, it is argued that for the purposes of direct taxation in most countries, and in all of the OECD countries apart from Ireland, there are two distinct forms of connection: a long-term connection and a short-term (usually annual) connection. It is further argued that this distinction emerged as part of the evolution of direct taxation over a lengthy period of time, and that when Ireland abandoned this long-established tradition in 1994 it facilitated the creation of the tax exile problem, and that that abandonment has continuing implications for any solution to the problem and for the nature of how individuals are connected to the country for tax purposes generally.

Fourthly, it is contended that the physical presence of an individual for more than a defined period of time in a particular year or tax period within a state is an inherently short-term measure of connection for direct taxation purposes, and that this is qualitatively different from long-term measures of connection. It is further argued that this form of measurement was originally applied only to aliens and is only suitable for measuring the attachment of individuals who are not otherwise connected to a country. The exclusive use of this short-term connecting factor in Ireland since 1994 has led to a situation whereby individuals may manage their physical presence in Ireland so as to remain non-resident while remaining in every other meaningful way connected to Ireland in the same way as other members of Irish society. Conversely, it is suggested that the straightforward nature and objective certainty of Ireland's statutory definition has been a positive factor in attracting foreign direct investment (FDI) to Ireland, and that any intended solution to the tax exile problem needs to take account of this. Finally, it is argued that there is no fully expounded theory of identification of taxpayers or of justification for the imposition of taxation which either adequately accounts for taxation as it exists in practice today, or which can provide a firm basis upon which a solution to the tax exile problem could be founded.

Main findings

The main findings of this work are, first, that theories of justification and identification of taxpayers have developed little since the eighteenth century, and that developments at that time in the benefit theory of taxation, which focused on the relationship and reciprocal obligations between the individual and the state, have proved regressive as regards the use of that theory as a theory of identification of taxpayers today.

Secondly, that the benefit theory of taxation is not an appropriate theory for identifying taxpayers as members of a society for tax purposes and neither explains, nor can form the basis for, taxation based on residence. However, the benefit theory is an effective theory for explaining taxation based on source.

Thirdly, that until 1803 all direct taxation in Great Britain and Ireland was based on two connecting factors: nationality and residence (in the case of aliens). The income tax of 1803 was revolutionary in a way that appears not to have been previously appreciated, as it was the first tax to be levied on the basis of residence and source, and the first to impose tax on non-resident aliens.

Fourthly, that throughout the evolution of direct taxation in Great Britain and Ireland, there have always been both long-term and short-term connecting factors used to determine whether an individual was a member of the society who thus bore an obligation to contribute towards taxation. However, the jurisprudence on the meaning of the words 'resident' and 'ordinarily resident' interpreted these connecting factors so broadly that even individuals with somewhat remote connections were deemed to be taxable.

Fifthly, when Ireland introduced its statutory definition of residence in 1994, it abandoned all forms of long-term connection to Ireland in favour of the purely short-term connecting factor of physical presence. This was, and is, unique among OECD countries, and while it made the test of residence both straightforward and objective, it also made it manipulable.

Sixthly, the extent of the tax exile problem has been significantly overstated in the public discourse, and statements that there are thousands of tax exiles, and

hundreds of extremely wealthy tax exiles are entirely baseless and appear to be derived from a misunderstanding of publicly stated figures. It is likely that there are approximately forty to fifty very wealthy non-residents with a significant and continuing personal and economic connection to Ireland, though many of these may have left Ireland for non-tax reasons. Only a small number of individuals has ever been publicly described as a tax exile in Ireland, though those that have include some of Ireland's wealthiest individuals.

Seventhly, considering Ireland's history of net outward migration and the large number of residents living overseas, citizenship is not an effective measure of membership of Irish society for tax purposes, nor would it be effective in terms of practical implementation, as such taxation could be easily avoided using the provisions Ireland's double taxation agreements (DTAs).

Finally, domicile is not an effective measure of membership of Irish society for tax purposes, particularly domicile of origin, though when used in conjunction with other connecting factors, such as residence, domicile may be a valuable way of distinguishing those with a short-term and those with a long-term connection to a country.

CHAPTER 1

THE TAX EXILE PROBLEM

He's spending a year dead for tax reasons.

Douglas Adams, *The Restaurant at the End of the Universe* (Pan Books 1980) 89

1.1 Introduction

Despite the prevalence of its discussion in the public discourse, and the fact that it remains firmly on the legislative agenda of the current government, there has been virtually no analysis, academic or otherwise, of the nature of the tax exile problem in Ireland. What little has been written has generally been characterised by inadequate research and a failure to examine the issue to any significant depth. In contrast, the issue has generated a considerable amount of academic debate in the United States, and this chapter seeks to draw on this work, together with a detailed analysis of parliamentary debates, media and political commentary and materials obtained in response to the author's FOI requests, in order to make a first step towards addressing this lacuna by identifying the core elements of the problem.

1.2 What is a tax exile?

There is no agreed definition of the term 'tax exile', and although it has been described by some as a status which is conferred on individuals by legislation,[1] the term is not in fact used in any Irish statute or statutory instrument nor has its meaning

[1] Former Labour Party leader Pat Rabbitte described financier JP McManus as 'the beneficiary of a Finance Act introduced by the Taoiseach which conferred tax exile status on him even though he was domiciled in this country' in a parliamentary question in 2000 (Dáil Deb 11 April 2000, vol 517, col 1221). Also, Minister for the Environment, Community and Local Government Phil Hogan, then an opposition spokesperson for Fine Gael, when asked his definition of a tax exile during a debate on the 2009 budget replied 'They are well off people and they are enjoying the status they have obtained, due to decisions made in the House with which I do not agree' (Dáil Deb 16 October 2008, vol 664, col 92).

been considered in any judgment of an Irish court.[2] As the chairwoman of the Irish Revenue Commissioners Josephine Feehily observed, 'the term "tax exile" is shorthand for many things'.[3] This lack of a definition has been cited as one of the reasons that it is difficult to analyse the issue,[4] though a report of the interdepartmental Tax Strategy Group of 2012 did suggest three possible meanings:[5]

- someone who lives in a country with a lower tax rate than that of her/his native country, to avoid paying high taxes;
- an individual who lives outside a specific jurisdiction to avoid paying tax in that jurisdiction;
- an individual who lives outside of her/his native country because of the tax regime in that country.

Each of these definitions is clearly similar and each contains both an objective element, the individual lives in a particular country that is not his or her 'native country' (exile), and a subjective element, the individual's purpose for living in the country in question is, to some extent, the reduction or avoidance of tax that would otherwise arise in the native country. The report goes on to state that, '[i]n an Irish context, discussion on "tax exiles" focuses on individuals of Irish origin or who are largely based in Ireland but who arrange their affairs so that they are not tax resident in the State and thereby pay less tax than if they were resident'. This statement identifies an additional element which has repeatedly formed part of the public discourse about the issue in Ireland in the last decade: that the 'tax exile' maintains a continued and unbroken long-term connection to Ireland.[6] Three successive Ministers

[2] The term is mentioned, incidentally, in four judgments of the High Court, but its meaning was not discussed, and in three instances the individuals referred to were not Irish nationals. See *Forshall and Fine Arts and Collections Ltd v Walsh* (HC 18 June 1997); *Superwood Holdings plc v Sun Alliance and London Insurance plc* [2001] 4 JIC 0407; *RS v PS* [2009] IEHC 579; *WD v SD* [2011] IEHC 120.

[3] Committee of Public Accounts Deb 19 February 2009.

[4] Dáil Deb 26 January 2011, vol 727, col 716, where Minister of State at the Department of Finance Martin Mansergh, said '[a]s there is no definition of tax exile in Irish law, nor any way of determining how many non-resident taxpayers are non-resident for tax reasons, it is difficult to prepare a report on the subject'.

[5] Tax Strategy Group, 'Residence Issues' (Department of Finance, 18 September 2012) <http://www.finance.gov.ie/sites/default/files/12-02-Residence-issues.pdf> accessed 19 May 2014, para 2.

[6] This element does not form part of the dictionary definition of the term, which is 'one who lives in a country chosen for its lower taxes on personal income' (see JA Simpson and ESC Weiner (eds), *The Oxford English Dictionary* (2nd edn, Clarendon Press 1989), and does not feature prominently in discussions of the issue in other countries such as the United Kingdom, United States or France. One

for Finance have responded to parliamentary questions regarding tax exiles by defining them as 'Irish citizens or Irish domiciled individuals claiming to be non-resident for tax purposes',[7] and there are numerous examples of politicians and media commentators highlighting various other forms of connection of tax exiles to Ireland.[8]

Some have suggested that the exile in question is a technical rather than factual one, or is a legal fiction, and that 'to all intents and purposes they are effectively living in this country, doing business in this country, using the facilities of this country' and that Ireland is 'the country they still called home and which still in so many ways sustains them'.[9] Others have referred to fact that the while tax exiles are non-resident for tax purposes, in many cases their spouses continue to live in Ireland as do their children who are educated here,[10] with some going so far as to suggest that 'the

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exception might be the statement of United States Senator Daniel Patrick Moynihan on introduction of legislation affecting the taxation of expatriates, where he said that '[e]ven after renunciation, these individuals can maintain substantial connections with the United States, such as keeping a residence and residing in the United States for up to 120 days a year without incurring U.S. tax obligations. Indeed, reports indicate that certain wealthy individuals have renounced their U.S. citizenship and avoided their tax obligations while still maintaining their families and homes in the United States, being careful merely to avoid being present in this country for more than 120 days each year' (141 Cong Rec S5443 (April 6, 1995)).

[7] Dáil Deb 11 December 2007, vol 643, col 880 (Brian Cowan); Dáil Deb 11 March 2009, vol 677, col 862 (Brian Lenihan); Dáil Deb 14 July 2011, vol 738, col 863 (Michael Noonan). Domicile is in essence is a legal concept denoting an individual's permanent home.

[8] There appear to be just two articles published in academic journals on the subject of Irish tax exiles, and both refer to this additional element of continued long-term connection. See Elaine Doyle, 'The Irish experience of tax exile: a modern-day anachronism?' (2010) 9 Accountancy Business and the Public Interest 1, 3; Kimberley Rowan 'Numbering Their Days: Treatment of Tax Exiles in Irish Tax Legislation' (2010) 42(5) Accountancy Ireland 62.

[9] Joan Burton TD in Select Committee on Finance and the Public Service Deb 24 February 2004 and Enda McDonagh, 'Dear Archbishop Brady...' (2007) 58 The Furrow 515, 517 respectively. See also Dáil Deb 22 October 2003, vol 573, col 10, where Joe Higgins TD referred to 'jet-setting tax exiles who make massive profits from the resources of the Irish people before escaping with virtually no tax being imposed on them. This happens because the Taoiseach's legislation permits the fiction that they do not live here'; Select Committee on Finance and the Public Service Deb 22 February 2006, where Joan Burton TD referred to the 'scandal whereby some extraordinarily wealthy individuals were able to claim offshore residency for tax purposes while residing here permanently'; Dáil Deb 17 February 2009, vol 674, col 63 where Labour Party leader Eamon Gilmore proposed a motion that 'Dáil Éireann believes that ... measures should be taken to end the practice whereby people living and conducting business in this country can avoid paying taxes by a phoney tax exile status ...'; Fionnán Sheahan, 'Limerick confers top honour on a favourite son, JP McManus' *Irish Examiner* (Cork, 5 May 2001) who said that '[a]lthough now in tax-exile in Geneva, in truth JP McManus has never left Limerick'; Matt Cooper, *Who Really Runs Ireland?: The Story of the Elite Who Led Ireland from Bust to Boom ... and Back Again* (Penguin Ireland 2010) 115 'A 1999 Revenue Commissioners document casts serious doubts on the workability of the residency rules. The document warned of "the risk that some of the richest 100 may be officially non-resident for tax purposes and yet in reality live here"'.

[10] Matt Cooper, 'Close this tax loophole? Not a prayer' *The Sunday Times* (Dublin, 26 May 2013) 'Even though they became "non-resident for tax purposes", a substantial portion of their wealth was still derived from assets held in Ireland where their families continued to live'; Dáil Deb 24 March 2009, vol 678, col 633 'Deputy Chris Andrews asked the Minister for Education and Science if tax exiles are

spouses of almost half of Ireland's tax exiles choose to remain in Ireland while their partners move abroad for tax reasons'.[11] Other forms of connection have also been highlighted, such as having made one's fortune in Ireland, being able to avail of the benefits of Irish citizenship and actively participating in public life in Ireland.[12] The personal wealth of individuals described as tax exiles is also frequently referred to, though not in terms necessarily suggest that it is a precondition to being considered a tax exile.[13]

The prevalence of these references to the continued connection to Ireland of tax exiles strongly suggests that there may be a mismatch between the level of connection to Ireland that politicians, media commentators and others believe ought to result in an individual being liable to direct taxation here and the legal definition of connecting factors in Irish tax legislation that in fact gives rise to such a liability. One of the contentions that will be advanced in this work is that this mismatch is central to the tax exile problem and is a result, at least in part, of the way in which residence is defined for the purposes of income tax and capital gains tax (CGT) in Irish legislation.

In the remainder of this work, a tax exile will be taken to mean an individual, normally one of Irish nationality or with an Irish domicile of origin, who ceases to be resident in Ireland primarily in order to reduce his or her exposure to Irish taxation, but who retains significant and continuing personal and economic ties to, and a significant and continuing physical presence in, Ireland.

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entitled to have their children educated free in Irish primary and post-primary schools or if they are expected to pay for their education; the number of children of tax exiles who are receiving free education in non-fee paying schools here; and if there are plans to review this'.

[11] Ian Kehoe, 'Irish living as tax exiles' *Sunday Business Post* (Dublin, 18 May 2008). See also Brenda Power, 'Obey the law? You might as well deal with the devil' *The Sunday Times* (Dublin, 24 April 2011). This assertion appears to be based on a misunderstanding of figures relating to the number of non-domiciled individuals filing tax returns and is discussed further in section 5.2(c) below.

[12] See Seanad Deb 24 March 2004, vol 175, col 2017 (Michael McDowell) and Dáil Deb 11 July 2002, vol 553, col 1928 (Ruari Quinn) respectively.

[13] See for example Select Committee on Finance and the Public Service Deb 9 December 2008, where Minister for Finance Brian Lenihan said '[t]here has been much criticism of this provision as it is considered some wealthy individuals are organising their affairs to ensure they are not resident in Ireland to avoid paying tax on their worldwide income or capital gains, especially those who have access to private aircraft which enable them to enter and exit the State with some ease' and Dáil Deb 9 December 2009, vol 697, col 636 where he said on the introduction of the domicile levy that 'we must ensure that every wealthy Irish domiciliary who pays little or no income tax makes a contribution to the State'.

1.3 The nature of the tax exile problem

1.3(a) Loss of revenue

Several distinct but related elements can be discerned in the public discourse surrounding the tax exile problem in Ireland. First, there have been comments by representatives of every major political party, and many in the media, suggesting that tax exiles do not pay any tax in Ireland, or that they pay very little tax here.[14] As outlined in section 1.2, a tax exile is by definition an individual who ceases to be resident in Ireland primarily in order to reduce his or her exposure to Irish taxation, so the resulting loss of revenue to the exchequer as a result of an individual moving abroad is therefore unsurprisingly identified as a key element of the tax exile problem.

The United States imposes tax on its non-resident citizens on their income arising in foreign countries, subject to several exemptions,[15] and concern that individuals were renouncing their citizenship in order to avoid this charge has been the subject of public, governmental and academic scrutiny and of several legislative provisions aimed at addressing the issue.[16] Academic writers in the United States have also highlighted the loss of exchequer revenue as a result of tax-motivated expatriation

[14] See for example: Committee of Public Accounts Deb 25 March 2004, where John Perry (Fine Gael, Chairman of the Committee) said 'Deputy Noonan mentioned tax exiles ... At a time when we are talking about equity in the tax system there are people who pay no tax anywhere'; Dáil Deb 9 December 2009, vol 697, col 636 where Minister of Finance Brian Lenihan (Fianna Fáil) said '[o]ur tax treatment of non-resident individuals is broadly in line with that of most other OECD countries. However, we must ensure that every wealthy Irish domiciliary who pays little or no income tax makes a contribution to the State'; Dáil Deb 10 February 2010, vol 701, col 957 where Mary Alexandra White (Green Party) said 'In a time when the country has only a modest income, it is not sustainable to have people in Ireland paying no tax while living somewhere else on paper'; Dáil Deb 10 December 2010, vol 701, col 754 where Joe Costello TD (Labour) said 'The Labour Party identified 7,000 tax exiles, who are virtually all millionaires, not paying a tax in this country and yet who enjoy all the benefits of being Irish citizens jetting in and out of the country as the fancy takes them';

[15] 26 USC § 1 imposes the charge to income tax on all individuals, but § 2(d) removes from this charge non-resident aliens, unless they are taxable under §871 or §877. All citizens are therefore within the charge, whether resident or not. For an outline of the exemptions available to non-resident citizens, see Bernard Schneider, 'The End Of Taxation Without End: A New Tax Regime For U.S. Expatriates' (2013) 32 Virginia Law Review 1, 17-23.

[16] See generally Alice G Abreu 'Taxing Exits' (1996) 29 University of California Davis Law Review 1087; Michael S Kirsch, 'Taxing Citizens in a Global Economy' (2007) 82 New York University Law Review 443; Yu Hang Sunny Kwong, 'Catch Me If You Can: Relinquishing Citizenship for Taxation Purposes After the 2008 Heart Act' (2009) 9 Houston Business and Tax Law Journal 411; Steven J Arsenault, 'Surviving a Heart Attack: Expatriation and the Tax Policy Implications of the New Exit Tax' (2009) 24 Akron Tax Journal 37; William L Dentino and Christine Manolakas, 'The Exit Tax: A Move in the Right Direction' (2012) 3 William and Mary Business Law Review 341; Schneider (n 15).

as a key element of the problem, with Abreu stating that the 'push to enact legislation that would either make the act of expatriation a taxable event, or extend the taxing jurisdiction of the United States to expatriates' had proceeded from a sense of outrage that 'followed the publication of stories that detailed how wealthy Americans had renounced their U.S. citizenship and moved abroad, thereby saving millions in federal taxes' and that a key component of this outrage was 'regret over foregone revenue. If expatriation has tax advantages, the argument goes, the federal government can raise revenue simply by eliminating those advantages'.[17]

Some Irish individuals described as tax exiles have emphasised that they do in fact pay tax in Ireland, with Denis O'Brien, when giving evidence in High Court defamation proceedings taken by him, even going so far as to suggest that to describe him as tax exile was itself libellous, and defining a tax exile as 'someone who doesn't pay their taxes. As I described to you this morning, I paid all my taxes in Ireland, all PAYE. And I would be one of the larger taxpayers in the country at this time'.[18] Like all other OECD countries, Ireland imposes income tax and CGT on the income and gains individuals who are resident Ireland, regardless of where they arise, while non-residents are only subject to these taxes on income and certain gains that have an Irish source. As a result, an individual who ceases to be resident in Ireland for tax purposes,[19] will cease to be subject to Irish tax on income and gains that arise outside Ireland, but may remain subject to Irish taxation on domestic sources of income and some gains.[20]

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[17] Abreu (n 16) 1090 and 1092 respectively. See also Dentino and Manolakas (n 16) 410: 'In enacting and amending I.R.C. section 877, Congress was concerned about the revenue loss that resulted from tax-motivated expatriations'.

[18] Vincent Browne, 'Questions and answers on Denis O'Brien and his tax' *Irish Times* (Dublin, 27 February 2013). JP McManus when asked during an interview on *Newstalk 106-108* whether he paid tax in Ireland replied, 'My position is, I have to pay my taxes in Ireland on any monies I earn in Ireland ... and what I earn abroad, I pay the taxes on abroad' (Ivan Yates, Interview with JP McManus (*Newstalk 106-108*, 13 December 2010)). See also Barry O'Halloran, 'Winner all right: When it comes to racing and breeding horses, ...' *Irish Times* (Dublin, 11 October 2003) which states 'There is also a question-mark over Magnier's own status. He is often referred to as a "tax exile", but one source close to Coolmore insists that Magnier does pay tax in this country'.

[19] The individual may remain subject to some sources of foreign income while still *ordinarily resident* in Ireland (ie until the individual has been non-resident for three consecutive years), see TCA 1997, s 820, though if the individual becomes a resident *of* a country with which Ireland has a double taxation agreement (DTA), Irish tax on foreign income and gains may be avoided before the individual ceases to be ordinarily resident.

[20] Such liability could be reduced by making relevant investments in Ireland through Irish resident companies, which are liable to corporation tax at the rate of either 12.5% or 25% depending on the nature of the investment, and withdrawing the profits free from dividend withholding tax, which is

1.3(b) Breach of equity or fairness of the tax system

A second element of the tax exile problem, one that is related to that of revenue loss, is the widely articulated concern that because tax exiles pay little or no tax in Ireland, the equity or fairness of the tax system has been compromised. This is usually expressed in statements to the effect that tax exiles do not pay their 'fair share', and comments along these lines have been made by many politicians and media commentators.[21] To address this concern, in 2011 the programme for government of the executive of the thirty-first Dáil made a commitment to 'ensure that tax exiles make a fair contribution to the Exchequer'.[22] Such comments are also prevalent in the public discourse regarding tax-driven expatriation in the United States. For example, in June 2013 Senator Jack Reed proposed a measure that would exclude expatriates from re-entering the US saying, 'American citizenship is a privilege. But it seems that a privileged few are trying to game the system by accumulating wealth and benefiting from the greatness of the United States and then renouncing their citizenship to avoid paying their fair share of taxes'.[23]

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possible if the individual is resident in a country with which Ireland has a DTA. See TCA ss 21 and 25, and 153(4) and 172D(2) and (3). Several of Ireland's DTAs also provide that Ireland cannot impose tax on dividends paid by Irish resident companies to individuals who are resident of the other treaty partner state.

[21] See for example Dáil Deb 5 February 2008, vol 646, col 57 where Joan Burton (Labour) said 'We spoke about the phenomenon of those people who are non-resident for tax purposes but to all intents and purposes live in this country. I have suggested strongly on behalf of the Labour Party that in a real republic, it is for everybody to make a contribution and pay a fair share of taxes'; Dáil Deb 26 November 2008, vol 668, col 841 where Mary O'Rourke (Fianna Fáil) said 'At a time when we are all being asked to do our patriotic duty, those citizens who have done extremely well but prefer not to contribute to the tax take of the economy, should pay their fair share'; Dáil Deb 10 February 2010, vol 701, col 957 where Mary Alexandra White (Green Party) said 'I refer to a separate section of our society that should contribute its fair share, namely, our so-called tax exiles'; Dáil Deb 26 January 2011, vol 727, col 715 where Arthur Morgan (Sinn Féin) said 'Millionaires and billionaires are avoiding paying tax while those on the new minimum wage are caught to some degree by the universal social charge. People are swanning around, not paying their fair share'.

[22] Department of An Taoiseach, 'Government for National Recovery 2011-2016' (Government Publications, 6 March 2011) <http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Programme_for_Government_Publications.html> accessed 19 May 2014, 16.

[23] Jack Reed, 'Reed Offers Amendment to Prevent Ex-Citizen Tax Dodgers from Reentering the U.S.' (12 June 2013) <http://www.reed.senate.gov/news/release/reed-offers-amendment-to-prevent-ex-citizen-tax-dodgers-from-reentering-the-us> accessed 19 May 2014. See also Abreu (n 16) 1140 'As the politicians who advocate their enactment eagerly proclaim, enacting either of the proposals will demonstrate that the American people will not allow the wealthy to renounce their citizenship without paying their "fair share" of U.S. taxes'; Elise Tang, 'Solving Taxpatriation: "Realizing" It Takes More Than Amending the Alternative Tax' (2006) 31 Brooklyn Journal of International Law 615, 645 'Until

What constitutes a fair share is normally discussed in the public finance and legal literature in the context of two widely accepted norms: *horizontal equity* and *vertical equity*.[24] Horizontal equity demands that 'tax burdens should bear similarly upon persons whom we regard as in substantially similar circumstances'.[25] Vertical equity requires that '[o]nce the tax base has been defined' taxpayers should be 'segregated according to their income levels. Thus, the rate of tax imposed on those with larger incomes should be higher than that imposed on those with smaller incomes'.[26] Of course, in order to implement these norms one must first specify which individuals' circumstances are being compared (ie who is a taxpayer) and, in the case of horizontal equity, the characteristics according to which the individual's circumstances may be considered to be similar.[27] As regards the first element, Schneider points out that 'the horizontal and vertical equity arguments do not address which taxpayers should be within the pool of persons that are being compared',[28] and it seems that, at least in the public finance literature, this is generally treated as a separate issue; one that has already been determined prior to examining the equitable distribution of the tax burden among those individuals.[29] As regards the second element, similarity of circumstances is generally defined according to some economic

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a time when tax-motivated expatriation ceases to enrage the citizenry as unfairly benefiting the wealthy, the realistic option would be to change a flawed system'.

[24] David Elkins, 'Horizontal Equity as a Principle of Tax Theory' (2006) 24 Yale Law and Policy Review 43, 43 says horizontal equity is 'universally accepted as one of the more significant criteria of a "good tax"', and describes vertical equity as one of the 'other two linchpins of contemporary tax theory' (the other being efficiency) (ibid 44). These norms are also widely accepted in the legal sphere (see Peter Harris, 'The Foreign Income Dividend Scheme: A Damage Assessment' [1997] British Tax Review 82, 99; John Tiley, *Revenue Law* (6th edn, Hart Publishing 2008) 10) and formed the basis of the 2009 Commission on Taxation's analysis of how to 'implement further changes to enhance the rewards of work while increasing the fairness of the tax system' in Ireland (Commission on Taxation, Commission on Taxation Report 2009 (Stationary Office 2009) 1 and 38-39).

[25] Henry C Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (University of Chicago Press 1938) 30. The term itself appears to have been coined by Musgrave (Richard Musgrave, *The Theory of Public Finance: A Study in Public Economy* (McGraw-Hill 1959) 160), though he acknowledges Simons as the 'high priest of horizontal equity' (Richard Musgrave, 'Horizontal Equity Once More' (1990) 43 National Tax Journal 113, 113).

[26] Robert L Palmer, 'Toward Unilateral Coherence in Determining Jurisdiction to Tax Income' (1989) 30 Harvard International Law Journal 1, 10. See also Nancy H Kaufman, 'Fairness and the Taxation of International Income' (1998) 29 Law and Policy in International Business 145, 164 who says 'vertical equity exists when the tax distinguishes appropriately between taxpayers who are not equals – when the distribution of the tax burden reflects the correct degree of progressivity, proportionality, or regressivity'.

[27] Other issues also require specification, such as what degree of different treatment will constitute a violation of the norm, though they are not relevant to the point being made here and are not considered.

[28] Schneider (n 15) 44.

[29] This point is discussed in more detail in chapter 2.

measure of wealth,[30] and Elkins argues that for 'horizontal equity to be an effective tool of tax theory, it needs to be understood as requiring that equally well-off taxpayers be taxed equally'.[31]

As already mentioned, broadly speaking the Irish tax system taxes individuals according to their falling within one of two distinct categories.[32] The first category is resident (or ordinarily) resident individuals, who are taxed on their total income and capital gains regardless of where they arise (ie the 'worldwide basis' of taxation). The second category is non-resident individuals, who are only taxed on their income and certain capital gains that arise in Ireland (ie the 'source basis' of taxation). This discrimination between residents and non-residents is not based on wealth or any other economic criterion, but is a legal distinction based on a defined degree of connection to a country. In the case of Ireland, this connection is measured by the number of days an individual is physically present in the state during a particular year or over a number of years.

Tax exiles, by definition, are within the second category of taxpayers: they are not resident (or ordinarily resident) in Ireland for tax purposes, and so are subject to Irish direct taxation on income and some gains that arise in Ireland, but are not liable to Irish tax on their foreign income and gains. They are taxed on the source basis rather than on the worldwide basis. There is nothing to suggest that tax exiles are subjected to Irish direct taxation on a different basis, or at a different rate, or in any other way any differently from other individuals who are within the same category as them, that is, from other non-residents, nor has there been any statement in the public discourse to suggest that such a difference in treatment is perceived to exist. The complaint that tax exiles do not pay their fair share, therefore, is not a complaint that such individuals

[30] Musgrave, 'Horizontal Equity Once More' (n 25) 113 says 'there is room for how "similar circumstances' is to be defined – e.g., accretion or consumption, annual or lifetime'.

[31] Elkins (n 24) 45. See also Louis Kaplow, 'Horizontal Equity: Measures in Search of a Principle' (1989) 42 National Tax Journal 139, 141 saying that indices of horizontal equity most commonly 'measure the number of magnitude of order reversals or the rank correlation between the pre- and post-reform distribution of income'; Paul R McDaniel and James R Repetti, 'Horizontal and Vertical Equity: The Musgrave/ Kaplow Exchange' (1993) 1 Florida Tax Review 607, 613 stating that the determination that two people are alike 'is satisfied in the context of taxation by a selection and definition of a tax base. Thus, with respect to [horizontal equity], once one has decided on the tax base (say, income), then all that is required is a definition of income.'.

[32] Though further distinctions, and differences in treatment, may also exist within these categories.

are paying less than the statutorily required amount on their Irish source income and gains, but rather that they are not also subjected to Irish tax on their foreign sources of income and gains. The heart of the perceived unfairness in relation to the tax exile problem is therefore the fact that certain individuals are treated as being within one category (non-residents, taxed on the basis of source) and, it is argued, therefore pay little or no tax in Ireland, when it is believed that those individuals properly belong within the other category (residents, taxed on a worldwide basis).[33]

It therefore appears that neither horizontal equity nor vertical equity are appropriate norms with which to measure the fairness of the tax system as regards the tax exile problem. These norms do not address the core issue of how one determines whether an individual should be considered to be resident or non-resident for tax purposes (this is a question of deciding 'which taxpayers should be within the pool of persons that are being compared') and they are not normally applied to compare taxpayers within the different categories of resident and non-resident.[34] Tellingly perhaps, academic analysis of the issue of tax-motivated expatriation by United States citizens has examined the question from the perspective of the norm of horizontal and vertical equity only in relation to a comparison of the expatriates with each other according criteria such as the diversification of their asset portfolios,[35] their wealth,[36] and their financial condition following expatriation,[37] and not by comparing the

[33] This is particularly the case as regards the tax exile problem in Ireland, where tax exiles retain significant and continuing personal and economic ties to, and a significant and continuing physical presence in, the country.

[34] There are some exceptions to this. Klaus Vogel, 'Worldwide vs. Source Taxation of Income: A Review and Re-evaluation of Arguments (Part III)' (1988) 16 Intertax 393, 396 argues that in examining the equity of a tax system '[t]he taxpayer who receives income from foreign investment must be compared not only to the neighbours in his state of residence, but to his competitors in the state of investment, the source state, as well', and concludes that the taxation of residents on their foreign income is inequitable (though much of his arguments are based on the inequities that arise between states rather than between taxpayers, and on the grounds of resulting economic inefficiencies). Dale Pinto, E-Commerce and Source-Based Income Taxation (IBFD 2003) 33-34 endorses Vogel's approach and conclusions, and Richard L Doernberg, Walter Hellerstein and Jinyan Li, *Electronic Commerce and Multijurisdictional Taxation* (Kluwer Law International 2001) 69 adopt a similar approach, stating that as a matter of equity 'a resident of Country R and a non-resident earning the same amount of profit from the same type of business activities in Country R should be taxed the same' (of course this is the opposite of the conclusion reached by Vogel and Pinto). In each work this analysis of inter-individual equity between residents and non-residents proceeds on the basis that membership of these categories has already been determined, and the equity of allocating an individual to one category or another is not examined in this context.

[35] Dentino and Manolakas (n 17) 411; Jeffrey M Colon, 'Changing US Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy' (1997) 34 San Diego Law Review 1, 30-31.

[36] Dentino and Manolakas (n 17) 411.

[37] Arsenault (n 16) 59.

expatriates with US citizens (whether resident or non-resident). Walker observes that, '[h]orizontal equity in the international context therefore is typically restated in more limited terms: all U.S. taxpayers should be taxed on their worldwide income at the same rate (or under the same rate schedule)',[38] and Colon states that, '[a] citizen is not similarly situated with an expatriate because, upon expatriation, the expatriate is subject to U.S. tax only on a source or trade or business basis'.[39]

This is not to say that the determination that an individual is within the category of resident or non-resident is not one that is subject to analysis in terms of the equity or fairness of that decision. For example, the 2009 Commission on Taxation examined the preferential tax treatment afforded to individuals who are resident but not domiciled in Ireland (the remittance basis of taxation) and concluded:

> Equity requires that taxpayers who are in a comparable situation should be afforded the same treatment for tax purposes. Making a distinction between individuals based on their domicile results in a situation where taxpayers who are otherwise in a comparable situation are treated for tax purposes in different ways. This is inequitable. Thus, for example, an individual who, although domiciled outside of Ireland, is a permanent resident should be treated the same as any other resident taxpayer.[40]

The normative basis of this conclusion is not expressly stated, though it is presumably derived from what Westen called the 'universal moral truth' that 'people who are alike should be treated alike', the earliest enunciation of which he ascribes to Plato and Aristotle and which he says has 'dominated Western thought ever since',[41] rather than

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[38] Andrew Walker, 'The Tax Regime for Individual Expatriates: Whom to Impress?' (2005) 58 Tax Law 555, 585.

[39] Colon (n 35) 31.

[40] Commission on Taxation (n 24) 142. A similar point was made by the UK Treasury in a 2003 public consultation on residence and domicile where it was stated that 'It is generally accepted as fair that those with the same characteristics are taxed in the same way. In the context of residence and domicile, the degree of connection of an individual to a country is an important characteristic, which may vary in intensity and over time'. It was further acknowledged that it is 'generally accepted as fair that those with a long-term connection owe a special obligation to support the social structures of the state. It is therefore necessary for governments to define the degree of long-term connection which is sufficient to generate this special obligation' (see United Kingdom, 'Reviewing the Residence and Domicile Rules as They Affect the Taxation of Individuals: A Background Paper' (HMSO, April 2003) para 4.6).

[41] Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537, 543. Westen goes on to argue that the concept of equality entails simpler claims on behalf of an individual or group of

being an attempt to apply the dictates of horizontal or vertical equity to the categorisation of individuals for tax purposes.[42] Westen observes, this 'formula ... involves two components: (1) a determination that two people are alike; and (2) a moral judgment that they ought to be treated alike' and that the 'determinative component is the first. Once one determines that two people are alike for purposes of the equality principle, one knows how they ought to be treated'.[43] As regards the tax exile problem, the determinative component is the categorisation of an individual as either a resident, subject to tax on a worldwide basis, or as a non-resident, subject to tax on a source basis only. This categorisation is effected through the legal definition of connecting factors in the tax code, which are measures of the connection of an individual to a particular country for tax purposes. In Ireland this connection determined solely by the extent of the individual's physical presence in the state for a defined period in a particular year or over a number of years.[44]

The complaints of inequity in relation to the taxation of tax exiles can also be viewed as a breach of Rawls' 'principle of fairness', which states that

> when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to the these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission[45]

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individuals to some condition or power, and that transforming these statements of rights into statements of equality is unnecessary and leads to conceptual confusion.

[42] Indeed, it seems likely that the norms of horizontal and vertical equity are themselves based on this universal moral truth, and constitute a specific application of it to the economic analysis of the taxation of individuals.

[43] Westen (n 41).

[44] The individual will be resident in Ireland if he or she is present in Ireland for 183 days in a single year, or for 280 days between the current year and the previous year (TCA 1997, s 819), and will be ordinarily resident if he or she has been resident for three consecutive years (TCA 1997, s 820).

[45] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 112. This was itself a refinement of the principle espoused by Hart that 'when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission' (HLA Hart, 'Are There any Natural Rights?' (1955) 64 Philosophical Review 175, 185). Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) is extremely critical of the principle, chiefly on the grounds that an individual should not be obliged to make a reciprocal payment for a benefit received from cooperative scheme that they did not volunteer to join. See also John Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1981); Richard J Arneson, 'The Principle of Fairness and Free-Rider Problems; (1982) 92 Ethics 616.

Mapel points out that 'a legitimate state should be regarded as a cooperative scheme for mutual benefit' for the purposes of the principle, and that 'individuals who have received benefits from the cooperative efforts of their fellow citizens have a prima facie obligation to do their fair share in return'.[46] The modern state provides many benefits, such as law enforcement, national defence, health care, education and social welfare, and the corresponding obligation on the individual is to contribute towards funding the provision of those services through taxation. Klosko says that there is 'little doubt that the principle of fairness also contributes significantly to widespread feelings concerning tax obligation. People's willingness to pay appears to be bound up with their awareness that payments go toward providing public goods'.[47] Breaches of the principle of fairness are sometimes referred to as the 'free rider problem'.[48]

The principle of fairness places the emphasis on the advantages received by the individual, and by society at large, *from* the state, which is the manifestation of their cooperative venture, rather than on the treatment of the individual *by* the state, which is the focus of the principle of equality discussed earlier in this section (ie the principle that people who are alike should be treated alike *by the state*). Notwithstanding this difference, in order to apply the principle of fairness one must still begin by determining which persons have engaged in the mutually advantageous cooperative venture in question, which entails some measure of who is a member of society for these purposes.

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[46] David R. Mapel, 'Fairness, Political Obligation, and Benefits across Borders' (2005) 37 Polity 426, 426. See also Richard Arneson, 'Doubting and Defending the Principle of Fairness' (Lecture to Centre of Ethics of the University of Toronto, 22 September 2011) <http://www.bgsu.edu/downloads/cas/file94274.pdf> accessed 19 May 2014.

[47] George Klosko, 'The Principle of Fairness and Political Obligation' (1987) 97 Ethics 353, 358-59. In the public finance literature, a *public good* is a commodity or service which is provided to all members of society and from which no individual member can be excluded from consuming; and where consumption by one individual does not affect the availability of the good to others. Examples include law enforcement and national defence. Public services such as health care, education and social welfare are usually referred to as *merit goods*. The distinction is not an important one in the context of the point being made by Klosko, and so one assumes that he is using the term in a more general sense to mean a commodity or service that is provided to all members of a society.

[48] See Idil Boran, 'Benefits, Intentions, and the Principle of Fairness' (2006) 36 Canadian Journal of Philosophy 95, 98 '[t]he principle of fairness grounds a moral obligation not to free ride as part of a fair scheme of cooperation'. For a discussion of the free rider problem in the context of public expenditure, see Garrett Cullity, 'Moral Free Riding' (1995) 24 Philosophy and Public Affairs 3.

Chapter 2 of this work will examine in detail the theoretical basis upon which the measure of connection of individuals to a country for tax purposes, and the categorisation of those individuals as resident or non-resident that flows from it, is made. It will be argued that the obligation to bear direct taxation is an incident of membership of the society upon which that tax is levied, and to which the benefits of the public spending financed by that taxation accrue, and that the connecting factors used in taxation are in effect measures of membership of society for this purpose. The categorisation of individuals as resident or non-resident is therefore in reality a categorisation of those individuals as members or non-members of the society in question for tax purposes. It will be contended in this work that the current definition of residence of individuals in the Irish tax code does not represent an accurate measure of membership of Irish society for tax purposes, and that this inaccuracy has facilitated the creation of the tax exile problem and lies at the heart of the perceived inequity that results from it: that individuals who are alike in that they bear the same level of connection to Ireland, and are therefore all members of Irish society with an obligation to finance that society through the payment of direct taxation, are not being treated alike because one group is being taxed on a worldwide basis and the other on a source basis only.

1.3(c) Breach of patriotic duty

A third element of the tax exile problem is the sense of outrage that it provokes in response to what is perceived to be an unpatriotic act: abandoning one's homeland to avoid an obligation to pay taxes to support it. This is a charge which has been levied only occasionally in the public discourse on the issue in Ireland, a typical comment being that made by Sean Barrett TD that 'if a person is fortunate enough to make much money here and in order to avoid paying capital gains tax decides to do a runner and live somewhere else, I would regard that as being disloyal and unpatriotic.'[49] In

[49] Dáil Deb 27 May 2009, vol 683, col 718. See also Dáil Deb 2 December 2004, vol 594, col 275 where Joe Higgins TD mentioned 'those patriotic exiles who love their country so much they connive to be out of it for half of the year to save a fortune in taxes which, if they did pay, would assist our health services and provide badly needed investment in hard-hit communities and other areas of social investment'; Dáil Deb 26 November 2008, vol 668, col 879 where Mary Alexandra White TD said '[t]here is nothing national or heroic about these people attending events in Ireland throughout the year, taking positions on State and commercial boards and proclaiming pride in being Irish, while paying none of the tax the rest of us pay. If they benefit from this country they should financially support this

contrast this complaint features prominently in the United States where escaping the tax net involves a formal renunciation of one's citizenship. Taxation of non-resident citizens was first introduced during the Civil War in response to the view that many citizens who had moved abroad were 'skulking away from contributing' their support to the country in a time of need.[50] Abreu points out that '[r]enouncing U.S. citizenship to save taxes is like flag burning; it offends people'[51] and in the debate over amendment of the expatriate tax regime in 1995 Congressman Neil Abercrombie described expatriates as 'Benedict Arnolds who would sell out their citizenship, sell out their country in order to maintain their wealth'.[52] In 2012, Facebook co-founder Eduardo Saverin renounced his US citizenship shortly before the shares in the company were due to commence trading on the NASDAQ stock exchange.[53] In response Senator Chuck Schumer proposed the Ex-PATRIOT Act which would impose a thirty per cent tax on capital gains on the disposal of US assets by individuals who had expatriated for a substantial tax avoidance purpose and would prevent their ever returning to the United States.[54] Schumer's rationale was that '[n]o one gets rich in America on their own. And when people do well in America, they should do well by America'.[55] Not all commentators share the politicians' patriotic zeal in relation to the issue. In 2008 the introduction of the exit tax regime for expatriates was described by some as 'America's Berlin Wall' with others calling expatriates 'tax hostages' and saying that behind the legislation was the same 'mean-spiritedness, and disregard for property rights and the right to emigrate because of political beliefs' exhibited by the

country'; Justine McCarthy, 'Pitch in as a patriotic citizen or stay away in the Seychelles' The Sunday Times (Dublin, 29 July 2012).

[50] Kirsch (n 16) 451, quoting Senator Collamer, the manager of the conference committee that adopted the 1861 tax law.

[51] Abreu (n 16) 1087.

[52] 141 Cong Rec H4015 (March 30, 1995). A similar statement was made by Congresswoman Rosa DeLauro who spoke of 'billionaire Benedict Arnolds who move their wealth offshore' (141 Cong Rec H6034 (June 15, 1995)). See also the comments of Congressman Charles Rangel that tax-motivated expatriation is 'wrong, it is unpatriotic, it is immoral for someone to enjoy all of the benefits of the United States and renounce their citizenship and then run off to some foreign island to enjoy it' (141 Cong Rec H4003 (March 30, 1995)).

[53] Laura Saunders, 'So How Much Did He Really Save?' *Wall Street Journal* (New York, 18 May 2012).

[54] Jon Matonis, 'Banishing Facebook's Eduardo Saverin Harms U.S. More' *Forbes* (New York, 23 May 2012). The text of the bill is available from the Library of Congress website <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s3205:> accessed 19 May 2014.

[55] 158 Cong Rec S3549 (May 24, 2012). Schumer's act did not have the necessary support in the Senate Committee on Finance to be further considered, but later in the year an identical proposal was tabled as an amendment to the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 by Senator Jack Reed (see n 23), and the quotation is taken from the Senate debate on that measure (which was also defeated).

old Soviet Union.[56] In 2012, Grover Norquist, the president of Americans for Tax Reform, compared Schumer's Ex-PATRIOT act to the *Reichsfluchsteuer*, a tax imposed on Jews fleeing Nazi Germany in the 1930s,[57] and Saverin was described in *Forbes* as 'an American hero'.[58]

In Ireland there have been repeated calls for, and legislative amendments proposing that, Irish citizens, who would otherwise be considered to be non-resident for tax purposes, should be taxed as if they were resident in Ireland and should therefore be subject to taxation on their total worldwide income and capital gains.[59] One interpretation of these proposals, and of the occasional references to a lack of patriotism on the part of tax exiles, is that, because these individuals remain Irish citizens, they are still considered to be sufficiently connected to Ireland to be under an obligation to pay taxes on the same basis as Irish residents. According to this interpretation, to tax non-resident citizens on a source basis only is to wrongly categorise them, and the source of appeal to patriotism may therefore be the same as that underlying the complaints of breaches of the equity and fairness in the tax system discussed in section 1.3(b) above, that is, that individuals who are alike in terms of their connection to the state are not being treated alike in the way in which they are taxed. As will be outlined in chapter 3, prior to the introduction of income tax in 1799, nationality or citizenship was the primary connecting factor for direct taxation in Britain and Ireland. The use of citizenship as a connecting factor in Irish taxation today is examined in chapter 6.

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[56] Editorial 'America's Berlin Wall' *The Economist* (London, 12 June 2008) and Richard W Rahn, 'Tax Hostages?' *Washington Times* (Washington, 12 June 2008) respectively.

[57] His comments were reported in Andrew Rosenthal, 'No Comment Necessary: Grover Norquist Plays the Nazi Card' *New York Times* (New York, 21 May 2012) and Ira Stoll, 'Schumer's Bid To Tax a Founder of Facebook Ignites Discussion of a Law Used by Nazis' *New York Sun* (New York, 21 May 2012).

[58] John Tamny, 'For De-Friending The U.S., Facebook's Eduardo Saverin Is An American Hero' *Forbes* (New York, 13 May 2012).

[59] See Select Committee on Finance and the Public Service Deb 24 February 2004, proposed amendment no 7 to the Finance Bill 2004 (Richard Burton TD); Dáil Deb 27 May 2009, vol 683, col 749, proposed amendment no 7 to the Finance Bill 2009 (Arthur Morgan TD) and the response of Minister for Finance Brian Lenihan (ibid, cols 750-51. See also Mark Hennessy, 'Gilmore urges ending of tax exile system and breaks for landlords' *Irish Times* (Dublin, 6 February 2009) where Labour leader Eamon Gilmore was quoted as saying 'Ireland should follow the United State's [sic] rules where if you carry the passport, you have a tax liability' and Justine McCarthy, 'Pay tax or lose your passport' *Sunday Times* (Dublin, 25 July 2010) where Gilmore was reported as having promised that '[t]he Labour party in government would revoke the passports of wealthy tax exiles'.

In the United States, on the other hand, it seems to be accepted that expatriates have exited the tax system and are correctly categorised as taxable on a source basis only. The cause of the complaint regarding their reported lack of patriotism therefore appears not to stem from a perceived breach of the principle of the equal treatment of equals, but rather from a view that the exit from the tax system itself constitutes a breach of patriotic duty. Criticism of individuals' decision to exit the tax system often focuses on the fact that they have received significant previous advantages as a result their citizenship which have allowed them to become wealthy, and that their decision to expatriate represents a failure in their obligation to pay their portion of this wealth in taxes. Viewed in this light, this 'unpatriotic behaviour' might be seen as a breach of the principle of fairness discussed in section 1.3(b).[60]

Another possibility is that this alleged lack of patriotism constitutes a breach of what Dworkin calls *associative* or *communal obligations*, which are the 'the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbors'. 'Political association', Dworkin says, 'like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation' and is a form of associative obligation.[61] Moore argues that patriotism, which she defines as 'a special concern with, and attachment to ... people who share a specific political and institutional structure', is an associative obligation. This obligation 'involves sentiments and aspirations for the security and well-being of the political community, and an attachment to, or special obligations toward co-citizens, that is, people who share a common citizenship arrangement', and includes duties to support, protect and promote the interests of the community and ones compatriots.[62] Moore says that the obligation

[60] This may also be the case with complaints of a lack of patriotism on the part of Irish tax exiles; in particular where the individual in question has moved abroad temporarily to avoid a liability to Irish CGT on the sale of shares in an Irish company (see section 1.3(a) and chapter 5).

[61] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 196 and 206 respectively. For a criticism of Dworkin's arguments, in particular his 'antivoluntarist' approach, see A John Simmons, 'Associative Political Obligations' (1996) 106 Ethics 247.

[62] Margaret Moore, 'Is Patriotism an Associative Duty?' (2009) 13 The Journal of Ethics 383, 385. She uses the term 'associative duty' rather than 'associative obligation' which she bases on Scheffler's conception of a specific class of special duties 'that we only have to those particular people with whom we have had certain significant sorts of interactions or to whom we stand in certain significant sorts of relations' (Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Impartiality in Liberal Thought* (Oxford University Press 2001) 49). For a contrary view, see Veit Bader, 'Reasonable Impartiality and Priority for Compatriots: A Criticism of Liberal Nationalism's Main Flaws' (2005) 8 Ethical Theory and Moral Practice 83.

is not based merely on reciprocity but arises from the nature of the relationship itself since political communities are 'valuable because they enable us to be collectively self-determining over the conditions of our existence' and they have 'secured important moral goods' for their participants and are 'central to the creation of a common life, in which people are co-participants and co-creators'.[63] Moore further argues that '[r]elations among co-nationals typically involve valuable sentiments of affinity and solidarity' and that the 'value of the common life that we share and the autonomy that is exercised through our collectively self-determining political association also explains why we might think that certain attitudinal responses are appropriate', and why 'certain actions constitute legitimate forms of dissent, while others seem to be objectionable disrespect'.[64]

It is not entirely clear whether the suggested associative obligation of patriotism can be said to arise purely from sharing 'a common citizenship arrangement' with others, or whether it is also necessary to 'share a specific political and institutional structure'.[65] Nor is it clear whether one of the duties that arise from the obligation of patriotism is the payment of taxes, or whether that is a separate associative obligation. Sepinwall argues that the associative obligation that a citizen is under to attend to the nation-state's best interests includes a duty to 'pay taxes to subsidize government services or programs even if she knows these programs will never benefit her, directly or indirectly' and that '[t]he obligation to contribute in such cases arises because this is just what compatriots do—just as the obligation to help out a friend or family member in need arises because that is just what friends and family do'.[66] As mentioned in section 1.3(a), United States citizens are subject to tax on their worldwide income and capital gains whether they are resident in US or not, though it is virtually the only country to impose tax on this basis. Ireland, does not impose tax

[63] ibid 391.
[64] ibid 395 and 392.
[65] Something that many citizens who were born overseas, or had long since emigrated, might not share. Andrew Mason, 'Special Obligations to Compatriots' (1997) 107 Ethics 427 argues that prevailing justifications for there being associative obligations do not support the notion that citizens of a country have special obligations to each other that residents do not, unless one assumes a particular definition of citizenship.
[66] Amy J Sepinwall, '*Citizens United* and the Ineluctable Question of Corporate Citizenship (2012) 44 Connecticut Law Journal 575, 599.

based on citizenship, though as mentioned earlier in this section, implementing a system similar to that in the United States has been advocated by some.[67]

Even if it were accepted that citizenship or patriotism are associative obligations that give rise to a duty to pay taxes, and that those obligations arise other than through the voluntary choice of the individual, as suggested by Dworkin, Scheffler, Moore and others, there remains the question of whether the bond that gives rise to the obligation can be voluntarily broken,[68] and, if it can, whether the individual's motivation in choosing to break it is relevant (ie whether its purpose is to avoid a charge to tax that would otherwise arise). Of course, in the case of Irish tax exiles, the suggestion is that this bond has been not broken, both because the exiles remain Irish citizens and because of their continued connection to, and physical presence in, the country. In the case of US expatriates, it is precisely this severing of the bond that is described as unpatriotic.

Finally, complaints of a lack of patriotism on the part of tax exiles might not have as their source a breach of any legal norm, but may be based simply on a distaste that an individual has renounced something which other members of society hold to be of great personal and collective value.[69]

1.3(d) Undermining confidence in the tax system

The fourth element of the tax exile problem is a concern that, as a result of the perceived breach of fairness of the tax system discussed in section 1.3(b), confidence in the system as a whole might be compromised and taxpayers' morale and levels of compliance might be undermined. Although it has been suggested that the fact that tax exiles do not pay their 'fair share' is offensive to compliant taxpayers,[70] the issue of a

[67] The use of citizenship as a connecting factor in taxation, particularly in the context of a solution to the tax exile problem in Ireland, is discussed further in chapter 6.

[68] Moore says that 'in the case of nations, membership has a significant, indeed ... necessary, subjective component' but does not give a concluded view on whether an individual who 'lacks self-identification with a group is thereby absolved from responsibility for that group' (Moore (n 62) 397 fn 35.

[69] And, of course, more than one of the suggested interpretations may be correct depending on the context of the complaint itself.

[70] See for example the comment of Joan Burton TD during the committee stage of the Finance Bill 2007 that '[i]t is a fundamental breach of republican trust that there is one rule for the vast majority of people

resulting diminution in confidence in the system or compliance with it has not been prominent in the public discourse in Ireland, although the chairman of the Revenue Commissioners Frank Daly did draw something of a link between the rules on tax residence, equity in the tax system and taxpayer compliance when he said

> On residency, I share all the views that have been expressed about equity in the tax system ... In trying to create a compliant culture we have Revenue's effectiveness in audit, enforcement and investigation. We have education of people and getting them to make the link between paying their tax and public services and responsibility and civic duty. A perception of equity in the tax system is vital from our point of view because if people believe that overall they are being treated fairly and equitably, that helps to improve tax compliance, particularly in a situation where tax rates are relatively low. The perception of equity is very important to us and that applies to residency, availing of allowances or whatever.[71]

The issue of confidence and compliance has been raised by politicians and in the academic commentary on the subject of tax-motivated expatriation in the United States however. In hearings before the US Senate Finance Committee concerning proposed amendments to the expatriate regime in 1995 Assistant Secretary of Treasury for Tax Policy Leslie B Samuels said:

> The administration supports these efforts because we believe that U.S. persons should pay their fair share of U.S. tax. Recent media interest, as well as the

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in a republic while another set of people can give two fingers to the compliant majority. The Minister is corroding the very element and core of a democratic republic, which is based on a contract between the citizenry and its government that taxation should be fair, visible and equitable' (Select Committee on Finance and the Public Service Deb 21 February 2007).

[71] Joint Committee on Finance and the Public Service Deb 10 November 2004. See also the Revenue Commissioners' submission to the 2009 Commission on Taxation where they state that their 'success in improving compliance in the tax system is heavily influenced by perceptions of fairness - the view that everybody is "paying their fair share"' and that '[a]chieving the right balance of horizontal and vertical equity is therefore very important to the whole concept of "voluntary compliance" with tax laws', but this was a general comment and was not made in the context of, or with reference to, the tax exile problem (Revenue Commissioners, 'Submission by the Revenue Commissioners to the Commission on Taxation' (Commission on Taxation, Submission F04, May 2008)). A compressive survey into taxpayer attitudes and compliance carried out by the Revenue Commissioners in 2009 did not address the issue of tax exile, or its perception (Revenue Commissioners, 'A Survey on Attitudes and Behaviour towards Tax and Compliance' (Revenue Commissioners, September 2009) <http://www.revenue.ie/en/about/publications/survey-reports.html> accessed 19 May 2014.

> attention devoted by the Congress and its staffs, demonstrate a keen interest in this problem. We believe that the public confidence in our tax system is eroded by the perception that some wealthy individuals are able to escape paying taxes through devices that are not generally available to all taxpayers.[72]

Colon suggested that the proposed amendments 'may ease administrative burdens and bolster the public's perception that the tax system is "fair" and cannot be gamed easily by wealthy expatriates, an important consideration for a tax system based on self-reporting',[73] and the evidence does seem to support the view that there is a link between perceived fairness and taxpayer compliance. Klosko says that people have a 'deep concern about the fairness of the tax system' and that '[r]ecent studies demonstrate that individuals are more willing to contribute their shares if they believe that everyone else – or most everyone else – is paying his.'[74]

There is no evidence that concern over the tax exile has problem has had an influence on compliance rates in Ireland in recent years, or that is has been identified as an issue, with the Revenue Commissioners reporting that, although there are 'clear indications that shadow economy activity has increased since the start of the economic slowdown' in 2008, 'already high compliance levels have improved' since that time 'despite the ongoing financial and cash-flow difficulties experienced by many taxpayers'.[75]

Finally, it could be suggested that the fact that certain high profile individuals are known to have reduced their liability to Irish tax by moving abroad, in some cases only temporarily, may encourage other wealthy individuals to do likewise. The present

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[72] United States Senate Committee on Finance, 'Tax Treatment of Expatriated Citizens' (Senate Hearing 104-795, 11 July 1995, US Government Printing Office) <www.finance.senate.gov/library/hearings/download/?id=d9bf46fb-61e4-439f-8031-e486aeb5a4ad> accessed 19 May 2014.

[73] Colon (n 35) 7. See also Christine L Agnew, 'Expatriation, Double Taxation, and Treaty Override: Who Is Eating Crow Now?' (1996) 28 The University of Miami Inter-American Law Review 69, 94; Kirsch (n 16) 501-02.

[74] Klosko (n 47) 359. See also Leandra Lederman, 'The Interplay between Norms and Enforcement in Tax Compliance' (2003) 64 Ohio State Law Journal 1453, 1461; Martha L Wartick and Timothy J Rupert, 'The Effects of Observing a Peer's Likelihood of Reporting Income on Tax Reporting Decisions' in Toby Stock (ed) *Advances in Taxation* (Emerald Group Publishing 2010) 65, 66.

[75] Revenue Commissioners, 'Annual Report 2012' (Revenue Commissioners 2012) <http://www.revenue.ie/en/about/publications/annual-reports/2012/index.html> accessed 19 May 2014.

author can report that in 2000, after it had become widely known in business circles that Denis O'Brien had avoided a large liability to Irish CGT by moving (it was then thought, temporarily) to Portugal, the relatively small tax practice for which the present author then worked was approached by several clients enquiring about the possibility of similarly avoiding Irish tax on future sales of their businesses.[76]

1.4 Summary and conclusions

This chapter has identified a number of distinct elements to the tax exile problem in Ireland, though there seems to be significant overlap between them. The most salient feature appears to be the perception that tax exiles, while non-resident for direct taxation purposes by virtue of having a physical presence in Ireland for only a certain number of days during the year, nonetheless remain significantly connected to Ireland both personally and economically, and that their exile is therefore to some extent artificial, or based on a formal legal categorisation, or mis-categorisation, rather than on factual circumstance, and that this gives rise to a breach of fairness between taxpayers.[77] This view is neatly encapsulated in the comments of Joan Burton TD during the debate on the Finance Bill 2007 that there was a 'fundamental defect, inequity and unfairness in our taxation system whereby people who are, to all intents and purposes, living in the State pay no tax' and that it is a 'fundamental breach of republican trust that there is one rule for the vast majority of people in a republic while another set of people can give two fingers to the compliant majority' and that this breach is 'corroding the very element and core of a democratic republic, which is based on a contract between the citizenry and its government that taxation should be fair, visible and equitable'.[78]

Central to the tax exile problem therefore, and to determining whether an individual is or is not a tax exile, is the issue of legal categorisation, or the way in which an individual's connection to Ireland is defined in the tax code. Chapter 2 of

[76] The author had three such clients and is anecdotally aware that there were several others in the firm for which he worked, and in other, larger, tax practices.
[77] This element is does not appear to form part of the issue in the United States, where exiting the tax net requires a formal renunciation of citizenship and a much greater severing of the individual's ties to his or her home country.
[78] Select Committee on Finance and the Public Service Deb 21 February 2007.

this work will examine various theories of taxation, and the way in which they have evolved, and will seek to establish the theoretical basis upon which definition of connecting factors for direct taxation have been, or can be, based. It will be contended that the obligation to pay direct taxation is an incident of one's membership of the society that is levying the tax, and that legal connecting factors used in taxation, such as residence, are in fact measures of an individual's membership of a society for tax purposes. Chapters 3 and 4 will examine the evolution of the connecting factors used in direct taxation in Britain and Ireland and will seek to demonstrate that there are two forms of connection: long-term, initially measured through nationality, and short-term, which applied to aliens and was measured through residence.

It will further be argued that the statutory definition of residence introduced in Ireland in the Finance Act 1994 abandoned measurements of long-term connection for tax purposes in favour of those which originally applied to aliens, and this has given rise to a mismatch between the forms of connection that are believed to indicate membership of, and long-term connection to, a society which should give rise to a worldwide liability to direct taxation and that which currently exists in the Irish tax code. The frequent references in the public discourse to the continued connection of tax exiles to Ireland, whether through their citizenship, economic interests, location of the residence of their spouse and children, the place where their 'home' is, or otherwise, appear to support this contention.

CHAPTER 2

TAXATION THEORY

This is a question too difficult for a mathematician. It should be asked of a philosopher.

Albert Einstein on the difficulty of understanding the US income tax
Quoted in Editorial, 'Tax Form Baffles Even Prof. Einstein' *New York Times* (11 March 1944)

2.1 Introduction

2.1(a) The purpose of taxation

The primary reason that governments impose taxes is in order to finance government expenditure. Tiley refers to this as the 'classic function of the tax system'[1] though of course taxation can have other functions, such as the redistribution of wealth and the removal of inequalities between individuals or sectors of society, the reduction of consumption to diminish inflation, and the promotion or discouragement of various forms of behaviour,[2] among others.[3] Equally, taxes are not the sole method by which a government can raise revenue. Other methods include income from government-owned corporations, sovereign wealth funds, sales of publicly owned assets, and seigniorage.[4] In Ireland, approximately 91 per cent of government revenue comes from taxation,[5] with the remainder being made up of a Central Bank surplus, interest

[1] John Tiley, *Revenue Law* (6th edn, Hart Publishing 2008) 7.
[2] For example, the relief for investment in films in section 481 of the Taxes Consolidation Act 1997 (TCA) which is intended to encourage investment in films produced by Irish companies, and the tobacco products tax in section 72 of the Finance Act 2005 which is intended (at least in part) to dissuade people from smoking tobacco.
[3] See Reuven S Avi-Yonah, 'The Three Goals of Taxation' (2006) 60 Tax Law Review 1 for a discussion of these various functions (and an interesting analysis of how the functions of revenue raising, redistribution and directing private sector activity require both an income tax and a consumption tax).
[4] That is, by the central bank purchasing government bonds with newly printed currency, or 'monetising' government debt.
[5] Ignoring government borrowing.

on state loans, income from the National Lottery, dividends from semi-state bodies, fines, property registration fees etc.[6]

The bulk of government revenue is spent on the provision of goods and services that impart benefits to society at large. As Buchanan stated, 'The income of the state represents payment made by individuals out of their economic resources in exchange for services provided'.[7] These are sometimes described as of *public goods*,[8] such as law enforcement and national defence, and *merit goods*,[9] such as health and education.[10] In Ireland, approximately 86 per cent of government expenditure is accounted for by spending on the departments of defence, justice, social protection, health and education.[11] As Graetz put it, 'the education of the nation's children and protection of our citizens from economic losses due to ill health, disability, or unemployment, along with ensuring economic security during retirement, are core functions of our national and state governments'.[12]

It does not necessarily follow that merely because they are the principal recipients of the benefits provided by government expenditure, that the members of the society served by that government should, or will, be the ones to pay the taxes that provide the revenue needed to fund those benefits.[13] For example, if a country had sufficient natural resources it might be possible for its government to fund public expenditure solely through the sale of those resources to persons who do not benefit

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[6] See Department of Finance, 'Exchequer Statement for the period ended June 2014' (Department of Finance 2014) <http://www.finance.gov.ie/sites/default/files/Final%20Exchequer%20Statement%20June%202014_0.pdf> accessed 27 July 2014.

[7] James M Buchanan, 'The Pure Theory of Government Finance: A Suggested Approach' (1949) 57 Journal of Political Economy 496, 498.

[8] Goods which might not be provided if left to market forces and which are provided by government for the use and benefit of all.

[9] Goods which, although they can be provided by the market, may be undervalued by consumers and whose provision is deemed publically beneficial and is therefore promoted through subsidies or direct government provision.

[10] From an economic perspective this may be an over-simplification, though it is a deliberate one, as an economic analysis is neither intended nor necessary for the purposes of the present discussion.

[11] Department of Finance, 'Exchequer Statement' (n 6).

[12] Michael J Graetz, 'The David R. Tillinghast Lecture - Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies' (2001) 54 Tax Law Review 261, 277

[13] Although Peter Harris, *Corporate/Shareholder Income Taxation and Allocating Taxing Rights Between Countries* (IBFD 1996) argues that because 'government is formed by and for community members, it is appropriate and necessary that community members contribute to the expense of government', and notes that 'the basic justification for government levying taxes is the provision of services to the community'.

from government expenditure, or through the taxation of foreign corporations licensed to exploit those resources.[14] This is the case in a number of Middle Eastern countries such as the United Arab Emirates, Qatar, Oman, Kuwait, Bahrain, Brunei and Saudi Arabia, which impose little or no direct personal taxation.[15] This is not the case in Ireland however, where the vast bulk of revenue is raised from members of Irish society to fund benefits provided to Irish society.[16]

; a legal context, the way in which the individuals who bear an obligation to pay direct personal taxes are identified is to be found in the definition of the connecting factors used in the tax code. As was outlined in chapter 1, the primary connecting factors used in direct taxation in Ireland, as in most other developed countries,[17] are residence and source.[18] Individuals who are resident in Ireland for tax purposes are subject to Irish direct taxation on their income and gains regardless of whether that income or those gains arise in Ireland or elsewhere. Individuals who are not resident in Ireland are subject to Irish direct taxation only on their income and certain gains that arise from sources in Ireland.

2.1(b) Types of theory of taxation

There are several issues that a theory of taxation might be called upon to address. Kennedy groups these 'essential questions' into three divisions: the purposes of taxation, the distribution of taxation, and the methods of attaining the purposes and distribution desired.[19] Another way of categorising these questions is to say that first a theory of taxation may be called on to *justify* the imposition of taxation, or answer the question, '*Why* should tax be paid?' Such a *theory of justification* may define the

[14] It could be argued that such corporations do derive some benefits from government expenditure, such as expenditure on infrastructure, though foreign corporations derive little if any benefit from expenditure on matters such as social welfare, health or education, which account for the bulk of government spending in most countries.

[15] Though most do have some indirect taxes on consumption and require social welfare contributions to provide retirement benefits.

[16] As will be outlined in this chapter, the vast majority of Irish tax revenue is raised from individuals living in Ireland. Equally, most benefits provided by government spending, such as education, health care, social welfare benefits etc, can only be accessed, or only accessed to a meaningful extent, by individuals living here.

[17] Including all OECD countries.

[18] In Ireland, other connecting factors include ordinary residence, domicile and, to a much lesser extent, citizenship.

[19] William Kennedy, *English Taxation 1640-1799: An Essay on Policy and Opinion* (G Bell & Sons 1913) 4.

limitations of the constitutional power of a monarch or state to impose tax and might be drawn upon to determine whether that power had been exceeded in a particular instance.[20] The second issue that a theory of taxation might be called upon to address is the *identification* of potential taxpayers, or to answer the question, '*Who* should pay taxes?' Such a *theory of identification* or of *jurisdiction* might define the jurisdictional limitations of the power to tax, identify which individuals or sources of wealth are within these limitations, and be drawn on to determine the most appropriate connecting factors to use, and to define those connecting factors, so as to impose tax on the individuals and sources which are within the limitations and which have been selected to be subject to the tax in question. Theories of *justification* and of *identification* concern the relationship between the individual and the state or society levying the tax in question, and, as will be outlined in this chapter, were the predominant concern of theoretical discussions of taxation in the medieval period.

The third issue that a theory of taxation might be called upon to address is the *method* of taxation employed, or to answer the question '*What* form of taxation should be used?' Such a *theory of method of taxation* might address whether taxation should be proportional, progressive or regressive, and upon what measure of faculty or ability taxation should be imposed (for example consumption, capital wealth or income). These questions involve consideration both of equity and of economic principles such as efficiency, neutrality and administrative convenience, and do not appear to have been addressed in the taxation theory of the period prior to the sixteenth century, though from that time onwards they predominate. Theories of the *method* of taxation concern the relationship between the individual being taxed and other individuals, and how the burden is to be shared among them, rather than the relationship between the individual and the state or society levying the tax in question.

The fourth issue that a taxation theory might be called upon to address is the *function* of taxation, or to answer the question '*How* should the power of taxation be used?' Such a *theory of the function of taxation* might address not only the issue of how the revenue raised by taxation is to be spent, but also the uses to which the

[20] The taxonomy and terminology used in relation to this, and the other possible theories of taxation outlined, is that of the present author.

imposition of taxation might be put beyond the raising of revenue, such as the redistribution of wealth or the promotion or discouragement of certain forms of behaviour. Again, these issues do not appear to have been addressed in the taxation theory of early periods and are distinctly modern.

The final issue that a taxation theory might be called upon to address is the *allocation* of taxing rights to avoid or mitigate international double taxation when two or more countries claim the rights to tax the same source of income or wealth. Such *theories of allocation* were not widely debated until the early twentieth century.

Of course, some questions may require reference to more than one of these possible theories of taxation, and a theory may be required to answer more than one of these questions. A failure to properly establish the question that is being posed, or to distinguish which theory is being invoked, or in what context, can lead to significant confusion.[21] For the purposes of the present work, it is theories of the *identification* of taxpayers that will of the greatest concern, as it will be argued that central to the tax exile problem is the way in which one determines whether an individual is subject to direct taxation in Ireland, and, more specifically, whether such an individual is categorised as resident, and thus subject to taxation on a worldwide basis, or as non-resident and thus subject to tax on Irish sourced income and gains only.[22]

One of the contentions advanced in this work is that there is no fully expounded theory of jurisdiction, or of connection to a state, for the purposes of direct taxation which either adequately accounts for taxation as it exists in practice today, or which can provide a firm basis upon which a solution to the tax exile problem could be founded. This chapter will examine theories of taxation that have sought to address these issues, from their earliest versions to those that are currently espoused today, and will offer an alternative theory for the identification of taxpayers and the definition of the connecting factor of residence in the case of individuals. The chapter draws on a number of different sources, some of which, such as medieval theories of allegiance

[21] See for example the discussion of the League of Nations report on double taxation in section 2.4(b), where it is argued that it is not clear whether the benefit theory of taxation is being discussed as a theory of the *method of distribution* of the tax burden or of the *justification* of taxation.
[22] This is discussed in detail in chapters 4 and 5.

and jurisdiction, and Rawls' principle of fairness, do not appear to have been considered in the context of theories of justification of taxation previously.

Direct taxation in Ireland was based on that of England (and later Great Britain) until it became an independent state in 1922, and income tax was not introduced here until some sixty years after it had first been introduced in Britain. Accordingly, much of the discussion in this chapter will make reference to English or British tax law, in particular that relating to the earlier periods considered.

2.2 Medieval theories of taxation

In the medieval period the king was normally expected to 'live of his own',[23] that is to say his personal expenditure, and that of the royal household, courts, council and guardsmen, was to be derived solely from his profits from the royal demesne, the incidents of feudal tenure and customary taxation, such as duties on imports and exports at the ports.[24] Additional taxation in the form of aids and subsidies could only legally be levied with the assent of parliament, and such assent was only granted for certain types of 'extraordinary' expenditure that could not normally be foreseen or be expected to be met from the king's personal sources of revenue. This generally occurred when funds were needed for the prosecution of war or the quelling of a rebellion, and in such a case it was expected that the entire realm would bear the cost equally.[25] Mitchell identifies this right to receive aids and subsidies as arising 'out of the old feudal notion that the vassal should aid his lord in time of need',[26] and throughout this period subsidies were invariably sought in times of actual or

[23] See Margaret Levi, *Of Rule and Revenue* (University of California Press 1988) 99. See also Martin Wolfe, *The Fiscal System of Renaissance France* (Yale University Press 1972) 9-10.

[24] This list of items of ordinary expenditure is taken from Thomas Fortescue (ed), *The Works of Sir John Fortescue, Knight, Chief Justice of England and Lord Chancellor to King Henry the Sixth* (Chiswick Press 1869) 455.

[25] Fortescue (n 24) 457, 'necessarye, that al the Realme beare for that case a singular charge' (paraphrased by the present author). See more generally ibid 455-63. (Sir John) Fortescue also includes the costs of sending and receiving ambassadors, of providing rewards to those who have done the king service as well as of new buildings and other costs that cannot normally be foreseen, though these were generally not funded by taxation.

[26] Sydney Knox Mitchell, *Taxation in Medieval England* (Yale University Press 1951) 221. See also Roger Schofield, *Taxation Under the Early Tudors, 1485-1547* (Blackwell 2004) 201-02; Peter Harris, *Income Tax in Common Law Jurisdictions: From the Origins to 1820* (Cambridge University Press 2006) 30-31.

impending war, with this fact always recited in the preamble to the grants themselves. These varied from simply stating that the commons had granted the king a subsidy 'for the defence of this your realm'[27] to more explicit provisions specifying the nature of the threat or emergency, and, on occasion, the specific use for which the sums raised were to be used.[28] Harriss notes that the principle of necessity was 'the focus of a tug of war' between the crown and the Commons during this period, notably during the reigns of Richard II and Henry IV, with rulers 'seeking to extend the doctrine of necessity to meet all their needs' and parliament remaining 'obstinately conservative' and 'striving to retain the principle of extraordinary need by associating the grants with defence (1384, 1386, 1393), tying them to the king's meeting with Charles VI (1391, 1393), making them out of affection rather than obligation (1391, 1398), and protesting that they should not be taken as a precedent (1398)'.[29]

In a case taken by King Henry VI in 1441 regarding a previous grant by Henry IV of discharge from any tax or tallage to the Bonhommes of Edington in their foundational charter, Fortescue KS (along with the majority of the other Barons of the Exchequer) argued that as the king only has aids and subsidies by grant of parliament, they did not belong to him and so any purported grant of discharge from them by him was void.[30] Hody CJKB (Sir John Fortescue's predecessor as Chief Justice of the King's Bench) stated that 'the law that requires the King to defend his people, is the same law that requires the people to grant to him from their goods in aid of this defence'.[31]

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[27] Chris Given-Wilson (ed), *The Parliament Rolls of Medieval England* (Scholarly Digital Editions 2005) vol v, 172, in the preamble to the grant of the subsidy of 1450.

[28] See for example the subsidy of 1404 in *The Parliament Rolls of Medieval England* (n 27) vol iii, 546.

[29] GL Harriss, 'Theory and Practice in Royal Taxation: Some Observations' (1982) 97 The English Historical Review 811, 814.

[30] John Maynard (ed), *La Premiere Part des Ans du Roy Henry le VI* (George Sawbridge, William Rawlins and Samuel Roycroft 1679) anno xix, Paschal term, plea 1, 62, 'issint icy le Roy n'ad aucun cause d' aver x ou xv, sinon per grant de son 'people': donc quand il grant que un de son 'people' sera discharge de ceo, ou il meme n'ad rien en icel forsque apres tiel grant, tiel grant est void' (translated and paraphrased by the present author).

[31] ibid 64, 'Car meme la Ley que veut que le Roy defendra son 'people', meme la Ley veut que le 'people' grantera a luy de lour biens en aide de cel' defence' (translated by the present author). The case was adjourned and it seems that no final decision survives. See RB Pugh and Elizabeth Crittall (eds), *A History of the County of Wiltshire* (Institute of Historical Research 1956) vol 3, 323.

Medieval theorists sought to justify the imposition of taxation based these legal elements of necessity, protection and reciprocal obligation.[32] Saint Thomas Aquinas in his *Summa Theologica* stated that '[i]t is no robbery if princes exact from their subjects that which is due to them for the safeguarding of the common good'[33] and in 1271 in his *De regimine Judaeorum, ad Ducissam Brabantiae* he wrote that 'a prince who fights for the common benefit' can 'make a charge upon the business of the community' through established forms of taxation, and that where 'some new circumstance arises such that it is necessary to spend more than usual for the common benefit' such as where 'enemies invade the land, or if some similar case arises' they may 'demand from their citizens sums beyond the normal exactions for the common benefit'. In this sense, according to Aquinas, the 'revenues of princes' are their 'pay'.[34] Sir John Fortescue echoes this latter point, stating that the king's estate is 'an office in which he maintains defence and justice in his realm' and that he is therefore entitled to be sustained by his realm.[35] Gierke provides a summary of the view of several other medieval writers who also justify taxation based on the protection provided by the monarch.[36]

Seligman states that protection was 'generally regarded as the chief function of the state' during the medieval period and describes this 'old doctrine' in terms of the *benefit theory of taxation*, of which it can be seen as an early version,[37] and argues

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[32] GL Harriss, *King, Parliament and Medieval England to 1369* (Clarendon Press 1975) 23-24 emphases that the 'theory of taxation formulated by the civilians and canonists' entailed a plea of necessity by the ruler. This, he says, 'implied both obligation and consent', and though he casts doubt on the extent to which the theory underlay the grant of the thirteenth in 1207, he says that these notions were 'clearly permeating political thought and feudal custom at the time, and were to exert even greater influence as national taxation become more frequent in the thirteenth century.

[33] Saint Thomas Aquinas, *Summa Theologica* pt II-II, q 66, art 8, ad 3 in Dino Bigongiari (ed) *The Political Ideas of St. Thomas Aquinas* (Hafner Press, 1953) 140. See also Christopher Todd Meredith, 'The Ethical Basis for Taxation in the Thought of Thomas Aquinas' (2008) 11 Journal of Markets & Morality 41.

[34] Saint Thomas Aquinas, 'The Letter to the Duchess of Brabant "On the government of the Jews"' in RW Dyson, *Aquinas: Political Writings* (Cambridge University Press 2002) 237.

[35] Fortescue (n 24) 459.

[36] Otto Gierke, *Political Theories of the Middle Age* (Frederic William Maitland tr, Cambridge University Press 1922) 190-191. These include Vincent of Beauvais, *Speculum doctrinale* (Adolf Rusch 1477) book x, chs 66-69, who stated that, because of his duty of caring for the public good, the king had a right of taxation, but only what was necessary for the protection of society and no more; John of Paris, *Tractatus de regia potestate et papali* (1303) ch 7, described the right to impose tax as arising 'from the fact that private property needs the protection of the State and its tribunals' and Jean Gerson, *Opera Omnia* (Louis du Pin (ed), 1706) vol iv, 199 and 616, argued that 'taxes should be imposed only for the purposes of the State and should be equal for all'.

[37] The benefit theory of taxation is discussed in section 2.3(a) below.

that 'taxes were looked upon as premiums of insurance which individuals paid to the collective insurance company — the state— in order to enjoy their possession in peace and security'.[38] Dowell similarly describes the customs duty of tunnage on wine and poundage on goods as 'an insurance premium'.[39] Vogel takes the view that the concept of reciprocal obligations of protection and taxation developed by the scholastic authors amounted to a 'sophisticated theory of justification for taxation',[40] and although how sophisticated it actually was beyond establishing this basic premise is open to debate, these principles continue to be cited as a justification for the imposition of taxation in modern times. In *Whitney v IRC* Lord Wrenbury described the policy behind the jurisdictional limits of income tax under Schedule D of the Income Tax Act 1918, which in this sense are identical to those currently imposed in Ireland by the Taxes Consolidation Act 1997, purely in terms of this principle:

> The policy of the Act is to tax the person resident in the United Kingdom upon all his income whencesoever derived and to tax the person not resident in the United Kingdom upon all income derived from property in the United Kingdom. The former is taxed because (whether he be a British subject or not) he enjoys the benefit of our laws for the protection of his person and his property. The latter is taxed because in respect of his property in the United Kingdom he enjoys the benefit of our laws for the protection of that property.[41]

Tiley discussed the same policy in terms that are virtually identical to those of John of Paris over 700 years before: 'UK residents are taxed because, whether or not British subjects, they enjoy the benefit of our laws for the protection of their property'.[42]

The taxation theory of the period under consideration was primarily a theory of *justification* based on the notion of reciprocal obligation, but was not in any sense a theory of *identification* or of *jurisdiction*, as it was silent as to the jurisdictional limits

[38] ERA Seligman, *Progressive Taxation in Theory and Practice* (2nd edn, Princeton University Press 1909) 150.
[39] Stephen Dowell, *A History of Taxation and Taxes in England from the Earliest Times to the Present Day* (Frank Cass & Co 1965) vol I, 168.
[40] Klaus Vogel, 'The Justification for Taxation: A Forgotten Question' (1988) 33 American Journal of Jurisprudence 19, 24. He cites Francisco Suárez, *Tractatus de legibus ac deo legislatore* (Coimbria 1612) book v, chs 13 and 15 as providing an exemplary summary of the scholastic view.
[41] [1926] AC 37, 54.
[42] John Tiley, *Revenue Law* (6th edn, Hart Publishing 2008) 1097.

of the direct taxation used to fund the protection provided, and as to the choice of connecting factors to be used, and their definition, and as to the identification of the persons liable to be assessed to direct taxation. However, it could be argued that a theory of justification based on the reciprocal obligations of the monarch and those within the realm could also be used for the purpose of identification of taxpayers.[43] Under such a conception, the obligation to pay tax would fall on those who benefited from the protection from war, rebellion or other national emergencies: that is, on the monarch's subjects and on any aliens who were resident within the realm. As will be outlined in chapter 3, it was in fact on these two groups that direct taxation was imposed during the medieval period,[44] and the theory of jusification for taxation of the time might thus imply the use of nationality and residence as connecting factors, even if this was not formally expressed.

It can also be argued that the connecting factors of nationality and residence were accurate ways of measuring membership of the society that benefited from the protection provided by the king and that owed a duty to fund it. As Willard observed:

> The property owners whose names appear on the local and country rolls charged with the payment of the taxes upon movables came from every rank and condition of medieval society save the very highest and the very lowest. The king's name does not appear on the rolls or the queen's, and the very poor would escape taxation because of the provision for a minimum holding of taxable property. The goods of all others were taxed. Earls, barons, and simple knights; the two archbishops, the bishops, abbots, and other clergy down to the chaplain in a country village; and on the same lists John the reeve, William the carter, and Adam the miller, the peasant folk of the countryside.[45]

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[43] A theory of justification for taxation can be a starting point for answering a number of the questions posed here; and related questions. For example, Vogel, 'The Justification for Taxation' (n 40) examines theories of justification for taxation in order to address the question of whether there is a limit to the rate of taxation that can validly be imposed, and Kennedy (n 19) examines the justification of taxation to address the issue of whether, and if so, to what extent, taxes should be imposed on the poor.

[44] It should be noted that taxation was imposed on corporations late in this period (for example in the grant of 1450, see *The Parliament Rolls of Medieval England* (n 27) vol v, 173; Harris, *Income Tax in Common Law Jurisdictions* (n 26) 49-50), however as all such corporations would have been owned by English residents, who were themselves members of English medieval society receiving protection from the king, discussion of the taxation of corporations is deliberately omitted.

[45] James F Willard 'The Assessment of Lay Subsidies 1290-1332' in American Historical Association, *Annual Report of the American Historical Association for the Year 1917* (Washington 1920) 281, 292.

As will be outlined in chapter 3, taxes during the period were assessed and collected locally from individuals where they were resident. This may have been no more than a matter of administrative convenience and practicality, however, considering that many of the taxes imposed were based on a quota system with a fixed, apportioned amount being levied on each parish, town and city, it is not unreasonable to suggest that residence within the relevant parish, town or city might have been used as a measure of an individual's membership of the local community, bringing with it an obligation to pay part of the share of taxes due from that community. The phrase to be 'in lot and scot' was used during the period to indicate that a person (usually a freeman of one of the cities) was obliged to pay taxes as part of the local community,[46] but it had a wider meaning that encompassed both the obligations, but also the rights and privileges of membership of that community.[47] Thus it seems that both at a national and at a local level, the concepts of membership of the community and the obligation to pay taxes to support that community were intertwined. Finally, complaints about the exemption from taxation of alien merchants in the fourteenth century,[48] although possibly motivated by purely selfish commercial considerations, do reinforce the notion that, so far as the ordinary populace were concerned, those who were members of a particular community should be required to contribute towards taxation levied upon that community, and that the proper test of such membership was residence in the locality in question.

While the medieval theory of taxation based on the notion of protection accounts for national parliamentary taxation during the period, it leaves out of account the various local charges, rates and taxes which were levied in return for other forms of benefit. These taxes, which took the form both of monetary payment and of the provision of tools, materials and labour, were raised to provide for the building and

[46] See for example ERA Seligman, *Essays in Taxation* (MacMillan & Co 1895) 43-44.
[47] These included voting and being members of a juries, and in the case of aliens becoming denizen, the rights to hold land in fee simple and to plead and be impleaded in the courts. See for example William Finnelly, *The Law and Practice of Elections in England, Scotland and Ireland* (A Maxwell 1830) 62-66; Sylvia L Thrupp, 'A Survey of the Alien Population of England in 1440' (1957) 32 Speculum 262, 263; James Davis, *Medieval Market Morality: Life, Law and Ethics in the English Marketplace, 1200-1500* (Cambridge University Press 2012); Graham S McBain, 'The Charters of the Cinque Ports – Are They Still Needed?' (2013) 5 Review of European Studies 90, 103.
[48] See chapter 3.

maintenance of 'highways, bridges, embankments, water-courses, town walls'[49] and other forms of infrastructure, as well as for the relief of the poor. Such taxes were 'chargeable on the community, to be borne and defrayed by common contribution',[50] and were usually apportioned among the community according to the benefit derived by each member of that community.[51] There is also evidence that in making these apportionments, the 'ability or substance'[52] of the members of the community was taken into account.[53] Cannan called these the 'two great principles or canons' of local taxation: 'that everyone who receives benefit from the local expenditure should be made to contribute in proportion to the benefit he receives' and 'that every inhabitant of a district should be made to contribute according to his ability'.[54] Although these features of taxation were not addressed in the taxation theory of the period, they prefigured elements of the *benefit theory* and *ability to pay theory* that later emerged and which are considered in sections 2.3 and 2.4 below.

As a result of exemptions from direct taxation afforded to people with goods or land below a certain value during the period,[55] one can also discern at this point the phenomenon, which was not formally expressed in the theory of the time, that persons of means bore an obligation not only to fund their own protection, but that of other members of society who could not afford to pay. In this sense, taxes were payments for the protection of the society as a whole, rather than solely for the protection of the individuals who were actually required to contribute. Finally, as will be outlined in chapter 3, during the period under consideration aliens living in England (and later in the period, Wales) were subject to poll taxes and alien subsidies in addition to having to contribute to the other taxes paid by English subjects. One cannot justify these taxes

[49] GH Blunden, *Local Taxation and Finance* (Swan Sonnenschein & Co 1895) 2.
[50] Thomas Madox, *Firma Burgi, Or an Historical Essay Concerning the Cities Towns and Buroughs of England* (William Bowyer 1726) 280.
[51] See for example Edwin Cannan, *The History of Local Rates in England: In Relation to the Property Distribution of the Burden of Taxation* (2nd edn, PS King & Son 1912) 10-12, who cites the example of a dispute in the middle of the thirteenth century regarding the erection of walls on Romney marsh in resolution of which the justiciar Sir Henry de Bathe issued an ordinance that the burden should be levied on the landowners whose lands were to be protected by the walls, and apportioned according the acreage held by each landowner.
[52] Madox (n 50) 280.
[53] See Cannan (n 51) 17, who cites 'a royal letter of 1378 ordering that the walls of Chichester shall be repaired' with the cost to be borne by the members of the community 'according to their ability and possessions, privileged persons, the sick, and mendicant poor excepted'.
[54] ibid, 159.
[55] See chapter 3.

purely in terms of protection from war, rebellion or other national emergency, as it is not clear how such persons could be considered to have received any additional or greater protection in this regard than English subjects.[56]

It is difficult to assess whether, or to what extent, taxation theory directly influenced the King and his council, or the members of parliament, when it came to negotiating and drafting grants of direct taxation during the period, though it seems reasonable to suggest that pragmatism and expediency also played a role. As will be outlined in chapter 3, alien merchants were exempt from the subsidies paid by English subjects, but in return paid a higher rate of customs duty. This exemption was important in promoting commerce and trade,[57] and, since the King was entitled to the revenue the customs without needing to seek a parliamentary grant, it meant that he was in effect exchanging an occasional source of revenue that had to be sought and justified for one that arose perennially. Also, the alien subsidies brought in very little revenue, and it has been suggested that in fact they were 'intended more as a political gesture to please the commons and to persuade them to agree what were reasonably generous grants of lay subsidy and trade taxes'.[58] Harris notes that some theories 'pull themselves up by the bootstraps' and 'are developed in order the explain existing practices', going on to point out that in time 'the validity of a theory may be sought to be justified by reference to the practice of countries', and the theory of taxation as a payment for protection may be such a theory.[59]

One final feature of taxation during the period worthy of note is that the notion that members of society in similar circumstances to each other ought to be assessed to a similar level of taxation seems to have been expressed on a number of occasions. Giuseppi argues that the background to the assessment of the merchants of Lombardy in 1342 can be found in the long standing 'claims of the burgesses of London that

[56] One can of course posit many other possible reasons for this additional taxation, such as discrimination against foreigners, the under-representation of such aliens and denizens in the parliament granting the subsidies, or the payments being in fact in the nature of a fee for the right to reside in the realm.

[57] See for example Alice Beardwood, *Alien Merchants in England, 1350 to 1377: Their Legal and Economic Position* (Mediaeval Academy of America 1931) 38.

[58] 'Introduction 1439-1440' in *The Parliament Rolls of Medieval England* (n 27) vol v, 1. TH Lloyd, *Alien Merchants in England in the High Middle Ages* (Harvester 1982) 4 notes that the 'main opposition to alien merchants undoubtedly came from vested commercial interests' during the period.

[59] Harris, *Income Tax in Common Law Jurisdictions* (n 26) 6.

foreigners who dwelt within their walls, and shared many of their privileges, should share also some part of the taxation to which they themselves were subject'.[60] In 1355 the citizens of London petitioned the King to end the alien merchants' exemption from subsidies,[61] and in the same year when a Florentine merchant living in London named Octavian Francisse (or possibly Fraunceys) complained of his chattels being seized after refusing to contribute towards a subsidy, the mayor and sheriffs replied in the ensuing inquiry that he 'resided continually in the City and trafficked there, and on that account ought to contribute with the rest of the citizens'.[62] Although one can doubt whether the motives of the citizens of London were driven purely by equitable principle or whether it was an attempt to seek a competitive commercial advantage over alien merchants (or to remove such an advantage from those alien merchants), or whether it was perhaps motivated purely by xenophobia, it is interesting that their complaint was phrased in terms that invoked this principle in terms very similar to the way in which it is invoked in complaints regarding tax exiles today.[63]

2.3 Theories of taxation from the medieval period to 1799

2.3(a) The benefit theory of taxation

Like the medieval period which preceded it, direct taxation in the sixteenth and seventeenth centuries was seen as justified on the basis of a reciprocal obligation on the monarch to protect the realm and on the subjects and residents within the realm to finance the cost of this protection. Bodin, writing in 1576 listed seven methods by which the monarch could raise revenue, the seventh of which was taxation of one's subjects, 'which one should never have recourse to unless all the other methods have failed and unless necessity forces one to provide for the Republic'. In such a case,

[60] Montague S Giuseppe, 'Alien Merchants in England in the Fifteenth Century' (1895) 9 Transactions of the Royal Historical Society 75, 91.
[61] Reginald R Sharpe (ed), *Calendar of Letter-Books Preserved among the Archives of the Corporation of the City of London at the Guildhall* (Corporation of the City of London 1899-1912) Book G, 52.
[62] ibid 47.
[63] For example Joan Burton TD, who speaking during the debate on the Finance Bill 2004 said, '[I]f to all intents and purposes they are effectively living in this country, doing business in this country, using the facilities of this country, they should pay their fair share of tax'. This is issue is further discussed in chapter 5.

'because the protection and defence of individuals depends on the preservation of the common good, everyone must lend assistance: and so charges and impositions are most just'.[64]

A similar emphasis on the benefit of protection is to be found in the writings several other theorists of the late seventeenth century.[65] Hobbes wrote that 'the impositions that are laid on the people by the sovereign power, are nothing else but the wages, due to them that hold the public sword, to defend private men in the exercise of their several trades and callings';[66] Petty pointed out that 'it is generally allowed by all that men should contribute to the public charge but according to the share and interest they have in the public peace';[67] Pufendorf wrote that 'taxes moderately imposed, and faithfully laid out in the service of the public, are only the wages which every man pays the Commonwealth for the defence and security of himself and fortunes, and to maintain the expenses unavoidably necessary to that end',[68] and Sheridan, advanced the view that 'all subjects, as well the meanest as the greatest, are alike concerned in the common safety' and should therefore 'bear the charge in equal proportions'.[69]

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[64] Jean Bodin, *Les Six Livres de la République* (1576) Book VI, Chapter II: 'Le septieme moyen est sur les subjects, auquel il ne faut jamais venir, si tous les autres moyens ne defaillent, et que la necessité presse de pourvoir à la République, auquel cas, puis que la tuition et defense des particuliers depend de la conservation du public, s'est bien la raison que chacun s'y emploie: alors les charges et impositions sur les sujects sont tre'justes' (translated by the present author from the 1579 French edition: Jean Bodin, *Les Six Livres de la République* (Jean de Tournes 1579) 611). The other methods were the royal demesne, the profits of conquests, gifts from friends, tributes from allies, the profits of trading ventures and customs on exports and imports.

[65] Both Seligman, *Progressive Taxation* (n 38) 159-160 and Vogel, 'The Justification for Taxation' (n 40) 26 attribute a similar view to Grotius, indeed Seligman (ibid 159) credits him as the 'originator of the benefit theory' of taxation, although the passages cited in support of this view appear to say no more than that it would, as a matter of international law, 'be unjust to make strangers, who only pass through a country, pay a poll-tax which is laid on the subjects to defray the charges of the state' (Hugo Grotius, *De Jure Belli Ac Pacis* (1625) Book II, Chapter II, §14, pt 1, translation from Hugo Grotius, *The Rights of War and Peace* (Richard Tuck ed, Liberty Fund 2005) vol 2, 154-55).

[66] Thomas Hobbes, *Leviathan, Or The Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil* (first published 1651, George Routledge and Sons 1886) Part II, Chapter XXX, 157-58.

[67] Sir William Petty, *A Treatise of Taxes and Contributions* (First published 1662, 3rd edn, Obediah Blagrave 1685) 68.

[68] Samuel Freiherr von Pufendorf, *De Jure Naturae et Gentium* (1672) book VIII, ch 5, § 4 (translation from Samuel Freiherr von Pufendorf, *The Law of Nature and Nations: Or, A General System of the Most Important Principles of Morality, Jurisprudence, and Politics* (First published 1672, Basil Kennet tr, 5th edn, London 1749) 829).

[69] Thomas Sheridan, *A Discourse of the Rise & Power of Parliaments, Of Laws, Of Courts Of Judicature, Of Liberty, Property, and Religion* (1677) 148.

There were several significant changes in taxation theory during this period however. First, there was a shift in emphasis away from attempts to justify the imposition of taxes based predominantly on examining their 'legal or constitutional propriety' and towards 'debate about the economic effects of taxation'.[70] This debate centred mainly on the issues of whether taxation should be proportionate or progressive, with the majority of writers during the period expressing a view on this issue.[71] The question of whether tax should be imposed by way of indirect taxation on articles of consumption or by direct taxation on income or capital was also widely discussed during the period, with earlier theorists predominantly favouring indirect taxation.[72]

Although these questions were predominantly about the *method* of taxation, and thus were more concerned with economic than legal considerations, they were frequently framed as issues of equity. Hobbes stated that 'To equal justice appertains also the equal imposition of taxes; the equality whereof depends not on the equality of

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[70] Michael J Braddick, *The Nerves of State: Taxation and the Financing of the English State, 1558-1714* (Manchester University Press 1996) 16.

[71] For a comprehensive outline of the major theorists of the period on this point, see Seligman, *Progressive Taxation* (n 38).

[72] Bodin, *Les Six Livres de la République* (1579) (n 64) 618 advocated taxes on things 'which serve only to deprave and corrupt subjects' such as confectionary, perfumes, fine cloths and jewellery. He saw such taxes as being for the 'honour of God, the profit of the Republic, the desires of the wealthy and the relief of the poor' ('Mais si on demnade les moyens de leuer imposts qui soyent à l'honneur de Dieu, au profit de la République, au souhait des gents de bien, au soulagement des poures, c'est de les mettre sure les choses, que ne servent sinon à gaster et corrompre les subjects, comme font toutes les friandises, et toutes les sortes d'affiquets, perfums, draps d'or et d'arget, soyes, crespes, canetilles, passements, tissures et tous ouvrages d'or, d'arget et d'Esmail: et toutes sortes de vestements superflus, et coulerus d'escarlate, cramoisi, couchenil, et autres semblables qui'l ne faut pas defendre' (translated by the present author)). Hobbes, *Leviathan* (n 66) 158, ; Petty (n 67) 72 and Pufendorf (n 68) 831 similarly extolled the virtues of indirect taxation on luxury items, while Charles-Louis de Secondat, Baron de Montesquieu, *L'Esprit des Lois* (1748) book XIII, chs 7 and 14 said that the 'duties felt least by the people are those on merchandise' and that this was the 'natural tax of moderate governments' (translation from Montesquieu, *The Spirit of the Laws* (Thomas Nugent tr, Colonial Press 1899) 210 and 215). In the eighteenth century, Jeremy Bentham, 'Proposal for a Mode of Taxation' in Werner Stark (ed), *Jeremy Bentham's Economic Writings* (Allen & Unwin 1952) vol I, 381-85 advocated a tax on interest of money lent, government and personal annuities, dividends paid by joint stock companies, profits from trade, and professional incomes (though his preference was for finance to be raised by way of the law on escheat, and he saw taxes on income with indemnity as preferable to consumption taxes. See Takuo Dome, 'Bentham and JS Mill on Tax Reform' (1999) 11 Utilitas 320, 326). William Frend, *Principles of Taxation* (First published 1799, J Mawman 1804) 65 stated that taxation should be accomplished by 'assigning the value of productive and unproductive capital, and taking the income for one year'. Adam Smith's first maxim of taxation (Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book V, ch II, pt I) was that 'the subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is in proportion to the revenue which they respectively enjoy under the protection of the state.'

riches, but on the equality of the debt that every man owes to the Commonwealth for his defence'[73] and Steuart, writing about the best method to impose a land tax stated that 'according to equity and justice all impositions whatsoever ought to fall equally and proportionally on every one, according to his superfluity'.[74] Groves argues that Adam Smith's first maxim entitles him 'to a place in the school of thought that features equity in its tax judgments and looks chiefly to net income as the index of tax capacity',[75] and this maxim is often referred to as Smith's 'canon of equity'.[76]

The second significant change in taxation theory during this period emerged as a result of the political theory of the 'social contract' found in the writing of theorists such as Hobbes and Locke in the seventeenth century and Rousseau in the eighteenth.[77] The essence of this theory was that states are made up of individuals who have come together to voluntarily form civil society on the basis of a contract entered into between them whereby each individual has ceded certain rights in return for the greater protection of his or her life, liberty and property afforded by the state. Musgrave observes that 'taxation as a price for services rendered seemed a natural complement to the contract theory of state',[78] however, the social contract view of the state did more than merely compliment the benefit theory of taxation, it brought about a subtle but important change to that theory. Its effect was to place the emphasis firmly on the benefits provided by the state to the individual, rather than the benefits it provided to society as a whole, or, as Vogel put it, the benefit theory based 'the justification for taxation not on a general "public benefit" of the tax, but on the benefit

[73] Hobbes, *Leviathan* (n 66) 157.

[74] Sir James Steuart, *An Inquiry into the Principles of Political Economy: Being an Essay on the Science of the Domestic Policy in Free Nations* (A Millar and T Cadell 1767) vol II, book v, ch xii, 577.

[75] Harold M Groves, *Tax Philosophers: Two Hundred Years of Thought in Great Britain and the United States* (Donald J Curren ed, University of Wisconsin Press 1974) 19. See also Sheridan (n 69) 148, who wrote that 'no taxes can be just or safe which are not equal', and Pufendorf (n 68) 831, who expressed the view that 'it is not the tax itself so much as the disproportion and inequality of it, which sits uneasily upon the people'.

[76] See for example Richard G Lipsey and Colin Harbury, *First Principles of Economics* (2nd edn, Oxford University Press 2004) 229.

[77] See Hobbes, *Leviathan* (n 66); John Locke, *Second Treatise of Government* (First published 1690, CB Macpherson ed, Hackett Publishing Company 1980); Jean Jacques Rousseau, *Du Contract Social: Ou Principes du Droit Politique* (Marc Michel Rey 1762). The conception of the social contract of each of these authors did of course differ in many ways, though these differences are not relevant to the point being made regarding the effect of the general political theory on the theory of taxation during the period under consideration.

[78] Richard Musgrave, *The Theory of Public Finance: A Study in Public Economy* (McGraw-Hill 1959) 63.

of the State for the individual', which he described as a formulation of the relevant questions at a 'higher level of abstraction' than the theory's predecessors.[79]

Kennedy, who examines the issue from the point of view of whether the poor ought to be subject to taxation, argues that this represented a change from a 'functional' view of society to a what he terms the 'Lockean' or 'freeholder' view, with the poor now being required to contribute towards taxation along with the rest of society.[80] The functional view was 'developed in the Middle Ages and was essentially the work of the Church' and preached the 'interdependence, and the duty or function of each in the service of the whole society'. Under this view, society was made up of classes 'who ought to and did perform functions in their society' and it 'might or might not be the place of a particular class to perform' the function of the provision of 'the means for certain services (i.e. taxation)' on behalf of the entire society.[81] For Kennedy, the weakness of this functional view of society was that 'while providing an opening for considering the various problems connected with the function of paying taxation, it did not in practice go on to consider them, and consequently left no rule or even fruitful discussion on the subject'.[82] The freeholder view, according to Kennedy, 'conceived of society as made up of independent individuals, who did not perform functions, but each of whom had rights which only required to be recognised and protected; the state was an institution formed for this purpose' and 'consequently every individual, receiving the benefit of this unique service, was bound in fairness to others to share in the cost of its provision'.[83]

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[79] Vogel, 'The Justification for Taxation' (n 40) 24.

[80] See for example the speech of Prime Minister Sir Robert Walpole to parliament on the proposed reintroduction of the salt tax on 21 March 1732 in Great Britain, *A Collection of the Parliamentary Debates in England from the Year 1668 to the Present Time* (John Torbuck 1741) vol x, 143 where he said that 'when money is to be raised for the public good, and for the security of all, [His Majesty] thinks that every one ought to contribute his share, in proportion to the benefit that he is thereby to receive' (145), that 'where the benefit is mutual, the expense ought to be in common' and that 'the duty on salt is a tax that every man in the nation contributes to, according to his circumstances and condition in life; every subject contributes something; if he be a poor man, he contributes so small a trifle, it will hardly bear a name' (149). JV Beckett, 'Land Tax or Excise: The Levying of Taxation in Seventeenth- and Eighteenth-Century England' (1985) 100 English Historical Review 285, 305 suggests that the decisive change came with the poll tax of 1641 (see chapter 3) which was followed by the introduction of excise duties two years later, and that 'from that point onwards it was argued that since each individual had rights which the state was protecting, each was bound to share in the cost of that maintenance'.

[81] Kennedy (n 19) 84.

[82] ibid 88.

[83] ibid 84.

This emphasis on the individual can be seen in Hobbes statements that the benefit for which a body politic is instituted is 'the peace and preservation of every particular man',[84] that equality in taxation depends on 'the equality of the debt that every man owes to the Commonwealth'[85] and that the burdens and charges of the commonwealth should be divided not 'proportionably to every man's ability' but 'proportionably to his benefit by commonwealth'.[86] It is also particularly clear in the writings of many of the French theorists. For example, Sully described taxation as the 'expense borne by each individual in civil society in return for his share of its benefits';[87] Montesquieu wrote that the 'public revenues are a portion that each subject gives of his property, in order to secure or enjoy the remainder'[88] and Mirabeau (the elder) took the view that 'the contribution of the individual is nothing other than the service that he provides to the state, and equally the expenditure of the state is nothing other than the protection of its individuals'.[89] Expressions of the older, functional view of society in the context of taxation are rare in the eighteenth century, although Swift preached that:

> He who doth not perform that part assigned him toward advancing the benefit of the whole, in proportion to his opportunities and abilities, is not only a useless, but a very mischievous member of the public: because he takes his share of the profit, and yet leaves his share of the burden to be borne by others[90]

and Samuel Johnson, in his rebuttal of the assertion advanced in the Declaration of Rights of the First Continental Congress of America that there should be no taxation in the American Colonies without representation in the parliament imposing those

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[84] Thomas Hobbes, *Human Nature and De Corpore Politico* (first published 1650, JCA Gaskin ed, Oxford University Press 1999) 135.

[85] Hobbes, *Leviathan* (n 66) 157. See also Dudley Jackson, 'Thomas Hobbes' Theory of Taxation' (1973) 21 Political Studies 175, 176-77.

[86] Hobbes, *Human Nature and De Corpore Politico* (n 84) 174.

[87] Maximilien de Béthune, Duke of Sully: 'L'impôt ne devrait être que la mise apportée par chaque individu dans la vie civile pour avoir part à ses bienfaits' quoted in Émile de Girardin, *L'impôt* (6th edn, Librairie Nouvelle 1853) 150 (translated by the present author).

[88] Montesquieu (n 72) book XII, ch 1: 'les revenues de l'Etat sont une portion que chaque citoyen donne de son bien pour avoir la sureté de l'autre, ou pour en jouir agréablement' (translation from Montesquieu, *The Spirit of the Laws* (Thomas Nugent tr, Colonial Press 1899) 207.

[89] Victor de Riqueti, Marquis de Mirabeau, *Theorie de l'Impôt* (1761) 336 (translated by the present author).

[90] Jonathan Swift, 'Sermon on Mutual Subjection' (first published 1744) in Thomas Sheridan (ed), *The Works of Rev. Jonathan Swift DD, Dean of St. Patrick's, Dublin* (1801) vol X, 34.

taxes, wrote that 'tax is a payment, exacted by authority from part of the community for the benefit of the whole'.[91]

This new focus on the benefits provided by the state to individuals was identified by Musgrave as 'the weak link of the benefit rule': that although the rule 'was useful as an expression of political thought, it did not furnish an operational rule of tax policy' because of the 'difficulty of imputing to individuals the benefits that arise from general public services'. Adam Smith, however, Musgrave says, was 'too realistic a thinker to overlook' this difficulty and 'shrewdly inserted an ability element' so that 'reliance on the protection theory of state was tempered'.[92] This weak link in the benefit theory, and its resulting replacement by the 'ability to pay theory' is discussed in section 2.4(a) below.

The third significant change in taxation theory during the period under consideration was a change in the nature of the benefit considered to justify the imposition of taxation. As outlined in section 2.2 above, during the Medieval period taxation was levied for the prosecution of war and the quelling of rebellion; that is, for the defence of the realm and of its subjects and the persons dwelling within it. In the seventeenth and eighteenth centuries, taxation was increasingly justified not on the basis of the physical protection provided to the individual, but on the basis of the protection provided to the individual's property. An early example of this can be found in the writing of Pufendorf, who saw the protection of the individual as providing protection for the individual's property, arguing that every man could be justly taxed because each was 'secured in his property by the care of the Commonwealth takes of him'.[93] Locke wrote that 'the supreme power cannot take from any man any part of his property without his own consent' because 'the preservation of property' was 'the end of government and that for which men enter into society'.[94]

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[91] Samuel Johnson, *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress* (4th edn, T Cadell 1775) 13.

[92] Musgrave, *The Theory of Public Finance* (n 78) 66-67.

[93] Pufendorf (n 68) 831.

[94] Locke (n 77) 73. Similar views were expressed by François Véron de Forbonnais, *Principes et Observations Oeconomiques* (Marc Michel Rey 1767) 78, 'the object of public service is the preservation of property' ('Le service public a pour objet la conservation des propriétés' (translated by the present author)) and Guillaume Thomas François Raynal, *L'Histoire Philosophique et Politique des Établissements et du Commerce des Européens dans les Deux Indes* (1780) book xix, ch xi (echoing Montesquieu, see (n 72), 'a tax may be defined, a sacrifice of a part of a man's property for the defence

Smith, in his first maxim of taxation, appears to take the matter a step further, stating that the subjects of every state ought to contribute towards the support of the government 'in proportion to the revenue which they respectively enjoy under the protection of the state',[95] thus apparently advancing the view that the benefit provided is not just the protection of the property of the individual, but the protection of the income derived from that property. Cooper gives a similar interpretation of this comment by Smith, stating that the implication is that 'the individual's economic well-being is the benefit provided by society' and that it is therefore not unrealistic to suggest that Smith's contribution to the benefit theory was 'that he suggested the diversion of the theory away from the former obsession with protection and toward a broader idea of economic welfare as the benefit that the state provides'.[96] This may also be the first instance of a theoretical argument supporting taxation based on source (protection of the income-generating apparatus) rather than taxation based on residence or nationality (protection of the individual to whom the income accrues).

The benefit theory of taxation as advanced during this period did not attempt to address the issue of *identification* of taxpayers. As Braddick points out, 'economic historians were frequently concerned with the non-revenue consequences of taxation, with the implications for the distribution of wealth and the structure of demand', ie the question of the *method* of taxation. 'Political historians, by contrast, are often more concerned with the authority by which taxation is raised',[97] ie the question of the *justification* of taxation. This is true not just of historians, but of economists and political theorists generally. When discussing taxation during the period under consideration, theorists tended to describe the persons who should be liable in the most general terms, referring to 'men',[98] 'people',[99] 'subjects',[100] 'citizens'[101] and

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of the rest' (translation from Guillaume Thomas François Raynal, *A Philosophical and Political History of the Settlements and Trade of the Europeans in the East and West Indies* (JO Justamond tr, 2nd edn, A Strahan, T Cadell Jnr and W Davies 1798) vol vi, 412).

[95] Smith (n 72).

[96] Graeme S Cooper, 'The Benefit Theory of Taxation' (1994) 11 Australian Tax Forum 397, 436-437.

[97] Braddick, *The Nerves of State* (n 70) 110.

[98] See for example Petty (n 67) 68, 72; Hobbes, *Leviathan* (n 66) 157-58; Pufendorf (n 68) 831; Locke (n 77) 73.

[99] See for example Hobbes, *Leviathan* (n 66) 157-58; Sheridan (n 69) 149.

[100] See for example Pufendorf (n 68) 831; Sheridan (n 69) 148, 150; Smith (n 72); Frend (n 72) 31.

[101] See for example Montesquieu (n 72) 207;

'individuals'[102] as deriving benefits and bearing an obligation to pay tax, but without specifying exactly who such persons were or providing any theoretical basis for how such persons were to be identified or defined in law. It seems that this issue of connection or jurisdiction was considered to be separate from the theory of taxation and taken as predetermined or at least widely understood. The reason for this is no doubt that in an era with little international mobility or trade, and where the vast majority of people lived in their entire lives in the country in which they were born and had no sources of wealth located elsewhere, the issue of jurisdiction rarely arose and wasn't worthy of significant attention.

One final development in the taxation theory of the period under consideration is the removal of necessity as a justification for the imposition of taxation. As mentioned in section 2.2 above, it was an established principle during the Middle Ages that the ordinary expenses of the king were to be financed by his personal sources of wealth (income from the royal demesne, customs, royal prerogatives, fines etc), with direct taxation levied only to meet extraordinary needs for the defence of the realm, however Braddick describes how, from the seventeenth century onwards, the ordinary expenses of the crown were increasingly borne from direct tax revenue rather than from the king's personal income, or 'demesne revenue'.[103] Schumpeter, whom Braddick cites in this regard, writing about a similar change in Austria and Germany calls this the shift from the 'demesne state' to the 'tax state', and attributes it partly to the extravagance and financial mismanagement of the rulers during the period, but mainly to the increasing cost of waging war.[104]

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[102] See for example Bodin, *Les Six Livres de la République* (1579) (n 64) 618; Sully (n 87) 150; Mirabeau (n 89) 336.

[103] See MJ Braddick, *Parliamentary Taxation in Seventeenth Century England: Local Administration and Response* (Royal Historical Society 1994) 2-11; Braddick, *The Nerves of State* (n 70) 12-26.

[104] Joseph A Schumpeter, 'The Crisis of the Tax State' (1918) reprinted in Richard Swedberg (ed) *The Economics of Sociology and Capitalism* (Princeton University Press 1991) 99, 104-05. Braddick, *Parliamentary Taxation in Seventeenth Century England* (n 103) 2 states that in England the 'resolution of the tension between demense and tax revenues was quite sudden and decisive, coming in the 1640s as a result of pressing military need', though others have suggested that the imposition of direct taxation to fund the ordinary expenses of government may have begun as early as 1534 (this is in part based on the preambles to the subsidy act of 1534 and subsequent parliamentary grants. See GR Elton, 'Taxation for War and Peace in Early-Tudor England' in JM Winter (ed), *War and Economic Development: Essays in Memory of David Joslin* (Cambridge University Press 1975) 3; JD Alsop, 'The Theory and Practice of Tudor Taxation' (1982) 97 The English Historical Review 1; JD Alsop, 'Innovation in Tudor Taxation' (1984) 99 The English Historical Review 83; RW Hoyle, 'Crown, Parliament and Taxation in Sixteenth-Century England' (1994) 109 The English Historical Review 1174. For a contrary view, see GL Harriss, 'Thomas Cromwell's "New Principle" of Taxation' (1978) 93 The English Historical Review 721; GL Harriss, 'Theory and Practice in Royal Taxation (n 29)). It certainly seems that the

During the period of the Commonwealth and the Protectorate, parliament had no access to demesne revenues, and so both the war and the ordinary expenditure of government was financed solely through direct taxation which became a regular (first weekly and then monthly) charge rather than an occasional one. Prerogative taxation was abolished during this period, with Braddick noting that 'wardship, monopolies, purveyance, ship money, forest fines, distraint for knighthood, benevolances and forced loans were all political casualties of the long parliament', and that 'after 1641 customs were fully controlled by parliament'.[105]

This, then, was the classical formulation of the benefit theory of taxation of the seventeenth and eighteenth centuries: a theory of justification for the imposition of taxation which had evolved from the taxation theory of the Middle Ages, but which now emphasised the benefit of protection of an individual's property rather than the protection of the individual him or herself, and which now endorsed the taxation of all members of society, including those on very low incomes,[106] on the basis of the

causes of the change began well before the Civil War, (an early example of an argument in favour of taxes being a permanent feature of public finance rather than impositions levied only times of necessity was made by Giovanni Botero in 1589. See Romain Descendre, *L'État du Monde: Giovanni Botero Entre Raison d'État et Géopolitique* (Librarie Droz SA 2009) 147-149) and Braddick (ibid 5-8) points out that under the Tudor monarchs there was a significant decay in the demesne revenues, a fact which he attributes partly to the policy of the Elizabethan regime of limiting expenditure and partly to inflation, rather than to financial mismanagement. He further notes (ibid 2) that between 1590 and 1640 'the distinction between demesne and tax revenues became increasingly blurred' with prerogative income being 'stretched to include a number of taxes, or sources of income that were effectively taxes, which in principle arose from the monarch's rights over the demesne', an example being the ship money levied between 1634 and 1640.

[105] Braddick, *The Nerves of State* (n 70) 15-16. This was confirmed following the Glorious Revolution in An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (1 Will & Mar sess 2 c 2) (1688), section 1 of which provided that 'levying money for or to the use of the crown, by pretence of the prerogative without assent of parliament, for longer time or in other manner than the same is or shall be granted is illegal'. After the Restoration in 1660 a short-lived attempt at the old distinction between ordinary and extraordinary revenues was attempted, though at this point 'revenues from crown lands had been relegated to virtual insignificance' and by 1670 'a demesne state was inconceivable' (Braddick, *Parliamentary Taxation in Seventeenth Century England* (n 103) 9). Following the passage of the Civil List Act of 1697 (An Act for granting to His Majesty a further Subsidy of Tunnage and Poundage towards raising the Yearly Sum of Seven hundred thousand Pounds for the Service of His Majesty's Household & other Uses therein mentioned during His Majesties Life (9 Will III c 23) (1697)) the king was granted a fixed annual sum of £700,000 to fund the expenses of the royal household and the costs of the salaries of 'the judges, the ambassadors, and other members of the civil service, and also the annuitants and pensioners of the crown' (Dowell (n 39) vol ii, 43) . By this time the 'English state had ceased to be a demesne state and had become a tax state' (Braddick, *Parliamentary Taxation in Seventeenth Century England* (n 103) 2).

[106] Many theorists argued that those who had only a subsistence level of income should be exempted from taxation (see for example Seligman, *Progressive Taxation* (n 38) 185-87 who discusses the views of Steuart, Woodward and Sonnenfels in this regard). However, Kennedy (n 19) 180 suggests that, to

benefits they individually received. In addition to providing justification, however, the benefit theory was also pressed into service to address the other, mainly economic, matters of concern of taxation theorists of the time: the most equitable mode of taxation (proportional or progressive) and the most appropriate measure of individual faculty on which to impose taxation (income, capital, consumption etc). Thus the benefit theory sought to address two of the taxation issues outlined in section 2.1(b) above: it was both a theory of *justification* and a theory of *method* of taxation. There was no component of the benefit theory that served as a theory of *identification*, however the theories of allegiance and jurisdiction of the time which are discussed in section 2.3(c) below may well have served this function, though they do not appear to have been discussed in the context of taxation, either at the time or by modern commentators.

As was the case in the medieval period, and as is outlined in chapter 3, direct taxation during the period under consideration continued to be imposed based on the connecting factors of nationality and residence, and it is again submitted that this proved an accurate method of measuring membership of the society that benefited from the protection provided by the king[107] and that therefore owed a duty to fund it. Also, direct taxes largely continued to be assessed and collected locally according to a fixed, apportioned amount being levied on each parish, town and city, and thus may be viewed as a charge a levied on members of a local community based on an obligation arising as a result of that membership.

Despite the significant developments in the benefit theory of taxation during the period under consideration, as will be seen in chapter 3, the jurisdictional scope of the taxes does not appear to have changed. It may well be that taxation policy was driven to a larger degree by expediency and practicality than by theoretical considerations, and that monarchs sought to maximise their revenue by imposing tax on all persons who were subject to their laws: that is, on their subjects and on aliens who were residing within their realm. Viewed from this perspective, one could suggest

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the extent that the poor were exempted from taxation during the period, this was not done on theoretical grounds but either out of compassion or out of a concern that any tax on their income or consumption would increase the price of labour.

[107] Either personally or through protection of the goods owned by the individuals in question.

that individuals were not subject to direct taxation because of the benefit of protection that they enjoyed under the laws of England, but rather that they were taxed because the laws of England provided the mechanism to enforce those taxes against them, and that the theory did little more than attempt to describe direct taxation as it actually existed rather than informing its design. As outlined in chapter 3, direct taxation on aliens and denizens was imposed at double the rate that applied to natural born subjects for most of this period, and this cannot be justified in terms of any greater benefit of protection that those individuals or their property might be supposed to have enjoyed under English law.

2.3(b) Public expenditure and local taxation

Although Smith may have attempted to divert the benefit theory of taxation away from its 'obsession with protection and toward a broader idea of economic welfare',[108] the fact remains that during the period under consideration the vast bulk of public expenditure was spent on military defence, diplomacy or the administration of the legal system. Braddick points out that in the period from 1660 to 1688 the cost of royal expenditure (household, wardrobe, chamber, privy purse, fees and annuities, gifts and rewards and payments to individual members of the royal family) came to approximately £8 million, and the cost of the civil administration (ambassadors, envoys, the secret service and expenditure related to the courts) amounted to approximately £5 million, while expenditure on the 'navy, military forces, the ordnance office and Tangier' came to slightly over £27 million.[109]

Although there was a 'rapid expansion of economic and social regulation' by government during the period, 'much of this activity was "free" to national government' either because it was 'cost-free (in that officeholders were more or less

[108] Cooper (n 96) 437.

[109] Braddick, *The Nerves of State* (n 70) 27 and 32. See also Michael Braddick, 'The Early Modern English State and the Question of Differentiation, from 1550 to 1700) (1996) 38 Comparative Studies in Society and History 92, 92-93 where he quotes Michael Mann, 'State and Society, 1130-1815: An Analysis of English State Finances' in M Zeitlin (ed), *Political Power and Social Theory* (JAI Press 1980) vol 1, 165, as saying that 'the functions of the state appear overwhelmingly military and overwhelmingly international rather than domestic. Only in the more recent past has state spending reflected a concern with welfare and social order'.

unpaid) or because the cost was borne by local rates'.[110] As Paine observed, 'the Nation is left to govern itself, and does govern itself ... almost at its own charge, on republican principles, exclusive of the expense of taxes. The salaries of the judges are almost the only charge that is paid out of the revenue'.[111] 'Welfare, social and economic regulation and law' were therefore 'negligible or non-existent costs to national government.'[112]

Central government did increasingly concern itself with matters of infrastructure and welfare during this period though, and there was national legislation concerning the maintenance and repair of roads,[113] the paving of roads,[114] the building and maintenance of sea defences,[115] the repair of bridges,[116] the building of county jails,[117] the fixing castles and forts on the Scottish border,[118] the destruction of choughs, crows and rooks[119] and the relief of the poor,[120] though this was financed by charges that were levied, assessed and collected locally and was not paid for by national taxation. As was the case in the medieval period, taxation theory therefore provided an accurate description of direct taxation at a national level, but failed to account for at least one aspect of local taxation: the requirement for the wealthy in the district to pay for the maintenance of the poor. This was the provision of a benefit that had nothing to do with protection of the physical person of the individuals concerned, or of their property, and the benefit did not accrue to the persons paying the tax, except

[110] ibid 22.
[111] Thomas Paine, *The Rights of Man: Being an Answer to Mr Burke's Attack on the French Revolution* (First published 1791, WT Sherwin 1817) 79-80.
[112] Braddick, *The Nerves of State* (n 70) 32.
[113] An Act for the mending of the Highways (2 & 3 Ph & Mar c 8) (1555).
[114] An Act for paving of the Highway between the Strand Cross and Charing Cross (24 Hen VIII c 11) (1532); An Act for the paving of Holborn (25 Hen VIII c 8) (1533).
[115] A general Act concerning Commissions of Sewers to be directed in all parts within this Realm (23 Hen VIII c 5) (1531)
[116] An Act concerning the amendment of Bridges in Highways (22 Hen VIII c 5) (1530).
[117] An Act concerning where and under what manner the Jails within this Realm shall be edified and made (23 Hen VIII c 2) (1531).
[118] An Act for the Reedifying of Castles and Forts and for the enclosing of Grounds from the Borders towards and against Scotland (2 & 3 Ph & Mar c 1) (1555).
[119] An Act made and ordained to destroy Choughs, Crows and Rooks (24 Hen VIII c 10) (1532).
[120] An Act for punishment of sturdy vagabonds and beggars (27 Hen VIII c 25) (1536); An Act for the Provision and Relief of the Poor (5 & 6 Ed IV c 2) (1551); An Act for the Relief of the Poor (2 & 3 Ph & Mar c 5) (1555); An Act for the Relief of the Poor (5 Eliz c 3)(1562); An Act for the punishment of Vagabonds and for Relief of the Poor and Impotent (14 Eliz c 5)(1572); An Act for the Relief of the Poor (39 Eliz c 3) (1597); The Poor Relief Act 1601 (An Act for the Relief of the Poor 43 Eliz c 2) (title provided for in Short Titles Act 1896 (59 & 60 Vict c 14), sch 1).

to the extent that it was to the advantage of the entire community of which the taxpayer was a member.

2.3(c) Theories of allegiance and jurisdiction

In the legal theory of the period under consideration, the nature of the connection of an individual to the monarch or to the realm was held to consist of a bond of allegiance.[121] This bond was based on the 'feudal obligation of fidelity and obedience due from a vassal to his lord',[122] though the allegiance owed to the monarch consisted of an 'absolute and unqualified fealty, as opposed to that qualified or conditional fealty which a vassal owed and swore to a lord'.[123]

This legal concept of allegiance was based on reciprocity and protection; it was a 'mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they, are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them'.[124] Blackstone described this as 'an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully',[125] and Forsyth, commenting on *Calvin's case*, wrote that 'allegiance by the English law is correlative with protection and where the Sovereign can no longer de jure protect his subjects, their allegiance ceases.'[126] Blackstone wrote that allegiance was 'distinguished by the law into sorts or species, the one natural, the other local',[127] and Salmond pointed out

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[121] This bond was likened to the ligaments that join the parts of the body together, (*Calvin's Case* (1608) 7 Co. Rep. la, 77 English Reports 377, 382: 'As the ligatures or strings do knit together the joints of all the parts of the body, so doth ligeance join together the Sovereign and all his subjects') though John W Salmond, 'Citizenship and Allegiance II' (1902) 18 Law Quarterly Review 49, 51 suggests that the term itself is 'a comparatively modern corruption of ligeance (ligeantia), which is derived from the adjective liege (ligius), meaning absolute or unqualified'.

[122] Salmond, 'Citizenship and Allegiance II' (n 121) 40. Salmond notes that the oath of fealty 'required, by the feudal law, to be taken by all tenants to their landlord' was 'couched in almost the same terms as our ancient oath of allegiance'.

[123] ibid 51. Salmond notes that it was a 'a settled principle of tenure, that all lands in the kingdom are holden of the king as their sovereign and lord paramount' and as the king was 'sovereign lord of all men within his kingdom, it became clear that there was no liege fealty possible or lawful, save that which was due to the king himself'.

[124] *Calvin's Case* (n 121) 382 (citing M Skeene, *De Expositione Verborum* (unknown)).

[125] William Blackstone, Commentaries on the Laws of England, Book I (Clarendon Press 1765) 358.

[126] William Forsyth, *Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence* (Stevens & Haynes 1869) 334.

[127] Blackstone (n 125) 357. In *Calvin's Case* (n 121) 383 it was stated that there were 'found in the law four kinds of ligeances': natural allegiance (of subjects), acquired allegiance (of denizens), local

that this division corresponds with the twofold nature of state membership found in all 'civilized communities', whereby 'members of the body politic are of two classes'; those of 'citizenship and residence'.[128] Natural allegiance was 'due from all men born within the king's dominions immediately upon their birth'.[129] This form of allegiance constituted a personal bond between the subject and the monarch that transcended the physical territory of the realm, and so 'subjects of England are bound by their ligeance to go with the King, &c. in his wars, as well within the realm, &c as without'[130] and equally in times of peace, because 'the King's power, command, and protection extendeth out of England' and that 'power and protection draweth ligeance', such 'ligeance cannot be local, or confined within the bounds' of England.[131] While the bond of natural allegiance thus extended beyond the monarch's realm and dominions, when it came to acquisition of nationality these territorial limits were all-important, so that the 'children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such',[132] whereas legislation was required for children of subjects born overseas to be considered nationals in certain circumstances.[133] It is in this sense that Lloyd Jacob commented that the 'King's allegiance was considered as a geographical tract'.[134]

Natural allegiance was acquired at birth because even at this point subjects were 'under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves', and this allegiance was original and antecedent to any other oath or promise.[135] Because this liege fealty was 'first in order of time' no other bond of loyalty had 'any claim to be preferred before it'.[136] Also, because

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allegiance (of aliens) and legal allegiance 'done upon oath at the torn of the leet'. Acquired allegiance is discussed later in this section. Legal allegiance referred to oaths taken for various offices granted by the monarch, and as such is not further considered here.

[128] John W Salmond, 'Citizenship and Allegiance I' (1901) 17 Law Quarterly Review 270, 270.

[129] Blackstone (n 125) 357.

[130] *Calvin's Case* (n 121) 386.

[131] ibid 388.

[132] Blackstone (n 125) 361-62. This seems not to have applied to the children of alien enemies born in the realm in a time of war. See *Calvin's Case* (n 121) 383, 'if enemies should come into the realm, and possess town or fort, and have issue there, that issue is no subject to the King of England, though he be born upon his soil, and under his meridian, for that he was not born under the ligeance of a subject, nor under the protection of the King'.

[133] See n 31 above.

[134] GH Lloyd Jacob, 'Nationality and Domicile; With Special Reference to Early Notions on the Subject' (1924) 10 Transactions of the Grotius Society 89, 99.

[135] Blackstone (n 125) 357.

[136] Salmond, 'Citizenship and Allegiance II' (n 121) 54.

'faith, obedience, and ligeance are due by the law of nature' and 'the very law of nature itself never was nor could be altered or changed',[137] natural allegiance was therefore 'a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature'.[138] The bond was correspondingly binding on the monarch, with Blackstone writing that 'the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries'.[139]

In contrast to natural allegiance, local allegiance was due when 'an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance'.[140] Such allegiance was purely territorial and only applied to aliens that were 'domiciled or resident within the kingdom' as only they 'owe obedience to the laws of the kingdom, and are within the benefits conferred by the legislature'.[141] This bond was not only local but also temporary, and subsisted only 'so long time as he continues within the king's dominion and protection and it ceases, the instant such stranger transfers himself from this kingdom to another', and thus 'the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire'.[142]

An alien who had been made denizen was 'in a kind of middle state between an alien, and natural-born subject'[143] having begun by owing local allegiance by virtue of physical presence within the realm, but because of denization owed a further 'acquired allegiance'[144] to the monarch. This allegiance was not confined only to the territory of the realm or the duration of physical presence within it, however neither was it universal or permanent since the denizen's natural allegiance to the monarch of his or her place of birth subsisted and could not be cancelled merely by pledging

[137] *Calvin's Case* (n 121) 392.
[138] Blackstone (n 125) 357.
[139] ibid 358.
[140] *Calvin's Case* (n 121) 383.
[141] Salmond, 'Citizenship and Allegiance II' (n 121) 61. However, aliens who were present for short periods of time within the realm were also expected to obey the law of the land while present. See *Raven's case* (1661) Kelyng, J 24, 84 English Reports 1065, 1071.
[142] Blackstone (n 125) 358.
[143] ibid 362.
[144] *Calvin's Case* (n 121) 383.

allegiance to another.[145] Natural allegiance could only be lost through an express act of the monarch, and having two such allegiances was impossible. Naturalised subjects would have been in a similar position. This appears to have been equally true for British subjects who took up residence in foreign countries and swore allegiance to the rulers there. For example, in 1523 a statute recited that many natural-born subjects had transported 'themselves with their wife, children and goods into Holland Zeeland Brabant Flanders and into other countries of foreign princes and there be sworn to the obedience of the princes and lords of the countries where they be now inhabited'[146] and paid their taxes as subjects in those countries, 'yet no declaration or enactment was made by Parliament on that point of disobedience, so as to disfranchise them and make them aliens'[147] but instead they were merely required to pay the same higher rate of customs duty as that paid by aliens and denizens on the importation of goods into England.

Although it does not appear to have been discussed in the context of taxation, there is very evidently a close correspondence between the constitutional theory of allegiance and the dominant theory of taxation of the time, the benefit theory of taxation, with both being based on the notion of a reciprocal obligation between the monarch and those under the monarch's protection. Under the theory of allegiance, the obligation of the subject or resident alien was obedience to the monarch and to his or her laws, and to fight for the monarch in times of war. Under the theory of taxation, this obligation took the form of a contribution towards the protection being provided, which predominantly entailed paying for the cost of war. Indeed, in the twelfth and thirteenth centuries individuals who held land by knight's fee and who were obliged by their tenure to do military service by providing a knight for forty days' service in the King's army if called upon, were sometimes required to pay a tax, known as *scutage* in commutation of this feudal obligation,[148] thus demonstrating a clear link between allegiance and taxation. There were differences, however, between the theories of allegiance and the benefit theory of taxation during the period. First, the

[145] See Blackstone (n 125) 361-62; Salmond, 'Citizenship and Allegiance II' (n 121) 52.
[146] An Act for Payment of Custom (14 & 15 Henry VIII c 4) (1523).
[147] Forsyth (n 126) 297.
[148] James Fosdick Baldwin, The Scutage and Knight Service in England (University of Chicago Press 1897) 7-8. See also Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I, Volume I* (Cambridge University Press 1895) 245-54. Scutage later came to be used as a term for any tax due from the holder of a knight's fee.

allegiance of an individual was not in any sense conditional upon a correspondence between the obligation owed by him or her and the protection that he or received from the monarch.[149] Secondly, the duty of allegiance was *personal*, whereas increasingly the benefit theory was seen as requiring the monarch to protect the property of the individual rather than the individual him or herself. As a result, the theory of allegiance had more in common with the benefit theory as originally espoused in the medieval period, rather than with the version that emerged during the seventeenth and eighteenth centuries.

Under the legal theory during the period there were two types of jurisdiction: jurisdiction over persons, and jurisdiction over property. Rutherforth points out that where the 'persons concerned in a dispute are obliged from their personal circumstances' to have 'recourse to the public for a determination' of that dispute, 'the right of the society, which corresponds to this obligation, is a jurisdiction over their persons'. Where the persons in question were obliged to seek a public determination, not because of their personal circumstances but 'because the thing in dispute' was 'in the power of the society', then the right in the society was 'a jurisdiction over the thing'.[150] An individual's personal circumstances might, depending on the nature of the dispute, have required him or her to have recourse to a public determination in Great Britain if he or she were a British subject or if he or she were physically present in Great Britain. Lipstein notes that in feudal society 'the court exercised its jurisdiction only because the case was somehow factually connected with its territory' which was the case when 'the defendant was resident, that the act had taken place, that

[149] It seems that no obligation to pay taxation arose in the absence of protection actually being provided by the monarch. For example, the grant of the fifteenth and tenth in 1472 specifically provided that if the army, the wages of which were to be funded by the grant, 'did not assemble, then by the same authority the same sums and each of them should be returned to their payers' (*The Parliament Rolls of Medieval England* (n 27) vol vi, 39).

[150] Thomas Rutherforth, *Institutes of Natural Law, Being the Substance of a Course of Lectures on Grotius de Jure Belli et Pacis, Read in St. John's College, Cambridge* (First published 1754, W and J Neal 1832) 164. Rutherforth went on to note that, in effect, all jurisdiction is over persons since they are the owners of things who must submit to the jurisdiction of the society: 'Thus if we consider only the immediate cause of jurisdiction, as it arises either from the personal circumstances of the parties contending or from the situation of the thing in dispute; it may be distinguished into these two sorts: but if we consider its operation, as it binds the parties to submit to the determination of the society, all jurisdiction, in this view of it, may be said to be over persons' (ibid 164-65). See also Robert Ward, *An Enquiry Into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and Romans, to the Age of Grotius* (A Strahan and W Woodfall 1795) 507 '[O]ne of the first principles concerning civil society is, that every creature, within the pale of a community, should, for the sake of the common good, be amenable to its laws'.

the contract had been concluded, or the object was situated there', noting that '[j]urisdiction and the application of law were co-extensive, but it was the convenience of applying the latter which determined the former and not the converse'.[151]

Lloyd Jacob draws a direct parallel between the theories of allegiance of the period and theories of jurisdiction, saying:

> Considered from an international point of view, the jurisdiction of a nation must be founded either upon the person or the property being within its territory; considered from a civil point of view, jurisdiction may be founded upon natural as well as local allegiance.[152]

though he goes on to draw one distinction, noting that the invariable and universal obedience owed by virtue of natural allegiance was 'the creation of civil law' and 'finds no countenance in the law of nations', where extra-territorial jurisdiction was not permitted.[153] Huber's maxims on the conflict of law similarly stated that laws are territorial in nature, with extra-territorial recognition of rights acquired under foreign laws a matter of comity between nations,[154] and Ryngaert notes that '[m]odern English adherence to the territorial principle' dates back to medieval times 'when criminal juries were summoned from the *locus delicti*' and 'and evidence was easiest to gather at the place where the crime occurred'.[155]

As will be made clear in chapter 3, there are also strong parallels between the allegiance owed by an individual and the extent to which that individual was subjected to direct taxation during the period. Subjects, who owed a personal allegiance to the

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[151] Kurt Lipstein, *Principles of the Conflict of Laws, National and International* (Martinus Nijhoff 1981) 4-5.

[152] Lloyd Jacob (n 134) 102.

[153] ibid, citing the maxim of Justinian *extra territorium ius dicenti impune non paretur* (One who exercises jurisdiction outside his territory may be disobeyed with impunity).

[154] The three maxims are: '1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond; 2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof; 3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects'. (Ulricus Huber, *De Conflictu Legum Diversarum in Diversis Imperiis* (1684), translation taken from Ernest G Lorenzen, 'Huber's De Conflictu Legum' (1919) 13 Illinois Law Review 375).

[155] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 55-56.

crown that was both perpetual and universal, were liable to tax whether they were resident in Britain or were abroad at the time of the assessment, whereas aliens, who owed an allegiance that was purely territorial and (potentially) temporary, were liable to tax only if they were resident in the realm. Thus it might be said that, at least indirectly, the theory of allegiance served as the theory of *identification* of taxpayers during the period.

2.4 Theories of taxation from 1799 to the present time

2.4(a) The benefit and the ability-to-pay theories of taxation

There was no significant change in taxation theory in the years immediately following the introduction of income tax in Great Britain in 1799. As had been the case prior to this time, there was an increasing focus on matters concerning the *method* of taxation, with a continuing debate over whether taxation should be proportional or progressive.[156] The benefit theory continued to be espoused in the form into which it had developed in the eighteenth century, with some writers emphasising the notion of taxation as a form of insurance. Richard Watson, the Bishop of Llandaff, said that the 'true principle of taxation' was that 'every man should pay for the protection of his property by the State, in exact proportion to the value of the property protected' just as 'merchants, who risk their goods on board a vessel, pay an insurance in proportion to the value of the goods insured'.[157] A very similar view was expressed by Thiers, who Seligman calls the 'the great apostle of the protection or insurance theory',[158] when he wrote that taxation should be 'proportional to the share of the costs that society has borne' for the individual, and that the individual has received 'as an insurance premium is proportionate to the sum insured'.[159]

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[156] See Seligman, *Progressive Taxation* (n 38) for a detailed account of this debate.

[157] Richard Watson, *The Substance of a Speech Intended to Have Been Spoken in the House of Lords, November 22 1803* (T Cadell and W Davies 1803) 19.

[158] Seligman, *Progressive Taxation* (n 38) 169.

[159] Adolph Thiers, *De la Propriété* (Paulin, Lheureux et Cie 1848) 363 'Ainsi l'impôt proportionnel, c'est-à-dire l'impôt proportionné à la part des frais que la société est supposée avoir faits pour vous, au service que vous en avez reçu, comme en matière d'assurances la prime est proportionnée à la somme assurée, rien de mieux' (translated by the present author). See also JR McCulloch, *A Treatise on the Principles and Practical Influence of Taxation* (First published 1845, 3rd edn, Adam and Charles Black 1863) 16-17, specifically approving of Thiers' insurance company metaphor; de Girardin (n 87) 249, 'as we understand it, tax is an insurance premium, paid by [property] owners, to assure against the natural risks that might disturb their possession or enjoyment [of that property]' ('Tel que nous le

Musgrave calls this a 'narrow' interpretation of taxation,[160] and by the middle of the nineteenth century economists began to reject it as an alternative theory of how the burden of taxation should be apportioned among taxpayers emerged. This was not a new theory of taxation, but rather a very old one, which was premised on the notion that individuals should be required to contribute to national taxation in accordance with their ability to pay; something Cannan had described as having been one of the 'two great principles or canons' of local taxation from as early as the fourteenth century.[161] This proposition was initially expressed in the context of income tax by stating that taxpayers ought to be left 'when the tax is taken from them, precisely in the same relative situation to each other, in which they were the moment before the tax was paid'[162] or as requiring an equal sacrifice from each, though it is now usually referred to as the 'ability to pay' theory of taxation.[163]

The 'classical version of the ability doctrine'[164] was outlined by Mill, who argued that:

> Equality of taxation, therefore, as a maxim of politics, means equality of sacrifice. It means apportioning the contribution of each person towards the expenses of government so that he shall feel neither more nor less

comprenons, l'impôt doit être la prime d 'assurance, payée par ceux qui possèdent, pour s'assurer contre tous les risques de nature à les troubler dans leur possession ou leur jouissance'; translated by the present author).

[160] Musgrave, *The Theory of Public Finance* (n 78) 68.

[161] See section 2.2 above.

[162] Frend (n 72) 40. See also John Craig, *Elements of Political Science* (T Cadell and W Davies 1814) vol ii, 264, 'The taxes which each inhabitant pays to the state consist of the quantity of enjoyment of which he is deprived'; William Paley 'The point to be regarded is not what men have, but what they can spare; and it is evident that a man who possesses £1,000 a year can more easily give up £100 than a man with £100 can part with £10; that is, those habits of life which are reasonable and innocent, and upon the ability to continue which the formation of families depends, will be much less affected by the one deduction than by the other' (Edmund Paley (ed), *The Works of William Paley DD* (CJG and F Rivington 1830) vol iii, 511); Benjamin Sayer, *An Attempt to Show the Justice and Expediency of Substituting an Income or Property Tax for the Present Taxes or a Part of Them, as Affording the Most Equitable, the Least Injurious, and the Least Obnoxious Mode of Taxation* (J Hatchard and Son 1833) 3, 'Considering equality of taxation to signify taxation in due proportion to every one's means and ability to pay, that most just principle of taxation, it seems to follow that income, which constitutes and evidences the means to pay, is the surest basis for equal taxation'.

[163] While there may be differences between an 'equal sacrifice' theory and an 'ability to pay' theory regarding the application of such theory to the *method* of taxation, or distribution of the tax burden, perhaps important ones, such differences are not relevant in the context of the current discussion.

[164] Musgrave, *The Theory of Public Finance* (n 78) 91.

> inconvenience from his share of the payment than every other person experiences from his.[165]

Mill went on to strongly criticise the benefit theory of taxation,[166] first stating that it was not 'admissible that the protection of persons and that of property are the sole purposes of government', and secondly observing that a tax based on the benefit theory would be regressive, as it could not be 'be admitted, that to be protected in the ownership of ten times as much property, is to be ten times as much protected', nor could it 'truly said that the protection of 1000l. a year costs the state ten times as much as that of 100l. a year, rather than twice as much, or exactly as much', but in fact, that the poorest in society were the ones who benefited most from the protection of government, as they were the ones who would 'would suffer most if that protection were withdrawn'. [167]

A third problem with the benefit theory was that economists were 'unable to devise a workable methodology for determining the extent of each taxpayer's benefit from government and, consequently, the extent of each taxpayer's obligation to pay tax in a benefit-based tax system'.[168] As mentioned in section 2.3, Musgrave described this as the 'weak link' in the benefit theory,[169] and Simpson described how opponents of free public education in the United States in the mid-nineteenth century based their arguments on the fact that 'it was utterly unjust to tax a man who had no children of his own in order to educate other men's children – that is, to tax one who would receive no direct benefit from the proposed governmental service' while 'advocates of the proposal still adhered to the ability theory, arguing that elementary education was a proper governmental function, toward which citizens should contribute in proportion

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[165] John Stuart Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (First published 1848, William J Ashley ed, 7th edn, Longmans, Green & Co 1909) 804.
[166] Groves (n 75) 29 says he did an 'extremely effective job in demolishing' it.
[167] ibid 804-05.
[168] Nancy H Kaufman, 'Fairness and the Taxation of International Income' (1998) 29 Law and Policy in International Business 145, 183. See also J Clifton Fleming, Robert J Peroni and Stephen E Shay, 'Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income' (2001) 5 Florida Tax Review 299, 333, 'This approach proved unworkable because it was impossible to formulate accurate allocations of important, but generalized, benefits (e.g., national defense, the corrections system, a legal system that protects property rights, and environmental protection) to particular individuals'.
[169] Musgrave, *The Theory of Public Finance* (n 78) 66-67.

to their means'.[170] Blum and Kalven also point out that there are 'some benefits conferred by the government which cannot, without defeating their very purpose, be made contingent on the ability of the recipient to pay for them. The most common instances today are education and welfare subsidies to the underprivileged'.[171]

Seligman argued that from the mid- to late-nineteenth century the benefit theory 'came to be abandoned as the foundation for a scientific treatment of taxation', by which he presumably meant an *economic* treatment of the *method* of taxation. He wrote that when this theory 'was discarded as the sole explanation of taxation, it became necessary to substitute for it another basis. In its stead there has been put the doctrine of ability or faculty',[172] while Cooper makes a similar point, observing that the '*leitmotif* of tax thought from Mill until today, accepted with just as much conviction as the benefit theory had been, is that of taxation according to ability to pay'.[173] Vogel notes that in the literature that followed this period, 'benefit and sacrifice arguments are considered, if at all, as reference points for structuring the tax system, and more particularly, to set the tax rate' and that the discussion 'nearly always is led in terms of ability to pay instead of using the sacrifice concept' which he argues indicates 'that the standard of measurement rather than the basic justification of tax liability is discussed'.[174] He describes the 'question how taxation could be justified'

[170] Herbert D Simpson, 'The Changing Theory of Property Taxation' (1939) 29 The American Economic Review 453, 462. Simpson described this as an example of 'the benefit theory in all frankness', and noted that 'until 1855 in Illinois the statutes provided that while school districts might be organized and might levy taxes for the support of the schools, nevertheless no one could be taxed for school purposes unless "his consent in writing was first had and obtained"', and that '[s]ubstantially similar statutes existed in a number of states'.

[171] Walter J Blum and Harry Kalven Jr, 'The Uneasy Case for Progressive Taxation' (1952) 19 University of Chicago Law Review 417, 454. They also state that the 'difficulties of isolating and measuring particular benefits are for the most part insurmountable' (ibid 455) and that it 'need merely be asked what groups would be called upon to pay for the enforcement of the antitrust laws or policing the income tax itself or the cost of maintaining the courts' (ibid 452).

[172] Seligman, *Progressive Taxation* (n 38) 156-57. The benefit theory was not permanently abandoned as a theory of the *method* of taxation. Musgrave, *The Theory of Public Finance* (n 78) 69-73 discusses how Maffeo Pantaleoni, Ugo Mazzola, Emil Sax, Knut Wicksell and Antonio Viti de Marco all advanced versions of the benefit theory in the context of the distribution of that tax burden, but which were based more on notions of economic efficiency than on equity or fairness. A more recent argument along these lines can be found in Cooper (n 96).

[173] Cooper (n 96) 441.

[174] Vogel, 'The Justification for Taxation' (n 40) 30-31. See also ibid 19, where the points out that even in Musgrave, *The Theory of Public Finance* (n 78), the 'most respected' treatise on public finance in international circles, 'the two historically most important theories for justifying taxation, the benefit and sacrifice theories (Musgrave refers to the latter as the ability to pay principle), almost exclusively as standards for distribution of the tax burden'.

as having been 'filed away as resolved' by the turn of the twentieth century.[175] Thus, from this point onwards, questions of the *method* and *function* of taxation predominated debates on the subject and it is unsurprising that discussion of taxation theory and policy was 'almost exclusively pursued by economists'.[176]

Although there was no further theoretical analysis of, or debate on, the benefit theory, nor any further developments or refinements of it, the concept of the imposition of tax on an individual being justified on the grounds of the benefit of protection provided to that individual's property continued to be applied throughout the late eighteenth and early nineteenth centuries. For example, in the case of *Colquhoun v Brooks* counsel on behalf of the Surveyor of Taxes contended that an alien who was resident in the United Kingdom and who carried on a trade wholly abroad was subject to income tax on the profits of that trade and that this resulted in no hardship as '[p]ersons residing here and enjoying the protection of the laws of this country ought to bear its burdens' and this appears to have been accepted by the court, with Herschell LJ pointing out that the individual's 'trade or profession is not enjoying the protection of the laws of this country', but rather '[h]e is enjoying it himself. He is in the same position as a British subject who is residing here'.[177] In *Winans v Attorney General*, a case regarding the taxation of bonds held by an individual domiciled outside the United Kingdom at the time of his death, Loreburn LC said 'the property received the

[175] ibid 20.

[176] Klaus Vogel, 'Worldwide vs. Source Taxation of Income: A Review and Re-evaluation of Arguments (Part I)' (1988) 16 Intertax 216, 217.

[177] (1889) 14 AC 493, 2 TC 490 (HL) 492. The taxation of foreign trades was also the subject to two proposed legislative amendments where the concept of protection was raised during the debates in the House of Commons. In 1882, Financial Secretary to the Treasury Leonard Courtney refused to accept a proposed amendment that would extend the remittance basis of taxation to companies saying that a company which was domiciled in England was 'protected by the English law; it depended upon its domicile for the maintenance of its position; and, therefore, the shareholders must pay a fair share of taxation' (HC Deb 31 July 1882, vol 273, col 248), and the following year John Hubbard MP, arguing in favour of an amendment to the Customs and Inland Revenue Bill 1883 that proposed to extend the remittance basis of taxation to individuals resident in the United Kingdom but carrying on a trade entirely abroad, described as a 'principle which was adopted by the establishment of the Income Tax' that 'all property which arose in this country under the protection of the law, and all money which was expended in the country, was liable to be taxed', and that 'many people who resided in this country, and had property created abroad, had in England the advantage of expending it under the protection and shelter of the English Government, and, therefore, might fairly be said to be under an obligation to contribute to the expenses of the English Government' but that 'neither in law nor in equity had they the slightest claim to tax property created abroad and not brought into this country' (HC Deb 10 May 1883, vol 279, col 478-79). See also HC Deb 7 April 1851, vol 115, col 1158, where MP Henry Thoby Prinsep argued for an abolition of income tax in favour of indirect taxation partly on the grounds that a 'casual visitor, or any one who had no recognised domicile' who benefited by the maintenance of order, and of the social status of the country' was not obliged to contribute to the former but was to that latter.

full protection of British laws – which is a constant basis of taxation' and Shaw of Dunfermline LJ said he knew of no reason 'either under the law of nations, by the custom of nations, or in the nature of things why property within the jurisdiction of this country, possessed and held under the protection of its laws' should not be subject to the tax on transfer as would have been the case if the deceased were a British subject.[178]

There equally appear to have been no further developments regarding theories of *identification* of taxpayers in the nineteenth and early twentieth century. Clearly, the ability to pay theory could not perform this function; as Tillinghast observed, although this theory is preferred in most modern literature as a 'basis for rationalizing the domestic tax system' in the international context it is 'meaningless until one has identified the persons or enterprises whose wealth is to be taken into account.'.[179] The question of *identification* of taxpayers was largely ignored by economists, who took the issue as having been pre-determined in their discussions of the *method* and *form* of taxation. This is unsurprising, as the definition of connecting factors for tax purposes may be viewed as a legal rather than an economic question, and, as Vogel points out, 'even in the context of policy discussions it is normally unavoidable to take some principal legislative decisions for granted'.[180]

2.4(b) The theory of economic allegiance

In 1921, following work done by the then recently formed International Chamber of Commerce, the League of Nations requested four internationally respected economists to examine the issue of international double taxation, which it was felt was an obstacle to financial reconstruction following World War I.[181] The

[178] [1910] AC 27, 30 and 48 respectively. See also the dictum of Wrenbury LJ in *Whitney v IRC* [1926] AC 37, 54, cited in section 2.2 above.

[179] David R Tillinghast, *Tax Aspects of International Transactions* (2nd edn, Matthew Bender 1984) 3. See also Michael S Kirsch, 'Taxing Citizens in a Global Economy' (2007) 82 New York University Law Review 443, 480, 'Before comparing people's ability to pay, the relevant universe must be defined'.

[180] Vogel, 'Worldwide vs. Source Taxation of Income (Part I)' (n 176) 217.

[181] The four economists were ERA Seligman, Sir Josiah Stamp, GWJ Bruins and Luigi Einaudi. For a detailed background to the work of the International Chamber of Commerce and to the League of Nations report, see Michael J Graetz & Michael M O'Hear 'The "Original Intent" of U.S. International Taxation' (1997) 46 Duke Law Journal 1021, 1066-76.

economists issued their report in 1923, the second part of which was given over to an examination of the 'general principles which govern international competence in taxation'.[182] While the primary focus of this analysis was to identify a principle, or set of principles, upon which a method of apportioning tax revenues, or the rights to such revenues, between countries who had concurrent valid claims to them might be made, that is, it was a search for a theory of *allocation* of taxing rights, this investigation also considered the identification of taxpayers and the nature of connection to a country for tax purposes (a theory of *identification*).

The report stated that the benefit theory was not 'able to avoid or to solve the problem of international double taxation' because governments provided services to individuals resident in their 'area' such as providing for 'personal safety, health and welfare' and also provided services to property 'within the limits of that area', such as 'its physical defence from spoliation, its protection from various kinds of physical deterioration and the maintenance of a system of legal rights surrounding it'. Clearly, property could be located in one state while its owner was located in another, and there was, the report found, 'no satisfactory method of apportioning' the benefit in such a case. In any event, the report dismissed the benefit theory from further consideration as it had been 'supplanted in modern times by the faculty theory or theory of ability to pay'.[183] The economists rejected taxation based on 'personal political allegiance or nationality', noting that the ties of non-resident citizens to a country may be 'merely nominal' and that in the 'modern age of the international migration of persons as well as of capital' it no longer formed an 'adequate test of individual fiscal obligation', and further rejected taxation based on temporary residence as 'plainly inadmissible'.[184] Taxation based on 'domicile or permanent residence' was described as 'more defensible', with the economists noting that it was 'getting further away from the idea of mere political allegiance and closer to that of economic obligation' (though no reason was given as to why a move in that direction was necessarily a positive one), while they described taxation based on the 'location of the wealth' as 'to a certain extent legitimate'. Neither principle on its own was held to be completely satisfactory,

[182] League of Nations, *Report on Double Taxation submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp* (League of Nations Doc EFS 73 F 19, 1923) 18-27.
[183] ibid 18.
[184] ibid 19.

in essence because of the validity of the other.[185] However, the report went on to suggest that '[t]aking the field of taxation as a whole' the reason that tax authorities 'waver' between the principle of domicile and that of location or origin' is that 'each may be considered as a part of the still broader principle of economic interest or economic allegiance'.[186] The report then went on to examine this notion of economic allegiance in the context of the acquisition and consumption of wealth, which broadly corresponded with the source of wealth and the residence of the owner of the wealth, and to make recommendations regarding the allocation of taxing rights between countries for a variety of sources of wealth according to whether the bond of economic allegiance was stronger with its place of acquisition or consumption, noting that the ideal solution was that 'the individual's whole faculty should be taxed, but that it should be taxed only once' and that 'the liability should be divided among the tax districts according to his relative interests in each'.[187]

In a critique of the report in the year following its publication, Coates commented regarding the theory of economic allegiance and its use as a theory of allocation that, '[n]o economic or other arguments are adduced in support of this dogma, nor is there any reconciliation of it with the doctrines expounded in Part I of the Report. In short, it begs the whole question.'[188] The claim in the report that the 'doctrine of economic allegiance' had by then 'come to be widely accepted in connection with the ordinary taxes on property and income' is also unsupported, and in fact several authors following the publication of the report believed that the theory

[185] ibid 19-20. Domicile or permanent residence could not be 'the exclusive consideration' because significant amounts of wealth may be owned by non-residents, and such property owners could not be 'declared devoid of all obligations to the place whence their profits are derived'. On the other hand, 'location or origin of the wealth' could not be 'the only test' because '[t]hose who are permanently or habitually resident in a place ought undoubtedly to contribute to its expenses' even if their 'property is situated or their income derived elsewhere'.

[186] ibid 20. The use of the word 'waver' is curious, as one would have thought that in most countries at the time, as indeed today, taxation was imposed simultaneously on the basis of source and residence, rather than wavering between the two.

[187] ibid 22-39. Quotation from ibid 20.

[188] WH Coates, 'League of Nations Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp' (1924) 87 Journal of the Royal Statistical Society 99, 101. He went on to note that 'the subsequent analysis of economic allegiance into the four elements of origin or economic location, physical situs, enforceability and domicile, together with their detailed application to various kinds of property and income, rest upon no appeal to economic reasoning such as distinguishes Part I of the Report'. In an article the following year he said that part II of the report 'gave every authority to the contradictory principle of economic allegiance and assignment by sources' (WH Coates, 'Double Taxation and Tax Evasion' (1925) 88 Journal of the Royal Statistical Society 403, 425).

of economic allegiance had originated in this work.[189] Graetz and O'Hear write that an examination of ERA Seligman's papers in Columbia University shows that it was he that proposed the 'allocational mechanism of economic allegiance' which became the 'foundation for the second part of the 1923 Report',[190] and they, and several other writers attribute this theory to Seligman, and in fact the wording of the report bears very strong similarities to that of Seligman's 1905 *Essays in Taxation* in this regard.[191]

Harris[192] and Vogel[193] both attribute the origin of the theory of economic allegiance to Schanz,[194] saying that Schanz had espoused it as a 'criterion for selecting subjects for taxation'; in other words, it was intended to be a theory of *identification*. According to Schanz's theory, every individual who was 'economically tied' to a community because he or she would 'benefit from the obligations of the commune being fulfilled' shared in the responsibility of funding that community.[195] These obligations of the community included, in the case of residents, 'internal and external security, roads for transport, sanitation, educational establishments ...' while in the case of non-residents they included 'the protection of their property' and 'the community's efforts in the form of value increases, profit, and safe revenues'.[196] Vogel notes that for Schanz an individual's ties to the state were based on either 'mere consumption' or 'business activities, including investment activities' and that where an individual was bound both to the state in which he or she was resident and to another state through business activities or because of income arising there, Schanz deems the

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[189] See for example WB Cowcher, 'League of Nations: Economic and Financial Commission' (1923) 132 The Economic Journal 566, 571, who, referring to the passage in which the report stated that taxes should be apportioned according to an individual's economic allegiance with each state quoted above, wrote that it was 'the most important in the whole Report. In it is born the new principle – Economic Allegiance'. See also WH Coates, 'Double Taxation and Tax Evasion' (1929) 92 Journal of the Royal Statistical Society 585, 592; Cornelius J Gregg, 'Double Taxation' (1947) 33 Transactions of the Grotius Society: Problems of Public and Private International Law 77, 80.

[190] Graetz and O'Hear (n 181) 1074 fn 215.

[191] Seligman, *Essays in Taxation* (n 46) 108-110. One difference being that Seligman described the 'principle of economic interest or economic allegiance' as one 'toward which all modern governments are tending', a comment that Graetz and O'Hear describe as optimistic (Graetz and O'Hear (n 181) 1076 fn 218). Other writers who attribute the theory of economic allegiance to Seligman include Clyde J Crobaugh, 'International Comity in Taxation' (1923) 31 Journal of Political Economy 262, 263; Simeon E Leland, 'Harding on Double Taxation' (1936) 24 California Law Review 379, 382; Yoseph Edrey and Shmuel Shani, 'The U.S. Taxation Of Aliens' (1992) 21 Capital University Law Review 121, 127.

[192] Harris, *Corporate/Shareholder Income Taxation* (n 13) 276.

[193] Vogel, 'Worldwide vs. Source Taxation of Income (Part I)' (n 176) 219-220.

[194] Georg Schanz, 'Zur Frage der Steuerpflicht' (1892) 9 Finanzarchiv 365.

[195] ibid 372 (translation from Harris, *Corporate/Shareholder Income Taxation* (n 13) 276).

[196] ibid 372-73 (translation from Harris, *Corporate/Shareholder Income Taxation* (n 13) 276).

allegiance to this other state, the source state, to be more important than that to the state of residence'.[197]

Although the authors of the League of Nations report had dismissed the benefit theory of taxation as a possible theory of *allocation*, it seems clear that the theory of economic allegiance is in fact no more than a variation of the benefit theory as it was outlined in section 2.3, with the benefit of protection of the individual, or of his or her goods, being replaced with the economic benefits derived from a state. Both Harris and Vogel state that Schanz acknowledges 'that the doctrine of economic allegiance is based on the benefits theory',[198] though the League of Nations report states that 'the problem of economic allegiance is one not of benefits but of duties or obligations'.[199] This seems like an empty distinction, as if the duties in question do not arise as a result of the benefits provided by the state, from where do they arise? Indeed, earlier on the same page of the report the economists state that it is 'undeniable that the individual owes some duty to the place where he lives. He receives benefits from, and confers benefits upon, that community'.[200] Also, while the report claimed that the benefit theory had been 'supplanted in modern times by the faculty theory or theory of ability

[197] Vogel, 'Worldwide vs. Source Taxation of Income (Part I)' (n 176) 219. Vogel notes that in League of Nations (n 182) the 'experts suggested that States reciprocally exempt nonresidents from income taxation so that only taxation by the State of residence would prevail', which was 'practically the opposite' of what was concluded by Schanz (ibid 220). Graetz and O'Hear (n 181) 1035 suggest that the reason for this preference for residence-based taxation was that Seligman, whose views were 'expressed in the 1923 Economists' Report to the League of Nations which plainly viewed source-based taxation as illegitimate because it is not based on the taxpayer's full ability to pay, or "faculty"' (see also ibid 1077 fn 220, where the authors stated that Seligman 'ultimately wished to safeguard the ability of nations to levy progressive taxes on the worldwide income of residents'). Robert L Palmer, 'Toward Unilateral Coherence in Determining Jurisdiction to Tax Income' (1989) 30 Harvard International Law Journal 1, 30-31 said that '[i]n retrospect, it appears that the Committee's approach was flawed from the very start due to its rigorous focus on the concept of ability to pay. That concept, in fact, could be fully effectuated only if each taxpayer is taxed exclusively by one nation. Thus, the Committee in a sense predetermined its conclusion that jurisdiction to tax should be based entirely on the one type of relationship least likely to overlap-personal relationship (in this case, domicile)'. Schanz, however, had pointed out that the question of *identification* of taxpayers and the choice of *method* of taxation were separate issues, saying that '[t]ax liability is made dependent upon an economic relation; after the circle of taxable persons has thus been determined ... society may say: each person economically bound to me is taxed ... to exonerate the economically weak ... according to a progressive system' (quoted in Vogel, 'Worldwide vs. Source Taxation of Income (Part I)' (n 176) 220).

[198] Harris, *Corporate/Shareholder Income Taxation* (n 13) 276. See also Vogel, 'Worldwide vs. Source Taxation of Income (Part I)' (n 176) 220.

[199] League of Nations (n 182) 29.

[200] ibid 29. The report also formulated the central question in relation to applying the theory of economic allegiance to the problem of double taxation as: 'In what ways and to what extent can a man be served by two or more governments that he should owe them any duty?' (ibid 22). This is just one of many inconsistencies and contradictory statements in the report.

to pay',[201] it nowhere explains how ability to pay could be used as a criterion for allocating taxing rights between states, or mentions it again, other than stating that in 'most complex communities, with more fully developed taxation expedients' the doctrine of economic allegiance is 'given quantitative expression by reference to terms of economic faculty or ability of the individual to pay'.[202]

This re-examination of the benefit theory in the context of a search for a theory of *allocation*, utilising a theory designed as a theory of *identification*, was a missed opportunity. Mill's criticism of the benefit theory on the grounds that 'the protection of persons and that of property' were not the 'sole purposes of government'[203] was even more valid in 1923 than it was when he made it in 1848, as the welfare reforms of the liberal government in the UK in the years before World War I with the passage of such legislation as the Education (Provision of Meals) Act 1906; the Education (Administrative Provisions) Act 1907, the Old-Age Pensions Act 1908 and the National Insurance Act 1911 saw a significant increase in spending on health, education and social welfare.[204] These benefits are not primarily concerned with the elements of economic allegiance as espoused by Schanz and the League of Nations report, that is, the acquisition or consumption of wealth, and are not, it is suggested, primarily economic but rather social in nature. This is not to suggest that the receipt of economic benefits related to the acquisition or consumption of wealth is not a valid, or even perhaps ideal, basis for a theory of *allocation* of taxing rights between states;[205]

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[201] ibid 18.

[202] ibid 20. The economists had also earlier stated that the ability to pay theory was 'more comprehensive' than the benefit theory, since it 'includes what there is of value in the benefit theory'. Kaufman (n 168) says of this claim that it 'is not true of ability-to-pay theory as it is customarily articulated today, whether in the context of an entitlement or welfarist view of economic justice. Ability-to-pay theory does not involve a benefit analysis'.

[203] See section 2.4(a) above.

[204] (6 Edw VII c 57); (7 Edw VII c 43); (8 Edw VII c 40); and (1 & 2 Geo V 5 c 55) respectively. When one excludes interest on the national debt, in 1850, 75 per cent of public expenditure was spent on defence, public order and safety with just 2 per cent on pensions, education, health care and welfare (UK public spending website: <http://www.ukpublicspending.co.uk/year_spending_1850UKmn_14mc1n#ukgs302> accessed 20 July 2014). By 1920, 58 per cent of spending was on defence, public order and safety and 23 per cent on pensions, education, health care and welfare (UK public spending website: <http://www.ukpublicspending.co.uk/year_spending_1920UKbn_14bc1n#ukgs302> accessed 20 July 2014).

[205] Graetz, 'The David R. Tillinghast Lecture' (n 12) 301 notes that from 'the time when the international income tax rules were first formulated until quite recently, questions about international income taxation were essentially questions about the taxation of corporations, since corporations accounted for virtually all international flows of capital'. Contrary to Mitt Romney's belief that 'corporations are people' (Philip Rucker, 'Mitt Romney says "corporations are people"' *The Washington Post* (Washington, 11 August 2011)), companies are not members of society and their

rather that a more modern formulation of the benefit theory of taxation based on a more realistic conception of the benefits actually provided by the state, beyond mere protection, which give rise to a reciprocal obligation to pay taxes to fund those benefits would have been welcome, both for the theory as a theory of *justification* and for any potential theory of *identification*. Instead, in the words Adams, all that was produced was a 'generalized label covering a number of separate judgments which the authors of the theory have reached about the expedient place to tax certain persons or transactions'.[206]

There does not appear to have been any significant development in the theory of economic allegiance following the League of Nations report in 1923, with the possible exception of Palmer's 'national tax base theory', which, also focused entirely on economic connections as the basis of a theory of *allocation*[207] and, as Graetz points out, 'policy discussion of international income tax policy is now dominated' by discussion of the conflicting economic approaches to advancing worldwide economic efficiency: capital import neutrality and capital export neutrality. These, say Graetz, now 'generally constitute the normative universe'.[208]

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primary, if not only, connection to a country is an economic one. Graetz (ibid 320) points out that in the case of corporations, the idea of residence is largely an effort to put flesh into fiction, to find economic and political substance in a world occupied by legal niceties. It is no accident that we call corporations doing business around the world "multinationals"' (see also Reuven S Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime* (Cambridge University Press, 2007) 11, where he says that 'the residence of corporations is difficult to establish and relatively meaningless' and that 'multinationals are not part of a single society and their income does not belong to any particular society for distributive purposes'). As a basis for a theory of *allocation*, economic allegiance may well be the most sensible approach in the case of corporate income and gains.

[206] Thomas S Adams, 'Interstate and International Double Taxation' in Roswell Magill (ed), *Lectures on Taxation* (Commerce Clearing House 1932) 101, 126. Vogel, 'Worldwide vs. Source Taxation of Income (Part I)' (n 176) reaches a similar conclusion, stating that all that remains from Schanz's suggestions 'is the term "economic allegiance", which is applied, however, today as a blanket term by everyone to his or her convenience'.

[207] Palmer (n 197). This theory was premised on an 'equitable division, among nations, of the world tax base' based on the 'relationship between the individual national economies and the world economy' and 'the interaction of the taxpayer with the economy of a given nation in a manner resulting in the production of income'. Again the focus was on purely economic factors, with 'governmentally provided benefits' described as irrelevant and the 'government's right to tax and the taxpayer's obligation' both seen as deriving from 'the duty owed by the government to the members of the national society vis-a-vis the national economy' (ibid 32).

[208] Graetz, 'The David R. Tillinghast Lecture' (n 12) 270-271. Indeed Graetz and O'Hear (n 181) 1078 argue that the 'importance of the 1923 Report, however, has been overemphasized' and that 'an analysis of the minutes of subsequent meetings of the treaty drafters (the Committee of Technical Experts) suggests that the opinions of the 1923 Report were rarely discussed or consulted. The term "economic allegiance," for instance, appears nowhere in the minutes of the 1927 meeting of the model treaty drafters, although controversy over allocation rules dominated that conference' (ibid 1079). Vogel, 'Worldwide vs. Source Taxation of Income (Part I)' (n 176) 220 makes a similar point, saying that the

2.4(c) Continued use of the benefit theory

While the League of Nations report had again proclaimed that the benefit theory was defunct and had been supplanted by the ability to pay theory, this was only the case as regards the benefit theory as a theory of *method* of taxation. There has been no replacement for the benefit theory a theory of *justification* of taxation, and neither the ability to pay theory, nor the theory of economic allegiance, have filled this void. Accordingly, the theory continues to be relied on in this regard. As Simpson observed, 'both the English and American courts had been accustomed to speak of benefit as the justification for taxation in general' but this was a 'matter of general political philosophy, not a statement of the benefit theory of taxation, which means the apportionment of taxes in proportion to the benefits conferred on the taxpayer'.[209]

In *Johnson v Commissioner of Stamp Duties* Lord Keith of Avonholm held that the 'presence of property within a State's jurisdiction has always been regarded as a cogent reason for recognizing the right and power to tax that property' because the 'property enjoys the protection of the State's laws',[210] going on to cite with approval the comments of Loreburn LC and Shaw of Dunfermline LJ in *Winans v AG* quoted in section 2.4(a) above.[211] Commentators also continued to emphasise the benefit of protection as justifying taxation, with Wurzel arguing that the taxation of aliens on their foreign income in the US is justified because protection is 'effectively granted not only by political measures in cases of conflict with foreign powers but also by the economic security a government affords a person admitted to residence within its territory',[212] Rolin said that a state could not tax persons merely passing through its territory as 'tax, being the counterpart of the protection afforded by a State to people or goods, appears unjustified and illegal if it is imposed on people or goods who, because of their nationality, their residence or their location, cannot benefit from that

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recommendation that 'taxation by the State of residence would prevail' was unconvincing and politically unacceptable, 'in particular to the numerous debtor States of that era' and that consequently, the 'further development of tax treaty policy was taken out of the hands of economics professors and transferred to technical experts'.

[209] Simpson (n 170) 455.

[210] [1956] AC 331, 352.

[211] See also the dictum of Wrenbury LJ in *Whitney v IRC* [1926] AC 37, 54, cited in section 2.2 above.

[212] Harold Wurzel, 'Foreign Investment and Extraterritorial Taxation' (1938) 38 Columbia Law Review 809, 828.

protection',[213] and more recently Hamburger has argued, in a non-tax context, that the concepts of allegiance and protection continue to be reciprocal, and that, as a result, terrorists who are foreign nationals and who owe no allegiance to the United States are not entitled to the protection of its laws.[214]

In the United States the benefit theory as a justification for taxation was endorsed by the state courts as early as 1853,[215] and in 1905 the United States Supreme Court held that the power of taxation is

> exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children

thus espousing a version of the benefit theory that is based not just on protection, but on other befits provided to the taxpayer.[216] Several modern commentators have also adopted a broader conception of the benefits that might be considered to justify taxation, though without being explicit about precisely which benefits are important,

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[213] Henri Rolin, 'Les Principes de Droit International Public' (1950) 77 (2) Recueil des Cours 305, 370-71 ('C'est ainsi que la doctrine reconnaît qu'un Etat ne pourrait pas taxer des étrangers simplement de passage sur son territoire; l'impôt, étant la contrepartie de la protection accordée par un Etat aux personnes ou aux biens, apparaît comme injustifié et illicite s'il frappe des personnes ou des biens qui, à raison de leur nationalité et de leur domicile ou de leur situation, ne peuvent bénéficier de cette protection'; translated by the present author).

[214] Philip Hamburger, 'Beyond Protection' (2009) 109 Columbia Law Review 1823.

[215] In *Williams v Mayor of Detroit*, 2 Mich. 560 (1853) the Supreme Court of Michigan stated that every 'species of taxation in every mode is in theory and principle based upon an idea of compensation, benefit, or advantage to the person or property taxed.... Taxation, not based upon any idea of benefit to the person taxed, would be grossly unjust, tyrannical, and oppressive, and might well be characterized as public robbery'.

[216] *Union Refrigerator Transit Co v Kentucky,* 199 US 194, 202 (1905) Brown J. See also *Lawrence v State Tax Commission of Mississippi*, 286 US 276, 281 (1932) Stone J, 'The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state, and, to them, the economic interest realized by the receipt of income or represented by the power to control it bears a direct legal relationship'; *New York ex rel Cohn v Graves*, 300 US 308, 312-13 (1937) Stone J, 'That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government'.

or in what context.[217] In 1937 the United States Supreme Court held that it was not a valid objection to the payment of a tax that 'the benefits paid and the persons to whom they are paid are unrelated to the persons taxed and the amount of the tax which they pay', noting that nothing was 'more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure'.[218] The court went on to state that tax 'is not an assessment of benefits' but rather 'a means of distributing the burden of the cost of government' and held that the 'only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes'.[219] Thus, as a matter of US constitutional law, and contrary to one reading of the earlier view of the Supreme Court in the *Union Refrigerator Transit Co v Kentucky* quoted in the previous paragraph, there is no necessity for an individual to receive an equivalent benefit from a state in order for that state to be entitled to impose tax on him or her. This would appear to sever what Musgrave called the 'weak link' in the benefit theory; the 'difficulty of imputing to individuals the benefits that arise from general public services', which arose as part of the emergence of the social contract theory in the seventeenth and eighteenth centuries.[220] However, while it seems that matching benefits to the tax paid by a specific individual is not a constitutional necessity in the United States, it appears that it remains a theoretical one in the eyes of many commentators, as an ongoing debate about the taxation of non-resident US citizens demonstrates.

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[217] See for example John H Christie, 'Citizenship as a Jurisdictional Basis For Taxation: Section 911 and the Foreign Source Income Experience' (1982) 8 Brooklyn Journal of International Law 109, 128, 'Residence and domicile are considered valid bases for tax jurisdiction principally on the theory that an individual who avails himself of the residing State's benefits and services ought to be obligated to pay for them'; Kaufman (n 168) 166, 'The government's provision of general public services and the taxpayer's consumption of them legitimize the tax'; Graetz, 'The David R. Tillinghast Lecture' (n 12) 298, 'The idea that the source country has a fair claim to the income produced within its borders is also grounded in the view that foreigners, whose activities reach some minimum threshold, should contribute to the costs of services provided by the host government, including, for example, the costs of roads and other infrastructure, police and fire protection, the system for enforcement of laws, education, and the like'.

[218] *Carmichael v Southern Coal & Coke Co*, 301 US 495, 521-22 (1937) Stone J.

[219] ibid 522. See also *Wisconsin v JC Penney Co*, 311 US 435, 444 (1940) Frankfurter J, 'A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society'.

[220] See section 2.3(a) above.

The United States imposes tax on the income of its citizens from all sources, whether arising in the US and abroad, regardless of whether those citizens are resident in the United States or in another country.[221] Traditionally, this has been justified based on the benefits provided to the individual by virtue of his or her citizenship. Kirsh points out that when income tax was imposed 1894 on US citizens living abroad, the rationale given by politicians was that 'if an American citizen went abroad and carried the protection of his country, of his citizenship with him, he did not escape its burdens',[222] and in 1924, when the United States Supreme Court upheld the constitutionality of taxing US citizens who are resident abroad on non-US income, McKenna J rejected the contention that 'a citizen's property without the limits of the United States derives no benefit from the United States' because 'government, by its very nature, benefits the citizen and his property wherever found'.[223] Since that time, both critics and advocates of this tax regime have addressed their theoretical arguments in terms of benefits provided (or not provided), in addition to debating the economic efficiency, administrability and other aspects of the regime. Opponents of taxation based on citizenship have pointed out that 'an individual is going to benefit from governmental expenditures only when he is in a country and utilizing the services supported by those expenditures',[224] that the 'American residing overseas is denied several federally funded benefits' because the US government does not 'subsidize the education of American children abroad' and may deny social security benefits in certain circumstances, notwithstanding that contributions have been made,[225] that 'U.S. consular services must be paid for by non-U.S. residents, at a profit to the State Department', that '[e]vacuation by the United States from a foreign country is charged at full-fare commercial rates' and that 'no way do Americans abroad receive benefits from the U.S. government comparable to citizens resident in the United States'.[226]

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[221] 26 USC § 1 imposes the charge to income tax on all individuals, but § 2(d) removes from this charge non-resident aliens, unless they are taxable under §871 or §877. All citizens are therefore within the charge, whether resident or not.

[222] Kirsch (n 179) 453, quoting Senator George Hoar during the Senate debate on the 1894 bill.

[223] *Cook v Tait*, 265 US 47, 56 (1924).

[224] Brainard L Patton, Jr, 'United States Individual Income Tax Policy as It Applies to Americans Resident Overseas' [1975] Duke Law Journal 691, 699.

[225] Christie (n 217) 135.

[226] American Citizens Abroad, 'ACA recommendation for fundamental reform of U.S. tax law affecting bona fide overseas residents' (American Citizens Abroad February 2012) <http://americansabroad.org/files/5313/3589/7840/coverpage.pdf> accessed 13 October 2013.

Kirsch has sought to justify the taxation of non-resident citizens, again predominantly on the grounds of the benefits they receive, which include personal protection when abroad,[227] protection of the individual's property situate abroad,[228] political rights, including the right to vote,[229] the ability to re-enter the United States at any time,[230] and noting that 'as long as citizens abroad receive significant benefits from holding citizenship' taxation on them is justified while 'the fact that other citizens might receive greater benefits is not directly relevant'.[231] He also suggests that prior benefits received while a citizen was resident in the United might justify the imposition of tax on the individual at a later stage when he or she was living overseas, but admits that it is a 'more tenuous argument'.[232] Blum and Singer state that the 'idea that an individual who has a strong connection with the United States should incur U.S. income tax on the basis of worldwide income' is not generally controversial, what is controversial is the issue of 'determining which individuals have a strong enough connection with the United States', going on to outline the various benefits referred to by Kirsch before stating that their disagreement with him 'about the wisdom of citizenship-based taxation centers on issues of compliance and administrability'.[233] Schneider also appears to accept the premise that tax is justified by the provision of benefits, stating that if 'the benefits received are minimal, taxation on that basis is unjustified' before addressing each of the 'alleged benefits' outlined by Kirsch and arguing that the 'right to move to or visit the United States without restriction is probably the only substantial benefit to long-term citizen expatriates' but that its 'value is impossible to quantify' and an 'unquantifiable, even inchoate right is a very weak

[227] Kirsch (n 179) 472-73, noting that even if it is never availed of it has a value in the same way that 'homeowner's insurance has value because the possibility exists that a home will be destroyed by fire or other casualty' and that the 'heightened focus on terrorism in recent years suggests an increased role for governmental protection of individual citizens overseas'.

[228] ibid 473. These include 'the investments and business operations of U.S. citizens overseas' and the protection against 'discriminatory treatment, restrictions on expropriation, and the right to transfer funds into and out of the host country' provided by double taxation agreements.

[229] ibid 474.

[230] ibid 476.

[231] ibid 478.

[232] ibid 476-77. In this regard he cites Charles I Kingson, 'A Somewhat Different View' (1981) 34 Tax Law 737, 740 where he states 'Many of these people may have grown up in FHA-insured homes, are having their parents cared for by federal programs rather than having to pay the medical expenses themselves, benefit from a large defense establishment and the maintenance of consulates, or first went abroad on Fulbright scholarships. As American citizens, they know how to take. Now let them, as American citizens, learn how to give'.

[233] Cynthia Blum and Paula N Singer, 'A Coherent Policy Proposal for U.S. Residence-Based Taxation Of Individuals' (2008) 41 Vanderbilt Journal of Transnational Law Volume 705, 709 and 710-711.

peg on which to hang the heavy hat of worldwide taxation and financial regulation'.[234] Avi-Yonah follows a similar approach and reaches similar conclusions, arguing that the 'right to vote argument is upside down' because although it is 'legitimate to argue that nonresident citizens must be given the right to vote because they are subject to US tax' it does not follow that 'because nonresident citizens vote they must be taxed'.[235]

Although the debate on the benefits that may or may not justify the taxation of non-resident citizens in the United States includes a discussion of protection of the individual and his or her property, it also moves beyond that to consider other benefits accruing to citizens. However, this appears to be the only modification of the classic formulation of the benefit theory as justification as it emerged in the seventeenth and eighteenth centuries and as is described in section 2.3(a) above, and this does not appear to represent any advance in the use of the benefit theory as a method of identification of taxpayers.

2.4(d) Other theories

One other theory worthy of a brief mention at this point is the *principle of fairness*, which, like the benefit theory of taxation, locates the source of certain political or moral obligations of individuals as being the benefits received by those individuals. As outlined in chapter 1, this principle provides that where an individual engages with a number of others in a joint enterprise according to rules, and that individual has benefited from the submission of those others to the restriction of their liberty as part of that enterprise, that individual is under an obligation to similarly submit to a restriction of his or her liberty.[236] In the context of the benefits provided

[234] Bernard Schneider, 'The End Of Taxation Without End: A New Tax Regime For U.S. Expatriates' (2013) 32 Virginia Law Review 1, 46-50. He also noted that 'the right to return is no greater than the parallel right held by expatriates of other countries, who are not subject to worldwide taxation by their county of citizenship while nonresident'.

[235] Reuven S Avi-Yonah, 'The Case Against Taxing Citizens' (2010) 127 Tax Notes 680. He also described the right to re-enter the US as a 'tenuous basis for taxation'.

[236] This is a rewording of Rawls' enunciation of the principle of fairness which places the emphasis on the obligation of the individual rather than the expectation of the group. Rawls' own wording was '[W]hen a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to the these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission' (John Rawls, *A Theory of Justice* (Harvard University Press 1971) 112), which was itself a refinement of Hart's principle that 'when a number of persons conduct any

by the state, Mapel states that the 'fairness theory of political obligation holds that individuals who receive public goods produced by the cooperative efforts of their fellow citizens have a prima facie obligation to do their fair share in return by obeying the law',[237] which law, of course, includes the payment of taxes. Mapel goes on to state that

> Beginning with H.L.A. Hart and the early Rawls and running through more recent writers such as Arneson, Klosko, Wolff, Dagger, and Cullity, virtually all fairness theorists agree that a person is obligated to do his fair share in a cooperative scheme only if he benefits from that scheme and the following conditions are met:
>
> > (1) the share of the good received is worth the recipient's efforts to help provide it;
> > (2) the benefits and burdens of the scheme are distributed fairly,[238]

thus basing the *justification* for the obligation squarely both on the value of the benefit received by the individual personally, and the *method* of distribution of the benefits generally, which corresponds with the benefit theory of taxation as a theory of *justification* and an unspecified theory of *method* of taxation which may be akin to the benefit theory or the ability to pay theory. Interestingly, Klosko, in rebutting claims of voluntarists such as Nozick and Miller and Sartorius, who claim that 'the provision of nonexcludable public goods cannot generate obligations',[239] has argued that this is not the case where the goods are 'presumptively beneficial', that is, where they are 'necessary for a minimally acceptable life' and 'desired by rational individuals

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joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission' (HLA Hart, 'Are There any Natural Rights?' (1955) 64 Philosophical Review 175, 185).

[237] David R Mapel, 'Fairness, Political Obligation, and Benefits across Borders' (2005) 37 Polity 426.

[238] ibid 428.

[239] George Klosko, 'The Principle of Fairness and Political Obligation' (1987) 97 Ethics 353, 354, referring to Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 95 and Frank Miller and Rolf Sartorius, 'Population Policy and Public Goods' (1979) 8 Philosophy and Public Affairs 148, 166. A public good is a good whose consumption by one person does not reduce its consumption by another (it is nonrivalrous in consumption) and a nonexcludable public good is one where it is impossible, or prohibitively costly, to exclude someone from obtaining the benefits of the good after it has been produced. National defence is a commonly cited example of such a good (see Roger A Arnold, *Economics* (South-Western, Cengage Learning 2014) 709).

regardless of whatever else they desire'.[240] In a later work, Klosko elaborated that although 'the number of these goods is perhaps small, such things as the benefits of physical security provided by law and order, national defense, and protection from a hostile environment appear obviously to fit the bill',[241] thus advancing a notion that appears even closer to the classic version of the benefit theory of taxation, which focused solely on the benefit of protection provided by the state. The principle of fairness has several parallels with the benefit theory as a theory of *justification* of taxation, and, in the context of a theory of *identification* of taxpayers, it seems that the principle of fairness determines which individuals are engaged in a joint enterprise according to whether or not those individuals receive benefits, with the main area of contention being whether those individuals have received those benefits voluntarily, or were in a position to refuse them. This might suggest that the receipt of benefits funded by public expenditure is sufficient to identify an individual as being within the group of individuals required to contribute towards the funding of those benefits. This point will be discussed further in section 2.4(e).

Finally, this section will briefly examine whether current theories of jurisdiction can inform theories of *justification* of taxation or of *identification* of taxpayers. As was outlined in section 2.3(c) above, prior to the introduction of income tax in 1799 there had been a neat parallel between the benefit theory of taxation, theories of allegiance and jurisdiction and the connecting factors used in direct taxation in Great Britain. Taxes were imposed on British subjects, wherever resident, and on aliens who were residing in Great Britain, and it was these two groups who owed two distinct types of allegiance (the one universal, the other local) and who were within British taxing jurisdiction, and it was these two groups who benefited from the protection that justified the taxes and that formed the basis for the duties of allegiance that were owed. As will be discussed in chapter 4, after 1803 income tax was imposed on the basis of residence (a charge on individuals resident in Great Britain, and later the United Kingdom, on all income wherever it arose) and of source (a charge on income arising in Great Britain, and later the United Kingdom, to individuals resident abroad), and nationality was no longer used as a connecting factor.

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[240] Klosko (1987) (n 239) 355.
[241] George Klosko, The Principle of Fairness and Political Obligation (Rowman and Littlefield 1992) 40.

In 1834 Story, following on the work of Huber,[242] set out his 'general maxims of international jurisprudence' which emphasised the territorial nature of jurisdiction, stating:

> [E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory ... the laws of every state affect and bind directly all property, whether real or personal, within its territory; and all persons who are resident within it, whether natural born subjects or aliens; and also all contracts made and acts done within it ...
>
> No State can, by its laws, directly affect or bind property out of its own territory or bind persons not resident therein ... yet every nation has a right to bind its own subjects by its own laws in every other place.[243]

Mann wrote that these 'general maxims were immediately and universally accepted and to this day dominate the doctrine of international jurisdiction',[244] and Martha notes that the 'nationality link (personal sovereignty) and the territoriality link (territorial sovereignty) are ... the fundamental elements of international taxation'.[245] Kaufman has suggested that although '[o]pinions differ about whether these established jurisdictional bases rise to the level of customary international law', it is reasonable to assert that they 'now constitute customary norms'.[246] After 1803, the taxation of residents was based on the territorial sovereignty or jurisdiction over them because of their presence within Great Britain,[247] while the taxation of non-residents was no

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[242] See section 2.3(c) above.

[243] Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (Hilliard, Gray and Co 1834) 19 and 21 respectively.

[244] Francis A Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111(1) Recueil des Cours de l'Académie de Droit International 1, 28.

[245] Rutsel Silvestre J Martha, *Jurisdiction to Tax in International Law* (Kluwer Law and Taxation 1989) 47.

[246] Kaufman (n 168) 148.

[247] Martha (n 245) 47 suggests that jurisdiction continued to be based on personal sovereignty in the case of nationals, and that it is 'generally accepted in international law that the jurisdiction to tax aliens is exclusively based on the principle of territoriality' and that 'a resident alien is only subject to the tax laws because of this incidental subjugation to the territorial supremacy of the taxing State' (ibid 52), and AR Albrecht, 'The Taxation of Aliens Under International Law' (1952) 29 British Year Book of International Law 145, 152-53 takes a similar view, stating that the 'inherent right of the state to tax is limited to its jurisdiction, that is, with certain exceptions, to all its subjects and to all persons and things within its territorial limits', and that '[i]nternational law permits the taxation of resident aliens in the

longer grounded on personal sovereignty or jurisdiction over British subjects, but was instead based on territorial sovereignty or jurisdiction over their sources of income being located in Great Britain.[248]

As regards theories of *justification* of taxation, the rules of international jurisdiction have been expressed in terms similar to the benefit theory of taxation,[249] though they are more usually expressed as being based on sovereignty or the rules of customary international law. As regards a theory of *identification* of taxpayers, modern theories of international jurisdiction unfortunately provide little guidance or insight. Some commentators take the view that international law places few if any constraints on the exercise of the jurisdiction to tax, with countries having 'substantial unfettered discretion to decide how far its tax collectors should cast their nets', subject only to the practical limitation that a 'nation has little to gain from attempting to levy on property, taxpayers, or activities that are beyond the limits of the nation's

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same manner as nationals' (ibid 158). Kaufman (n 168) 170 fn 139 on the other hand, argues that the 'concept of residence jurisdiction in international taxation is founded on the international law principle of nationality, adjusted to take account of economic rather than political ties'. Avi-Yonah, *International Tax as International Law* (n 205) 23 makes a similar argument, suggesting that nationality-based taxation has been dramatically expanded to adopt a definition based on residence.

[248] Charles Cheney Hyde, *International Law Chiefly As Interpreted and Applied by the United States* (2nd edn, Little Brown and Co 1945) vol I, 672 says that when 'a tax is levied upon the income of a non-resident alien, it is obviously in the nature of a tax upon his property within the control of the territorial sovereign rather than a personal tax', and that 'the right of taxation does not necessarily require the existence of a bond of allegiance between him and the taxing State. That right depends rather upon the relation of the property itself therewith' (ibid 258), noting that the 'right of the territorial sovereign to tax property as such depends upon its having such a connection with the taxing State as to justify the conclusion that it is an asset belonging thereto, protected by its power and from which contribution should be made to support the government' (ibid 362). See also Francis Wharton, *A Digest of the International Law of the United States* (Government Printing Office 1887) vol 2, 514, 'Taxation may no doubt be imposed, in conformity with the law of nations, by a sovereign on the property within his jurisdiction of a person who is domiciled in and owes allegiance to a foreign country. It is otherwise, however, as to a tax imposed, not on such property, but on the person of the party taxed when elsewhere domiciled and elsewhere a citizen. Such a decree is internationally void'.

[249] In *Jeffreys v Boosey* (1854) 4 HLC 815, 945; 10 English Reports 681, 732 Pollock CB stated that '[n]atural born subjects and persons domiciled or resident within the kingdom owe obedience to the laws of the kingdom, and are within the benefits conferred by the legislature; but no duty can be imposed upon aliens resident abroad, and with them the legislature of this country has no concern, either to protect their interests or to control their rights', while in *Ex parte Blain* (1879) 12 Ch D 522, 526 James LJ said that there was a 'broad, general, universal principle that English legislation ... is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction' and that every 'foreigner who comes into this country, for however limited a time, is, during his residence here within the allegiance of the Sovereign, entitled to the protection of the Sovereign and subject to all the laws of the Sovereign'. See also Christie (n 217) 128, 'Residence and domicile are considered valid bases for tax jurisdiction principally on the theory that an individual who avails himself of the residing State's benefits and services ought to be obligated to pay for them'.

enforcement power'.[250] Others take the view that in order for the exercise of jurisdiction under international law to be permissible, there must a 'substantial and genuine connection between the subject-matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised'.[251] This view has also been expressed in negative terms, with Starke stating that the 'one practical limitation on the exercise of wide jurisdiction' was that 'no state attempts to exercise a jurisdiction over matters, persons or things with which it has absolutely no concern'.[252] Garbarino argues that in 'contemporary international legal studies' the 'three main philosophical grounds for a country's right to tax income', that 'taxation is payment for goods and services received from the taxing state', that 'taxation is a return for advantages received from the state' and that 'taxation is an expression of the will of the state, limited by rules of international law', have been unified in one principle: 'the taxation of nonresidents must depend on some nexus or connection between the territory and the activity generating the income'.[253]

The difficulty is that contemporary international legal studies do not provide any theoretical exposition or guidance as to what constitutes a sufficient nexus or

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[250] Palmer (n 197) 3-4. See also Harold Wurzel (n 212) 815, 'As far as tax experts are concerned, the majority clearly adhere to the doctrine of sovereignty as granting an unrestricted taxing power'; M Norr, 'Jurisdiction to Tax and International Income' (1962) 17 Tax Law Review 431, 431, 'No rules of international law exist to limit the extent of any country's tax jurisdiction'; Arnold A Knechtle, *Basic Problems in International Fiscal Law* (WE Weisflog tr, Kluwer 1979) 37, 'Up to the present there has been no internationally recognized principle in public international law which limits the sovereignty of States in fiscal matters ... Hence, in principle there are no externally imposed legal limits on the fiscal jurisdiction of States. Even where external relations are involved, national fiscal law can be shaped by the legislator as extensively as appears useful to him'.

[251] Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 298. See for example Hyde (n 248) vol 1, 665, 'It must be clear that in so far as international law is concerned the right of a State to impose a personal tax upon an individual depends upon the intimacy and closeness of the relationship that has been established between itself and him'; Mann, 'The Doctrine of Jurisdiction in International Law' (n 244) 49, '[A] State has (legislative) jurisdiction, if its contact with a given set of facts is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non-interference and reciprocity and the demands of inter-dependence)'; Michael Akehurst, 'Jurisdiction in International Law' (1972-73) 46 British Year Book of International Law 145, 180, 'Customary international law permits a State to levy taxes only if there is a genuine connection between the State and the taxpayer (nationality, domicile, long residence, etc.), or between the State and the transaction or property in respect of which the tax is levied'; Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 650, 'International law accepts that a state may levy taxes against persons not within the territory of that state, so long as there is some kind of real link between the state and the proposed taxpayer, whether it be, for example, nationality of domicile'.

[252] IA Shearer (ed), Starke's International Law (11th edn, Butterworths 1994) 184, quoting Evatt J in *Trustees Executors and Agency Co v Federal Commissioner of Taxation* (1933) 49 CLR 220.

[253] Carlo Garbarino, 'A Study of the International Tax Policy Process: Defining the Rules for Sourcing Income from Isolated Sales of Goods' (1988) 29 Harvard International Law Journal 393, 396.

connection in order for an exercise of tax jurisdiction to be valid, or how such a connection might be legally defined. As Kelsen observed, the 'norms of international law are mostly incomplete norms; they require completion by norms of national law.[254] Martha points out that as regards taxation 'the specification of the terms of "residentship"' is evidently an incomplete norm of general international law and is therefore a 'question left to the discretion of the national legal orders', noting that there is a 'great diversity in the method (criteria) employed by States to define residence'.[255] Akehurst observes that what 'counts as a close connection will vary from context to context',[256] and it seems that in the context of residence, the only elaboration upon this is a broad consensus that a 'person cannot be held to be resident if his presence is of a temporary or fleeting character'.[257] Beyond the limitation that a charge to tax on the worldwide income or capital gains of tourists and visitors to a country is not permissible, it therefore appears that modern theories of jurisdiction are of little benefit in attempting to formulate a theory of identification of taxpayers.

2.4(e) A suggested theoretical approach to identification

[254] Hans Kelsen, *Principles of International Law* (Rinehart & Co 1952) 205.

[255] Martha (n 245) 91. He later notes that 'international law remains silent about what "residence" means as well as whether one can speak of residence in a given case. For, whereas international law spells out the rules regarding fiscal jurisdiction, it does not determine the terms of fiscal concepts ... Consequently, States are free not only to determine whether someone is, for instance, their national, but they are also free to determine the criteria which have to be fulfilled in order to speak of nationals. The only thing settled here by international law is the basic rule that a State may tax its nationals and residents on their world wide [sic] income'.

[256] Akehurst (n 251) 179.

[257] Mann, 'The Doctrine of Jurisdiction in International Law' (n 244) 114. See also AG Heffter, *Le Droit International Public de l'Europe* (J Bergson tr, Cotillon Paris 1857) 133, 'Foreigners are not subject to laws concerning taxes ... in countries in which they are sojourning ... But, they are liable to pay taxes levied on the use or consumption of certain objects or the exercise of certain trades; for example, road tolls, fees for concessions and licences, taxes on financial instruments, stamp duties or registration fees' ('Les étrangers ne sont pas soumis aux lois concernant les impôts et la conscription militaire, établies dans le territoire où ils séjournent ... Mais ils sont tenus de payer les impôts qui grèvent l'usage ou la consommation de certains objets et l'exercice de certaines industries ; par exemple, les droits de péage des chaussées, ceux de concession ou de patente, les contributions mobilières, les droits de timbre et d'enregistrement'; translated from French by the present author); Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publishing Company 1919) 95, 'The transient alien, however, is internationally exempt from personal taxes'; Albrecht (n 247) 154, 'Widespread practice has sanctioned the custom that in order to be subjected to the poll tax, the income tax, and many other forms of direct taxes, an alien must be present within the jurisdiction of the taxing state for a minimum period of time'; Christie (n 217) 127, 'A person cannot be burdened with taxes merely because he is temporarily within the State's borders. Therefore, the term usually is coupled with additional requirements, any of which, if satisfied, will provide the State with a valid basis. Most states require that the individual reside within the State for a specified period of time before he is subject to taxation'.

None of the theories outlined thus far in this chapter can be considered a coherent, fully realised theory of *identification* of taxpayers. The benefit theory comes the closest, though there are several problems with its use in this regard. The 'difficulty of imputing to individuals the benefits that arise from general public services'[258] has already been referred to, and with a theory of *identification* there would be the added problem of determining which benefits should give rise to an obligation to pay tax, and the extent of benefits received that would be required for the obligation to arise. Palmer notes that 'governmentally provided benefits are virtually impossible to quantify, even in the limited context of deciding which government "presumably" provides the greatest benefits with respect to a given class of income-producing activities' and that such an approach could only be 'applied through the use of a more-or-less arbitrary classification system'.[259]

Some benefits spill out across borders and accrue to individuals who, under existing theory and practice, are not expected to make a tax contribution to the state providing them. As Mapel observes, one does not 'ordinarily think that Canadians have an obligation to pay taxes to the United States for national defense' even though 'Canadians undoubtedly receive enormous defense benefits by living next door'.[260] Gann and Schneider both reject the taxation of non-resident United States citizens partially on the grounds that the benefits it is suggested justify such taxation are collective and also accrue to others.[261] The particular benefit that both mention is protection, one of the bedrocks of the benefit theory of taxation. Palmer too uses this example as the basis for his objection 'to the use of the benefits doctrine to fix jurisdictional limits' on 'philosophical grounds', stating that since each national

[258] Musgrave, *The Theory of Public Finance* (n 78) 67.
[259] Palmer (n 197) 28.
[260] Mapel (n 237) 427.
[261] Pamela B Gann, 'The Concept of an Independent Treaty Foreign Tax Credit' (1982) 38 Tax Law Review 1, 65, 'Compare, however, a U.S. citizen and a French citizen residing in Paris. Each may benefit similarly from expenditures by the United States, as well as by expenditures by the United Kingdom and West Germany, for example. Much defense expenditure today is not only national but international. One speaks of mutual defense expenditures, such as those of the NATO alliance, or of the total defense capability of the United States and its allies against the Soviet Union and its allies ... Thus, the collective benefit argument proves too much, since the benefits from many of these expenditures are not confined to U.S. citizens'; Schneider (n 234) 47, 'Finally, there are general expenditures such as international policing that arguably benefit U.S. persons abroad, but not as distinct from all persons outside the United States', and (ibid fn 268), 'Even Prof. Kirsch, who argues in favor of worldwide taxation of nonresidents, appears to concede that these benefits, not being limited to U.S. citizens, are not sufficient to justify taxation'.

government exists to provide 'government-type services (i.e., benefits) to the members of such nation's own society' and that the provision of 'subsidiary, and often unintended, benefits' to 'persons other than the members of the national society' cannot be seen as 'cloaking the government with the "justifiable" right to tax the recipient'.[262] Attempting to set a threshold or minimum level of benefits that must be received before an obligation to pay taxes arises would also be impractical, as some individuals who are in receipt of publicly funded benefits, such as those in receipt of social welfare payments, subsidised or free health care etc, are not intended to be taxed on those benefits, while high net worth individuals, who might not actually claim many of the benefits available, are certainly expected to contribute towards them.

The matter is further complicated by the fact that the degree of connection to a country such as Ireland that is necessary in order to avail of various publicly funded benefits varies considerably. As already mentioned, some benefits do not require even the physical presence of the individual in the state in order for them to be enjoyed; an example might be news and other broadcasts by the national broadcaster, RTE. Other benefits will accrue to individuals who are physically in the state for any period of time, no matter how short; for example a tourist who is in Ireland for a single day is entitled, on that day, to precisely the same protection under the policing and judicial system as someone who has lived in Ireland his or her entire life. Other benefits require a longer-term connection, such as residence,[263] or ordinary residence,[264] or habitual residence[265] in the state. The fact that entitlement to these latter benefits, and many others under the Irish social welfare system, depends on precisely the sort of connection to the state that it intended a theory of *identification* of taxpayers would enable one to define, merely adds another layer of difficulty.

As already outlined, while the benefit theory of taxation may have shortcomings as a theory of identification, the ability to pay theory cannot function in this

[262] Palmer (n 197) 29.
[263] For example, the Education Act 1998, 6(b) sets out the intention that 'as far as is practicable and having regard to the resources available, there is made available to people resident in the State a level and quality of education appropriate to meeting the needs and abilities of those people'.
[264] For example, only individuals who are ordinarily resident in Ireland are entitled to apply for a medical card (Health Act 1970, s 45) or for higher education grants (Student Support Act 2011, s 14(1)).
[265] For example, only individuals who are habitually resident in Ireland are entitled to unemployment assistance or the old age (non-contributory) pension (Social Welfare Consolidation Act 2005, ss 141(9) and 154 respectively).

regard at all. As Edrey and Shani note, 'establishing the income tax system solely on the principle of the taxpayer's ability to pay is useless, unless it takes into account the identity of those who should pay the tax'.[266] The theory of economic allegiance is equally no better a candidate, since it is in reality a version of the benefit theory of taxation in which the only benefits considered are economic ones related to the creation or consumption of wealth, and under which a very large number of benefits actually provided by the state (such as health care, education and social welfare) are ignored.

As outlined at the beginning of this chapter, it is not controversial to state that as a matter of theory, and of actual practice, the main purpose of taxation is to raise funds for public spending, and the main purpose of government spending is to provide benefits to the society which that government serves.[267] In this sense, tax is a charge imposed on the members of a society in order to fund services provided to the members of that society, and, as a general proposition, the imposition of taxation is justified on that basis. As Harris puts it, 'the basic justification for government levying taxes is the provision of services to the community'.[268] However, when a justification is sought for the tax imposed on a specific individual, it is argued that one must look to the benefits provided to that specific individual. This is the classic version of the benefit theory of taxation as it has been espoused for over two hundred years.

It is surprising that the argument does not appear to have been advanced that the justification for the taxation of the individual is the provision of the benefits that the tax revenue funds not to him or her, but to the society or community at large of which he or she is a part or member. This is particularly curious when one considers

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[266] Edrey and Shani (n 191) 129.

[267] As Graetz, 'The David R. Tillinghast Lecture' (n 12) 277 puts it, 'In our democratic society, we the people have organized a national government to protect our safety and security, to maintain our liberty, and to promote the well-being of our citizens and residents ... Likewise, the education of the nation's children and protection of our citizens from economic losses due to ill health, disability, or unemployment, along with ensuring economic security during retirement, are core functions of our national and state governments'. See also Palmer (n 197) 31, 'The fundamental purpose of any national government is to provide for the common good of the members of the national society', citing Thomas Hobbes, *Leviathan, Or The Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil* (first published 1651, George Routledge and Sons 1886); John Locke, *Second Treatise of Government* (First published 1690, CB Macpherson ed, Hackett Publishing Company 1980); John Gray, *The Nature and Sources of Law* (Columbia University Press 1909) and John Rawls, *A Theory of Justice* (Harvard University Press 1971).

[268] Harris, *Corporate/Shareholder Income Taxation* (n 13) 4.

that a great many of the benefits provided under modern social welfare systems are provided to individuals who could not afford to pay a market rate for them and who might not otherwise be able to acquire them, and that these benefits are intended to be paid for, and are paid for, by other members of the society who may never benefit from their contributions, and who in the vast majority of cases will not benefit to the extent of their contributions. Kaufman says that 'a specific allocation to each taxpayer of the costs of the benefits consumed by that taxpayer is impracticable' and that it is not 'feasible to charge each taxpayer for the value of the benefits the taxpayer consumes',[269] however not only is a quid pro quo system of taxation not feasible, it is clearly not intended. As Palmer points out, 'governments are more than centralized entrepreneurs ... they act to redistribute wealth and to insure a certain level of social justice' and the benefit theory 'does not adequately account for these common governmental functions'.[270] Buchanan argues that the 'rejection of the benefit theory of taxation should rest not upon the difficulty of individual isolation of specific benefits but upon the unacceptability of the ethical ideal of the individual quid pro quo'.[271]

Of course many writers have noted that, as Buchanan put it, '[a] significant portion of public funds is expended for the "general welfare," not to benefit particular persons or groups',[272] and Vogel argues that 'taxes are consideration paid for the totality of state services by all taxpayers taken together', rather than being 'prices for individual state services'.[273] But these observations do not appear to have been synthesised to provide an alternative to the benefit theory of taxation as a theory of *justification* of taxation or *identification* of taxpayers.

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[269] Kaufman (n 168) 183.
[270] Palmer (n 197) 25
[271] Buchanan (n 7) 500.
[272] ibid 499. See also Richard A Musgrave and Peggy B Musgrave, *Public Finance in Theory and Practice* (5th edn, McGraw-Hill 1989) 220-21.
[273] Klaus Vogel, 'Worldwide vs. Source Taxation of Income: A Review and Re-evaluation of Arguments (Part III)' (1988) 16 Intertax 393, 395. See also Edrey and Shani (n 191) 130 who make a similar point, noting that '[i]nevitably, the tax is imposed on groups of people who can generally be supposed to benefit from all of the government's performances or part of them', and Harris, *Corporate/Shareholder Income Taxation* (n 13) 5, who says that 'the community as a whole is required to pay for government services on a benefits basis'. As mentioned earlier in this section, several writers, such as Gann and Schneider reject the taxation of US citizens who are resident abroad on the grounds that 'collective benefits' often accrue to individuals who are not members of the collective that is providing them. See n 261.

Clifton Fleming, Peroni and Shay have argued that 'in determining how the income tax will allocate the fiscal burden of the U.S. government' according to the ability to pay theory, 'individuals should be taken into account if their connection with U.S. society is so substantial that fundamental fairness requires their net incomes to be compared with the net incomes of other U.S. residents for purposes of making an equitable allocation of the tax burden'. They note that individuals 'who continuously live year-round in the United States easily satisfy this standard but there is less clarity when the connection with the United States is less extensive', though unfortunately they did not pursue the question of whether the United States' residency rules accurately reflect connection to United States society, as it was beyond the intended scope of their work.[274] Kirsch, in examining whether the United States should 'impose no more than a nominal tax burden' on citizens residing overseas endorses this view, arguing that there are 'strong arguments for treating citizens abroad as members of U.S. society for purposes of the distributional equity analysis', such as the fact that 'by retaining his U.S. citizenship, is expressing a voluntary identification with the United States', that 'organizations representing the interests of U.S. citizens abroad often highlight the significant ongoing ties between overseas citizens and U.S. society' and that '[c]itizens living in the United States also view U.S. citizens living overseas as part of U.S. society, particularly in times of crisis'.[275] Other writers have also linked the notion of the membership of a community or society and the ability to pay theory. For instance Avi-Yonah says that the 'ability to pay argument is that US citizens are part of a community and should contribute their fair share to the pool of income that is redistributed across the community',[276] and Kaufman argues that 'a taxpayer's membership in a society seeking a just distribution of goods animates that taxpayer's obligation to pay an ability-to-pay income tax',[277] but again they do not pursue the issue further in the context of theories of *justification* or *identification*.[278] However, it

[274] Fleming, Peroni and Shay (n 168) 309.
[275] Kirsch (n 179) 479 and 481-82.
[276] Avi-Yonah, 'The Case Against Taxing Citizens' (n 235) 681.
[277] Kaufman (n 168) 172. She also notes that an 'individual's participation in the relevant community obligates the individual to contribute to a just distribution of goods in that community, thereby legitimizing the tax' (ibid 166).
[278] Schneider (n 234) 50 rejects Kirsch's view saying that it is no more than an argument that there is a 'general benefit to citizenship', which he dismisses as 'simply an argument from desperation' saying that one 'cannot justify the imposition of extensive tax and reporting burdens on the basis of some inchoate "general benefit"'. Gann (n 261) 64 similarly dismisses the notion that 'the proper equity comparison is between U.S. citizens living abroad and those living in the United States' citing the rejection of the notion of political allegiance in League of Nations (n 182).

is clear that membership of society is being discussed in this context only as an appropriate measure for the allocation of the tax burden, and not for determining whether the imposition of tax is justified in the first place, or in determining the identity of those on whom it should be imposed. In other words, membership of a society is seen as relevant to a theory of the *method* of taxation, but not necessarily to the *justification* of taxation, or the *identification* of taxpayers. Kirsch makes it clear that 'before asking whether one person has the same ability to pay taxes as another, one must identify the universe of comparison', and that he is operating on the assumption that 'citizens abroad are properly included within this universe'.[279] This identification of taxpayers as being within the 'relevant universe' or not, was made according to the traditional benefit theory of taxation.[280] Thus it seems that an individual's membership of a society is considered relevant when comparing that individual to the other members of that society for the purposes of distributing a tax burden among them, but it is not seen as a relevant criterion when examining the relationship between that individual and the society which is levying a tax to determine whether he or she is someone who bears an obligation to contribute towards it, or whether such an imposition would be justified.

In 2001 Graetz argued that a 'fundamental reexamination of the system of international income taxation and the principles and concepts on which it is based' was needed, as these rules had been 'put in place during the formative period – 1918 through 1928 – for international income taxation, a time when the world economy was very different', noting many significant recent economic changes.[281] He suggested that the professional international tax community of 'lawyers, accountants, and economists, in the universities, private practice, and the government' would find such a reexamination difficult because they had been 'blinded by adherence to inadequate

[279] Kirsch (n 179) 479.
[280] ibid 470-479.
[281] Graetz, 'The David R. Tillinghast Lecture' (n 12) 269 and 315-16. He lists the recent changes to the world economy as including 'the unprecedented movement of goods and services and of labor and capital throughout the world, the innovations in financial instruments and business combinations, the economic and political unification of Europe, the emergence of capitalism in the former Soviet Union and eastern Europe and of China as a major economic force, the advent of electronic commerce, and ongoing integration of the world's economy' (ibid 269). Stanford G Ross, 'International Taxation: A 20-Year View' (1992) 57 Tax Notes 945, 947 makes a similar point, stated that '[h]istorical rules based on geographic source of income and nationality of taxpayers, and jurisprudential concepts that emerged in the early twentieth century, are simply not adequate in today's world'.

principles and remain wedded to outdated concepts'.[282] Palmer notes in relation to the benefit theory of taxation, which is significantly older than the rules Graetz was talking about, was 'developed when international trade was, by today's standards, uncommon' and that in that era 'if a person resided in a given nation, he or she could expect to be called upon to pay tax only to that nation's government'.[283] In addition to the many changes to the nature of international trade and the world economy noted by Graetz, there have been considerable changes to the nature of the benefits provided by government. As noted in section 2.4(b) in the United Kingdom in 1850, 75 per cent of public expenditure was accounted for by spending on defence, public order and safety, with just 2 per cent spent on pensions, education, health care and welfare. By 2010 spending on defence, public order and safety had dwindled to just 12 per cent and 67 per cent of public expenditure was now on pensions, education, health care and welfare.[284] It is not unreasonable to suggest that the benefit theory of taxation as a theory of *justification* and of *identification* is equally based on inadequate principles and outdated concepts and is in need of modification[285]

The modification offered in this work is what might be called the *membership theory of taxation*. This theory states that taxes are justified where they are imposed on the members of a society in return for benefits provided to that society as a whole. The obligation of an individual member of a society to contribute towards taxation is *justified* by the improvement in the general welfare of the society as a whole, rather than any necessary improvement in the welfare of that individual him or herself. An individual is *identified* as someone who is under an obligation to contribute towards taxation if he or she is a member of the society imposing the tax. Once such membership is established, that individual is required to contribute towards the tax on the same terms as other members of the society and according to the norms for the

[282] ibid 269.
[283] Palmer (n 197) 31.
[284] These figures ignore interest paid on the national debt. See UK public spending website: (UK public spending website: <http://www.ukpublicspending.co.uk/year_spending_1850UKmn_14mc1n#ukgs302> (1850 figures); UK public spending website: <http://www.ukpublicspending.co.uk/year_spending_2010UKmn_14mc1n_E02070#ukgs302> accessed 20 July 2014)
[285] As Vogel, 'The Justification for Taxation' (n 40) 44 noted, 'During the last hundred years, the reality of the State has changed. The theory of tax justification, therefore, must be reexamined in light of this new reality and, to the extent necessary and possible, it must be adjusted to this change, fitted to the new reality, "modernized"'.

method of distribution of the tax burden (ie on the basis of his or her ability to pay, or some alternative basis).

In Ireland, approximately 79 per cent of government expenditure is accounted for by spending on the departments of social protection, health and education,[286] and a very considerable number of individuals will contribute a larger sum of money through their taxes to fund this social spending than they will ever directly receive in return.[287] Although the social welfare system, and the welfare state as a concept, has its opponents and its critics, there is no major Irish political party which has as a policy a reduction in the amount of, or eligibility for, benefits from the social spending discussed above, nor does there appear to be any vocal advocacy group calling for such a change, or for an alternation in the redistributive effects of the taxation system in Ireland. There are many reasons one might advance as to why this might be the case.

For example, one could argue that social spending by the government improves the society in which the contributor lives, and that this improvement accrues not just to net recipients of that spending but to net contributors as well. A society in which every individual is fed, clothed, housed, educated and has his or her health care needs met is not just a better society for the individuals who could not afford to pay for these things themselves and might otherwise have to rely on charity or endure hunger, homelessness, illiteracy and preventable or curable disease; it is arguably a better society for all its members. One might adopt such a view because it is believed that such a society is more morally just, or because it is politically expedient (societies that do not have these features may become politically unstable) or because the individuals view their contributions as an economically justified form of insurance or social safety

[286] Department of Finance, 'Exchequer Statement' (n 6).

[287] In Ireland in 2013, the top earning 25 per cent of taxpayers paid 83 per cent of the total income tax collected. The top earning 22 per cent of taxpayers, accounting for 478,692 cases (made up of individuals and married couples who are jointly assessed) earned more than €50,000, the vast bulk of that group earning between €50,000 and €100,000. See Letter from chairwoman of the Revenue Commissioners Josephine Feehily to Niamh Maguire, secretary to the Committee of Public Accounts (12 March 2014) <http://www.oireachtas.ie/parliament/media/committees/pac/correspondence/2014-meeting1200304/%5BPAC-R-1308%5D-Correspondence-3A.4---Josephine-Feehily,-Office-of-the-Revenue-Commissioners.pdf> accessed 19 May 2014. Although some of this group may well become net recipients of social spending depending on their future health or employment status, it is a fact that as a group they will not receive anything close to 83 per cent of the benefits of the social spending which they help to fund.

net which will provide for them or their family members in the case of changed circumstances or future need; or perhaps for a combination of these reasons, or for others.[288]

The particular political, moral or economic justification for accepting (or rejecting) governmental social spending and the redistributive nature of the tax system which funds it is not relevant to the theory being advanced, nor is the theory contingent on any one such view in preference to another. What is intended is that the proposed theory will enable an analysis of how individuals are identified as being under an obligation to contribute towards direct taxation, and to inform the design of the legal connecting factors used to implement this determination, and, in the context of this work, in particular to examine the taxation of tax exiles and the nature of the tax exile problem. The membership theory of taxation is not intended to serve as a method of analysis of, or justification for, the redistribution of income through the taxation system or the welfare state, but merely acknowledges these as observable facts about the system as it currently exists.

It is difficult to reconcile the benefit theory of taxation with the manner in which connecting factors for taxation are defined, especially in Ireland. The benefit theory of taxation states that an individual has an obligation to pay taxes if he or she has received benefits commensurate with those taxes. As has already been outlined in section 2.1(b), an individual is subject to direct taxation if he or she is resident in Ireland or if he or she has income or gains which have their source in Ireland. For the benefit theory to operate as a theory of *identification* of taxpayers, therefore, residence and source must be effective as measures of whether an individual has received benefits in Ireland. In the case of residence, this is clearly not the case, except perhaps as regards certain nonexcludable goods such as protection, as one might argue that living in Ireland necessarily entails having benefited from the protection provided by the police and defence forces. But protection is only one of a number of benefits

[288] Of course, penalties for non-compliance no doubt play a role in ensuring that each member of society makes the appropriate contribution, though they cannot account for the extent of the contribution required or its intended use by government.

provided by public spending, and a relatively minor one at that.[289] Residence is no measure at all of whether an individual has benefited from spending on health or education or social protection, for example. In the case of taxation based on source, arguably the benefit theory of taxation *does* operate effectively, in particular if one applies the economic allegiance version of the benefit theory, since an individual who has income or gains which arise in Ireland may be considered to have received economic benefits in relation to the acquisition of wealth in Ireland. This may explain why theorists such as Schanz and Vogel, who were strong advocates of source-based taxation in preference to taxation based on residence, also promoted the concept of economic allegiance.[290]

The membership theory of taxation states that an individual has an obligation to pay taxes if he or she is a member of the society levying those taxes. Thus, for the membership theory of taxation to operate as a theory of *identification* of taxpayers, residence and source must be effective as measures of membership of a particular society. In the case of residence, it is submitted that this is the case, and that living in a country is generally an effective measure of whether an individual is a member of that country's society. It will be contended in chapter 3 of this work that an examination of the evolution of direct taxation and of the connecting factors which it used demonstrates that tax has always been imposed on all members of English (and later British and Irish) society, and that the connecting factors used, nationality and residence, were effective measures of membership of society for this purpose. In chapter 4 it will be argued that Ireland's statutory test of residence which was introduced in 1994 no longer serves as an accurate measure of membership of Irish society for tax purposes, and that this has contributed to the tax exile problem. In the case of taxation based on source, clearly the membership theory of taxation does not operate as an effective theory of *identification*, since only individuals who are not resident in Ireland are taxed on a source basis, and since the membership theory of taxation only tells us that such individuals are not members of Irish society. Thus an effective theory of *identification* would state that an individual is under an obligation

[289] In the year to June 2014 in Ireland, public spending on the departments of defence and justice accounted for just 6.7 per cent of total government spending (excluding interest on the national debt). See Department of Finance, 'Exchequer Statement' (n 6).
[290] See Vogel, 'Worldwide vs. Source Taxation of Income (Part I)' (n 176).

to contribute towards taxation if he or she is a member of the society imposing the tax, and that if that individual is not a member of that society, he or she is obliged to contribute if he or she has received economic benefits in relation to the creation of wealth from that society. In the context of the tax exile problem it is the question of whether an individual is resident, or is a member of Irish society, that is important.

It is submitted that, in the context of the taxation on the basis of residence, the membership theory of taxation has several other advantages over the benefit theory. First, the membership theory does not entail any quantification of, or imputation to individuals of, benefits that arise from general public services, thus avoiding what Musgrave described as the weak link of the benefit theory.[291] Secondly, the fact that some 'collective benefits' cross borders and are received by individuals who it is not normally intended to tax is not problematic, since these individuals are not members of the society providing the benefit, nor are such benefits economic or related to the acquisition of wealth. Finally, the membership theory does not require that in order for a liability to pay taxes to arise an individual must meet the criteria to qualify for benefits funded by those taxes (eg residence, ordinary residence or habitual residence), thereby avoiding a situation where the theory upon which one basis decisions about jurisdictional rules is itself dependent on a different set of jurisdictional rules.

The membership theory of taxation is intentionally not explicit about the definition of the terms 'society' or 'membership'. There are many possible conceptions of 'society', and these may vary significantly depending on the context in which the term is used and on the perspective the person using it. A precise and universally agreed meaning in the context of direct taxation may be impossible, but is in any event unnecessary. What the membership theory suggests is that when attempting to identify whether an individual is, or should be, obliged to pay tax, or when analysing the use or meaning of a connecting factor such as residence, ordinary residence, domicile or citizenship in that regard, what one is really doing is attempting to measure membership of the society that is levying the tax, however that society might happen to be conceived or defined. It is the recognition that connecting factors are not measures of anything in themselves that is important, and that 'residence' has

[291] Musgrave, *The Theory of Public Finance* (n 78) 66-67.

no independent significance, but is rather a way of estimating whether an individual's connection to a society is sufficiently close that he or she ought to bear an obligation to contribute towards taxation along with its other members. Determining this question may well provoke an examination or debate about how the society in question wishes to define itself for taxation, or indeed other, purposes. But the membership theory of taxation need play no role in that debate. It merely argues that once society, and membership of it, have been broadly defined according to preference, liability to direct taxation should be dependent on membership of that society, and not on any benefits received from it.

It might be observed that the membership theory of taxation has more similarities to the benefit theory as it was originally enunciated in the medieval period than it does with the version that emerged under the influence of social contract theory in the seventeenth and eighteenth centuries. In the context of the benefit theory as a theory of *justification* or of *identification* of taxpayers, it is certainly arguable that the changes made to the theory during that period, in particular the emphasis on the individual and the tax paid and benefits received by him or her, were regressive and introduced difficulties for the theory that have made it all but unworkable.[292] In some ways, the membership theory is similar to the functional view of society discussed in section 2.3(a), which emphasised the 'interdependence, and the duty or function of each in the service of the whole society'.[293] However, the membership theory of taxation is not intended to be a denial of social contract theory, or of an endorsement of any alternative view of the state and its relation to the individual.[294]

In 1927 the Mr Justice Holmes made his now famous observation that 'taxes are what we pay for civilised society'.[295] The membership theory of taxation offers a slightly different conception of this idea; that 'taxes are what we pay for *membership*

[292] Both as a theory of *justification* of taxation and as a theory of the *method* of taxation.
[293] Kennedy (n 19) 84.
[294] The membership theory may have implications for theories of allocation of taxing rights between states with competing claims and the alleviation of international double taxation. As discussed in section 2.4(b), the paradigm theory is currently that of economic allegiance, which appears to be more appropriate in the considering taxation based on source than taxation based on residence in the case of individuals, and perhaps more appropriate in the case of corporations, who cannot be said to be members of society in the same way that individuals are. Further consideration of these implications is, however, beyond the scope of the present work.
[295] *Compania General de Tabacos de Filipinas v Collector of Internal Revenue*, 275 US 87, 100 (1927).

of civilised society'. An individual's tax contribution does not buy him or her free or subsidised education or health care or social welfare. It buys membership of the society which provides these benefits to certain of its members in certain circumstances. The remainder of this work will examine, among other things, the application of this theory to direct taxation and the connecting factors which it uses as they have evolved in Britain and Ireland, and to the tax exile problem.

CHAPTER 3

TAXATION FROM THE EARLIEST PERIOD TO THE INTRODUCTION OF THE INCOME TAX

I have received your letter about the excise and I am surprised at your insolence in writing to me at all ... May God's curse light on you all, and may it make your homes as open and free to the excise officers as your wives and daughters have always been to me while I have represented your rascally constituency.

Extract from a letter from Anthony Henry, MP for Southamption, to his constituents in 1714 in response to their request that he vote against the Budget.
Reprinted in Denis Healy, *My Secret Planet* (Bloomsbury Reader 2012)

3.1 Introduction

This chapter will examine the jurisdictional limits of direct taxation in Great Britain and Ireland, and the connecting factors used, in the historical period before the introduction of the income tax in 1799. It will seek to demonstrate that throughout this lengthy period, the two connecting factors used were nationality and, in the case of aliens, residence, and that this corresponds with the two groups of members of society during the period, nationals and aliens, and with the legal theories of allegiance and jurisdiction outlined in chapter 2. This correspondence does not appear to have been previously examined. These two connecting factors can also be seen as measuring two qualitatively different levels of connection of an individual to a society, with nationality being a long-term connection, and residence, in the case of aliens, representing a much short-term connection that was much more easily broken. Again, this corresponds with the two forms of allegiance owed by these groups and outlined in chapter 2. Chapter 4 will demonstrate that shortly after the introduction of income tax in 1799 nationality was (almost entirely) abandoned as a connecting factor for the purposes of direct taxation, and that from this point onwards residence became the measure of both long-term and short-term connection for tax purposes.[1] Chapter 4 will

[1] Though, as will be discussed, to some extent domicile was also used as a measure of long-term connection for direct tax purposes.

further argue that the introduction of Ireland's statutory definition of residence in 1994 abandoned the use of residence as a long-term connecting factor, and that this has contributed to the tax exile problem in Ireland. Chapter 6 will examine the case for the reintroduction of nationality as a measure of long-term connection for tax purposes, both as a potential solution to the tax exile problem and generally.

Virtually all writers and commentators on direct taxation prior to 1799 have either ignored the jurisdictional aspects of the taxes in question, or have mentioned them only in passing. The notable exception is Harris' recent work,[2] which appears to be the first to examine the issue in any systematic way. While Harris' work is commendable it suffers from a number of drawbacks from the perspective of the subject matter of this work. Harris' work examines four discrete questions, of which the question, 'why is income tax imposed simultaneously on a source and residence basis'[3] is only one; and these are analysed across a period of over 700 years in more than thirty separate jurisdictions, resulting in a study which Harris acknowledges is 'narrowly focused and bounded by various limitations'.[4] From the perspective of the current work, the most important of those limitations is that in determining whether a particular tax was imposed on the basis of residence, of source, or both, Harris examines only the wording of the legislative grant themselves, and any commission to collect them, both as regards any jurisdictional limitations imposed and as regards the provisions for assessment and collection of the taxes. He is thus led to conclude that certain subsidies and aids were imposed on the basis of source, or of both residence and source simultaneously.[5]

This chapter will argue that the jurisdictional limits and connecting factors used in direct taxation were not formally expressed and defined in the legislation of the period prior to 1799 in the way that they are in modern statutes, nor were they expressed with consistent terminology or with modern drafting precision. This chapter will examine direct taxation during this period in the wider context of, in particular

[2] Peter Harris, *Income Tax in Common Law Jurisdictions: From the Origins to 1820* (Cambridge University Press 2006).
[3] ibid 5.
[4] ibid 2.
[5] It is certainly the case that if a modern statute were expressed in similar terms, this would be the correct interpretation.

land ownership, the legal and constitutional theory of the time, the taxation and legal status of aliens during the period and the method of administration and collection of the taxes, and will seek to demonstrate that, as a matter of law and practice, direct taxation was at no time imposed on aliens who were not resident in Britain, but that taxation was imposed on subjects who were overseas temporarily, and perhaps on subjects who were permanently resident abroad.[6] Thus, it is contended that source taxation, in the modern sense of the taxation of non-residents regardless of their nationality, was not a feature of direct taxation in Britain prior to the introduction of the income tax in 1799, and that apparent variation in the jurisdictional basis of the parliamentary grants can be otherwise explained. This examination, it is hoped, will elucidate the connecting factors used in direct taxation in Ireland today, and place them in their proper historical context, and thus may be of wider academic value beyond its relevance to the tax exile problem.

This chapter will also examine direct taxation during the period in the context of the prevailing theory of taxation, the benefit theory, and will argue that although this theory generally describes taxation as it existed in practice, since subjects and resident aliens were the two groups who received protection from the monarch and were required to contribute towards funding that protection, there are features of local taxation, such as taxation for the provision of the poor, which are not accounted for. It will further be argued that membership theory of taxation advanced in chapter 2 provides an equally valid description of taxation during the period, since subjects and resident aliens were the two groups of which society was comprised at the time, and that this theory can account for the features of local taxation that the benefit theory cannot.

Finally, this chapter will examine the use of physical presence in a locality for a defined period of time as a measure of residence in, or of connection to, that community. This topic does not appear to have been previously considered by commentators, and this chapter will seek to demonstrate that tax was imposed on alien merchants in medieval England on the basis of their physical presence there beyond a

[6] It will also demonstrate that the direct taxation of the period was mostly territorial, with few if any sources of wealth situated abroad being taxed, other than goods in transit and certain debts.

set, and frequently varied, number of days, and that at a local level, physical presence was also used as a measure of residence for the purposes of legislation regarding the poor. It will be argued that these tests were not used in isolation, and were appropriate only where the individual in question did not satisfy another test of long-term connection to the locality in question.[7] It will further be argued in chapter 4 that Ireland's statutory definition of residence for income tax and CGT purposes introduced in 1994, which is based solely on physical presence in Ireland, abandoned any other measure of long-term connection and implemented a test that is only appropriate for individuals with no other connection to the country.

3.2 Direct taxation from the eariest period to 1500

Information on taxation in England prior to the Norman invasion is scant, with Dowell describing ancient Britain as 'beyond the range of fiscal history'.[8] It is known that in Roman Britain there was direct taxation of inhabitants on their personal property (principally flocks and herds) through the *scriptura* and a through a poll tax on individuals, the *capitatio humana*,[9] and in the Anglo-Saxon period the king's revenue was largely derived from his possessions of land (the royal demesne) with direct taxation imposed on land owners in the form of a hearth tax, known as a *fumage* and, in times of emergency, in the form of a payment for the provision of ships to defend the kingdom known as the *shipgeld*. A further tax, imposed on land and moveable goods, known as the *danegeld*, was collected to 'bribe away the ferocious Vikingr'.[10] Little is known about the jurisdictional basis of these forms of taxation other than that they were imposed on landowners and inhabitants.

In the feudal period between the Norman invasion and the end of the fifteenth century England was still primarily an agrarian society where 'land was the foundation of political power, social status and material wealth'.[11] As outlined in chapter 2, the

[7] In the case of merchant aliens, nationality or denization, and the case of the poor laws, having been born in the district in question. See section 3.5 below.
[8] Stephen Dowell, *A History of Taxation and Taxes in England from the Earliest Times to the Present Day* (Frank Cass & Co 1965) vol I, 3
[9] ibid 4.
[10] ibid 9.
[11] Chantal Stebbings, *The Victorian Taxpayer and the Law: A Study in Constitutional Conflict* (Cambridge University Press 2009) 5.

King's revenue was derived primarily from the royal demesne and from indirect taxation on merchandise imported into or exported from the realm, with direct taxation being levied only in times of emergency. In the very early part of this period these generally took the form of taxes on land, such as the *carucage* and *scutage*, and taxes on moveable goods, such as the *tallage*.[12] Again, little is known of the connecting factors used to imposed this tax other than that they were imposed on landowners and inhabitants.

Following the signing of Magna Carta in 1215, the king was in effect prevented from levying direct taxation without a grant from parliament,[13] and, beginning with the imposition of the Saladin tithe in 1188, the various forms of direct taxation became merged into a form of taxation on the value of an individual's moveable goods known as a subsidy.[14] More often than not, these subsidies were imposed at a higher rate on the men of the cities, boroughs and ancient demesne than on those living in rural districts.[15]

It does not appear that these taxes on movables in the early part of the period, from the imposition of the Saladin tithe to 1334, were ever imposed on persons resident abroad nor on movables situate abroad, with the possible exception of goods in transit. The ordinance of the Saladin tithe stated that '[e]veryone shall give in alms

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[12] See Dowell (n 8) vol I, 34-58. Edwin RA Seligman, in *Essays in Taxation* (MacMillan & Co 1895) 48, suggests that these early feudal payments 'gradually became land taxes, just as the Saxon *shipgeld* and *danegeld* were land taxes', though Sydney Knox Mitchell, in *Taxation in Medieval England* (Yale University Press 1951) 112 suggests that the danegeld was 'based on the valuation of land, movables and revenues'.

[13] United Kingdom, *Statutes of the Realm* (George Eyre and Andrew Strahan 1810-28) vol I, 9. 'No scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid'. Translated from the original Latin: <http://www.orbilat.com/Languages/Latin/Texts/06_Medieval_period/Legal_Documents/Magna_Carta.html> accessed 18 November 2013. However, it should be pointed out that the king did occasionally resort to exacting forced loans and benevolences (a form of non-statutory taxation) from wealthy nobles or merchants who paid them in order to maintain themselves in the king's good graces. See Roger Schofield, *Taxation under the early Tudors, 1485-1547* (Blackwell 2004) 6. GL Hariss, *King, Parliament and Medieval England to 1369* (Clarendon Press 1975) 3 says that the first national lay subsidy possessing the elements of both 'public necessity and public consent' was the thirteenth levied in 1207.

[14] See Harris (n 2) 34-37. See also Seligman, *Essays in Taxation* (n 12) 43-45.

[15] For example the tenth and sixth of 1294. See James F Willard 'The Assessment of Lay Subsidies 1290-1332' in American Historical Association, *Annual Report of the American Historical Association for the Year 1917* (Washington 1920) 281. See also, James F Willard, 'The Taxes upon Movables of the Reign of Edward I' (1913) 28 English Historical Review 517.

this year the tenth of his rents and movables ...'.[16] Although the jurisdictional basis of the tithe is not stated (there is no definition of 'everyone') Harris points out that 'the primary focus of this levy would have been the annual produce from agriculture',[17] and this produce would have belonged to the people who owned or worked the land who would, one assumes, would have been resident in England. Mitchell says that 'it seems clear from contemporary accounts that it was a general levy on all the people of the realm',[18] and the fourth granted in 1193 was specifically charged on 'every person in the kingdom in respect of rents and goods'.[19] The assessment of the taxes on movables at this time usually involved a 'sworn statement by all persons chargeable as to the value of their movables',[20] so presumably the owners of the movables in question had to at least be present in England at the time of the assessment, if not normally resident there.

One cannot state with certainty that non-resident aliens who happened to be in England at the time of the assessment or had goods there would not have been taxed, but this seems unlikely for a number of reasons. First, as Glasscock notes, the local rolls of assessment in the period before 1334 demonstrate that in rural areas the goods charged were predominantly large domestic animals, grains and other crops and occasionally carts or other agricultural implements,[21] and Dowell says that in towns the charge was levied on stock in trade and chattels.[22] Willard points out, by custom various goods, such as 'treasure, riding horses, bedding, clothing, vessels, tools, geese, capons, hens, bread, wine, cider, beer, and all kinds of food ready for use' which were not owned by merchants or burgesses, and which were not for sale, were exempt from the subsidies.[23] As a result, it seems that the tax was only levied on agricultural or other produce which was for sale and not on personal possessions.

[16] A translation of the opening paragraph from the original Latin is contained in Dowell (n 8) vol I, 61.
[17] Harris (n 2) 35.
[18] Mitchell (n 12) 114.
[19] Dowell (n 8) vol I 62.
[20] Harris (n 2) 36.
[21] Robin E Glasscock, *The Lay Subsidy of 1334* (Oxford University Press 1975) xxv.
[22] Dowell (n 8) vol I 69.
[23] Willard, 'The Assessment of Lay Subsidies 1290-1332' (n 15) 291.

Secondly, alien merchants who came to England to sell their goods had been exempted from direct taxation under the charter *Carta Mercatoria*[24] in return for their grant of increased subsidies on the importation and export of certain goods,[25] and there is evidence that they were successful in overturning assessments to subsidies made on them on the basis of the liberties granted in the charter.[26] Finally, the tax was not levied on persons with moveable goods valued at less than a minimum that varied between six and twelve shillings, and it seems that up to 65 per cent of the population may have escaped direct taxation altogether.[27] This would have excluded many alien immigrants and, one assumes, aliens who happened to be in the realm for reasons other than the sale of merchandise, even if their personal possessions had not been exempt from the tax.

There is also nothing to suggest that these early taxes on movables included goods situate outside England. Willard points out that in the period from 1290 to 1334, the taxes on movables 'at no time ran beyond the boundaries of England'.[28] In 1316 a writ was issued to investigate whether one Hamo Godchep had been assessed for the fifteenth on his movable goods 'within the realm in addition to the issues of his lands outside', with the reply that he had been assessed on 'all his goods movable within the realm, except goods issuing from foreign lands.'[29] There is evidence that the tax was to be levied on merchandise that was owned by English residents but was in transit, as can be seen from the writ to the collectors of the subsidy of 1319 to

> summon before them the richest and most sufficient inhabitants of the City and suburbs, and put them severally on their oath that they will loyally confess what goods and chattels they have within their house and without, *as well on*

[24] Originally published in Latin in Rymer's *Foedera*, an English translation is available in Harry Rothwell (ed), *English Historical Documents 1189-1327* (Eyre and Spottiswoode 1975) 515-518.
[25] They were to be 'free and quit of murage, pontage and pavage' and of any 'exaction, prise or prest or any other burden' imposed on their person, merchandise or goods. See Rothwell (n 24) 515,517.
[26] See for example Alice Beardwood, *Alien Merchants in England, 1350 to 1377: Their Legal and Economic Position* (Mediaeval Academy of America, 1931) 71-72; Reginald R Sharpe (ed), *Calendar of Letter-Books Preserved among the Archives of the Corporation of the City of London at the Guildhall* (Corporation of the City of London 1899-1912) Book G, 52.
[27] Pamela Nightingale, 'The Lay Subsidies and the Distribution of Wealth in Medieval England, 1275-1334' (2004) 57 Economic History Review 1, 11.
[28] James F Willard, *Parliamentary Taxes on Personal Property 1290 to 1334* (The Mediaeval Academy of America 1934) 26.
[29] *Calendar of Letter-Books of London* (n 26) Book E, 72.

> *the sea as elsewhere*, in merchandise, in debts clear, and in jewels of gold and silver, or other property, save only their chattels arising from their foreign lands and tenements and appertaining to the same.[30]

From a jurisdictional perspective, it therefore appears that these early taxes on moveables were levied on individuals on the basis of residence in England on their goods situate there and possibly on certain goods that were in transit. It is not clear whether non-resident subjects were liable to such taxes, though it seems unlikely that non-resident aliens would have been so liable.

At a local level, the distinction between taxation based on source (ie where the movables to be taxed were located) and residence (where the owner of movables normally lived) was an important one. Willard refers to several cases of what he says may have been a frequent difficulty for merchants who lived in London but had merchandise both there and in other parts of England: taxation of their goods in both locations.[31] Such issues were resolved by the merchant in question being taxable only in the place in which he was resident.[32] Even within London itself, provision was made in 1311 that where citizens of the city had their 'mansion' in one Ward but their merchandise or goods were in the other, or where they were Aldermen in one Ward but had their mansion in another, they should be 'taxed and assessed in those Wards where they reside with their wives, children, or families ...'.[33] This early method of resolving the issue of double taxation through assessment only in the place in which an individual was resident lends further support to the contention that from a jurisdictional perspective taxes were intended to be levied on the basis of residence.

The contemporary taxation theory of the period, which is outlined in chapter 2, appears to adequately describe the forms of direct taxation that were imposed, with those who were protected by the king (those living in his kingdom) paying taxes to

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[30] ibid 123 (emphasis added). See also Willard, *Parliamentary Taxes on Personal Property 1290 to 1334* (n 28) 65. 'Foreign' in this sense, may refer to lands and tenements outside London, rather than lands situated outside England.

[31] Willard, *Parliamentary Taxes on Personal Property 1290 to 1334* (n 28) 65, 153-55. The problem applied equally to those living outside London but who had goods located there on the day of assessment of the tax. This phenomenon may be a very early example of double taxation.

[32] ibid.

[33] *Calendar of Letter-Books of London* (n 26) Book D, 285.

fund that protection. It is also suggested that the membership theory of taxation outlined in chapter 2 is supported by the nature of taxation during the period, with the members of feudal society, the king's subjects and aliens residing within his realm, paying the taxes which supported that realm

3.2(a) The settling of the fifteenth and the tenth in 1334

As a result of complaints regarding irregularities and corruption on the part of the collectors of the subsidy of a fifteenth of the moveable goods of rural dwellers and a tenth of those of urban dwellers in 1332, when a further grant of a 'fifteenth and tenth' was made in 1334 a special method of assessment was adopted whereby the writs to the royal commissioners called on them to agree with the 'communities of the cities and boroughs and with the men of the townships and the tenants on ancient demesne'[34] the sum to be paid. From that point until the last grant of a fifteenth and a tenth in 1623,[35] the tax was a fixed charge levied on each locality and apportioned among its inhabitants according to the rate fixed by composition in 1334.

Once the tax on movables had become a levy of a fixed quota payable in this manner, it came to possess the characteristics of local taxation,[36] and 'every particular county, city and town assessed and collected the amount charged upon the district my means of the method they found most convenient to them'.[37] Schofield identifies three methods of local assessment: 'a fixed assignment of parts of the local charge on to parcels of land, fresh assessments on the value of lands, and fresh assessments on the value of goods'.[38] Schofield goes on to note that with each form of assessment 'the traditional tax charged on a vill was charged on the inhabitants of that vill', [39] which he describes as the 'general principle of residence as a necessary condition for

[34] James F Willard, 'The Taxes upon Movables of the Reign of Edward III' (1915) 30 English Historical Review 69, 70.
[35] An Act for payment of Three Subsidies and Three Fifteenths by the Temporality (21 James I c 33).
[36] See Edwin Cannan, *The History of Local Rates in England : In Relation to the Property Distribution of the Burden of Taxation* (2nd edn, PS King & Son 1912) 13-14.
[37] Dowell (n 8) vol I, 87.
[38] Schofield (n 13) 40. These methods of assessment were in operation both during the period currently under consideration, and in the later Tudor period.
[39] ibid 42. A *vill* is a term used to describe a medieval unit of land broadly equivalent to a parish or manor.

eligibility for local assessment to a fifteenth and tenth'.[40] He also cites cases, similar to the earlier ones noted above, of individuals being liable to double taxation (both where they were resident and where their goods were located), with the resolution again being taxation in the place of residence only. Thus it seems that after 1334 the fifteenth and tenth continued to be a tax levied primary, if not exclusively, on the basis of residence.

While many of the statutes granting a fifteenth and tenth after 1334 did no more than simply recite the fact of the grant, there are exceptions, such as in 1435 where it was recited that the charge was to be levied on 'on the moveable goods of the laity of this your said realm' and the grant of 1487 which was to be 'taken and levied from the movable goods and chattels and other things of the lay people of this your realm'.[41] The standard commission to collect the fifteenth and tenth of the late fourteenth and early fifteenth centuries also contained an indication that the charge was intended to be levied on residents, charging the commissioners to 'levy, collect and receive for the king's use from all cities, boroughs and towns, and from all secular lords of towns and other lay persons having goods and possessions, and from others both great and small in the county' in question.[42]

The legislation during this period does not expressly state whether aliens were subject to the forms of direct taxation so far discussed, nor do those outlined in section 3.2(b) below. As will be discussed in section 3.3 below, in the period next considered the subsidies were specifically imposed on aliens,[43] though it is submitted that, considering the imprecise nature of legislative drafting during the period under consideration, this is not of itself a reason to suppose that aliens had previously been exempt from direct taxation. Given the relatively large numbers of aliens living in

[40] ibid 43. Schofield notes that where the assessment of the fifteenth and tenth was made on lands, it was invariably made on the occupier rather than the owner, which again supports the notion that the tax was on those resident in the locality in question and borne by them, rather than by the landowners resident elsewhere being taxed, in a local sense, on the basis of source.

[41] Chris Given-Wilson (ed), *The Parliament Rolls of Medieval England* (Scholarly Digital Editions 2005) vol iv, 486 and vol vi, 400 respectively.

[42] United Kingdom, *Calendar of the Fine Rolls* (HMSO 1911-1962) vol x, 45.

[43] Maureen Jurkowski, Carrie L Smith and David Crook, *Lay Taxes in England and Wales 1188-1688* (Richmond PRO Publications 1998) xlv note that from 1512 'Tudor and Stuart lay subsidies taxed aliens resident in England was well as native-born inhabitants'.

England,[44] and the often hostile and xenophobic sentiments towards them,[45] it would be strange indeed if they had not been required to make a contribution with subjects living in the realm. Ekwall indicates that there is evidence of some aliens being taxed on their movables in London in 1292[46] and Beardwood says that the taxation of aliens became a 'definite policy' late in the reign of Edward III.[47] Thrupp says that to infer from the fact that aliens could not own land or plead or be impleded in the courts that they were therefore not subject to direct taxation is 'absurd'.[48] In 1342 a commission was issued to assess 'the men and merchants of Lombardy and Italy conversant in London' to 'to answer as do other aliens' on their portions of any 'subsidy or contribution in any grants or subsidies' made to the king or his progenitors.[49] As mentioned earlier in this section, alien merchants had received an exemption from direct taxation by virtue of Carta Mercatoria and on occasion when they were taxed in breach of this charter, pursued the matter before the exchequer, usually successfully.[50] This strongly suggests that in the absence of such an exemption, these merchants would have been liable to taxation notwithstanding that they were aliens. This again supports the theory that all members of feudal society, both subjects and aliens resident in England, were required to pay taxes to fund the protection provided by the king.

3.2(b) Other direct taxes during the period

[44] JL Bolton (ed), *The Alien Communities of London in the Fifteenth Century* (Richard III & Yorkist History Trust 1998) 8 estimates that 'resident aliens formed at least six per cent of the population' of London in the mid-fifteenth century. TH Lloyd, *Alien Merchants in England in the High Middle Ages* (Harvester 1982) 6 says that no evidence exists to enable an accurate estimate of the number of aliens living in or visiting England in the thirteenth and fourteenth centuries.

[45] ibid 1-2. See also Jurkowski and others (n 43) 94.

[46] Eilert Ekwall (ed), *Two early London Subsidy Rolls* (CWK Gleerup 1951) 43.

[47] Beardwood (n 26) 72-73, though given that Beardwood's work discusses alien merchants and she may be referring to alien merchants rather than aliens generally, as she appears to use the terms 'aliens' and 'alien merchants' interchangeably.

[48] Sylvia L Thrupp, 'A Survey of the Alien Population of England in 1440' (1957) 32 Speculum 262, 263. However, Lloyd, *Alien Merchants in England in the High Middle Ages* (n 44) 6 argues otherwise, saying that in the thirteenth and fourteenth centuries 'aliens were not subject to direct taxation, except for those in scot and lot with denizens and in such circumstances it is impossible to distinguish denizens from resident aliens'.

[49] *Calendar of the Fine Rolls* (n 42) vol v, 307. The background to this appears to have been a row that had been brewing between Edward III and the merchants of Lombardy for some time regarding debts. See for example *Calendar of the Fine Rolls* (n 42) vol v, 142.

[50] See for example Beardwood (n 26) 71-72.

Following the settling of the fifteenth and tenth in 1334, various additional forms of taxation were imposed, either as supplements to the fixed amount that it raised or as alternatives to it. These fell into broadly two types: poll taxes and land taxes, though the latter sometimes also included grants on moveables and on wages and fees from certain offices.

3.2(b)(i) Poll taxes

In 1377 a grant of 4d was made 'to be taken from the goods of each person of the same realm over the age of 14 years, males as well as females, with the exception of genuine beggars'.[51] Although stated to be levied on the goods of individuals, this was in fact a poll tax and was taken from every person in the realm.[52] In 1379 a graduated poll tax was 'levied from various persons of the kingdom'[53] according to their rank or status in society, with those higher status paying more. This tax was expressly stated to be 'be levied from people only in the place where they are resident, and nowhere else.'[54] A third poll tax was levied in 1380 of three groats 'from every lay person whether within or without franchises', with the provision that 'that none shall be charged to pay elsewhere than in the place where he, his wife, and his children dwell, or where he lives in service'.[55]

In 1440 a new form of poll tax, known as the 'alien subsidy'[56] was introduced and levied on all persons 'not born in England but dwelling within this your said realm',[57] and thus applying to both to aliens and to denizens. The tax was initially to be levied annually for three years, though it was extended and renewed on a number of occasions and was levied for the final time in as a separate subsidy in 1487.[58] As

[51] *Parliament Rolls of Medieval England* (n 41) vol ii, 364.
[52] See for example Dowell (n 8) vol I, 92; Harris (n 2) 45.
[53] *Parliament Rolls of Medieval England* (n 41) vol iii, 57.
[54] ibid 58.
[55] ibid 90.
[56] Jurkowski and others (n 43) 94.
[57] *Parliament Rolls of Medieval England* (n 41) vol v, 6. There were exemptions for men and women born in Wales, aliens made denizen, alien women married to Englishmen or Welshmen, clerics and children under 12.
[58] It was extended for a further two years in 1442, (*Parliament Rolls of Medieval England* (n 41) vol v, 38) when the exemptions were extended to include men and women born in Ireland and the islands of Jersey and Guernsey). It appears that the tax was not collected between 1444 and 1449 when it was renewed for four years and the charge was extended to 'every Venetian, Italian, Genoan, Florentine, Milanese, Luccan, Catalan, Albertine, Lombard, Hanser and Prussian who is a merchant or factor, and all other foreign merchants, born outside your said lordships, duchies and islands, and dwelling within

with the other poll taxes, these alien subsides were levied on the jurisdictional basis of residence.[59] As mentioned in chapter 2, these subsidies brought in very little revenue, and may have been 'intended more as a political gesture to please the commons and to persuade them to agree what were reasonably generous grants of lay subsidy and trade taxes'.[60]

The poll taxes and alien subsidies were clearly imposed on the jurisdictional basis of residence alone,[61] and again supports the notion that direct taxation applied to all members English society, both subjects and aliens living in England.[62]

3.2(b)(ii) Taxes on land

Direct taxes were imposed on land on several occasions in the fifteenth century.[63] In the first part of the century these taxes were directly assessed on individuals holding various interests in land, while in the latter part they consisted of the levying a set sum on each county, city, borough and town according to a fixed quota, with this sum apportioned among, and collected from, the inhabitants according to local custom, much as was the case with the fifteenth and tenth.

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this your realm' (ibid vol v, 144), and the exemptions were extended to include men and women born in Normandy, Gascony and Guyenne. In 1453 the subsidy was renewed and granted to Henry VI for his life, with a higher rate for alien merchants dwelling in the realm as householders than those who resided with other foreign merchants or with subjects, and with a provision for the taxation of alien merchants who had been made denizens by letters patent (ibid vol v, 230). Edward IV continued to levy the subsidy after he seized power in 1461 until Henry VI's death in 1471 (see Jurkowski and others (n 43) 106-07), and the subsidy was again levied in 1483, with a further category of aliens keeping a brewhouse within the realm added and with exemptions for the merchants of Brittany and Germany and for 'the Venetians, Genoese, Florentines and Luccans who are merchants, brokers, factors or attorneys of any of the said nations of Italy' (*Parliament Rolls of Medieval England* (n 41) vol vi, 197). It was levied for the final time as a separate subsidy in 1487 (ibid vol vi, 401-02).

[59] All of the alien subsidies contained a limitation that they were to apply only to aliens who were householders or who were 'dwelling within this your said realm' (see *Parliament Rolls of Medieval England* (n 41) vol v, 6; vol v, 144; vol v, 230; vol vi, 197 and vol vi, 401). Also, none of the alien subsidies provided for distraint, which suggests that aliens who had left the realm were considered to be no longer subject to tax, and may have also reflected the reality that such individuals would have forfeited any interest in land that they might have acquired by licence and were unlikely to have left any goods against which distraint could have been effected.

[60] 'Introduction 1439-1440' in *Parliament Rolls of Medieval England* (n 41) vol v, 1.

[61] Harris (n 2) 45 describes the 1380 poll tax as the first considered in his study expressly levied on the basis of residence

[62] Although the grants refer to persons 'of the kingdom' or 'of the realm', the tax of 1379 provided that 'every foreign merchant, of whatsoever status he be' was to pay 'according to their estate like denizens'and so presumably applied to all aliens as well as English subjects who were living in England (*Parliament Rolls of Medieval England* (n 41) vol iii, 58).

[63] Twice in 1404, and again in 1411, 1428, 1431, 1435, 1450, 1472, 1489 and 1497. See *Parliament Rolls of Medieval England* (n 41) vol iii, 546, vol iii, 648 vol iv, 318 vol iv, 369, vol iv, 486, vol v, 172-3, vol vi, 4, vol vi, 421 and vol vi, 516 respectively.

The grants of 1472 and 1489 were stated to levied on the profits from various interests in land,[64] but were for a fixed sum[65] which was apportioned among the various counties, cities, boroughs and towns. Both grants were stated to apply to every 'temporal person corporate or unincorporated of this realm',[66] and that of 1489 was also specifically limited to land 'in England, Wales and their marches'.[67] Only two of the parliamentary grants made in the first part of the century, those of 1428 and 1435, contained any provisions as to the jurisdictional scope of the charge. The former was

[64] These included 'lands and tenements, rents, fees, annuities, offices, corrodies and pensions' from various form of freeholds and life interests.

[65] In the case of the grant of 1472, the amount the be collected was cost of 13,000 archers for a full year at a wage of 6d per day, while in the case of the grant of 1489 it was for a fixed sum of '£75,000 towards the support and maintenance of an army of 10,000 archers' (ibid vol vi, 4 and 421 respectively). In March 1453 an unusual grant had been made of the cost of providing 20,000 archers (reduced to 13,000 in April of that year) to the King for a half a year at a wage of 6d per day, and which provided that every county, city, borough and town of the realm should contribute equally 'according to their substance', leaving it to the commons themselves to decide how the tax should be apportioned among them (*Parliament Rolls of Medieval England* (n 41) vol v, 230-32). This apportionment was later done by the commons agreeing that each county should bear the cost of a set number of archers, and Jurkowski and others (n 36) 105, say that this was done using the same proportions as the counties contributed towards the fifteenth and tenth, with the cost of one archer to be borne for every 50 marks normally assessed on the relevant country in the levy of the 1334 fifteenth and tenth. The grant further provided for this number to be further apportioned among each city, borough, town, township, village and hamlet of the counties by the commissions for the collection of the tax which were to later issue. Although the levying of the tax was postponed later that year and never actually collected (*Parliament Rolls of Medieval England* (n 41) vol v, 233, and this is presumably why it is not mentioned either in Dowell (n 8) or Harris (n 2)) it formed the basis of the grants of 1472 and 1489. The commons were formally released from the imposition of the subsidy of 1453 on the making of the 1472 grant (*Parliament Rolls of Medieval England* (n 41) vol vi 6), so presumably its details were the minds of the members of parliament at that time. Jurkowski and others (n 36) 106, describe it as serving as a precedent for the 1472 grant.

[66] In the case of the grants by the Commons. The grant from the Lords was from the 'lords spiritual and temporal of the realm of England' (See Parliament Rolls of Medieval England (n 34) vol vi, 4 and 6, and 421). It is not clear why the term 'persons ... of the realm' is used in the later taxes on land, as opposed to 'within the realm', which is used in the earlier ones, or 'dwelling within the realm' which was used in the alien subsidies. The phrase the 'community of the realm' was introduced into political discourse in the thirteenth century and referred to the commonalty, whose parliamentary assent through their representatives was required along with that of the prelates, earls and barons for a valid grant of taxation, these being the three estates of the realm (see for example the closing paragraph of the 'Statute of York' (Revocation of the New Ordinances (15 Edw II c 1) (1322)). See also William Stubbs, *The Constitutional History of England in Its Origin and Development Volume 2* (First published 1875, Cambridge University Press 2011) 163-168). Aliens were not part of the commonalty and were not represented at parliament, and so the 'community of the realm' referred to the king's subjects. The use of the phrase 'persons ... of the realm' in the later statutes may therefore have represented a deliberate intention to impose tax on English subjects but not on aliens, who could not, in any event, own land in England (this point is discussed in nn 97-99 and the accompanying text below).

[67] In 1497 each person 'having lands or tenements or other hereditaments or possessions in lands or tenements, in fee-simple, fee-tail, freehold, at will, after the custom of the manor, in wardship, by execution or ancient demesne' was required to contribute towards a subsidy equal to the return from two fifteenths and tenths (*Parliament Rolls of Medieval England* (n 41) vol vi, 516) and although the grant did not contain any jurisdictional limitation, the amount was to be apportioned among the counties in the same manner as the fifteenth and tenth.

imposed on 'every person within the said realm who is seised of lands and tenements within the same realm' held by knight's fee,[68] which appears to limit the charge to individuals resident in England on land located in England, while the latter was imposed on 'every person seised of manors, lands, tenements, rents, annuities, offices, or of any other temporal possession as of freehold in England',[69] which, taken at face value, and read with a modern eye, might easily cause one to reach the conclusion that the charge was limited to land located in England, but applied to all landowners regardless of their residence.[70] However, one must be careful about drawing conclusions as to the jurisdictional limits of the taxes during the period based on the wording of these grants alone, for a number of reasons.

First, the absence of a specific jurisdictional limit being contained within the wording of a particular grant should not of itself lead one to conclude that there was an intention to impose tax on sources of wealth located abroad or on persons residing abroad. The grants were not drafted with the legal precision of modern taxing statutes, and a failure to specify, for example, that a tax was to apply only to land located in England does not necessarily imply an intention to tax land located outside England. As Harris points out, it is difficult to categorise some taxes during this period as regards international jurisdiction because the direct taxes imposed were 'not designed with these categories and sub-categories in mind' and 'some tax laws simply do not contain sufficient information to enable an appropriate categorisation'.[71]

Secondly, there was often no clear division in the legislation of the period between provisions imposing the charge to tax (which may or may not have included jurisdictional limitations on that charge) and provisions detailing the manner of assessment and collection of the tax, as one would expect to find in a modern tax statute. In many cases, the provisions for assessment and collection of the taxes can be seen as qualifying or elaborating upon the charging provisions of the grant, but even where they do not and are separate and distinct, they nevertheless provide

[68] *Parliament Rolls of Medieval England* (n 41) vol iv, 318.
[69] ibid 486.
[70] Harris (n 2) 48 says in relation to the subsidy of 1435 that it is 'evident from the charging words that this was essentially a tax on the basis of source'. See also ibid 104 where he categorises the subsidy of 1428 as being jurisdictionally a 'source tax'.
[71] Harris (n 2) 11.

valuable clues as to the practicalities of tax assessment during the period, which in turn can shed light on the likely jurisdictional basis of the taxes imposed. For example, while the grant of the first subsidy in 1404 is not recorded on the Parliament Rolls, a commission to collect it in the county of Derby that survives recites that it was to extend to all lands 'within the allegiance of England', and was to be payable by 'each person, man or woman, within the realm of England' and required the commissioners to 'to make inquisition in the said county touching the names of all persons bound to contribute to the payment of the subsidy',[72] thus suggesting a similar jurisdictional limitation to the grant of 1428 discussed in the preceding paragraph.[73] The subsidy of 1450 was stated to be payable by 'every person who has sole estate of freehold', with no jurisdictional limitation, though the commissioners charged with collecting the tax were instructed to examine 'all persons residing or present in any of your said counties ...',[74] which could be interpreted as meaning that the charge only extended to individuals resident in England, but that it was payable on land situate abroad.[75]

Thirdly, the jurisdictional limitations contained in charging provisions, and in the administrative provisions, of the parliamentary grants of direct taxation on land during this period varied considerably, both in the extent to which such limitations were provided for at all, and, where they were provided, in the form and wording of those limitations. This variation is open to two possible interpretations: either the jurisdictional basis on which taxation was imposed was frequently and intentionally

[72] *Calendar of the Fine Rolls* (n 42) vol xii, 252.

[73] Harris (n 2) 47 states that 'the jurisdiction of this tax seems to have been essentially based on source', seemingly overlooking or ignoring the limitation regarding the taxpayers being 'within the realm of England'.

[74] *Parliament Rolls of Medieval England* (n 41) vol v, 173.

[75] Harris (n 2) 49 says that although there were 'no specific jurisdictional limits' 'residence or presence may be presumed to have been a necessary condition', though he appears to limit his view in this regard to what he describes as the 'second head' of charge of the grant (that on 'any office, wages, fee or fees for a term of years or otherwise than of the estate of freehold'), and later (ibid 103) lists the land tax element of the charge as a 'source tax'. There does not appear to be anything in the wording of the grant to warrant such a limitation, as the relevant provision directs commissions to be issued to individuals in each county 'to examine all persons residing or present in any of your said counties where they are the commissioners, about the value of their haviour of the foregoing'. This is the only provision for the issuing of such commissions in the grant, and so the 'forgoing' must logically include both heads of the charge, as a contrary view would suggest that there was no direction to issue commissions in relation to the first head of the charge. The argument that this was a residence-based charge is bolstered by the fact that in a writ to expedite the assessment and collection of the subsidy in the following year, it was provided that each individual should be examined on oath on all of his income by the commissioner of one county only, though it did not expressly state that this should be the county in which the individual was resident (See *Parliament Rolls of Medieval England* (n 41) vol v, 211).

changed from one imposition to another, or, alternatively, the jurisdictional basis of the taxes was more stable than is indicated by the wording of the grants, and the inconsistency in that wording can be otherwise explained.[76] One should be slow to adopt the former interpretation in the absence of compelling confirmatory evidence,[77] as it leads to a number of problematic conclusions. Taking just one example, such a view would suggest that in 1428 a tax was imposed which was jurisdictionally limited to 'every person within the said realm' and to 'lands and tenements within the same realm',[78] but that just three years later the extent of the charge, which was now on 'every man of woman of every estate having land',[79] had been extended to tax both non-residents and land situate abroad, without the intention to extend the jurisdictional scope of direct taxation having actually been expressed.[80]

Viewing the legislative provisions and other information relating to taxation during the period as a whole, a more consistent and coherent picture emerges of the jurisdictional basis of direct taxation during the period under consideration. First, it is clear that no parliamentary grant expressly imposed a charge on land situate outside England,[81] whereas several of the grants contained the limitation that the tax was only to apply to lands and tenements within the realm, or in England, or in England and Wales, or within the listed counties, cities, boroughs or towns.[82] There is no firm

[76] For example by a general lack of precision in legislative drafting, or because the taxation of sources of wealth outside England or of individuals resident outside England may simply not have been an issue that required, or received, consideration from the King or parliament during the medieval period because of the nature of feudal English society (this point is developed further in the paragraphs the follow).

[77] The present author is aware of no such evidence.

[78] *Parliament Rolls of Medieval England* (n 41) vol iv, 318.

[79] ibid vol iv, 486

[80] A commission to collect the first subsidy of 1404 (*Calendar of the Fine Rolls* (n 42) vol xii, 252) limited the imposition to 'each person, man or woman, within the realm of England' and to 'lands, tenements and possessions, and goods and chattels, in the bishopric of Durham and Hexhamshire as well as elsewhere within the allegiance of England', whereas a commission to collect the second subsidy of that year contained no such limitation, nor did the grant of the tax itself (ibid 289 and *Parliament Rolls of Medieval England* (n 41) vol iii, 546 respectively), yet there was no change in the administrative machinery for the collection of the taxes, nor does there appear to be any evidence of an intention to widen the jurisdictional scope of taxation in the period between the two grants

[81] Of course, the lack of such an express statement is not, of itself, evidence that the taxes were not to apply to foreign land. It should also be noted that the grant of 1450 was stated to apply to 'all lords and other persons holding any lordships or seigneuries directly' of the King in Wales. See *Parliament Rolls of Medieval England* (n 41) vol v, 172.

[82] For example, the grant of 1428 limited the charge to 'lands and tenements within the same realm'; that of 1435 charged 'manors, lands, tenements, rents, annuities, offices, or of any other temporal possession as of freehold in England'; the grant of 1489 charged land 'in England, Wales and their marches' and the 1497 grant was levied on land 'within any of the said counties, cities, boroughs or

evidence to suggest that taxation of land situated abroad was ever intended or effected during the period, and this interpretation is consistent with the taxation of land in the next period considered. Although migration did take place, and there were many alien immigrants living in England during the period,[83] the technological and other constraints on travel were considerable and regular international travel was rare for anyone other than merchants engaged in international trade.[84] More importantly, with the exception of those wealthy alien merchants engaged in the importation and exportation of goods, the majority of those coming to England were artisans, labourers and servants;[85] people whose migration was motivated chiefly by poverty, persecution or political upheaval and who would have been very unlikely to have left any sources of wealth which could have been subject to direct taxation (land or movables) outside England, either in their countries of origin or elsewhere. Indeed, many of these individuals would not have had sufficient sources of wealth in England to even be subject to direct taxation there.

English subjects who were resident in England may have owned land outside England but in another kingdom or duchy controlled by the English King (for example Ireland, Calais or Gascony), though the extent of any such ownership is difficult to estimate from extant sources. What is clear is that taxation on such land, or on the produce from such land or on movables situated there, was granted by the barons in the dominion in question and not by the English parliament. Ireland, for example, had its own parliament from 1264 until 1800 which had even gone so far as to expressly declare its legislative and legal independence from England in 1460.[86] Grants of subsidies were made in Ireland during the period, and Strayer and Rudisill note that in Ireland 'by the 1340s and 1350s we have clear cases of general parliamentary

towns' (*Parliament Rolls of Medieval England* (n 41) vol iv, 318, vol iv, 486, vol vi, 421 and vol vi, 516 respectively).

[83] Thrupp (n 48) 266 estimates the alien population of England in 1440 at 16,000, not including 'regular clergy, children under twelve, and alien women married to Englishmen' or most merchants or servants of great households. As mentioned in chapter 2, individuals born in Ireland were English subject and not aliens, however, as JL Bolton, 'Irish migration to England in the late middle ages: the evidence of 1394 and 1440' (2000) 32 Irish Historical Studies 1 points out, the grant of 1440 did unusually apply to the Irish, and so they are included in Thrupp's figure. See also Beardwood (n 26).

[84] See for example Robert Bork and Andrea Kann, *The Art, Science, and Technology of Medieval Travel* (Ashgate Publishing 2008) 7-9.

[85] See Thrupp (n 48) 267-68.

[86] See for example James Lydon, 'Ireland Corporate of Itself: The Parliament of 1460' (1995) 3 History Ireland 9.

taxation'.[87] Further, Richardson and Sayles observe that while 'Ireland in the twelfth and thirteenth centuries was regarded by the English kings as a source of profit', there was a 'sharp decline in revenue from 1315 onwards' and that by 1361 'there could have been no surplus of revenue from Ireland' but rather there was 'an increasing dependence upon England' to supplement the revenue raised in Ireland.[88] As a result, the taxation of sources of wealth situate outside England may not have been seen as an issue that required consideration when the King and his council sought grants of subsidies from the English parliament, nor would the parliament itself have felt it was within its power to grant taxation in relation to land or movables situated in another part of the realm, especially when that dominion already had its own parliament and made its own grants.

It is also possible that English subjects may have owned land in places not within the allegiance of the King of England, for example in France. Bracton, writing in the late thirteenth century refers to 'some who are in the allegiance of both and always were, before the loss of Normandy and after'[89] and it seems that aliens were not prohibited from owning land under French law.[90] However, it is again suggested that taxing such foreign lands may not have been an issue considered by the English kings or parliament during the period.

No parliamentary grant during the period under consideration expressly imposed a charge on land situated in England which was owned by individuals who were resident abroad, though several of the parliamentary grants were expressed to apply only to persons or inhabitants 'within the said realm', or 'any temporal person, corporate or unincorporated, of this realm'.[91] However, there is evidence in the

[87] Joseph R Strayer and George Rudisill Jnr, 'Taxation and Community in Wales and Ireland, 1272-1327' (1954) 29 Speculum 410, 414, though they also point out that the Irish parliament 'never obtained exclusive control over taxation' and that frequently the 'king's agents had to deal with individual lords and local communities, sometimes with very small local communities' (ibid 414 and 411 respectively)
[88] HG Richardson and GO Sayles, 'Irish Revenue, 1278-1384' (1962) 62 Proceedings of the Royal Irish Academy 87, 89-91. See also Anthony Sheehan, 'Irish Revenues and English Subventions, 1559-1622' (1990) 90C Proceedings of the Royal Irish Academy 35 on how the requirement for English subvention of the Irish revenue continued and increased during the sixteenth and seventeenth centuries.
[89] Bracton (n 97) 329.
[90] See for example Robert Joseph Pothier, *Oeuvres de Pothier IX: Traités des Personnes et des Choses* (First published 1781, Jean-Joseph Bugnet ed, Videcoq Pere et fils 1846) 20-27.
[91] The grant of 1428 was stated to apply to 'all inhabitants of every parish of this said realm who are householders' and to 'every person within the said realm who is seised of lands and tenements'; that of 1472 was levied on 'any temporal person, corporate or unincorporated, of this your realm' and the grant

administrative machinery of one of the taxes on land of an intention to impose tax on individuals who were overseas in certain circumstances. The subsidy of 1435, was imposed on 'lands, tenements, rents, annuities, offices, or of any other temporal possession as of freehold' of every person, and the grant provided that in each county of England all persons 'who are living in the said counties and are seised of lands or tenements within England', were to appear before the appointed commissioners to be examined on oath as to their holdings of taxable freehold interests and the commissioners were to 'certify the names of all such persons who dwell or live in the said counties who do not appear'.[92] It further provided that it would be lawful for the commissioners to examine all persons who were 'in prison or overseas when the said examination is made' through 'their attorney or deputy'.[93] It is not clear from the wording whether this provision was intended to apply to landowners who were temporarily unavailable for examination on the day fixed for the assessment of the tax, or to landowners who normally resided outside England. English subjects did of course travel abroad (for example for trade, war, pilgrimage, education or to experience the culture of other countries generally) and some may have been temporarily absent at the time of imposition of the tax. Others may have spent extended periods abroad in the service of the king while retaining land (or other taxable goods) in England.[94] For example, John Talbot, first earl of Shrewsbury and first earl of Waterford, spent almost sixty per cent of his adult life either in Ireland or

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of 1489 was imposed on every 'temporal person corporate or unincorporated of this realm' (*Parliament Rolls of Medieval England* (n 41) vol iv, 318; vol vi, 4 and vol vi, 421 respectively).

[92] *Parliament Rolls of Medieval England* (n 41) vol iv, 486. The barons and baronesses were to be examined only by the 'chancellor and treasurer' or other 'barons of the exchequer' appointed by him. It seems that the tax was assessed and collected locally on the basis of residence, and HL Gray, 'Incomes from Land in England in 1436' (1934) 49 The English Historical Review 607, 610 fn 3 points out that there is evidence from the particulars of accounts drawn up by the commissioners for London that persons who had land both in London and elsewhere were assessed in London, and refers to one case, that of Thomas Canynges (a grocer, and later (1456-57) Lord Mayor of London; see HCG Matthew and Brian Harrison, *Oxford Dictionary of National Biography* (Oxford University Press 2004) vol 9, 970–71) who only had lands in Bristol and Gloucestershire, but was assessed in London. Several similar instances are to be found in the appendix to Gray's paper, both for London and Lincolnshire and Middlesex.

[93] ibid. This was to become a more or less standard provision in the grants of directly assessed taxes in the early part of the next period considered (see section 3.3 below).

[94] In the late thirteenth century Bracton (n 97) 329 describes Michael de Fiennes (who was later appointed as Edward I's chancellor) as being an English subject 'dwelling in France' and GP Cuttino, 'A Chancellor of the Lord Edward' (1977) 50 Bulletin of the Institute of Historical Research 229, 230 says that Edward I granted de Fiennes a gift of the church of Paignton in Devon in 1245 and later describes him as a 'frequent commuter across the Channel' who was granted freedom of toll and custom at the port of Dover.

in France, including virtually the entire period from 1427 to 1445,[95] yet he was assessed to the subsidy of 1435 on his income from English land along with the other nobles.[96]

During the period under consideration (and the following period) aliens were prohibited from owning land in England. This prohibition extended to holding land by freehold or copyhold, and to the taking of a lease for a term of years, and any such interests in land which were purported to have been acquired by an alien would have been forfeit to the King by escheat.[97] There was an exception for alien merchants, who could lease a house for their habitation for a term of years, though if they died or departed the realm the King became entitled to the lease.[98] Any lease of 'lands,

[95] Fighting in the Hundred Years' War. See AJ Pollard, 'Talbot, John, first earl of Shrewsbury and first earl of Waterford (c.1387–1453)' in HCG Matthew and Brian Harrison, *Oxford Dictionary of National Biography* (Oxford University Press 2004)

[96] Gray (n 96) provides a list of the barons assessed to the tax. Talbot was one of the wealthiest landowners in England at the time, and whether he would have been considered to have been non-resident, or to have been resident in England but temporarily abroad (albeit for very prolonged periods), is of course entirely moot. However the distinction may not have meaningful during the period, for taxation or any other purpose, since he was overseas in the king's service and owed allegiance the king regardless of where he was living.

[97] See Edward Coke, *The First Part of the Institutes of the Laws of England, Or A Commentary Upon Littleton* (4th edn, I More Esq 1639) 2b; William Evan Davies, *The English Law Relating to Aliens* (Stevens 1931) 161-62. Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I, Volume I* (Cambridge University Press 1895) 443 express 'serious doubt whether these rules can be traced far beyond the end of the thirteenth century' and suggest that prior to that time land may have been owned by individuals who did not owe fealty to the King of England, or who did but also owed fealty to another (eg in France). They cite Henry de Bracton, *Bracton on the laws and customs of England, vol 4* (First published 1260 (approx), George E Woodbine ed, Samuel E Thorne tr, Belknap Press 1977) 328-29 in this regard, though Bracton does seem to suggest that aliens are barred from actions relating to land in England, if not the holding of such land, writing that 'just as an Englishman is not heard impleading any one with respect to lands and tenements in France, so an alien or Frenchman who is in the allegiance of the king of France resident in France ought not to be heard pleading in England'. He does go on to point out that some were 'in the allegiance of both' the kings of France and England, and so were presumably aliens in neither kingdom and entitled to own land in both. Escheat of lands descending to aliens was provided for in the tract *Of the King's Prerogative* which appears as a statute in 1324 (see United Kingdom, *Statutes of the Realm* (George Eyre and Andrew Strahan 1810) vol I, 227) though A Statute for those who are born in Parts beyond Sea (25 Edward III) (1351) provided that children born beyond the sea whose parents were 'of the faith and ligeance of the King of England' could inherit. Forfeiture of lands purported to be acquired inter vivos by aliens certainly occurred in the early fifteenth century, if not earlier (see *Calendar of the Fine Rolls* (n 42) vol 14, 227 and vol 18, 59 for grants by the King to others of such land).

[98] See Coke (n 97) 2b; Davies (n 97) 162. It appears that in certain circumstances aliens could obtain a licence from the King permitting them to purchase land in freehold, and some wealthy alien merchants obtained such licences. This land escheated to the King on the death of the merchant, or if the merchant left the realm. See Beardwood (n 26) 62-63. However, during at least part of the period under consideration, merchant aliens were prohibited from acquiring leases and required to lodge with freemen of the cities and towns where they sold their merchandise. See for *Calendar of Letter-Books of London* (n 26) Book C, 75, 80. See also Frank Sargent, 'The Wine Trade with Gascony' in George Unwin (ed), *Finance and trade under Edward III* (Longmans Green, 1962). Aliens who had received

meadows, pastures, woods, and the like' by such merchants was prohibited.[99] Aliens who had moved away from England to reside elsewhere, or who were normally resident abroad, would therefore not have owned land which could have been taxed.

It seems reasonable to conclude therefore that the subsidies imposed on land during the period did not extend to land situated outside England, and that although they may have been imposed on English subjects who were temporarily abroad, or even English subjects who were abroad for prolonged periods and who may have been considered non-resident,[100] they did not apply to non-resident aliens. This point seems even clearer with the taxes on land in the second part of the century, which were assessed as a fixed quote locally in the same manner as the fifteenth and the tenth. This interpretation is consistent with the jurisdictional basis of taxation in the next period considered, and with the mechanism for the assessment and collection of the tax, one of the cardinal principles of which during the overlapping and later Tudor period, was, according to Schofield, the taxation of the individual in the district where the he or she was resident.[101] The connecting factors used in the taxation of land were therefore nationality and residence, and this again supports the view that direct taxation was imposed on all members of English society who benefitted from the king's protection, both subjects and resident aliens.

3.2(b)(iii) Taxes on moveables, wages and fees

As was the case with the taxes on land, the subsidies imposed on moveable goods and on certain wages and fees during the period under consideration were again not imposed with any consistent jurisdictional limitations, though the provisions regarding the assessment and collection of a particular tax did give an indication of the connecting factors used. The commission to collect the first subsidy of 1404 set out a charge on the moveables of 'each person' with goods or chattels above a set value, and on 'all persons who have lands or tenements, annuities or pensions, without doing service or office, or rents charged for life or for term of years or on condition

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letters patent of denization were entitled to purchase land in the same way as natural-born subjects (see William Blackstone, *Commentaries on the Laws of England, Book I* (Clarendon Press 1765) 362).

[99] Coke (n 97) 2b.

[100] At least in the modern sense of that term. The meaning of resident for taxation purposes during this period is unclear.

[101] Schofield (n 13) 76.

until they be advanced or better provision be made for them'.[102] However, since the tax was for a fixed amount, it seems likely that it would have been assessed and collected like the fifteenth and tenth, according to a quota from the inhabitants of each town and parish, and therefore on the basis of residence.

The jurisdictional basis of the later subsidies appears to have been somewhat more clearly based on the residence of the taxpayer, with the charge on goods in 1428 applying to 'all inhabitants of every parish of this said realm who are householders',[103] the commissioners charged with the collection of the subsidy of 1450 instructed to examine 'all persons residing or present in any of your said counties ...',[104] the tax on moveables 1489 to be assessed on their owner 'only in the place where he spends most time, as an inhabitant and resident, and in no other place',[105] and that of 1497 being levied on owners of goods and chattels where only they were resident, with the

[102] *Calendar of the Fine Rolls* (n 42) vol xii, 252. The charge on annuities and pensions was aimed at endowments from the King which were often made until appropriate lands became available to be granted to the individual in question (usually by escheat). See for example James Bothwell, 'Edward III and the 'New Nobility': Largesse and Limitation in Fourteenth-Century England' (1997) 112 The English Historical Review 1111, 1122. The extravagance of these grants was a source of concern for the commons during the reign of Henry IV, as they felt the King had been unnecessarily generous. See AL Brown 'The Commons and the Council in the Reign of Henry IV' (1964) 79 The English Historical Review 1, 19; *Parliament Rolls of Medieval England* (n 41) vol iii, 523-24. Any such individuals hoping for advancement or better provision through the grant of lands would have had to have been English subjects.

[103] *Parliament Rolls of Medieval England* (n 41) vol iv, 318. The term 'household' had a diverse range of meanings in medieval England and did not indicate any particular ownership or estate in land and would have included all forms of tenure or tenancy of occupied residential property. It was used in the grant of the subsidy in the sense of an economic unit, headed by the 'householder' and would have included all persons resident in the household in question, including servants. See Felicity Riddy and others, 'The concept of the household in later medieval England', in Sarah Rees Jones and others, 'The later medieval English urban household' (2007) 5 History Compass 112, 119-20. See also J Krause, 'The Medieval Household: Large or Small?' (1957) 9 The Economic History Review 420; Maryanne Kowaleski and P J P Goldberg (eds), Medieval Domesticity: Home, Housing and Household in Medieval England (Cambridge University Press 2008) 2.

[104] *Parliament Rolls of Medieval England* (n 41) vol v, 173.

[105] ibid vol vi, 421. Harris (n 2) 55 notes that this administrative provision applied only to the tax on moveables and not to the tax on land, and so was the first tax considered by his study 'that expressly incorporates both a source and a residence basis'. It is not clear why it was not provided that the charge on land should be made where the owner was resident (something that was shortly to become what Schofield (n 13) 76 described as 'a cardinal principle of Tudor direct assessment taxation'), though it may have course have been an oversight. It may also have indicated that non-resident landowners (all of whom would have been subjects) were intended to be liable to the tax on land, and hence a residence-based limitation would have been inappropriate, but that non-resident aliens were not intended to be subject to the tax on goods, hence a residence-based limitation was required. Considering that the grant was for a fixed sum to be raised and assessed according to a quota (see Jurkowski and others (n 43) 123), it seems likely that both the charge on land and the charge on goods were assessed and collected locally by the commissioners in their counties in the same manner as the apportioned part of the fifteenth and tenth; that is, predominantly on the basis of residence. Thus it seems more likely that apparent difference in treatment of the tax on land and that on goods was unintentional.

exception of livestock, corn and retail businesses, which were to be assessed where they were located.[106]

As was the case with land, there was no tax during the period which was expressly levied on moveable goods, chattels located abroad or wages or fees arising abroad, though neither was there any statutory provision which expressly limited the charge only to such sources of wealth located in England (and Wales).[107] As outlined at the beginning of section 3.2,[108] there is some evidence in the earlier period suggesting that tax was imposed on moveables in transit but not 'chattels arising from their foreign lands'.[109] As already noted, during the period under consideration the earlier subsidies were directly assessed and the later ones were for a fixed amount which was apportioned among the various parishes, cities and towns, and so would have been assessed and collected locally by the commissioners and their appointed officers, presumably in the same manner as the fifteenth and tenth.[110] To the extent that a direct assessment was carried out, this appears to have been done by way of a 'house-to-house canvass'.[111] While a local assessor might not be able to determine the existence of, much less the value, of moveable goods that were located permanently abroad, or that arose as the produce of foreign lands, one would expect that those resident in a particular district would be aware if a neighbour had merchandise such as crops, livestock or hides which had been sent abroad for export or were in the process of being transported into or out of England. As a result, it is not unreasonable to suppose that such goods in transit would have subject to direct taxation. Again, such an interpretation is consistent with the taxation of movables in the next period considered, and the failure to expressly impose the tax on goods and chattels in transit

[106] *Parliament Rolls of Medieval England* (n 41) vol vi, 516

[107] For example the subsidy of 1428 charged 'all inhabitants of every parish of this said realm who are householders' to tax on 'their moveable goods' with no further limitation as to the goods charged (ibid vol iv, 318).

[108] See nn 29and 30 and the accompanying text.

[109] *Calendar of Letter-Books of London* (n 20) Book E, 72 and 123 respectively.

[110] See for example, Seligman, *Essays in Taxation* (n 12) 43-47; Willard, 'The Assessment of Lay Subsidies 1290-1332' (n 15) 284-87; Schofield (n 13) 111-12. This may have meant that there was no actual assessment of the value of taxpayers' land and goods, but that instead the charge was levied on a predetermined list of contributors in each district (see Schofield (n 13) 40-43).

[111] James F Willard, 'Side-Lights upon the Assessment and Collection of the Mediæval Subsidies' (1913) 7 Transactions of the Royal Historical Society 167, 172. See also Richard W Hoyle, *Tudor Taxation Records: A Guide for Users* (PRO Publications 1994) 17.

could be attributed to a general imprecision in the wording of the statutes in the medieval period.

Although aliens could not own land during the period under consideration, there was no prohibition on aliens acquiring 'property in goods, money, and other personal estate' and they were entitled to 'trade as freely as other people'.[112] As already discussed regarding the earlier part of this period,[113] there is therefore no reason to suspect that aliens living in England did not pay the subsidies on their moveable goods in the same way as resident subjects. Non-resident aliens, or aliens who had been living in England but who had returned to live abroad, would have been unlikely to have had any produce from land which might be taxed, such as livestock, woolfells, hides or crops, unless they were in the process of importing or exporting them, and such alien merchants paid a higher rate of customs duty but were exempt from direct taxation on their merchandise. The administrative provisions in the grants discussed earlier in this section also strongly suggest that the taxes on moveables, wages and fees were intended only to apply to residents. One can therefore reasonably conclude that these subsidies extended to goods situate in England, and possibly to the agricultural produce of English land which was in transit abroad, and applied to individuals who were resident in England (whether subjects or aliens), but did not apply to non-residents. Once again this appears to support the view advanced in this work that direct taxation was imposed on all members of English society who benefitted from the king's protection, both subjects and resident aliens.

3.2(c) Summary and conclusions

In summary, while direct taxation was not legislatively expressed to apply on any fixed or consistent jurisdictional basis during the period under consideration, examining the evidence as a whole it seems that it in fact applied to:

- residents of England (whether subjects or aliens), on their land and goods situated in England and possibly on their movables in transit abroad,

[112] Blackstone (n 98) 360.
[113] See sections 3.2 and 3.2(a) above.

- English subjects who were overseas on their land, and possibly on their movables, situate in England.

This interpretation is supported by wording the parliamentary grants themselves, none of which expressly imposes tax on non-resident aliens or on land situate abroad, and by the nature of the assessment of the taxes, which were mostly for fixed amounts that were apportioned among the inhabitants of the parishes, cities and towns on the basis of their residence there and according to their measurable wealth in that locality. It is further supported by nature of medieval society, where land, and the produce from land, was the main source of taxable wealth and could only be owned by subjects and, in limited cases, by resident aliens.

This interpretation is also supported by the constitutional theory of allegiance and jurisdiction which first emerged during this period,[114] and according to which subjects owed a permanent duty of allegiance to their sovereign in return for his protection regardless of where they happened to be resident, while aliens owed only a temporary allegiance for so long as they were resident within the realm. It is also entirely consistent with the jurisdictional basis of the direct taxation in the next period considered, and also bears a striking similarity to the jurisdictional limits of Pitt's Income tax of 1799,[115] which taxed residents (both British subjects and aliens) on various sources of income arising within Great Britain and on the remittance into Great Britain of income arising abroad from foreign possessions, and which only taxed non-resident subjects, but not aliens, on income arising from sources in Great Britain. The act also provided that British subjects who were ordinarily resident in Great Britain but who were abroad for the purpose of temporary residence should be chargeable as if they continued to be resident in Great Britain,[116] and it seems that this provision can be traced directly back to the provision for the taxation of subjects who were temporarily abroad through their attorneys during the medieval period.[117] Finally, the act provided for assessment locally in the parish or place of the taxpayer's residence,

[114] Though it was not comprehensively expounded upon until the next.
[115] An Act to repeal the Duties imposed by an Act, made in the last Session of Parliament, for granting an Aid and Contribution for the Prosecution of the War; and to make more effectual Provision for the like Purpose, by granting certain Duties upon Income, in lieu of the said Duties (Duties upon Income Act 1799) (39 Geo III c 13).
[116] ibid, s 10.
[117] *Parliament Rolls of Medieval England* (n 41) vol iv, 486.

and that persons abroad at the time of the time of the assessment were to be rated in the parish or place where they had last been ordinarily resident in Great Britain.[118]

There appears to be no compelling evidence to suggest that the jurisdictional basis of taxation during the period was broader than has been suggested here, or that it included the taxation of non-resident aliens or of land situated abroad. It is possible that the scope of taxation was in fact narrower and was more or less completely territorial, applying to subjects and aliens who were resident and present in, or only temporarily absent from, the realm and being charged only on sources of wealth located within the realm. No source consulted by this author makes any mention of the taxation of individuals who were normally resident abroad, or of sources of wealth situated outside England. Nor is there any mention of any assessment of non-residents or of foreign land or movables, or of any complaint in relation to such taxation or any purported exemption from it. Conversely, references to taxation of individuals in more than one district, and the potential double taxation thereby arising, and to the taxation of, and the exemption from taxation of, alien merchants, are plentiful.

Finally, this view is also strongly supported by the theory of taxation of the period which focused on the protection provided by the king, a protection that would not have been available to aliens resident abroad or to land in foreign countries, while land in other parts of the realm which was within the king's protection was already taxed to pay for that protection locally, and supports the contention made in this work that taxes during the period were imposed on all members of feudal society.

3.3 Direct taxation during the period from 1500 to 1798

3.3(a) The period from 1500 to 1628

As already mentioned, fifteenths and tenths continued to be levied until 1623, invariably in addition to a further subsidy. The jurisdictional basis of the fifteenth and tenth did not alter during this period, and was in essence a charge on the inhabitants

[118] Duties upon Income Act 1799 (n 115) s 73.

of the relevant parish, town or city and was levied on the basis of residence, both in the jurisdictional sense and, predominantly in the local sense.[119] Between 1512 and 1515 a form of subsidy was developed, jurisdictionally largely based on the subsidies of fifteenth century, and the subsidy of 1523,[120] which represented a consolidated form of the various innovations contained in these acts, was to form the basis for direct taxation for the next 100 years.[121] There was a considerable increase both in the length of the acts of parliament granting the subsidies and in the precision of the language used, in particular in relation to matters of administration of the assessment and collection of the tax.

The subsidy of 1523 was imposed annually for a period of four years and was not for a fixed sum, although it was intended to raise a sum of approximately £80,000.[122] It was to be 'taxed set levied and paid of every person' of every estate or degree and was imposed on various forms of freehold interest in land (fee simple, fee tail, copyhold etc), on certain types of goods worth in excess of forty shillings (plate, merchandise, reaped crops, household goods, debts and other chattels) and on individuals aged sixteen or above who did not have taxable land or goods but who had wages of more than twenty shillings per year.[123] Every 'alien or stranger born out of the King's obedience' was charged at double the rate for native born subjects, and an additional poll tax was levied on such aliens who had no land, goods or wages that were otherwise taxable.[124]

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[119] See section 3.2(a) above.

[120] An Act of Subsidy (14 &15 Hen VIII c 16) (1523).

[121] See Schofield (n 13) 89; Harris (n 2) 60. The first subsidy of the period was in 1504 and was for a sum of £30,000 (*Parliament Rolls of Medieval England* (n 41) vol vi, 523). This was levied in a form substantially similar to that of the subsidy of 1497, and was assessed in the various counties, towns and boroughs according to a fixed quota (see section 3.2(b)(ii) above.

[122] See Jurkowski and others (n 43)137. The subsidy of 1514 (An Act of Subsidy of £160,00 (5 Hen VIII c 17) (1514)) had been for a fixed sum of £160,000, and the subsidy of 1515 (The Subsidy (6 Hen VIII c 26) (1515)) was intended to raise a fixed sum of approximately £35,000 of the residue of the sum not collected under the 1514 grant, with the balance of this deficiency raised by the grant of a fifteenth and tenth (see Jurkowski and others (n 43) 134). These fixed sums were not formally apportioned among the shires by the act themsevles.

[123] This was the last subsidy of this form to expressly tax wages (see Hoyle (n 111) 12), although Harris (n 2) 66-67 points out that the tax on 'other yearly profits' in the land tax head of charge was broad enough to include certain types of wages, and from 1545 expressly excluded the wages of servants. See also Schofield (n 13) 102.

[124] Subsidy Act 1523 (n 120), s 2. Section 6 provided that a person was only to be liable either to tax on land or on goods, whichever yielded the greatest amount of tax.

No specific jurisdictional limit was provided regarding the land or wages that were within the charge to the tax, although the tax on goods was levied on all the taxable items listed 'as well within this Realm as without'. Equally, no jurisdictional limit was stated as to the persons subject to the tax, with the exception that only aliens and strangers 'born out of the King's obedience inhabiting within this Realm' were liable to the tax on goods or the poll tax. While the territorial limits of the tax were thus not entirely clear from the charging section, some clarification is to be found in an examination of the provisions regarding its assessment and collection, which were geared firmly towards taxation based on the residence of the individual. Section 6 of the act provided that every person was to be 'be rated taxed and set and the sum of him set to be levied' where he 'shall keep his house or dwelling, or where he then shall be most conversant abiding or resident or shall have his most resort unto and shall be best known' at the time of the making of the assessors' certificates[125] and the complex administrative system set out in the act was geared almost entirely towards the valuation of an individual's taxable wealth by other persons living in the same district.[126] There remain, however,several inconsistencies and uncertainties which are discussed in the sections that follow.

3.3(a)(i) Taxation of non-residents

As already noted, aliens were not entitled to hold freehold estates in land or to hold land by way of lease for a term of years, and any purported acquisition of such interests was deemed to be void.[127] An alien could obtain denization by means of

[125] Sections 3, 4, and 5 of the act of 1523 provided for the elaborate machinery of assessment of the subsidy, which required the Commons to nominate Commissioners to act for every shire, riding, city and town within the realm who then issued precepts to assessors in every district and administrative division for which they acted. The assessors appeared before the Commissioners and took an oath to enquire into the value and substance of 'every person dwelling or abiding' or otherwise having his 'most resort' 'within the limits of the places' for which the assessors were charged, and to 'truly present and certify' before the commissioners 'the names and surnames substance and values' of the lands, goods and wages chargeable by the act and owned by all such residents (ibid s 5). Section 9 of the act provided that the Commissioners were to appoint individuals in each district in their county to act as collectors, who were issued with estreats under seal setting out the names and amounts of tax due from every person 'as well man as woman chargeable to this act housholder labourer or servant and all household servants of all other inhabitants or dwellers' within the district in question.

[126] The tax was levied predominantly on visible sources of wealth (land, goods and merchandise), and RG Lang (ed), Two Tudor Subsidy Rolls for the City of London: 1541 and 1582 (London Record Society 1993) lx, writing about the period slightly later in the sixteenth century, notes that in London the 'common opinion of a person's wealth was formed in the close communities of ward, parish and precinct', that there was a 'tradition of taking stock of neighbours' abilities' and that there were 'frequent and various enquiries into the numbers and affairs of all or large classes of the city's inhabitants'.

[127] See section 3.2(b)(ii) above.

letters patent, and would thereby become an English subject and entitled to virtually all the same rights as any other English person,[128] including the acquisition of interests in land, and alien merchants were entitled to lease a house for their habitation, and in certain circumstances could obtain a licence to acquire a freehold interest, but this was forfeit to the King if the individual left the realm. These restrictions were in fact strengthened during this period, with an act of 1540 providing that 'all leases of any dwelling house or shop within this realm or any of the King's dominions made to any stranger articifer or handy craft man born out of the King's obedience, not being denizen ... shall be void and of none effect'.[129] As a result, any taxable interest in land liable to the subsidy 1523, or to later, similar subsidies could only have been held by a natural-born English subject, by an alien who had become an English subject through denization or by an alien who had received a licence to purchase property from the King.[130] The only individuals resident outside England who could have held a taxable interest in English land would have been the former two groups: English subjects, whether natural born or denizen.[131] This may explain why the charge on goods and the poll tax were specifically stated to only apply to aliens and strangers 'born out of the King's obedience inhabiting within this Realm', while the charge on land contained no such limitation, since such individuals could not own land in England and such a limitation already existed in law.[132] The fact that the charge to tax on goods in section 2 only included a requirement as to residence for aliens might also suggest that English

[128] Other than the right to be a member of either house of parliament, or of the privy council, or to hold any office of trust whether civil or military, or to have any grant of lands, tenements or hereditaments from the Crown. See George Hansard, *A Treatise on the Law Relating to Aliens, and Denization and Naturalization* (V and R Stevens and GS Norton 1844) 193-94.

[129] An Act Concerning Strangers (32 Hen VIII c 16) (1540), s4. The prohibition on aliens acquiring interests in land was relaxed in 1844, but was not finally abolished until the passing of the Naturalisation Act in 1870. See Davies (n (n 97) 163. By this time the law was easily evaded and forfeitures were not exacted, however, as late as 1834 in the case of *Fourdrin v Gowdey* (1834) 40 English Reports 146, a case involving a clause in a will to sell the testator's (English) assets and distribute the proceeds to his siblings who were resident in France, it was held that Crown was entitled to the English land forming part of the testator's estate.

[130] The number of aliens assessed to tax on land was extremely low. In 1541, just 45 aliens or strangers were assessed to tax on their lands in London, compared with the 626 who were assessed for goods and the 652 who were assessed to the poll tax (see Lang (n 126) lxxv).

[131] Harris (n 2) 68 points out that it is unclear from the wording of the act whether 'non-resident aliens were to be taxed with respect to any land they might have in England' but does not consider whether non-resident aliens could legally own a taxable interest in such land in the first place.

[132] Although curiously the charge on land for the third and fourth years of the subsidy included this proviso in relation to aliens (Subsidy Act 1523 (n 120), s 2). This proviso did not appear in later subsidies of this nature in relation to the tax on land held by aliens, and so may have been unintentional.

subjects residing abroad *were* intended to be subject to tax on their goods situated in England, and there is nothing in the act to directly contradict such a supposition.

It is in the nature of poll taxes that they are imposed on persons who are resident in a particular country, so it is unsurprising that section 2 of the act provided that the tax on aliens who did not otherwise possess taxable land, goods or wages was only imposed on those inhabiting within the realm.[133] There was no jurisdictional limitation expressed on the taxation of wages under the act, however considering that those who had insufficient land or goods to be otherwise taxable and who received wages were most likely clerks, servants, agricultural and other types of manual labourers, it is difficult to conceive of circumstances where such an individual would have received wages for duties physically carried out in England while actually resident elsewhere.[134] In any event, this head of charge did not appear in the later subsidies during this period. It therefore seems reasonable to suggest that, to the extent that non-residents were liable to tax on located assets in England under the act of 1523, only non-resident subjects of the King[135] would have been so liable.

Section 16 of the act provided that the subsidy was not to apply to 'the inhabitants and dwellers' of Ireland, Wales, Calais, Hammes, Guînes,[136] Guernsey or Jersey concerning any manner of 'lands tenements or other possessions, goods chattels or other moveable substances which the said inhabitants or dwellers' had within Ireland, Wales, Calais, Hammes, Guînes, Guernsey or Jersey, or any 'fees or wages' which such inhabitants had of King for their attendance and service in those places.[137]

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[133] Subsidy Act 1523 (n 120), s 2. It sould be noted that section 2 of the act distinguished between persons 'born under the King's obedience' and 'every alien or stranger born out of the King's obedience'. An alien could obtain denization by means of letters patent, and would thereby become an English subject and entitled to virtually all the same rights as any other English person. However, such an individual would remain an alien or stranger for the purpose of the act and would have been liable to higher (double) rate of taxation paid by aliens rather than the rate paid by natural-born subjects.

[134] It is also worth noting that the provision for the taxation of persons outside the realm contained in section 2, and discussed in the following paragraphs, did not apply to wages.

[135] Either natural-born, or made denizen.

[136] Hammes and Guînes were inland castles that guarded the approach to Calais.

[137] Further exemptions were provided for the 'English inhabitants or residents' of the Cinque Ports (section 17) and of the counties of Northumberland, Cumberland, Westmorland, Chester, the Bishoprick of Durham or the towns of Brighthemstone and Westborne in Sussex (section 18). Section 21 also exempted the scholars and students of the universities of Oxford and Cambridge and the colleges of Our Lady in Leicester, Winchester and Eton for their salaries, wages and books, and the land owned by the colleges themselves.

This may suggest that English subjects resident in such places were intended to be taxed on any land, goods, fees or wages which they had within England.[138]

The act contained two administrative provisions for the taxation of individuals not present in England at the time of the assessment of the subsidy.[139] Section 6 of the act provided that if any person chargeable to the tax 'happen to be out of this realm or far from the place where he shall be known' at the time of assessment, then he was to be assessed in the district 'where he was last abiding in this realm and best known', while section 2 provided that subjects and resident aliens who 'at time of the said assessing or taxation yearly to be had or made shall be out of this realm' but who had taxable land or goods within the realm were to be taxed by the assessors in the district where the land or goods were located, or where the individual's factor, deputy or attorney was located 'as if the same person were or had been at the time of the assessing within this realm abiding or dwelling'.[140]

At first glance these provisions appear to be contraditory, with one section providing for the taxation of an individual based on his or her most recent place of *residence*, and the other providing for taxation based on the *source* or location of the individual's assets. However, these provisions can be read as being complimentary and dealing with two subtly different scenarios. Under this interpretation, the provision in section 6, which was stated to apply to *any person*, addressed the situation

[138] Helen Miller, 'Subsidy Assessments of the Peerage in the Sixteenth Century' (1955) 28 Bulletin of the Institute of Historical Research 15, 25 notes that neither John Bourchier, Lord Berners, the deputy of Calais nor William, Lord Sandys, the treasurer of Calais were assessed to the subsidy of 1523, with the Commissioners noting in the case of the latter that he was not assessed because he was 'in the King's service in Calais' (it appears that Lord Sandys was assessed by Cardinal Wolsley for the first year of the subsidy, but not assessed for the second). Miller correctly notes that the act only exempted land and fees and wages for royal service arising in Calais, although it is possible that the exemption of these two peers arose as a result of a separate writ from the King. Lang (n 126) xlviii-xlix states that such writs of exoneraton were issued in favour of individuals such as 'ambassadors or military commanders resident abroad'. The fact that these were the only two peers who appear not to have been assessed to the subsidy of 1523 strongly supports the notion that non-resident (or perhaps temporarily non-resident) English subjects were intended to be, and in fact were, assessed to tax on their sources of wealth in England.

[139] Some assessments of this sort did take place. Schofield (n 13) 111 notes that Sir Thomas Wyatt (the younger) 'was abroad, and was assessed on the evidence of his neighbours to the subsidy of 1546' (he was in Boulogne fighting against the French in the Italian War of 1542–46, but was the owner of an estate in Kent. See Ian W Archer, 'Wyatt, Sir Thomas (b. in or before 1521, d. 1554)' in HCG Matthew and Brian Harrison, *Oxford Dictionary of National Biography* (Oxford University Press 2004)).

[140] Section 11 of the act also provided for the distraint of lessees, bailiffs and stewards who held goods or collected rent on behalf of taxable persons, including persons 'out of the realm'.

where an individual, whether an English subject or an alien, was normally resident in England but was temporarily abroad at the time of the assessment,[141] and, in the case of aliens, the individual's ordinary place of residence was known. In such a case tax was to be assessed in the district in which the individual was resident, just as it would have been for other residents. The provision in section 2, which was stated to apply to every person 'born under the King's obedience' and every other 'stranger or denzien inhabiting within' the realm, dealt with the a situation where an English subject was resident abroad, or where an alien was resident in England but was temporarily abroad at the time of the assessment (and the alien's normal place of residence in the realm was unknown), with tax in this instance being imposed on the basis of the source of the taxable wealth.[142] This interpretation of these provisions gives further support to the notion that aliens resident outside England were not intended to be subject to the subsidy.[143] This also makes sense from a practical perspective, as an alien leaving England to take up permanent residence elsewhere would have been unlikely to leave taxable sources of wealth such as plate, merchandise, reaped crops, household goods or other chattels behind.

3.3(a)(ii) Worldwide taxation of residents

The extent to which individuals resident in England were charged to tax on assets located abroad under the act is extremely difficult to estimate. Although some of the surviving certificates of the assessors and the estreats returned to the Exchequer record the names of the taxpayers and whether they were assessed for land, goods, wages or the poll tax, they do not record the location of their taxable wealth or whether any of it was located outside England.[144]

As already mentioned, grants of taxation in the ealier period before 1500 were not expressly stated to apply to sources of wealth (land and goods) located outside

[141] ie he should '*happen* to be out of the realm' (emphasis added).
[142] Harris (n 2) 59 cites this part of Subsidy Act 1523 (n 120), s 2 as imposing tax on a source basis jurisdictionally, though he does not distinguish between natural-born English subjects and aliens in this regard.
[143] With the exception (already stated) of aliens normally resident in England but temporarily abroad at the time of the assessment.
[144] See Hoyle (n 111) 21-25.

England, although the grants on moveables appear to have included a charge on goods in transit overseas and the taxes on land were frequently, but not consistently, limited to land situated in England. The subsidy of 1523 was expressly levied on goods 'as well within this Realm as without',[145] and this may well have been a continuation of the older rule regarding the taxation of goods in transit. It might also be taken to imply that the other sources of wealth taxed under the act (land or wages) were only to be taxed if they were located in England.

The machinery of assessment of the subsidy did not explicitly provide for its imposition on sources of wealth located outside England,[146] nor would it have readily lent itself to the valuation of such assets. Miller notes that is difficult to say what form of examination of taxpayers was carried out by the assessors, but that (referring to the of assessment of the peerage), 'only those goods within the residence visited could be valued' and the annual income from land 'could only be assessed on the word of the peer himself'.[147] Schofield states that 'it cannot be discovered whether the assessments were made by direct inspection, by interrogation, by estimation, or on the basis of records such as rentals or inventories',[148] although Lang argues that 'the general methods stipulated and implied' in the legislation were direct enquiry of the person being valued and estimation, rather than 'direct inspection or the examination of rentals or inventories'.[149] Any such direct enquiry would not have been made on the oath of the individual in question.[150] An assessor resident in a particular district would have found it extremely difficult to estimate the value of any land or goods which a neighbour might have outside England,[151] with the possible exception of the value of any crops, wool, hides, livestock or manufactured items which the individual might have produced during the year and sent for export. Although it may be speculation to suggest that it is these sorts of goods 'as well within this Realm as without' that are

[145] Subsidy Act 1523 (n 120), s 2.
[146] Although it should equally be noted that nothing in the provisions relating to the assessment to the tax expressly excluded such an imposition.
[147] Miller (n 138) 25.
[148] Schofield (n 13) 117.
[149] Lang (n 126) liv.
[150] Unless the individual were called for examination before the Commissioners in a case of suspected under-valuation pursuant to Subsidy Act 1523 (n 120), s 2, though this form of examination proved unpopular and was abolished in 1559 (see Miller (n 138) 28).
[151] And, given the levels of underevaluation in relation to taxation later in the period (see for example Lang (n 126) lviii-lix), may not have been able to rely on a direct enquiry.

envisaged by the section 2 of the act, such a supposition would appear to tally with the levy on goods in transit found in the grants of taxation in the period prior to 1500.

The exemption in section 16 of the act for the inhabitants of Ireland, Wales, Calais, Hammes, Guînes, Guernsey and Jersey on their land and goods located there is, on the face of it, somewhat puzzling as it would appear to suggest that, in the absence of this specific exemption, individuals not resident in England but resident in one of these dominions would have been liable to tax on their land and goods situate outside England. By extension, it would suggest that persons resident somewhere other than these dominions, and therefore not entitled to this exemption, would be subject to English taxation. One would have to presume that such a radical extension of tax jurisdiction was not intended, and a more harmonious reading of the provision in light of the jurisdictional basis of the subsidy advanced in this section would suggest that section 16 was intended to do no more than confirm that the act was not intended to extend to the dominions, and that English subjects resident in any such place would be liable only on their land and goods in England. Such an extension of jurisdiction would also have faced considerable constitutional difficulties. Ireland, for example, had its own parliament which had expressly declared its legislative and legal independence from England in 1460,[152] and which had the sole authority to grant subsidies on behalf of the Irish people.[153] Also, from as early as 1540 the revenues raised in Ireland were not sufficient to meet the expenses of the civil and military establishment there and a subvention was required from the English exchequer.[154]

3.3(a)(iii) Later subsides in the period to 1628

Subsidies in the form of that levied in 1523 continued to be granted for over one hundred years, with the last of this type granted by parliament in 1628.[155]

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[152] See for example James Lydon, 'Ireland Corporate of Itself: The Parliament of 1460' (1995) 3 History Ireland 9.

[153] Though the counties outside the Pale often refused to recognise the grants of the parliament and negotiated separate grants to the King. See for example David B Quinn, 'The Irish Parliamentary Subsidy in the Fifteenth and Sixteenth Centuries' (1935) 42 Proceedings of the Royal Irish Academy 219, 220.

[154] See Anthony Sheehan, 'Irish Revenues and English Subventions, 1559-1622' (1990) 90C Proceedings of the Royal Irish Academy 35, 44-46.

[155] An Act for the Grant of five entire Subsidies granted by the Temporality (3 Char I c 8) (1628). See Harris (n 2) 80.

Although there were minor changes to the wording of the acts during that time, there were few, if any, significant changes to their jurisdictional basis.[156] Harris[157] argues that in 1553 the scope of the charge on land was extended to include land situate outside England and Wales, basing this view on the fact that the description of the various forms of freehold interest subject to the tax was stated in the act of 1553[158] to include land 'as well within ancient demesne and other places privileged as elsewhere'. This would have represented a very considerable extension of the jurisdictional scope of the subsidies, and, may have given rise to significant constitutional and practical difficulties.[159] An alternative, and it is suggested more harmonious, interpretation of the wording is that it did no more than confirm that land located in places normally exempt from tax, such as the Cinque Ports, was now subject to the charge along with all other land *elsewhere in England and Wales.*[160]

The most significant change in this form of subsidy was that, like the fifteenth and tenth before it, it slowly reverted from being a tax directly assessed on the taxable wealth of each individual to a levy of a fixed amount apportioned among the various parishes, cities and towns of England and Wales. It is difficult to say when this process first began, although Hoyle, citing figures from Schofield, states that 'beyond doubt the way in which the assessments for the subsidy become wholly untrustworthy after the end of Henry VIII's reign'[161] (in 1547) and that by 1559 there had been a 'dramatic

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[156] Minor changes include the description of the individuals liable to the tax at the standard rate being changed from 'every person born under the King's obedience' to 'every person and orphan born within this realm of England, Wales or other the King's dominions' in 1543 (An Act for the Subsidy of the Temporality (34 & 35 Hen VIII c 27) (1543), s 1), which amounted to a change of wording rather than one of substance, though from this point onwards, the counties of Wales were also included in the charge to the subsidy. Also, the act of 1593 (An Act for the grant of Three entire Subsidies and Six Fifteenths and Tenths, granted by the Temporality (35 Eliz c 13) (1593), s 12) provided that an individual was to be assessed in the district 'where he and his family were resident for the most part of the year next before the same presentment and taxation made' rather than in the district in which the individual was resident at the time of the making of the assessor's certificate as had previously been the case (see for example the previous grant of 1589: An Act for the granting of Four Fifteenths and Tenths, and two entire Subsidies to our most gracous Sovereign Lady the Queen most Excellent Majesty (31 Eliz c 15) (1589), s 12). Again, this change is not significant from a jurisdictional perspective.

[157] Harris (n 2) 68.

[158] An Act for the Grant of a Subsidy and two 15ths and 10ths by the Temporality (7 Edw VI c 12) (1553), s 5.

[159] For example, Ireland had its own parliament and granted its own taxes, subsidies and aids to the crown. See sections 3.2(b)(ii) and 3.3(a)(ii) above.

[160] Unless specifically exempted under another provision of the act. Subsidy Act 1553 (n 158), s 30 provided an exemption for the inhabitants and residents of the Cinque Ports, but not for the land situate there owned by persons resident elsewhere in the realm.

[161] Hoyle (n 111) 15. See also Schofield (n 13) 243; Harris (n 2) 71.

fall' in the numbers assessed and the fall in yields 'was a matter of public comment'.[162] Even as early as 1543, the grant had begun to be described as for 'one entire subsidy'[163] rather than for 'a yearly subsidy',[164] suggesting a levy of a fixed sum, and in 1589 there is for the first time a grant of 'two entire subsidies'.[165]

Dowell describes how in each district there was a list of 'subsidy men', who bore the brunt of the charge to tax, and a subsidiary list of 'bearers, a class below the property qualification of the subsidy men, but yet of sufficient ability to bear some portion of the burden'.[166] When a fresh subsidy was granted, the assessors would readjust the list of subsidy men and bearers to take account of deaths, sales of estates etc, 'with a view to produce the usual amount'[167] of tax for the district. The assessment thus became 'as conventionalized and formal as a court dance'[168] and was intended only as a method of ensuring that 'when a subsidy was levied people paid according to their relative ability as their communities commonly perceived that to be.'[169] As a result, the jurisdictional aspects of the subsidies became of less importance towards the end of this period, and they came to represent to an even greater extent a charge levied on the members of the local community according to the visible signs of their wealth.

Two other common provisions of these subsidies are worthy of note. The first addressed the situation where an indvidual was taxable in more than one district (eg as a result of having more than one place of abode), and provided that a 'certificate of residence' could be issued so that the individual would only be assessed in one district and would be discharged of assessment in the other.[170] It was intended that tax would assessed be in the district yeilding the largest amount of tax, though some taxpayers

[162] ibid 29. Michael J Braddick, *The Nerves of State: Taxation and te Financing of the English State, 1558-1714* (Manchester University Press 1996) 94, estimates that in London the yield of a subsidy fell by about fifty per cent between 1558 and 1590, and by a further seventy per cent between 1590 and 1630.
[163] Subsidy Act 1543 (n 156), s 1.
[164] For example in the previous grant of 1540: The Bill for the Subsidy (32 Hen VIII c 50) (1540), s 3.
[165] Subsidy Act 1589 (n 156), s 4. By this time a single subsidy was a levy of approximately £80,000 (see Dowell (n 8) vol I, 154-55.
[166] Dowell (n 8) vol I, 155. See also Seligman, *Essays in Taxation* (n 12) 47.
[167] Dowell (n 8) vol I, 155.
[168] MW Beresford, *Lay Subsidies and Poll Taxes* (Phillimore 1963) 12.
[169] Lang (n 126) lix.
[170] See Hoyle (n 111) 32-33.

were suspected of using the provision to avoid or reduce their assessments. Any such attempt at avoidance was punishable by a levying of tax at double the normal rate.[171]

The second section of note provided that any individuals who by 'craft or covyn to the intent to defraud this grant of subsidy'[172] moved their residence to one of the places exempted from the tax, such as the Cinque Ports,[173] was to be assessed in the district where such an individual was last resident. It therefore appears that the pheonomenon of moving one's residence, or of claiming to be resident in one place while in fact being resident in another, in order to reduce or avoid a charge to tax is far from a modern phenomenon, though of course the Tudor tax exiles were only moving from one part of the realm to another.

3.3(a)(iv) Summary and conclusions

As was the case with the previous period considered, a considerable portion of the taxes levied in the sixteenth and early seventeenth century were assessed according to a quota system, and represented a charge collected from the members of each local community in satisfaction of that community's contribution towards the sum being raised for the purposes of national defence. Of those taxes that were directly assessed, there is again no evidence of any intention to impose tax on non-residents, other than on land owned by subjects who were temporarily abroad, nor is there evidence of an intention to impose tax on sources of wealth located abroad, with the possible exception of merchandise produced in England which was overseas or in transit. Equally, there is no evidence of such taxes actually being assessed or collected.

This is again in accordance with the prevailing taxation theory of the time and with the notion advanced in this work that taxation was imposed on all members of English society in return for protection provided by the King to that society.

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[171] See for example Subsidy Act 1523 (n 120), s 8. Schofield says that only one case of 'fraudulent removal' has been discovered: that of John Jones, clothier of Abingdon and of Burford, Oxon., claimed in each place that he had been assessed in the other for the subsidy of 1546. He further notes that 'other cases may well have occurred; but owing to the deficiencies of the original commissioners' returns it is unlikely that they can ever completely be reconstructed'. See Schofield (n 13) 116.

[172] ibid, s 22.

[173] See the text to n 137above.

3.3(b) The period from 1628 to 1798

3.3(b)(i) Direct taxation under Charles I

King Charles I ruled without parliament from 1629 to 1640, and in order to raise money that would normally have been collected by a grant of subsidies or of fifteenths and tenths, imposed an extra-parliamentary charge for the provision of ships for the defence of the realm.[174] The writs for the ship money themselves were not express as to their jurisdictonal basis, however instructions sent to each county by the Lords of the Privy Council 'for the better executing of the said Writ' set out the cost of the ship and men that should be apportioned among the country, city or town and provided that the sum was to be subdivided 'as other common Payments upon the County and Corporate-Towns aforesaid, are most usually subdivided and assessed' with the town and parishes to be 'rated by the Houses and Lands lying within each Parish and Town, as is accustomed in other Common Payments' and with further provison that no person was to be assessed 'unless they be known to have estates in Money, or Goods, or other means to live by, over and above their daily Labour' and that any other persons who 'by reason of gainful Trades, great Stocks of Money, or other usual Estates' had or occupied little or no land and would otherwise not normally be assessed to tax should be 'rated and assessed according to their worth and ability'.[175]

Thus it appears that, like the fifteenth and tenth and subsidies of the later Tudor period, the tax was assessed as a fixed amount apportioned among the residents of the district according to their perceived level of wealth relative to the rest of the community and measured by the external signs of that wealth: land, goods and other possessions. It is also notable that the instructions of the Privy Council suggest that

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[174] This 'ship money' was not new and had its origins in the ship geld of the Anglo-Saxon era and was normally levied on the Cinque Ports, who in return were exempted from parliamentary taxation (see Dowell (n 8) vol I, 211-12; Jurkowski and others (n 43) xlix-xli), but in a break with precedent were in this instance were levied on all counties of England and Wales in the years between 1634 and 1640

[175] Quotations taken from the instructions of the Privy Council to 'the High-Sheriff of the County of Middlesex, and to the High-Sheriff of the County of Hartford and to the Majors and other Head-Officers of Corporate Towns within the said Counties' in John Rushworth, *Historical Collections of Private Passages of State, Weighty Matters in Law, Remarkable Proceedings in Five Parliaments: Beginning the Sixteenth Year of King James, Anno 1618 and Ending the Fifth Year of King Charls, Anno 1629* (Robert Boulter 1682) vol II, 259-61.

such taxes were normally imposed only on those who occupied land, again emphasising the residence basis of direct taxation at the time.

In 1640[176] and 1641[177] subsidies were granted by parliament which were largely based on the Tudor subsidies, and which, from a jurisdictional perspective, were identical. In 1642 a subsidy was granted for a fixed sum of £400,000. Unlike the subsidies that preceded it of this type, it was no longer expressed to be a directly assessed tax, with the act setting out the amount to be paid by each county in England and Wales.[178] The act did not provide for how the sum of £400,000 was to be apportioned among the various the parishes, towns and cities in each county,[179] Presumably, with a history of collecting an apportioned sum for the fifteenth and tenth of over three hundred years, and of apportioning, rather than assessing, the sum to be paid for the subsidies of at least the previous fifty years, the local assessors simply divided the sum due among the residents of their district who were usually liable (ie the subsidy men and bearers).[180]

From a jurisdictional perspective the 1642 act was expressed in terms almost identical to those of 1523, though the tax was now to be assessed on taxpayers in each county in which they had taxable land or goods (ie on a source basis, locally) rather than in the country in which they principally resided.[181] Section 13 of the act reaffirmed the charge on goods 'remaining or being beyond the seas' and specifically

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[176] An Act for the releif of His Majesty's Army and the Northern Parts of the Kingdom (16 Char I c 2) (1640)

[177] An Act for the further releif of His Majesty'sArmy and the Northern Parts of the Kingdom (16 Char I c 4) (1641)

[178] Although there was also a poll tax levied on aliens and 'Popish recusant convicts' (Catholics who had not attended Church of England services and taken the sacrament in the previous twelve months), who had insufficient land or goods to be otherwise charged. See An act for the raising and levying of Moneys for the necessary defence and great affairs of the Kingdoms of England and Ireland and for the payment of debts undertaken by the Parliament (16 Char I c 32) (1642), s 3.

[179] although section 4 of the act did provide in respect of the charge to tax on land that each person should pay the 'proportionable part and portion of such sum or sums of money as are imposed charged and set upon each several counties according as the same shall be divided distributed taxed or set upon each several town hamlet paris or place where such person or persons is or shall be chargeable'.

[180] The act (ss 3 and 4) provided for very low thresholds of liability, with all persons with goods to the value of £3 or land with a yearly value of £1 being required to contribute, though it is not clear to what extent, if any, this resulted in individuals who were not normally charged being assessed to this subsidy.

[181] Subsidy Act 1642 (n 178), s 12. The provision for taxing residents who were temporarily abroad at the time of the assessment in the place where they had last been resident was also absent. Such persons would presumably have been assessed in the district where their land or goods were located, according to the provision for the taxation of non-residents (Subsidy Act 1523 (n 120), s 2 now contained in Subsidy Act 1642 (n 178), s 5.

included money and debts due to persons resident in England and Wales, with the individual to be assessed in 'the place of his residence or abode'.[182]

In 1641 a poll tax was levied on all persons 'inhabiting or residing within this Kingdom' according to their rank, from Duke downwards.[183] As with all previous poll taxes, from a jurisdictional perspective it was imposed solely on the basis of residence.

3.3(b)(ii) Direct taxation during the period of the Commonwealth and the Protectorate

Four different methods of raising revenue were employed during the period of the Commonwealth and the Protectorate. First, money was raised through various forms of loans known as propositions and subscriptions.[184] Secondly, levies were imposed from time to time in various counties on individuals who had not contributed, or had not adequately contributed, funds in support of the parliamentary forces. There was quite a variablity in the form and wording of the early examples of these levies, though from May 1643 onwards they became somewhat standardised.[185] Committees were named for each county, town and city to be assessed who then appointed assessors for each local district. These assessors were to 'inquire by the best means of any that shall remain or be within such respective divisions that have not contributed ... or shall not contribute or lend according to their abilities'. The assessment was made according to the individual's 'estates in land and goods' according to the amount the assessors 'think fit and reasonable', provided that lands were not to be rated above a fifth of their yearly revenue and goods, chattels and other personal estate not to be rated above a twentieth of its capital value. There was an exemption for anyone who was worth less than 'ten pounds, per annum, in Lands or other yearly profits' or 'one hundred pounds in goods, or personal estate' at the time of the assessment.[186] From

[182] Also of note was section 25, which provided that where any alien, whether denizen or not, assigned taxable goods or land to a child that had been born within the realm in order to avoid the double charge imposed on such aliens, then the child was to pay the double charge as if he or she were an alien.

[183] An Act for the speedy provision of money for disbanding the Armies and setling the peace of the two Kingdoms of England and Scotland (16 Char I c 9) (1641).

[184] See for example An Ordinance for raising Money in London (26 August 1642) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) 24-25); Jurkowski and others (n 43) li.

[185] See Jurkowski and others (n 43) li.

[186] See An Ordinance for the speedy raising and levying of money throughout the whole Kingdom of England, and dominion of Wales for the relief of the Commonwealth, by taxing such as have not at all contributed or lent, or not according to their Estates and Abilities (7 May 1643) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) vol I, 145-155).

both a jurisdictional and an assessment and collection perspective, this early form of assessment was imposed on English subjects and aliens solely on the basis of residence.

This second form of assessment was to form the basis for the third: the monthly assessment. Like its predecessor, it was assessed and collected by assessors appointed by the committees for each county, city and town, though from February 1645 they were to levy a fixed apportioned charge on the 'true Yearly Values of Lands, Rents, Annuities, Offices, and Hereditaments, and according to the true Value of Goods, Chattels, Debts, or other Estate, Real or Personal, within the said several Counties, Cities, Limits, or Places respectively'. This charge was later expressed as the 'pound rate', with the tax being levied equally on every pound (twenty shillings) of the yearly value of land and every twenty pounds in goods.[187] The assessment was similar to the subsidy of 1642 in that it was for a fixed sum apportioned among the various districts of each county, city and town, however it seems that the imposition of the pound rate had led to a much more equitable subdivision of the amounts due among the various districts than the traditional method of apportionment.[188] This provision served as 'the model for the vast majority of subsidies' levied not only during this period but also for the early part of the next period considered.[189]

A separate form of this type of assessment was the national monthly assessment for the parliamentary army known the tax 'for Sir Thomas Fairfax's army',[190] which once again levied a fixed charge to be apportioned on the 'Lands, Goods, Annuities, Rents, Offices, or other Estate, real or personal' within 'the said several Counties, Cities, limits or places respectively'.[191] Although the express

[187] See An Act For Raising Ninety thousand pounds per Mensem, For the Maintenance of the Forces raised by Authority of Parliament, for the Service of England and Ireland, For Six Months, from the 25th of March, 1649 to the 29th of September, 1649 (7 April 1649) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) vol II, 24-57) which defined the pound rate as: ''so much upon every twenty shillings Rent, or yearly value of Land and Real Estate, and so much upon Money, Stock, and other Personal Estate, by an equal Rule (wherein every twenty pounds in Money, Stock, or other Personal Estate, shall bear the like charge as shall be laid upon every twenty shillings yearly Rent, or yearly value of Land).

[188] See Dowell (n 8) vol ii, 5; Harris (n 2) 112-13.

[189] Jurkowski and others (n 43) lii.

[190] ibid.

[191] An Ordinance for Raising and maintaining of Forces for the defence of the Kingdom, under the Command of Sir Thomas Fairfax, Knight (17 February 1645) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) vol I, 614-626).

provision for the assessment of non-residents contained in the older subsidy acts was not included, tenants were assessed for houses and lands they occupied and were entitled to deduct any tax paid from the rent due to their landlords, which may have included English subjects that owned land but were resident, or temporarily resident, abroad.[192] A later version of the monthly assessment also provided that:

> all those persons who have left the Commonwealth, and removed themselves beyond the Seas to inhabit (except Merchants whose affairs do necessarily call them abroad, or such other persons as shall be by order of his highness and Council licensed therewith) shall be assessed a double proportion upon their Lands, Stocks and Chattles, of what others for their Lands, Stocks and Chattels of the like value shall be Assessed.[193]

This provision was aimed at exiled (Royalist) Cavaliers,[194] and, as there was a specific exclusion for merchants and others who were abroad on business, it would seem to have applied to predominantly, if not entirely, to English and Welsh subjects who had moved abroad but who had retained land in England or Wales, as it seems extremely unlikely that an alien or denizen would have permanently returned to the land of his or her birth during a period of civil war leaving taxable property behind, and any land owned by such a departing alien would have been forfeited. There is therefore no reason, or indeed direct evidence, to suggest that in practice the tax deviated jurisdictionally from the others imposed contemporaneously, or previously or subsequently, and so can be seen as having been levied on the basis of nationality and residence (for aliens) rather than on the basis of source.[195]

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[192] See the Ordinance of 17 February 1645 (n 191).

[193] Assessment upon England at the Rate of Sixty Thousands Pounds by the Month for three Months (1656) (Henry Scobell, *A Collection of Acts and Ordinances of General Use Made in the Parliament Begun and Held at Westminster the Third Day of November, Anno 1640 and Since* (Henry Hills and John Field 1658) Anno 1656, c 12, p 423). This act also provided for a partial assessment based on residence in the case of the inhabitants of London, who, if they had taxable goods in ward or parish other than the one in which they were resident, were to be taxable only in where they were resident.

[194] See BEV Sabine, *A History of Income Tax: The Development of Income Tax from Its Beginning in 1799 to the Present Day Related to the Social, Economic and Political History of the Period* (Routledge 2006) 14.

[195] Harris (n 2) 112 describes this monthly assessment as 'an essentially source based tax', and though this is certainly true from the perspective of its assessment and collection within England and Wales, the extent to which this was the case jurisdictionally is, in the author's view, doubtful.

The fourth type of measure was a weekly assessment to tax, first imposed in February 1643.[196] This was largely based on the subsidy for £400,000 granted to Charles I in 1642, with a fixed amount to be contributed each week by every county, city and town in Wales, and although there were several differences between the two pieces of legislation, from a jurisdictional perspective they were more or less identical.[197] The charge imposed on land and goods was virtually a word-for-word copy of sections 3 and 4 of the 1642 act, although there was no poll tax on aliens and recusants and no equivalent to the provision in section 5 of the 1642 act for the assessment of non-residents.

3.3(b)(iii) Direct taxation from the Restoration of 1660 to the Glorious Revolution of 1688

Five separate forms of direct taxation were imposed during the reign of Charles II.[198] First, there was a continuation of the imposition of monthly assessments in the form developed during the period of the Commonwealth and the Protectorate. From a jurisdictional perspective these acts were identical to their predecessors, being a levy of a fixed sum apportioned to various districts of each county, city and town according to the value of the land and goods in each district, assessed according to the pound rate. There was no specific provision for the taxation of non-residents,[199] and the tax was assessed and collected locally on the basis of source.[200]

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[196] See An Ordinance for the speedy raising and levying of Money for the maintenance of the Army Raised by the Parliament, And other great Affairs of the Commonwealth, by a Weekly Assessement upon the Cities of London and Westminster, and every County and City of the Kingdom of England, and Dominion of Wales (24 February 1643) (CH Firth and RS Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (HMSO 1911) vol I, 85-100). Assessments in this form were also made on a monthly basis. See An Ordinance For raising of Twenty thousand pounds a Moneth for the Relief of Ireland (16 February 1648) (CH Firth and RS Rait (eds), Acts and Ordinances of the Interregnum, 1642-1660 (HMSO 1911) vol I, 1072-1105).

[197] See Harris (n 2) 111.

[198] No direct taxation was levied during the reign of James II (1685-88). See Jurkowski and others (n 43) lxiii.

[199] Although as with the previous assessments, tenants were assessed for houses and lands they occupied and were entitled to deduct any tax paid from the rent due to their landlords.

[200] Though the act of 1661 did provide that individuals living in London who had their homes in one ward but had taxable goods in another ward were taxable only in where they were resident (An Act for granting unto the Kings Majesty twelve hundred and threescore thousand pounds to bee assessed and levied by an assessment of threescore and ten thousand pounds by the month for eighteene months (13 Char II, Session 2, c 3) (1661), s 12). Similar provisions were contained in the monthly assessments of the previous period. See n 193 in relation to the monthly assessment of 1656. Section 13 of the act of 1661 also provided that indivuals residing outside London but also being taxable within London should be taxed where they were resident.

The second form of direct taxation was the poll tax. Initially levied in 1660[201] in the same form as that imposed in 1641, the later impositions of 1667 and 1678 also included additional charges on 'every person and persons bodies politic and corporate guilds or fraternities within this Kingdom of England Dominion of Wales or Town of Berwicke upon Tweed'[202] having 'personal estate in such debts owing to them within the realm or without' or 'exercising any office place or public employment' or having 'any pension or yearely stipend or annuity by virtue of any gift or grant from His Majesty under His Great Seal or Privy Seal'.[203] The act of 1667 was the last directly assessed tax that expressly charged aliens at a higher rate than natural-born subjects.[204] The act of 1678 also imposed a charge on every person 'residing and inhabiting within the Kingdom' of twenty shillings for every hundred pounds of joint stock held in the East India Company or the Guinea Company, to be deducted at source from their next dividend.[205] The tax was assessed and collected locally on the basis of residence, and section 21 provided that 'if any person at the time of the Assessing shall be out of the realm such person shall be rated where such person was last abiding within the realm'.[206] Jurisdictionally, the tax was assessed on the basis of residence, and did specifically include debts owed abroad.

The third form of direct taxation was the hearth tax imposed in 1662. It was levied on all dwellings and lodgings 'within the Kingdom of England Dominion of Wales and Town of Berwick upon Tweed' for every fire hearth and stove.[207] Section 20 provided that the tax was to be 'charged only on the Occupier for the time being of such Hearth or Stove'. Clearly, the tax was imposed solely on the basis of residence both from a jurisdictional and from an assessment perspective.

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[201] An Act for the speedy provision of money for disbanding and paying off the forces of this Kingdom both by Land and Sea (12 Char II c 9) (1660).
[202] An Act for raising Moneys by a Poll, and otherwise towards the Maintenance of the present War (18 & 19 Char II c 1) (1667).
[203] ibid, ss 1, 2 and 3 (respectively).
[204] ibid, s 9. The act of 1678 did have a separate rate for alien merchants. See An Act for raising Money by a Poll and otherwise to enable His Majesty to enter into an actual War against the French King and for prohibiting several French Commodities (29 & 30 Char II c 1) (1678), s 10.
[205] An Act for raising Money by a Poll 1678 (n 204), s 9.
[206] A provision that presumably applied only to persons normally resident in England or Wales but temporarily overseas.
[207] An Act for establishing an additional Revenue upon His Majestie His Heires & Successors for the better support of His and theire Crown and Dignity (14 Char II c 10) (1662).

Fourthly, there was a grant of four subsidies in 1663 which were in substantially the same form as the act of 1641, and which from a jurisdictional perspective were identical.[208]

Finally, in 1671 there was a grant of a subsidy of a new and somewhat hybrid form, encompassing a charge on land and goods, similar to that in the monthly assessment form of taxatation, but also a charge on fees and wages of individuals holding public offices and of their clerks and servants similar to that in the later poll taxes of the period.[209] It was a directly assessed tax, rather than being a taxed for an apportioned sum, probably the first such in almost a hundred years, and it also included a charge on bankers having 'personal estates in debts owing to them or to any others in trust for them within the Realm or without or having any ready monies' and on interest on loans to the King.[210] The charge to tax on goods was levied on all 'persons bodies politic and corporate, guilds or fraternities within this Kingdom of England, Dominion of Wales', on their 'personal estate in goods, wares, merchandise, stock or other chattels'. It was to be assessed on the individual 'at such places where he or she with his or her family shall be resident at the time of the execution of this Act'.[211] The charge on land encompassed various forms of freehold interest as well as mines, parks, woods, fishings and various forms of profits from land and hereditaments 'situate, lying and being within the Kingdom of England, Dominion of Wales or Town of Berwicke upon Tweed'. It was to be assessed 'in the place where such messuages manors lands tenements hereditaments and premises respectively do lie'.[212] Persons holding a public office were to be assessed in the district where the office was executed and provision was also made for taxing persons liable for their ready monies or personal estate who were out of the realm at the time of the assessment 'in such county city or place where he was last abiding within the Realm'.[213] Jurisdictionally, the tax

[208] Itself based on the Tudor subsidy of 1523. Dowell (n 8) vol ii, 29-30 notes that the yield from this tax was low and it was therefore the last grant of a subsidy in the form first levied in the early 1500s. Presumably, the method of apportionment of the sum to be paid in each district under the monthly assessments had required a larger number of individuals to contribute, and when the older form of subsidy was imposed the assessors had reverted to the older list of 'subsidy men', yielding a lower amount of tax and leading to its demise.

[209] An Act for granting a Subsidy to his Majesty for Supply of his Extraordinary Occasions (22 & 23 Char II c 3) (1671).

[210] ibid, ss 2 and 3 respectively.

[211] ibid, ss 7 and 31 respectively.

[212] ibid, ss 9 and 31 respectively.

[213] ibid, s 31.

was levied on the basis of residence, and was also predominantly assessed and collected on this basis. The charge to land was limited to land in England and Wales, though banker's debts abroad were expressly included. No such express provision was made in the case of goods, and it is not clear whether the charge extended to goods situated abroad.

3.3(b)(iv) Direct taxation from 1688 to 1798

At least five separate forms of direct taxation were imposed during the reigns of William III and Mary. First, taxes in the form of the monthly assessments of the Commonwealth which were levied during the reign of Charles II continued to be levied during this period, with the last such tax in this form levied in 1691. Secondly, poll taxes in substantially the same form as that of the tax of 1678 were levied on a number of occasions, with the last such tax being levied in 1697.[214]

Thirdly, taxes, now referred to as 'aids', were levied in the form of the subsidy first imposed in 1671. The act of 1692 was jurisdictionally levied on the basis of residence, though it seems that it was assessed on a mixed basis of both residence and source. Although the charge on land was limited to landholdings in England and Wales, debts, goods and other personal estate located abroad was expressly charged.[215] As before, tenants were liable for the land they occupied and could deduct any tax paid from the rent due to their landlords; public office holders were assessed where the office was executed, owners of taxable goods and personal estates were assessed where they were they were resident; and land was assessed where it lay.[216] Where an

[214] An Act for granting to His Majesty an Aid by a Quarterly Poll for One Year (9 Will III c 38) (1697). It seems that this was due to a refusal by local commissioners to produce adequate assessments and 'widespread evasion by the professional classes and gentry'. See WR Ward, *The English Land Tax in the Eighteenth Century* (Oxford University Press 1953) 30.

[215] An Act for granting to Their Majesties an Aid of Four Shillings in the Pound for One yeare for carrying on a vigorous War against France (4 Will & Mar c 1) (1692), ss 1 and 2 charged every 'person and persons bodies politic and corporate guilds and fraternities within this Kingdom of England Dominion of Wales and Towne of Berwick upon Tweed' on any 'estate in ready monies or in any debts whatsoever owing to them within this realm or without' and on any 'estate in goods wares merchandise or other chattels or personal estate whatsoever within this realm or without'. It also charged 'every person and persons commissioner or commissioners having using or exercising any public office or employement of profit' and their agents, clerks and subordinates on all 'salaries gratuities bounty money reward fess or profits' therefrom. As in 1671, section 3 of the act of 1692 charged various forms of freehold interest in land including mines, parks, woods, fishings and various forms of profits from land and hereditaments which were 'situate lying and being happening or arising within the Kingdom of England Dominion of Wales and Town of Berwick upon Tweed'.

[216] ibid, ss 10, 11 and 12 respectively.

individual had taxable goods or personal estate in a county other than the one in which that individual was resident, the tax was to be levied where the goods were located, and if the owner of goods or personal estate was 'out of the realm' at the time of the assessment, the assessment was to be made at the 'county city or place where he was last abiding within the realm'.[217] This latter provision seemed only to apply to temporary non-residents, and did not apply to the charge to land or public offices and employments.

The tax was stated to be directly assessed rather than for an apportioned amount, though Dowell points out that the same Commissioners were appointed to collect the first tax of this type during the period in 1688 as had collected the apportioned monthly assessment that preceded it, and so the 'assessment was made, to considerable extent, on the old lines' of that tax.[218] In the years following 1692 as the tax was again imposed as a direct assessment 'the produce of the rate declined, as loose assessment and fraudulent returns sapped the foundation of the tax.'[219] From 1697 onwards the aid was imposed as a charge of a fixed amount apportioned among the counties, and further apportioned within them according to the 'judgments and discretions' of the Commissioners,[220] and from 1698 onwards it was apportioned according to the 'sums which were assessed on the same hundreds or divisions respectively by virtue of' the act of 1692.[221] It subsequently became known as the 'land tax', and was imposed in a substantially unchanged form, certainly from a jurisdictional perspective, annually from 1703 until 1798, and then perpetually until 1963 until it was abolished.[222]

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[217] ibid, ss 12 and 11 respectively, although the former provision did not apply where an individual was resident in one parish or ward in London and had 'goods wares or merchandise' in another parish or ward. In such a case, the assessment was to made in the parish or ward where the individual was resident only.

[218] Dowell (n 8) vol ii, 47.

[219] ibid 48.

[220] An Act for granting to His Majesty the sum of One Million four hundred eighty four thousand & fifteen Pounds one Shilling eleven Pence three Farthings for disbanding Forces paying Seamen and other Uses therein mentioned (9 Will III c 10) (1697), s 6.

[221] An Act for granting to His Majesty the Sum of One Million four hundred eighty four thousand and fifteen one Shilling eleven Pence three Farthings for disbanding the Army providing for the Navy and for other necessary Occasions (10 Will III c 9) (1698), s 6. JV Beckett, 'Land Tax or Excise: The Levying of Taxation in Seventeenth- and Eighteenth-Century England' (1985) 100 English Historical Review 285, 296 notes that at this point 'central government abandoned its efforts to levy a realistic income tax, and no further attempt was made until Pitt's innovations of 1799'.

[222] William Phillips, 'No Flowers, by Request' [1963] BTR 285 suggests that the making of the tax perpetual was as a result of erroneous copying of the statute from a previous one; a curious proposition

The fourth type of tax levied during this was period was similar to the hybrid poll taxes of 1667 and 1678, and which was confusingly also described as a 'land tax'.[223] It was a directly assessed tax which, in addition to levying a poll tax, also charged servants' wages, pensions paid out of the public revenue, salaries of various officers of the state and on the 'yearly income or profits' from the practice of various professions.[224] The act also imposed tax on various forms of goods and chattels including ready money or debts 'within this realm or without' belonging to persons within the realm; 'goods wares merchandise commodites manufactures or vendible stock whatsoever within this realm' belonging to any person within the realm 'exercising any trade mystery occupation or business of merchandising shopkeeping or other buying or selling by wholesale or by retail'; various forms of livestock owned by persons in possession of land; and on the various forms of landholding within the realm taxed in the aids and land tax already discussed in this section.[225]

No express territorial limitation was placed on the servants' wages, public pensions, salaries of officer of the state, income from professons or livestock subject to the tax, though it is not unreasonable to suggest that by their nature these were only likely to accrue to, or belong to, individuals resident in England or Wales. Further, the tax in relation to the wages and pensions was to be assessed where the individual was

considering the title of the act in question: The Land Tax Perpetuation Act 1798 (An Act for making perpetual, subject to Redemption and Purchase in the manner therein stated, the several Sums of Money now charged in Great Britain as a Land Tax for one Year, from the twenty fifth Day of March One thousand seven hundred and ninety eight 38 Geo III c 60) (title provided for in Short Titles Act 1896 (59 & 60 Vict c 14), sch 1). William Kennedy, *English Taxation 1640-1799: An Essay on Policy and Opinion* (G Bell & Sons 1913) 128 says that by this time the land tax had become something more in the nature of a rent charge than a tax. Ward (n 214) 7 points out that the tax 'soon fell almost entirely upon landed incomes' and so it became a land tax not just in name but in practice. However, as Peter Mathias and Patrick O'Brien, 'Taxation in Britain and France, 1715-1810: A Comparison of the Social and Economic Incidence of Taxes Collected for the Central Governments' (1976) 5 Journal of European Economic History 601 observe, 'a relatively small, and, on trend, declining, proportion of the public revenue of central government' derived from the land tax during the eighteenth century, and public revenue was raised increasingly through the assessed taxes and indirect taxation such as the excise and stamp duties. Harris (n 2) 404 fn 123 notes that the tax on personal estate was abolished in 1833 and the tax on offices and pensions in 1876.

[223] An Act for granting an Aid to His Majesty as well by a Land Tax as by several Subsidies and other Duties payable for One Year (8 & 9 Will III c 6) (1696).

[224] ibid, ss 2, 3, 4, and 5 respectively. The poll tax was levied on every person 'within this Kingdom of England Dominion of Wales and Town of Berwick upon Tweed'. The charge on servant's wages was not included in subsequent enactments of this form of legislation.

[225] ibid, ss 6, 7, 8 and 10 respectively. The charge on livestock and land was not included in subsequent enactments of this form of legislation.

resident; in relation to the salaries of public offices where the salary was payable and in relation to the professions where it exercised. The livestock was to be taxed where it was located.[226] Those items that might be located in England or Wales but belong to persons normally resident abroad, that is: debts, money and trading stock, were taxed solely on a residence basis, and were assessed where the individual was resident or where the trading stock was located.[227] It seems that although tax applied predominantly to sources of income and wealth in England and Wales, it did specifically apply to debts and ready money located abroad. Provision was made that if a taxpayer 'shall at the time of assessment be out of the realm such person shall be rated therefore in such county city or place where he was last abiding in this realm'.[228] This provision seems to have only applied to persons who were normally resident in England and Wales but were temporarily abroad, strengthening the argument that the tax was not intended to apply to non-residents. This form of tax was levied on just two further occasions, both in 1702.[229]

The final form of direct taxation to be considered during this period are what became known as the 'assessed taxes': taxes on the outward signs of wealth.[230] The first of these was the tax on inhabited dwelling houses within the Kindgom of England and Wales first imposed in 1695 for a period of seven years,[231] and which was continued in 1709[232] and further extended in 1747.[233] Further taxes followed on carriages, household plate chest, male and female servants, horses, sporting licences, hair powder, dogs, clocks and watches and armorial ensigns.[234] All of these taxes were

[226] ibid, s 25.
[227] ibid.
[228] ibid.
[229] An Act for granting an Aid to Her Majesty by diverse Subsidies and a Land Tax (1 Anne c 6) (1702) and An act for granting to Her Majesty several Subsidies for carrying on the War against France and Spain (1 Anne, Session 2, c 17) (1702).
[230] See Harris (n 2) 186.
[231] An Act for granting to His Majesty several Rates or Duties upon Houses for making good the Deficiency of the clipped Money (7 & 8 Will & Mar c 5) (1695).
[232] An Act for continuing Part of the Duties upon Coals, Culm and Cinders, and granting new Duties upon Houses being twenty Windows or more, to faise the Sum of fifteen hundred thousand Pounds, by way of a Lottery, for the Service of the year one thousand seven hundred and ten (8 Anne c 4) (1709). See Dowell (n 8) vol iii, 168-172; Arthur Hope-Jones, *Income Tax in the Napoleonic Wars* (Cambridge University Press 1939) 12.
[233] An Act for repealing the severall Rates and Duties upon Houses, Windows and Lights; and for granting to His majesty other rates and Duties upon Houses, Windows or Lights; and for raising the Sum of four millions four hundred thousand Pounds by Annuities, to be charged ont eh said Rates or Duties (20 Geo II c 3) (1747).
[234] See Dowell (n 8) vol iii, 195-285.

jurisdictionally levied solely on the basis of source on sources of wealth situate in England and Wales.[235]

3.4 Local taxation from the medieval period to 1798

As already outlined in chapter 2, local taxation was assessed according to two key principles. First, a form of the benefit theory, which held that everyone who received benefits financed by the local expenditure should be made to contribute in proportion to those benefits, and secondly, a requirement that these charges should be assessed according to the ability of the inhabitants in question. As regards the charges for the relief of the poor, the benefit theory would have operated somewhat differently than the other forms of expenditure funded by local charges since those paying the tax did not benefit directly from it, rather it was the members of their community, and thus the community as a whole, that benefited. With regard to measures of ability, in 1633 propositions which became known as the 'judges resolutions' drawn up by Sir Robert Heath CJ set out that, in relation to the charges for the relief of the poor, ability should be measured according to the value of land, but that there may be an additional charge according to an inhabitant's visible personal wealth.[236]

There were several cases of relevance in relation to local taxation during the period. In *Jeffrey v Kenshley and Foster*[237] the plaintiff objected to an assessment to a rate to repair the church in Hailsham on the grounds that he was not a parishioner there because, although he owned and farmed one hundred and thirty acres within the parish, his house was a few miles away in the parish of Chiddingley. The court held that although Jeffrey 'dwells in another town' he was 'an inhabitant and parishioner of Hailsham' because the lands there were in his 'proper possession and manurance'. The court pointed out that Jeffrey was entitled to attend the 'assemblies of the parishioners

[235] And, after 1707, in Scotland. See The Union with Scotland Act 1706 (An Act for an Union of the Two Kingdoms of England and Scotland 6 Anne c 11) and the Union with Scotland (Amendment) Act 1707 (An act for rendering the Union of the Two Kingdoms more entire and complete 6 Anne c 40) (titles provided for in Short Titles Act 1896 (59 & 60 Vict c 14), sch 1).

[236] See Edwin Cannan, *The History of Local Rates in England: In Relation to the Property Distribution of the Burden of Taxation* (2nd edn, PS King & Son 1912) 82. Cannan (ibid 95-96) also points out that later cases demonstrated that personal goods and stock in trade were also used as measures of wealth in the late eighteenth century.

[237] (1589) 5 Co Rep 64 b, 77 English Reports 153.

of Hailsham', and emphasised the pragmatic point that if Jeffrey were not charged for the repair of the church, no person would be charged for the land which he occupied in Hailsham and 'great inconvenience would ensue; for one who inhabits in the next town, may occupy the greatest part of the lands in another town ; and so churches in these days will come to ruin.'[238] Significantly, the court also held that if the lands had been occupied by a tenant farmer, Jeffrey would not have been chargeable for the lands in respect of his rent, as the tenant would be considered an inhabitant and parishioner and the receipt of rent would not make the landlord a parishioner.

Thus it seems that, for the purposes of local taxation, the terms 'inhabitant' and 'occupant' were more or less synonymous.[239] Although the court did point out that if Jeffrey were not charged for his lands in Hailsham no one would be charged for them, local taxation was seen as based on residence and not source, and the court expressly stated that 'the charge is on the person, and not on the land'. The case also seems to demonstrate that membership of a local community was not to be measured by any literal meaning of the terms 'parishioner, 'resident' or 'inhabitant', but on a broader conception that included both living in the locality and working the land there; with the court pointing out that a person was not a parishioner only in the 'place where he lies, sleeps, or eats'. The case was followed in a number of later decisions.[240]

The 1601 act for the relief of the poor provided that taxation was to be imposed on 'every inhabitant parson vicar and other, and of every occupier of lands houses ... coal mines or saleable underwoods' which sum was to be 'gathered out of the same parish according to the ability of the same parish'.[241] Cannan argues that there was a 'hopeless contradiction involved in the coupling together of the inhabitant and the non-

[238] ibid 156-57. The average size of a parish during the period was approximately one thousand acres, so Jeffrey's holding in Hailsham of one hundred and thirty acres would have been significant (see Margaret Clark, 'Northern Light? Parochial Life in a "Dark Corner" of Tudor England' in Katherine L French, Gary G Gibbs and Beat A Kümin, *The Parish in English Life, 1400-1600* (Manchester University Press 1997) 56, 56).

[239] This view was expressly stated by Lord Kenyon CJ in the later case of *R v The Directors and Guardians of Tunstead and Happing* (1790) 100 English Reports 712, 713.

[240] See for example *Paget v Crumpton* (1599) 78 English Reports 898; *Leigh v Chapman* (1685) 2 Saund 423 (where Hale LJ reached the same conclusion, though didn't actually cite the *Jeffrey* case in his decision); *Burton v Wileday* (1737) 95 English Reports 284; *Atkins v Davis* (1783) Cald 315.

[241] Poor Relief Act 1662 (An Act for the better Relief of the Poor of this Kingdom 14 Char II c 12), s 1 (title provided for in Short Titles Act 1896 (59 & 60 Vict c 14), sch 1).

resident occupier in a system of taxation according to ability'.[242] This contradiction was resolved in *Anthony Earby's Case*,[243] where the court stated that it had been 'resolved by all the judges of England upon a reference made to them and upon conference by them had together' that each inhabitant was to be assessed to the poor rate on the 'visible estate he hath in in the town where he doth dwell, and not for any other land which he hath in any other place or town'. This case also resolved any potential double taxation that might arise if an individual were living in one parish and an occupant of another by virtue of land farmed there, and was therefore subject to local taxation in both. This resolution was made on the basis of source: the individual would be taxed only on the visible wealth located in each parish, but not on any sources of wealth located elsewhere. The issue of double taxation as also addressed in *R v Clapp*, where Lord Kenyon CJ said that if an individual were 'doubly charged; in the parish in which he lives, in respect of his inhabitancy; in that in which he has lands' the individual could 'appeal to the sessions; and we must take it for granted that the justices will do what is right.'[244]

There is an interesting parallel between the connecting factors used in national taxation and local taxation. Nationally, an individual was liable to taxation if he or she was a subject of the monarch or was an alien that was resident in the realm, though it is not clear how residence was legally defined at this point, or whether there was any threshold period of physical presence beyond which an individual would be considered to be resident. As is discussed in section 3.5 below, locally an indigent individual was considered to be part of a particular community, and therefore the responsibility of that community, if the individual had been born there (akin to nationality) or if the individual had lived there for a period of three years, and later, one year (akin to residence).

Further, the *Jeffrey* case[245] demonstrated the danger of taking a definition of the term 'resident' or 'parishioner' literally and to be a measure of something in and

[242] Cannan (n 36) 76.
[243] (1633) 2 Bulst 354. Cannan (n 36) 84 notes that 'contrary as it appears to the plain intention of the Parliament of 1601, the decision of the judges met with general acceptance, and was never disturbed either by subsequent judicial deliverances or by legislation'.
[244] (1789) 100 English Reports 480.
[245] n 237.

of itself, rather than being merely a method of determining membership of a particular community. It also demonstrated that an individual could be a member of a community, and thereby taxable, even if he or she did not actually reside there, provided the individual had significant economic interests in the locality in question.

3.5 Residence measured by duration of physical presence in a place

One important feature of the taxation of alien merchants in medieval England had to do with the length of time they were entitled to remain in England within which to conduct their business. It seems that it had been customary to require alien merchants to leave the realm on pain of forfeiture of their goods within a set period, which was usually forty days,[246] though this rule was not always observed and was a regular source of complaint from native merchants and traders.[247] This forty-day rule seems to have been superseded by the provisions of *Carta Mercatoria* in 1303[248] and so it was reinstituted by parliament in 1327 following a petition from the citizens of London.[249]

In 1343 the exemption from taxation in Carta Mercatoria was reinterpreted as only applying where the alien merchants remained in the realm for fewer than forty days, and parliament decided that 'alien merchants who remain and dwell in the realm,

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[246] Joseph Chitty, *A Treatise on the Laws of Commerce and Manufactures and the Contracts Relating Thereto* (A Strahan 1820) 131, citing Lord Coke, suggests that this forty-day rule was ancient, dating back at least to the time of King Alfred (871-899), when it was 'forbidden that any alien merchant should make his haunt in England except at the four fairs, or sojourn in the land beyond forty days'. See also the discussion of the 'Regulations for the Lorraine Merchants' dating from first half of thirteenth century in Henry Thomas Riley (ed), *Liber Custumarum* (Longman, Green, Longman and Roberts 1860) xxxv-xxxviii; Beardwood (n 26) 57-58. This period of forty days appears to have varied somewhat during the medieval period, as is discussed further in this section. See for example Tim Unwin, *Wine and the Vine* (Routlege 1996) 190 who notes that Gascon wine merchants 'were limited to a stay in England of only forty days until 1280 when this period was extended to three months'; TH Lloyd, *England and the German Hanse 1157-1611: A Study of their Trade and Commercial Diplomacy* (Cambridge University Press 1991) 110 who notes the period being reduced from three months to forty days in 1411.

[247] See for example the writ of certiorari addressed to the Mayor and Sheriffs of London in *Calendar of Letter-Books of London* (n 26) Book C, 80. See also Lloyd, *Alien Merchants in England in the High Middle Ages* (n 44) 24.

[248] *English Historical Documents 1189-1327* (n 24) 515: 'Furthermore, that the aforesaid merchants may lodge at their will in the cities, boroughs and towns aforesaid, and tarry with their goods, at the pleasure of those to whom the inns or houses belong'.

[249] *Parliament Rolls of Medieval England* (n 41) vol ii, 9; vol ix, 119; vol ix, 128-29.

and take profits in the realm as or more fully than denizen merchants do, should aid and bear charges along with others of the realm during the time they dwell here, as is aforesaid'.[250] Commissions were issued later that year, such as the one to the Commissioners in London to 'assess upon all merchants and other strangers and aliens staying and trading in the city of London' their portion of all subsidies from the beginning of Edward III's reign in 1327 'having regard to the length of their stay in the city'[251] though it appears that little tax was actually collected.[252] In 1404 the period within which alien merchants were required to sell their merchandise was amended to a quarter of a year after their arrival within the realm.[253]

In 1440, at the time the first alien subsidy was being introduced, stringent controls were placed on merchant aliens' freedoms, though the period within which they had to conclude their business and leave the realm was extended to 8 months.[254] As already mentioned, in 1453 the alien subsidy was applied at a higher rate to alien merchants who were householders. The standard rate applied only to merchant aliens who were 'dwelling, abiding, repairing or returning' in the realm 'for a period of six weeks'.[255] In 1483 the alien subsidy applied at the higher rate to any alien merchant who was 'a householder or lodging in the same realm for the period of three months', with the standard rate applying to non-householders 'dwelling and abiding' in the realm for any period of time, but 'lodging in any place under your obedience with the said foreign merchants'.[256] The alien subsidy of 1487 was identical in this regard.[257]

In 1484 a statute required alien merchants of the 'nation of Italy such as Venetians, Genoese, Florentines, Apulians, Sicilians, Luccans, Catalans', among other things, to sell their merchandise within eight months of arrival in the realm,[258] although an act of the following year provided that all 'forfeitures, penalties, seizures and

[250] ibid vol ii, 137.
[251] *Calendar of the Fine Rolls* (n 42) vol v, 331.
[252] See Beardwood (n 26) 73-75.
[253] *Parliament Rolls of Medieval England* (n 41) vol iii, 543.
[254] *Parliament Rolls of Medieval England* (n 41) vol v, 24-25. Thrupp (n 48) 263 notes that 'Very few merchants appear on the rolls' for the 1440 subsidy, and that 'It seems to have been implicitly understood that the tax was not designed' for this group.
[255] *Parliament Rolls of Medieval England* (n 41) vol v, 230.
[256] ibid vol vi, 197.
[257] ibid vol vi, 401-02.
[258] ibid vol vi, 263.

actions' contained in the act of 1484 were to be 'revoked, void and annulled and of no strength against all manner of persons'.[259] This appeared to abolish the penalty for Italians not selling their merchandise within eight months, though not necessarily the requirement so to do.[260] In 1487 it was provided that the act of 1404, which required alien merchants, among other things, to sell their merchandise within a quarter of a year of their arrival within the realm, 'with everything included in it ... and every proviso made in it, shall be good and effectual and last forever'.[261]

Further restrictions on aliens were imposed during the reign of King Henry VIII, though it is not clear to what extent, if any, these rules were enforced, with many of the provisions against aliens later being relaxed under the reign of Queen Elizabeth I.[262] The majority of the direct taxes levied between 1500 and 1667 required aliens who were resident in England (and later, Wales) to pay at a rate that was double that imposed on natural-born subjects. However, there was no express provision linking this higher charge to any particular period of physical presence in England or Wales. Thus, it is unclear whether there was any minimum period of occupation required for an alien[263] to be considered to be resident within the realm for tax purposes.[264] It is notable however, that the act of 1593 provided that an individual was to be assessed in the district 'where he and his family were resident for the most part of the year next before the same presentment and taxation made' rather than in the district in which the individual was resident at the time of the making of the assessor's certificate as had previously been the case.[265]

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[259] ibid vol vi, 290.

[260] An Act Concerning Strangers (32 Hen VIII c 16) (1540), s 1 specifically refers to the act of 1484 as if it were still in force, and required all aliens made denizen to be 'bound and obedient by and unto' the act (and other names acts) and 'to all the contents of the same'.

[261] *Parliament Rolls of Medieval England* (n 41) vol vi, 403. The petition to the King was mainly concerned with the provision in the act of 1404 requiring alien merchants to spend the proceeds of selling their merchandise within the realm, though the requirement to sell goods within a quarter of a year was also mentioned, and the ordinance does appear to apply to every provision of the act.

[262] See for example Richard Plender, 'Protection of Immigrant and Racial Minorities: A Survey of British Legal History' (1971) 13 William and Mary Law Review 338, 353-61.

[263] It appears that subjects may have been liable to direct taxation whether resident or not.

[264] No published case of the period appears to raise, much less resolve, this issue. Of course residence for tax purposes may not have been measured by physical presence at all, and, considering that the taxes were assessed and collected locally, usually according to fixed quotas for each district, may have been based on other factors such as having a place of abode (eg a lease as opposed to a temporary lodging), or taxable moveble goods other than imported merchandise for sale (subject to customs duty) within a particular district.

[265] An Act for the grant of Three entire Subsidies and Six Fifteenths and Tenths, granted by the Temporality (35 Eliz c 13) (1593), s 12. For the previous provision, see An Act for the granting of Four

Measures of residence based on physical presence did exist for other purposes from at least as early as the sixteenth century. The early legislation regarding the poor contained a provision requiring beggars not able to work to return to the city, town or district 'where they were born, or else to the place where they last made their abode the space of three years' and not to beg outside of the relevant district on pain of punishment.[266] In a later act, provision was made that 'all justices of the peace, mayors, sherrifs, bailiffs and other officers of every city, borough, riding and franchise within the realm' were to make enquiry of 'all aged poor impotent and decayed persons born within their said divisions and limits or which were dwelling within threee years next before this present parliament' who 'live by alms or charity of the people that be or shall be abiding within the limits of their commissions and authorities' and make a register book of their names and to 'settle the same poor people for their habitations and abidings'.[267] It seems that the intention was that the responsibility for the support and maintenance of the destitute should fall on the other members of the communities of which they formed a part. For these purposes an individual was considered to be a member of a community in one of two circumstances: either the individual was born in the district in question, or the individual had resided in the district for a sufficient period of time; in this case, three years.

In 1662 an act provided that an individual coming to settle in a parish in a tenement with an annual value of less than £10 could be lawfully removed within forty days to the place where he or she was last legally settled either as a native, householder, sojourner, apprentice or servant for at least forty days.[268] Thus, an individual who resided or sojourned in a parish for forty days, or who was born there, or who worked

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Fifteenths and Tenths, and two entire Subsidies to our most gracous Sovereign Lady the Queen most Excellent Majesty (31 Eliz c 15) (1589), s 12.

[266] *Parliament Rolls of Medieval England* (n 41) vol vi, 548 (An Act against vagabonds and beggars (19 Henry VII c 12) (1503-4), s2). A similar provision was contained in An Act concerning punishment of Beggars and Vagabonds (22 Hen VIII c 12) (1530-31), s3; and in An Act for the Punishment of Vagabonds and for the Relief of the poor and impotent Persons (1 Ed VI c 3) (1547) s 9. An earlier act had provided that beggars who couldn't work were to go to the parish where they last dwelled or where they were best known or where they were born. See *Parliament Rolls of Medieval England* (n 41) vol vi, 508 (An Act against vagabonds and beggars (11 Henry VII c 2) (1495)).

[267] An Act for the punishment of Vagabonds and for Relief of the Poor and Impotent (14 Eliz c 5) (1572), s16.

[268] Poor Relief Act (n 241), s 1.

there as an apprentice or servant for at least forty days, was legally settled there. If that individual were to become destitute, his or her maintenance would be the responsibility of that parish, and if the individual was at that time in another parish, he or she was to be removed to the parish the individual was legally settled.

This appears to have set the threshold for membership of a community quite low, and considerably lower than that which had obtained previously. The reason for this may have been that the purpose of the act was, in part, to restrain the poor from settling 'themselves in those parishes where there is the best stock' (in effect, welfare shopping) and from burning and destroying woods so as to build cottages and settle on commons. The forty day rule may, therefore, have been set so as to encourage parish officials to act quickly and decisively to remove vagrants entering their parish, and to discourage the poor from moving to another parish in the first place.[269]

In 1691 it was provided that individuals could acquire a settlement in a parish without delivering a notice if they carried out a public office, were hired in service or under an apprenticeship or paid their share towards the public taxes or levies; but only if they did so for an entire year.[270] Thus it appears that for a person of modest means, physical presence of a year was required in order to be considered to have formed part of a community for the purposes of the poor laws, whereas for a person who could afford rent of £10 per year,[271] and who was therefore presumably much less likely to

[269] ibid. Section 2 provided that individuals could travel to another parish for work provided they had a certificate (which became known as a 'certificate of settlement') setting out that the individual had a dwelling house and was declared to be an inhabitant of the parish granting the certificate. In 1685 An Act for Reviving and Continuance of several Acts of Parliament therein mentioned (1 Jam II c 17) (1685), s 3 provided that the forty day period was only counted from the time of delivery of a notice in writing to the churchwardens or overseers of the poor of the parish setting out the individual's place of abode and number of family residing with him or her, and in 1691 An Act for the better Explanation and supplying the Defects of the former Laws for the Settlement of the Poor (3 & 4 Will & Mar c 11) (1691), s 2 provided that such notice had to be read in church. Only individuals who took a lease of a tenement worth at least £10 per annum, or who purchased a freehold, could not be removed within the forty day period. Although not expressly mentioned in the act, Lee CJ held in *R v Inhabitants of St Nyotts* (1739) Burr SC 132, 133 that an individual who owned a freehold in a parish and was resident in that parish for forty days thereby acquired a settlement there.

[270] An Act for the better Explanation and supplying the Defects of the former Laws for the Settlement of the Poor (3 & 4 Will & Mar c 11) (1691), ss 5-7.

[271] Gregory Clark, 'The Long March of History: Farm Laborers' Wages in England 1208-1850' (2007) 60 Economic History Review 97, 100 estimates the average farm labourer's wage from 1660 to 1669 in England to have been 10.9 (old) pence. Assuming three hundred workdays per year, this comes to a little under £14 per annum.

become indigent, forty days sufficed.[272] Unlike the *Jeffrey* case,[273] which took a broad conception of membership of a community, rather than focusing narrowly on the definition of a particular term (in that case, 'parishioner'), the decisions in cases appealing against orders for removal from parishes under the act of 1662 took a literal and strict interpretation of the meaning of 'settlement' and other terms in that legislation. Thus an alien who was married to an Englishwoman and who spent more than forty days in a parish did not gain a settlement because he had no settlement in any other parish to which he might have been removed (though there was no evidence of any actual attempt to remove him), [274] and a widow whose husband died after sixteen days of tenancy, but who stayed in possession and herself spent more than forty days in the parish did not gain a settlement as she was not the tenant for a full forty days.[275] Indeed, in the latter case Kenyon CJ observed, 'if we were to decide on the express words of the act of parliament, we should overturn ninety-nine cases out of a hundred that have been determined on this statute'. It therefore appears that, although the forty day rule was a measure of residence in a local community, membership of that community, which was measured by whether there was a *settlement*, required the additional elements of nationality and a strictly construed form of means test.

Finally, it is worth noting that under Scottish law, an individual was considered to be domiciled, and therefore subject to the jurisdiction of the courts, in Scotland only if he or she had been resident there for at least forty days.[276] Although it should be

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[272] Richard Burn, Joseph Chitty and Thomas Chitty, *The Justice of the Peace and Parish Officer, Volume 4: On the Poor Laws* (S Sweet 1831) 558 suggested that this was as a result of the 'favour with which the ownership of real property, as indicative of individual respectability, has always been regarded' and that 'the credit and confidence reposed in a man who has been trusted as tenant with the occupancy and temporary possession of a £10 a-year tenement, was sufficient to exonerate him from the condition of legal vagrancy'.

[273] (1589) 77 English Reports 153.

[274] *St Giles' v St Margaret's Westminster* (1715) 93 English Reports 31. Holt CJ said 'that he did not know that a foreigner had a right to be maintained in any place to which he came, but that they might let him starve'.

[275] *R v Inhabitants of South Lynn* (1794) 101 English Reports 370. See also *R v Inhabitants of Dilwyn* (1835) Burr SC 54 Lord Hardwicke CJ, which held that an individual who spent more than forty days in a parish under two different tenancies with the same landlord, each for more than £10 per year, did not gain a settlement as he had not spent the requisite forty days under one or other tenancy; *R v Topcroft* (1786) 2 Bott 210, which held that an individual who occupied a tenancy of more than £10 per year, but lived with his son in a neighbouring parish did not gain a settlement as he had not both occupied the tenancy and resided in the parish.

[276] See for example Henry Home Kames, *Historical Law-Tracts* (A. Millar 1758) 352-57. See also Sir Roger Hog of Harcarse, *Decisions of the Court of Session from 1681 to 1691* (G Hamilton and J Balfou

pointed out that Scottish law does not appear to have had a direct effect on the evolution of the jurisdictional basis of, or connecting factors used in, English or Irish taxation, it does demonstrate a contemporary view that residence for legal purposes was something which could be measured by physical presence in a location alone.

3.6 Summary and conclusions

Although the period of time examined in this chapter is a lengthy one during which several distinct forms of direct taxation were imposed, there was little, if any, change in the either the jurisdictional basis of the taxes or in the connecting factors used. The legislation rarely expressed any jurisdictional limits, and the connecting factors used were rarely stated and never defined. Where such matters were addressed, there was a distinct lack of consistency both in the language used and in the limits apparently imposed. However, examining the period in its entirety and considering the realities of land ownership, the taxation of aliens, the nature of the administration, assessment and collection of the taxes and the prevailing theories of allegiance and jurisdiction, there is no reason to suppose that the jurisdictional basis of the taxes varied from one imposition to another. A more cogent explanation is that these inconsistencies arose as a result of a general lack of importance of jurisdictional provisions during the period, at least in the international sense, and that they can be attributed to a lack of precision in the parliamentary drafting of the time.

The extent to which tax was imposed on foreign sources of wealth during the period is uncertain, though there is evidence of taxation of goods in transit and of debts located overseas. Although many of the statutes of the period imposing tax on land did not limit the charge to land situated in England (or Britain), there was no grant of direct taxation that specifically included land situated abroad, and there many reasons to suspect that it was never intended to tax such land. First, if a subject, or an alien made denizen, did own land in one of the dominions, such land would have been taxed there: the parliament of England (or Great Britain) did not have authority to impose tax on

1757) 125-26 where in a case in 1684, it was submitted that a Scottish sailor who had gone on a voyage to Holland and died before his return had, by reason of being forty days abroad, established his domicile in Holland.

land situated in another one of the monarch's territories.[277] Secondly, it is extremely unlikely that any English (or British) subject or denizen would have owned land in a foreign country, as in order to acquire such land they would, presumably, have to pledge allegiance to the monarch of that country and would thereby forfeit the right to own land in England (or Britain). Of course, an alien resident in England (or Britain) might own land in the country of which he or she was a native, though this would then raise the third issue: how local assessors could be aware of such ownership or be able to value it in order to impose direct taxation. Finally, there is no evidence in any source consulted by the present author of land situated abroad being taxed during this period.

During the entire period considered in this chapter, there is just one instance of tax expressly being imposed on individuals who were inhabiting 'beyond the seas'. As outlined in section 3.3(b)(ii), the provision in these monthly assessments that date from the end of the period of the Commonwealth[278] were aimed at exiled (Royalist) Cavaliers,[279] and applied to English and Welsh subjects who had moved abroad but who had retained land or taxable goods in England or Wales. All other direct taxation legislation during the period either omitted any reference to the residence of those taxed, or imposed tax on individuals within the realm or residing within the realm. There were administrative provisions for the taxation of subjects and aliens who were normally resident in England or Wales but who were temporarily abroad, and there is also evidence of the taxation of noblemen who were abroad in the service of the King (sometimes for prolonged periods) and of exemptions for some such persons, strongly suggesting that in the absence of such an exemption taxation would have been imposed. It therefore appears that the taxation of temporary non-residents was clearly intended.

The position regarding the taxation of permanent non-residents is not so certain, however to the extent that such taxation did take place it would not have

[277] Ireland had its own parliament which had the sole authority to grant subsidies and aids. See also Harris (n 2) 81-92; 141-48; 157-65; 196-268 for a detailed account of taxation in the American Colonies in the seventeenth and eighteenth centuries. See also John F Avery Jones, 'Taxing Foreign Income from Pitt to the Tax Law Rewrite—the Decline of the Remittance Basis' in John Tiley (ed) *Studies in the History of Tax Law* (Hart Publishing 2004) 15, 38, who observed that the land tax 'did not attempt to tax land abroad' as at that time this 'would have been a breach of sovereignty'.

[278] Assessment upon England at the Rate of Sixty Thousands Pounds by the Month for three Months (1656) (Scobell (n 193)).

[279] See BEV Sabine, *A History of Income Tax* (n 194) 14.

applied to non-resident aliens. An alien living abroad would have been unable to acquire land in England or Wales, or would have forfeited such land on returning to live abroad, and would have been extremely unlikely to have had the type of goods which were subject to direct taxation situate there, eg reaped crops, woolfells and hides and other produce of land, cattle, sheep, pigs and other animals, wagons, carts, ploughs and other agricultural implements, merchandise, household goods, jewellery, plate and other valuables. Further, there is no clear intention in any of the statutes of the period to tax aliens normally resident abroad, nor is there any evidence of such taxation actually being imposed in any of the sources consulted by the present author. Finally, with the exception of the period from the 1520s to the mid- to late 1500s and a period in the late 1600s, direct taxation was imposed according to a quota system and was apportioned among the various districts according to a set amount and levied and assessed on the 'subsidy men' and 'bearers' who were the people of means living in the locality who were adjudged to be taxable on the basis of their visible wealth. It therefore appears that, to the extent that direct taxation was imposed on non-residents, it applied to subjects and denizens who were temporarily abroad, and may, in a limited way, have applied to subjects normally resident abroad.

One of the contentions advanced in this work is that for the purposes of direct taxation in most countries, and in all of the OECD countries apart from Ireland, there are two distinct forms of connection: a long-term connection and a short-term (usually annual) connection. It is further argued that this distinction emerged as part of the evolution of direct taxation over a lengthy period of time, and that when Ireland abandoned this long-established tradition in 1994 it facilitated the creation of the tax exile problem, and that that abandonment has continuing implications for any solution to the problem.

As has been outlined in this chapter, taxation during the period considered was primarily territorial and the main connecting factor used was the residence of the individual in question, though nationality was also used to a limited extent, as subjects who owned land in Britain and who were abroad at the time of the assessment were taxed as a matter of practical reality, even if this was not formally expressed in the wording of the legislation itself. There is clearly a qualitative difference between nationality and alien status, and this difference can be viewed in terms of the strength

of connection of the individual to the realm. Nationality was a form of long-term connection to England which was acquired either at birth or, in the form of denization, through letters patent from the King which had to be petitioned and paid for. Aliens, on the other hand, had a shorter-term connection which was based on residence alone, and which could be broken by physically leaving the realm.[280]

It is also clear that nationals and resident aliens were the two groups who were subject to direct taxation during the period, and that, from the fourteenth century onwards society was seen as divided into these two distinct groups which had different rights and obligations as a matter of constitutional law. Tax was thus imposed to the full extent that was seen as being permissible under prevailing theories the allegiance and jurisdiction. However, viewing the period as a whole it cannot be argued that direct taxation was expressly imposed on the *basis* of nationality and of residence in the case of aliens. The distinction argued for between long-term and short-term connection for tax purposes is therefore not yet clearly in evidence in the taxation legislation of the period.

As a matter of local assessment, individuals during the period were to be taxed only in the district in which they were residing.[281] Although it is not clear how residence was defined during this period, and it seems that the terms inhabiting, dwelling and residing were used synonymously, in the case of individuals who may have had more than one place of residence in England or who were otherwise mobile within the country (if not internationally), the factors taken into account included the location of the individual's home, the location of the individual's spouse and children, and the place where the individual spent the most time.[282] These are measures that indicate a long-term connection to a particular district and which would later form the

[280] Of course, many aliens would in fact have spent considerable periods of time (some perhaps most of their lives) in England, and may have been unable to procure, or perhaps afford, denization. The fact remains that they could have severed their connection at any time by physically leaving England, and so had a different connection to it than subjects or denizens.

[281] As already mentioned in section 3.2(b)(ii), Schofield described this as a 'cardinal principle of Tudor direct assessment taxation' (Schofield (n 13) 76), and it was expressly provided for in several of grants of direct taxation during the period and in the commissions to collect them.

[282] See *Calendar of Letter-Books of London* (n 26) Book D, 285 and *Parliament Rolls of Medieval England* (n 41) vol iii, 90 and vol vi, 421 respectively.

basis of the legal meaning of the term 'resident' in the case law of the nineteenth and early twentieth centuries.[283]

Another contention advanced in this work is that the physical presence of an individual for more than a defined period of time in a particular year or tax period within a state is an inherently short-term measure of connection for direct taxation purposes, and that this is qualitatively different from long-term measures of connection. It is further argued that this form of measurement was originally applied only to aliens. There is clear evidence of the taxation of alien merchants who remained in England beyond the forty days permitted under the Carta Mercatoria, or the longer periods of time occasionally later provided for (six weeks, a quarter of a year, three months, eight months), and this charge was imposed on the basis of physical presence alone. It would be speculation to suggest that this rule was the direct antecedent of the six month rule that was first introduced in the income tax act of 1800,[284] however it does demonstrate that the use of physical presence as a measure of short-term connection for the purposes of direct taxation existed in the medieval period, and that it did not apply to English subjects. As regards local taxation, there is clear evidence in the legislation dealing with the maintenance of the poor later in the period that two forms of connections to a community existed: a long-term connection, based on having been born in the locality and a short-term connection, based on having been physically present in the locality for a defined period of time.

The prevailing theory of *justification* of taxation, the benefit theory of taxation, is generally supported by taxation as it existed during the period under consideration. Those receiving protection from the monarch, subjects and aliens resident in the realm, were those who were required to fund the provision of that protection, and those who were not protected by the monarch were not required to contribute. The membership theory of taxation advanced in chapter 2 is also supported by both national and local taxation as it existed during the period.

As already noted, the vast majority of the direct taxes assessed during the lengthy period considered here were not directly assessed but were apportioned among

[283] See chapter 4.
[284] See chapter 4.

each locality according to a fixed quota. As is outlined in section 3.3(b)(iii), these taxes were paid by a small number of 'subsidy men' and bearers in each district, with the majority of those living in that district not being assessed to taxation.[285] Of the smaller number of subsidies and aids which were directly assessed, virtually all contained an exemption for individuals with an interest in goods or land below a particular value, and it is clear from the subsidy rolls that only a small percentage of the population was assessed to and paid these taxes.[286] As a result, taxes were paid by a portion of society in return for the benefits provided to society as a whole. Equally, as outlined in section 3.4, local taxes during the period was levied in order to fund local expenses such as those for the maintenance of the poor, and these were imposed on individuals who did not themselves derive any direct benefit from the taxes paid. The benefit theory of taxation does not account for these features of direct taxation before 1799, though it is suggested that the membership theory of taxation advanced in this work does, as it argues that taxes are paid by members of society in order to fund benefits provided to that society as a whole, rather than to the individual contributor.

[285] See Dowell (n 8) vol I, 155. See also Seligman, *Essays in Taxation* (n 12) 47.

[286] A notable exception are the poll taxes of 1377- 1380 (see section 3.2(b)(i) above) which contained no exemptions and applied to every person resident in England, including the poor, and which led in part to the Peasant's Revolt of 1381. See Harris (n 2) 45-46.

CHAPTER 4

TAXATION FROM THE INTRODUCTION OF THE INCOME TAX TO MODERN TIMES

To boost the British economy, I'd tax all foreigners living abroad.

Terry Jones, *Monty Python's Flying Circus*, season 2 episode 15

4.1 Introduction

This chapter examines the jurisdictional provisions in relation to direct taxation from the introduction of income tax in Britain 1799 to modern times and the courts' interpretation of those provisions, and will in particular examine the introduction of the statutory definition of residence for tax purposes in Ireland in 1994. It will be argued that the act of 1799 was novel not just in its imposition of a comprehensive income tax, but also jurisdictionally in the way in which it differentiated between subjects who were ordinarily resident in Great Britain and those who were not, and in the introduction of the remittance basis of taxation for certain types of foreign income. It will further be argued that the introduction of the 'six month rule' in 1800 marked an evolution in short-term connecting factors for taxation, though there had been previous instances of physical presence being linked to the concept of residence and to the obligation to pay taxation. Where the act of 1800 was evolutionary the act of 1803 was revolutionary, however, as this appears to be the first time that tax was expressly levied on aliens resident abroad, and, it will be argued, this marks a jurisdictional shift from the imposition of tax based on personal sovereignty over British subjects to one based on territorial sovereignty over the property which is the source of the income being taxed, whether owned by subjects or not. These developments do not appear to have previously been examined in the context of the connecting factors used in taxation, and the significance of the change made in 1803 seems to have been largely unnoticed by both contemporary and modern commentators.

The chapter will also outline how there were few legislative changes to the jurisdictional basis of the direct taxes of any significance after 1803, so that by 1994 in Ireland the provisions imposing tax were ones that had been drafted in, and for, a very different era.[1] It will be argued that the jurisprudence during the period under examination interpreted the difference between the short-term connection of residence that was not for a temporary purpose, or was of six months in duration, and the longer-term connection of ordinary residence extremely narrowly, and interpreted the meaning of residence generally in an very broad way. It will further be argued that, for this and other reasons, it is difficult to extract any coherent principles from the decided cases, and that this is attributable, at least in part, to a lack of any coherent theory upon which those principles might be based. Difficulties in defining connection to the United Kingdom for tax purposes can also be seen in the legislative attempts to permit the remittance basis of taxation to continue for one group of individuals with a particular degree of connection to the United Kingdom and to deny it to others, and again it is argued that this is due in part to the undeveloped nature of theory in the area at the time.

This chapter will argue that the introduction of the statutory definition of 'resident' and 'ordinarily resident' in Ireland in the Finance Act 1994 was yet another revolution in the jurisdictional basis of direct taxation. This act defined residence solely in terms of physical presence in Ireland, and it will be contended that this is a connecting factor which traditionally had been only used for, and which is only appropriate for, defining the connection to a country of aliens, or of other individuals who would not otherwise be considered to be sufficiently connected for an obligation to pay taxes to arise; in other words, for individuals who would not otherwise be considered to be members of Irish society. It is argued that the legislative change was based almost entirely on a UK consultative document from 1988, a fact that does not appear to have been previously noted, and various theoretical deficiencies in the proposals put forward in that document are examined. Support is also found therein for the contention that physical presence is a connecting factor appropriate to

[1] In the early nineteenth century it took almost thirty-seven hours to travel from Dublin to London (seven and a half on the steam packet to Holyhead, and over twenty-nine hours by mail coach from there to London; see Jasper Mottershead, *The Traveller's Guide from London to Holyhead* (C Hulbert 1827) 1 and 50 respectively),

individuals with a short-term connection to a country only, as the proposals in the 1988 document were based on legislation designed to impose tax on aliens resident in the United States, with the vast majority of individuals in that country being subjected to income tax on the basis of much longer-term connection: their citizenship. It will be argued that the legislative amendment abandoned other long-standing forms of connection used for tax purposes, and that as a result the definition of 'resident' in Irish law is not an accurate measure of Irish society for tax purposes. It will further be argued that, while this legislative change did not cause the tax exile problem, it no doubt facilitated and contributed to it.

The changes brought about in 1994, and in particular their significance regarding the type of connecting factor used, again seems to have been largely unnoticed and academically unexamined, with such discussion as there was of the legislative changes largely being confined to the practical aspects of the legislation rather than theoretical ones. The final aspect of the legislative definition of residence in Irish tax law that is examined is the claim that it is in keeping with OECD norms and corresponds with international practice. This chapter will show that in fact, Ireland's approach is unique among the OECD member countries and relatively rare among other countries, a fact that does not previously appear to have been made by other commentators.

Finally, this chapter will also briefly examine the introduction of the statutory definition of residence in the United Kingdom in 2013 and notes that although it is based predominantly on physical presence, unlike the Irish definition it also utilises various other measures of long-term connection, such as having a home, a place of abode or family resident in the United Kingdom or working full-time there.

4.2 The introduction of the income tax (1799-1815)

As outlined in chapter 3, there were two main forms of direct taxation in the eighteenth century: the annually imposed land tax, which was a fixed charge apportioned according to a quota among the counties, cities and boroughs, and the assessed taxes on outward signs of material wealth such as carriages, plate, horses and

servants. Returns from the land tax declined significantly during the century, and for most of it the vast bulk of public revenue was raised through indirect taxation such as excise, stamp duties and customs.[2]

Although 'incessant campaigning for an income tax by men of recognised authority went on all through the eighteenth century, and even before',[3] there was 'entrenched opposition'[4] towards it. However, the British economy had undergone very considerable change during the eighteenth century,[5] and there were large numbers of individuals, and significant sources of wealth, which were largely untaxed.[6] A crisis

[2] Patrick K O'Brien, 'The Political Economy of British Taxation, 1660-1815' (1988) 41 Economic History Review 1, 14 states that the receipts from the land tax deteriorated, falling from 47 per cent of Exchequer revenues in the 1690s to just 21 per cent in the 1790s, which he attributes to the fact that 'the nominal values of real estate (assessed to tax) bore an increasingly unreal relationship to current market values for land, houses and other forms of property'. He notes (ibid 26) that it 'became far and away the most important source of taxation available to successive administrations'. ERA Seligman, *The Income Tax* (2nd edn, The Macmillan Company 1911) 60, states that in 1792 the land tax and assessed taxes accounted for £3.25 million out of a total revenue of £17.25 million (which is closer to 19 per cent, quite a bit lower than O'Brien's 21 per cent) and notes (ibid 57) that 'like that of most other countries, the English revenue system of the eighteenth century had come to consist almost exclusively of customs and excises' (See also Albert Farnsworth, *Addington: Author of the Modern Income Tax* (Stevens & Sons 1951) 45). JV Beckett, 'Land Tax or Excise: The Levying of Taxation in Seventeenth- and Eighteenth-Century England' (1985) 100 English Historical Review 285, 297 notes that the excise duties were first imposed during the period of the Commonwealth on a variety of items such as ale, beer, cider, perry, spirits, salt, soap, cloth, hats, starch, copper, iron and lead, but following the Restoration only the excise on liquor was initially continued, but between 1694 and 1698 new duties were imposed on salt, spices, malt, wine, spirits, tea, coffee, cocoa, tobacco, timber, coal, and various imports' (ibid 299). Although there was considerable public criticism of the land tax, according to O'Brien (ibid 19) it 'was never reformed into a more efficient and equitable instrument for raising revenue', predominantly because of opposition from 'social groups who escaped lightly, such as merchants and manufacturers' and from 'landowners from the north and west of the kingdom, whose estates were said to be grossly undervalued compared to estates located in the home counties'.

[3] William Phillips, 'The Origin of Income Tax' [1967] BTR 103, 115.

[4] O'Brien, 'The Political Economy of British Taxation, 1660-1815' (n 2) 21.

[5] Peter Harris, *Income Tax in Common Law Jurisdictions: From the Origins to 1820* (Cambridge University Press 2006) 386 notes several features of relevance, such as the establishment of the Bank of England, the securing of government borrowing in the form of annuities on taxation and the increasing market for such annuities, the expansion of trade with the Colonies and the increasing proportion of wealth accounted for by trade and the lucrative professions, and an increasing amount of personal property represented by intangibles such as shares, loans and government stock.

[6] In his Budget speech on the introduction of the income tax on 3 December 1799 (see section 4.2(a) below) Prime Minister and Chancellor of the Exchequer William Pitt (the younger) estimated that there was £107 million of assessable national income, which included foreign income remitted from abroad (£5 million), income from professions (£5 million) retail profits (£5 million), mortgages and annuities (£12 million), profits on capital employed in foreign commerce (£12 million) and profits on capital employed in domestic trade and industry (£28 million); the latter he described as 'a species of income which more than any other baffles a conjecture' (Great Britain, *The Parliamentary Register: Or History of the Proceedings and Debates of the House of Lords and Commons during the Third Session of the Eighteenth Parliament, Volume VII* (J Debrett 1799) 109. See also BEV Sabine, 'Great Budgets 1: Pitt's Budget of 1799' [1970] BTR 201, 204).

in Britain's public finances during the Napoleonic wars in the late 1790s,[7] together with the failure of an increase in the assessed taxes to raise the revenue required from the so-called 'Triple Assessment' of 1798,[8] finally led 'the political classes to accept a policy which translated into law their oft-proclaimed principle that Englishmen should contribute to the needs of the state in accordance with their abilities to pay'.[9] This was the first directly assessed tax in over a hundred years,[10] and was, with its successor act of 1803, to set the basis for the territorial limits of income tax and capital gains tax (CGT) in the United Kingdom and Ireland for almost the next two hundred.

4.2(a) Pitt's act of 1799

The tax legislation introduced by William Pitt (the younger) in 1799 (hereafter referred to as the 'act of 1799)[11] was unique in British direct taxation in many ways, not least of which is that it sought for the first time to introduce a comprehensive, directly assessed income tax.[12] The tax was also novel in that it contained a subtle, but

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[7] Harris (n 5) 384 notes that there was a collapse in the value of government stock, that the Bank of England suspended in specie payments, and that there was an imminent danger of a French invasion. For a detailed examination of the political and economic background to the tax see Seligman, *The Income Tax* (n 2) 57-78; Sabine, 'Great Budgets' (n 6).

[8] An Act for granting to His Majesty an Aid and Contribution for the Prosecution of the War (38 Geo III c 16) (1798). This act imposed a levy of between three and five times the amount of the assessed taxes levied in 1797, though individuals liable to the tax could opt instead to pay an income tax of a maximum of ten per cent of their incomes from land, professions, trades and vocations, annuities, interest and other payments, if this gave rise to a lower assessment. There was an exemption from the income tax element for those declaring incomes below £60 per annum, and Phillips, 'The Origin of Income Tax' (n 3) 124 notes that 'it was remarkable how large a number of persons declared their income as "just under" £60'. The act raised only £2 million of the expected £4.5 million (ibid). See also Seligman, *The Income Tax* (n 2) 71

[9] O'Brien, 'The Political Economy of British Taxation, 1660-1815' (n 2) 1.

[10] See chapter 3.

[11] An Act to repeal the Duties imposed by an Act, made in the last Session of Parliament, for granting an Aid and Contribution for the Prosecution of the War; and to make more effectual Provision for the like Purpose, by granting certain Duties upon Income, in lieu of the said Duties ('Act of 1799') (39 Geo III c 13).

[12] Phillips, 'The Origin of Income Tax' (n 3) 113-114 notes that there were earlier attempts to impose tax on salaries and wages (see chapter 3), but that none of them 'bore more than a faint resemblance to income tax as we now know it'. Seligman, *The Income Tax* (n 2) 51 describes the *dixième* (tenth) introduced by Louis XIV in 1710 which was 'supposed to be a tax of ten per cent on all incomes throughout the country' from real estate, salaries, securities and businesses, but which 'soon became a farce' (ibid 52) with individuals and classes securing exemption, an administrative system which 'largely existed on paper' and 'in the few places where the tax was actually assessed, even in part, on businesses, it was levied not on individuals but on groups of business men' and 'what was originally a percentage tax became an apportioned tax' (ibid 52).

important, change in the jurisdictional basis of the tax which does not appear to have been appreciated by either contemporary or modern commentators.[13]

Section 2 of the act of 1799 imposed the charge to tax on

> 'all the income arising from property in Great Britain belonging to any of His Majesty's subjects, although not resident in Great Britain',

and on

> 'all income of every person residing in Great Britain ... whether such income as aforesaid shall arise from lands, tenements or hereditaments, wheresoever the same shall be situate, in Great Britain or elsewhere, or from any kind of personal property, or other property whatever, or from any profession, office, stipend, pension, employment, trade or vocation'

At first glance, this appears to impose tax on the same basis as previous directly assessed taxes in Britain:[14] by levying it on subjects, whether resident or not, and on resident aliens, and Harris correctly observes that taxation based on residence and source 'goes back a long way' but that the rules in section 2 are 'probably the clearest of any direct tax law to this date'.[15] However, sections 8 and 10 of the act must also be considered to develop a full picture of the jurisdictional scope of the tax.

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[13] In fact, most writers have either simply outlined the contents of the relevant jurisdictional provisions (eg Great Britain, *Observations etc Upon the Act for Taxing Income in which the Principles and Provisions of the Act are Fully Considered* (Bunney & Gold 1799); Stephen Dowell, *A History of Taxation and Taxes in England from the Earliest Times to the Present Day* (Frank Cass & Co 1965) vol ii, 225), or have ignored this aspect of the legislation completely (eg Seligman, *The Income Tax* (n 2) 78-82; BEV Sabine, *A History of Income Tax: The Development of Income Tax from Its Beginning in 1799 to the Present Day Related to the Social, Economic and Political History of the Period* (first published 1966, Routledge 2006) 26-30). The exception is Harris (n 5), though even he appears to have missed the significance of the changes, as is discussed in the paragraphs that follow.

[14] See chapter 3.

[15] Harris (n 5) 415. However, he does comment that it is interesting that the charge on income arising from property in Great Britain 'does not seem to cover non-resident aliens' (ibid), though as been argued in chapter 3, there was no direct tax prior to this point that had been expressly levied on non-resident aliens, and none that were likely to have been intended to be so levied, and no evidence of any attempt to tax aliens not resident in England (or Britain).

Section 10 of the act provided that any subject 'whose ordinary residence shall have been in Great Britain, and who shall have departed from Great Britain, and gone into any parts beyond the seas, for the purpose only of occasional residence' was to be deemed to be 'a person chargeable in respect of his or her income, as a person actually residing in Great Britain'. Such an individual would therefore have been liable both on income arising in Great Britain and on income from abroad. The legislation of earlier periods had often made provision for the taxation of individuals who were abroad at the time of the assessment,[16] and this section seems to be based largely on those provisions. However, the earlier provisions were administrative and provided that absentees were to be assessed on their land and goods in England (and Wales) in the place of their last residence or where the land or goods were located. Section 10 of the act of 1799 was a specific jurisdictional provision which deemed absentees who were ordinarily resident to be chargeable as if they were still resident, that is, on their sources of income arising in Great Britain *and* on their foreign income.[17]

This distinction between 'ordinary residence' and residence ('actually residing in Great Britain') was novel and had not featured in previous legislation. Although neither term was defined, it seems that being physically abroad at the time of the assessment may have been sufficient for an individual to be considered not to be 'actually residing in Great Britain', however to cease to be ordinarily resident this presence overseas had to be for a purpose other than of only 'occasional residence'. Thus, connection to Great Britain for tax purposes seems to have been based both on an objective factor (the individual's physical presence abroad) and a subjective one (the purpose of that residence abroad).

[16] See for example An Act of Subsidy (14&15 Hen VIII c 16) (1523), ss 2 and 6; An Act for raising Money by a Poll and otherwise to enable His Majesty to enter into an actual War against the French King and for prohibiting several French Commodities (29 & 30 Char II c 1) (1678), s 21; An Act for granting to Their Majesties an Aid of Four Shillings in the Pound for One year for carrying on a vigorous War against France (4 Will & Mar c 1) (1692), s 11; An Act for granting an Aid to His Majesty as well by a Land Tax as by several Subsidies and other Duties payable for One Year (8 & 9 Will III c 6) (1696), s 25.

[17] Act of 1799 (n 11), s 73 contained the relevant administrative provisions, setting out that individuals were to be assessed in the parish or place of their residence, and if abroad at the time of the assessment in the 'parish or place where he or she was last ordinarily resident, or abiding within this realm' and if not known 'where he or she shall have any property' or where his or her agent was desirous of being assessed.

What does not appear to have been previously remarked on, is that, between them, sections 2 and 10 of the act of 1799 combined to levy income tax on the basis of three distinct types of connection to Great Britain.[18] First, individuals who were resident in Great Britain, whether they were British subjects or aliens, were subject to tax on both their domestic and foreign income (ie on a 'worldwide basis').[19] Secondly, non-resident subjects whose ordinary residence was in Great Britain were also taxed on a worldwide basis; and finally, subjects who were neither resident nor ordinarily resident in Great Britain, were taxed on income arising from property in Great Britain (ie on a source basis only).

This distinction between non-resident subjects who were ordinarily resident in Great Britain and those who were not was entirely new in British direct taxation, though it is perhaps not a surprising one. As mentioned in chapter 3, in earlier periods when directly assessed taxation had been imposed, the law of England (and Wales) was based firmly on the *jus soli* (right of the soil), and an individual was considered to be a subject if he or she was born within England (or Wales) or any of its dominions.[20] Tax was imposed almost exclusively on land and movables,[21] with land situated outside England and Wales not being subjected to English taxation. The vast majority of subjects spent their entire lives in the country of their birth, and those owning sufficient land or wealth to be subject to taxation normally only travelled abroad for specific and temporary purposes such as trade or war, or to serve as ambassadors or otherwise in the service of the monarch.[22] There had been some significant changes during the hundred years since taxation had last been directly imposed in Britain. First, a series of legislative provisions known collectively as the British Subjects Acts 1708 to 1772[23] had provided that children whose fathers were natural born subjects but who were born outside of the 'ligeance of the Crown of

[18] Disappointingly, Harris (n 5) 416 does no more than comment that 'persons ordinarily resident in Great Britain but currently overseas for occasional residence were to be treated as residents'.
[19] Though, as is outlined a little later in this section, not all types of foreign income were taxable.
[20] There was a limited provision for the children of ambassadors who were born overseas while their father was in the service of the monarch to be deemed natural born subjects. See chapter 2.
[21] Taxes were also levied by way of poll, and, occasionally, on salaries and profits from public employments and on servants' wages, though these would only have been levied on individuals who were resident in England (or Wales) or, possibly, those who were temporarily abroad in the service of the monarch (see chapter 3).
[22] See chapter 3.
[23] The collective title is provided for in the Short Titles Act 1896 (59 & 60 Vict c 14), sch 2.

England, or of Great Britain' were to be natural-born subjects from the time of their birth.[24] Secondly, through colonisation, there had been a very considerable expansion in number of British Dominions.[25] As a result, for perhaps the first time in its history, there were now large numbers of British subjects who lived permanently outside Great Britain, and who, perhaps, had even been born overseas.[26] These subjects could not be considered to have the same degree of connection to Great Britain as those who had been born and lived there all of their lives. Subjects who were resident in Great Britain, or who were ordinarily resident there but who were temporarily abroad, were unquestionably members of British society, and so bore an obligation to contribute towards the country's public finances. Subjects who were ordinarily resident abroad, and who already paid taxes in the colony, dominion or country in which they lived,[27] were arguably not members of British society to the same degree. Sections 2 and 10 of the act of 1799 appear to give legislative recognition to this fact by providing that subjects ordinarily resident abroad should only be taxed on income arising from property in Great Britain, but not on their foreign income.

Section 8 of the act provided that person who was actually 'in Great Britain for some temporary purpose only, and not with any view or intent of establishing his or her residence therein' was not to be liable under the act 'as a person actually residing in Great Britain'. Again, it seems that residence ('actually residing in Great Britain')

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[24] JM Ross, 'English Nationality Law: *Soli* or *Sanguinis*?' in CH Alexandrowicz, *Studies in the History of the Law of Nations* (Martinus Nijhoff 1972) 1, 16 notes that the 'principle of *jus sanguinis*' was not applied to the full, and 'did not extend the inheritance of nationality beyond the second generation'. See also Clive Parry, *British Nationality Law and the History of Naturalisation* (Giuffrè 1954) 72-84; Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland* (Stevens 1957) vol I, 72-77.

[25] By 1800 these now included Ireland and Gibraltar in Europe; Anguila, Antigua, the Bahamas, Barbados, Belize, Bermuda, British Guiana, the British Virgin Islands, The Cayman Islands, Dominica, Jamaica, St Kitts, St Lucia, St Vincent and the Grenadines, Surinam, Trinidad and The Turks and Caicos Islands in the West Indies; Quebec, Ontario, New Brunswick, Newfoundland and Nova Scotia in what is now Canada; the Cape Colony, the Gold Coast and Senegal in Africa; and India, Malaya and New South Wales (which included most of the Eastern half of Australia, Tasmania and New Zealand). See TO Lloyd, *The British Empire 1558-1983* (Oxford University Press 1996). The British Empire at this point covered 1.5 million square miles and had a population of over 20 million (see LCA Knowles, *The Economic Development of the British Overseas Empire* (George Routledge & Sons 1924) 102), fewer than 16 million of whom lived in Great Britain or Ireland (see JR McCulloch, *A Descriptive and Statistical Account of the British Empire* (3rd edn, W Clowes and Sons 1847) 448).

[26] Ross (n 24) 16 notes that the 'eighteenth century was a period of increasing generosity in the grant of nationality *jure sanguinis*, but during the nineteenth century the view gained ground that there were too many British subjects living in foreign countries and maintaining no strong connection with the United Kingdom'.

[27] See Harris (n 5) for an excellent analysis of taxation in the British colonies up to 1820.

was based on the objective factor of physical presence, but that if the individual did not also have the necessary subjective intent to establish residence (that is, to intend to be in Great Britain for other than a temporary purpose) he or she would not be taxed as a resident.[28] The section went on to provide that such non-residents who were temporarily in Great Britain were to be liable to the Triple Assessment of 1798, as if it were still in force. Since non-resident (and non-ordinarily resident) British subjects were subject to income tax on income from sources in Great Britain under section 2 of the act of 1799, it seems that this provision must have been primarily aimed at aliens who were temporarily present in Great Britain and who, if they were not taxed as residents, would have had no liability under the 1799 act at all.[29] Section 8 was entirely novel and does not appear to have been based on any prior provision of UK direct taxation legislation.

There was also an expansion in the charge to tax on foreign assets. Schedule A of the act contained rules for the computation of income and was divided into four parts, with the first three parts further subdivided into eighteen cases. The third part dealt with 'income arising out of Great Britain', with the seventeenth case covering income from foreign possessions and the eighteenth case 'money arising from foreign securities'.[30] Avery Jones notes that these two categories of foreign income were a 'separate type of income unrelated to the categories of domestic income, such as trading profits, interest etc',[31] and that at the time 'most foreign trade was with the

[28] It should be noted that, with the possibly sole exception of views expressed by Shand L in *Lloyd v Sulley* (1884) 2 Tax Cases 37, 44, it has generally been held that this provision is not a charging provision (ie it does not impose tax on those who are in Great Britain for more than a temporary purpose and not intending to establish residence there, or, in later versions of the provision, for more six months) but rather it is intended to be an exemption (ie that a person who is otherwise resident should not be considered resident if he or she is only in Great Britain for a temporary purpose and without intending to establish residence there, or, in later versions of the provision, for fewer than six months). See sections 4.2(c) and 4.3(b) below.

[29] Act of 1799 (n 11), s 9 provided that where an individual who was temporarily resident was charged under both acts (ie where the individual was a British subject who was not resident but was liable under the 1799 act on income from property in Great Britain), then the Commissioners would allow such deduction as they deemed just and proper on proof of a double charge.

[30] Act of 1799 (n 11), sch A, pt I, and first fourteen cases, dealt with incomes from land. Sch A pt II comprised the fifteenth case which covered 'income from any trade, profession, office, pension, stipend, employment, or vocation', and the sixteenth case which dealt with income from 'annuities, interest of money, rent charge, or other payments of the like nature'. Sch A pt IV was a 'catch-all' category covering 'income not falling under any of the foregoing rules'.

[31] John F Avery Jones, 'Taxing Foreign Income from Pitt to the Tax Law Rewrite—the Decline of the Remittance Basis' in John Tiley (ed) *Studies in the History of Tax Law* (Hart Publishing 2004) 15, 16.

colonies' so 'the typical foreign possession of the time was immovable property, perhaps a plantation'.[32]

Individuals were assessed to tax on their income from foreign possessions on the 'remittance basis', that is on the 'full amount of the annual net income received in Great Britain'[33] rather than on the amount actually earned in the year.[34] This was yet another novel provision, and one that is still found in modern legislation, albeit in modified form.[35] Interest on foreign securities was charged on an 'arising' basis rather than on the remittance basis, ie on the 'annual income of such securities' whether received in Great Britain or not.[36] Certain foreign movables and foreign debts had been taxed in earlier legislation,[37] and this appears to have been mirrored in the taxation of interest on foreign mortgages and bills of exchange in the eighteenth case of the 1799 act. However, foreign land, however, was not previously subjected to direct taxation

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[32] ibid 17 and 23. In an explanation of the act published in the same year (Great Britain, *Observations etc Upon the Act for Taxing Income* (n 13) 22), it was stated that the seventeenth case 'principally relates to property in the West Indies or Ireland, many large proprietors of which are continual residents in Great Britain'. Harris (n 5) 417 fn 163 points out that in Pitt's Budget speech of 3 December 1798 he stated that the eighteenth case was targeted at mortgages 'of estates in the West Indies'. Of course foreign property in other colonies was also intended to be taxed. For example the act of 1799 (n 11), s 102 made provision for the assessment of income from property imported into Great Britain from any of the British plantations in America at the place of importation by Commercial Commissioners, and made a similar provision in respect of income received in Great Britain from such property which had not been imported.

[33] Act of 1799 (n 11), sch A, pt III.

[34] Avery Jones, 'Taxing Foreign Income from Pitt to the Tax Law Rewrite ...' (n 31) 17 notes that 'the dearth of any markets abroad coupled with rules requiring important colonial produce to be shipped to England in the first place' meant that the produce of foreign estates was necessarily remitted to England for sale, and that even where the produce was sold abroad 'the system of payment necessarily by bills of exchange, rather than, as now, moving money through the banking system, meant that foreign income would be remitted.' On this point he also later (23) cites Great Britain, *A Guide to the Property Act 46 Geo III* (2nd edn, Joyce Gold 1807), a contemporary explanation of the act of 1803 (An Act for granting to His Majesty, until the sixth day of May next after the Ratification of a Definitive Treaty of Peace, a Contribution on the Profits arising from Property, Professions, Trades, and Offices ('the act of 1803') (43 Geo III c 122) (1803)), which was in this regard identical. This act is discussed in section 4.2(c) below.

[35] Though now it only applies to individuals who are not domiciled in Ireland. See Taxes Consolidation Act (TCA) 1997, ss 71(2) and (3), in relation to income tax, and s 29(4) in relation to capital gains tax (CGT). The UK rules (which also only apply to individuals who are not domiciled in the UK) are contained in Income Tax Act 2007, pt 14 ch 1A and Taxation of Chargeable Gains Act 1992, s 12.

[36] Act of 1799 (n 11), sch A, pt III. Avery Jones, 'Taxing Foreign Income from Pitt to the Tax Law Rewrite ...' (n 31) 20 points out that 'securities' were not 'securities issued by a company as we think of them today because there were then few foreign companies' but referred to mortgage debts and bills of exchange, again citing Great Britain, *A Guide to the Property Act 46 Geo III* (n 34).

[37] See for example An Act of Subsidy (14 &15 Hen VIII c 16) (1523), s 2; An Act for raising Moneys by a Poll, and otherwise towards the Maintenance of the present War (18 & 19 Char II c 1) (1667), s 1; An Act for granting a Subsidy to his Majesty for Supply of his Extraordinary Occasions (22 & 23 Char II c 3) (1671), s 2; An Act for granting to Their Majesties an Aid of Four Shillings in the Pound for One year for carrying on a vigorous War against France (4 Will & Mar c 1) (1692), s 2.

in Great Britain.[38] The act of 1799 did not alter this; rather it imposed a new charge on the produce of foreign land, or on the proceeds of the sale of such produce, when it was physically brought into Great Britain.[39]

In summary, it appears that the act of 1799 utilised three forms of connection to Great Britain upon which the obligation to pay tax was based, depending on whether the individual was *resident* (for subjects and aliens), *ordinarily resident* (for subjects only) or *not ordinarily resident* (for subjects only); non-resident aliens (as had always been the case) were not subject to the tax. Neither residence nor ordinary residence was defined, though it appeared to contain both a subjective and an objective element. Aliens and subjects who were not ordinarily resident in Great Britain could break their connection with the country by simply ceasing to reside there. For subjects who ordinarily resided in Great Britain, they also had to demonstrate that they had gone abroad for more than just occasional residence there. The implication being that occasional residence abroad *was* enough to sever the ties of residence.

4.2(b) Pitt's amendment act of 1800

The act of 1799 was amended by legislation in 1800 (hereafter referred to as the 'act of 1800')[40], which introduced a significant change to the jurisdictional basis of the tax, which will be referred to in this work as the 'six month rule'. Section 19 of the act of 1800 provided that the provisions 'which exempt from the duties thereby granted persons being in Great Britain for some temporary purpose only, and not with any view or intent of establishing their residence therein' were not to extend 'to any person who shall have continually resided in Great Britain for the space of six calendar

[38] See chapter 3.

[39] Harris (n 5) 414 notes that in an official proposal for the reintroduction of the Triple Assessment, with significant amendments, dated 6 September 1798, there were three cases devoted to the taxation of foreign income, with the third being 'income from capital employed in foreign trade'. Harris argues that Pitt's speeches subsequent to the passing of the 1799 act make it clear that the omission of this case did not indicate an intention to exempt income from a foreign trade. This matter was addressed in Addington's income tax act ('the act of 1803' (n 34)), s 84 of which provided that the tax was to be imposed on income from trades whether carried on 'in Great Britain or elsewhere'. This act is discussed in section 4.2(c) below. Avery Jones, 'Taxing Foreign Income from Pitt to the Tax Law Rewrite ...' (n 31) 26 notes that it was not until 1889 that it was determined that a trade controlled from abroad constituted a foreign possession, with income from it being taxed in Britain on the remittance basis.

[40] An Act for the better ascertaining and collecting the Duties granted by several Acts passed in the last session of Parliament relating to the Duties on Income, and to explain and amend the said Acts ('Act of 1800') (39 & 40 Geo III c 49) (1800).

months prior to the time required for the delivery of his or her statement of income'. Such individuals were to be 'chargeable to the said duties on income in the manner directed by the said recited acts, as a person actually residing in Great Britain, whether such person shall be a subject of His Majesty or not'.

Thus an individual who was in Great Britain for a temporary purpose and who did not intend to establish his or her residence there, was nevertheless deemed to be resident for tax purposes if he or she was present there for six months of the tax year. This was the first time that residence was defined in a statute in terms of physical presence in Britain, though there had been previous occasions where tax was imposed on aliens who were physically present for a defined period.[41] The six month rule has remained part of the tax code since 1800,[42] and in Ireland's case now effectively forms the entire basis of the statutory test of residence.[43]

Section 19 of the act of 1800 expressly provided that the six month rule was to apply whether the individual in question 'shall be a subject of His Majesty or not'. As already noted in section 4.2(a) above, subjects who were ordinarily resident in Great Britain were subject to the income tax as if they were resident, whether they were physically present in the country during the year or not;[44] so the six month rule was clearly not intended to apply to this group. The rule can therefore only have been intended to apply to two groups of individuals: aliens who were not (otherwise considered) resident in Great Britain, and subjects who were not ordinarily resident and not (otherwise considered) resident in Great Britain.[45] These are individuals who would, apart from their physical presence in Great Britain, either not have been subject to the income tax at all (ie aliens), or would have been charged only on their income

[41] See for example chapter 3, which discusses the alien subsidy of 1453 (Chris Given-Wilson (ed), *The Parliament Rolls of Medieval England* (Scholarly Digital Editions 2005) vol v, 230) which was imposed on merchant aliens who were 'dwelling, abiding, repairing or returning' in the realm 'for a period of six weeks'. See also chapter 3 for a discussion of measures of residence for other purposes based on physical presence in a locality.

[42] The current version of six month rule in the UK is contained in Finance Act 2013, sch 45 para 7.

[43] See section 4.4 below.

[44] Act of 1799 (n 11), s 10.

[45] The amending provision does not appear to have done away with the subjective element of the test in the Act of 1799 (n 11),, s 8, but rather clarified that an individual who was present in Great Britain for more than six months in a particular year was to be treated as resident regardless of whether the individual had the 'intent of establishing his or her residence therein' or not. This view is supported by the act of 1803 (n 34)), s 85 which contains the six month rule and the subjective tests of the Act of 1799 (n 11), s 8 as separate tests. See section 4.2(c) below.

arising from property in Great Britain ie (non-ordinarily resident subjects). The six month rule, it is submitted, was therefore a measure which was aimed at those who otherwise did not have a sufficiently close connection to Great Britain for an obligation to pay tax to arise. This point will be returned to in section 4.4, when the introduction of Ireland's statutory definition of residence is considered.

It is not clear how the period of six months was chosen, and this aspect of the act appears not to have been debated or discussed during its passage through parliament.[46] Presumably, since the tax was imposed on the income earned in a particular year, it was felt that if an individual was present for more than half of that year, he or she should be liable to contribute.[47]

4.2(c) Addington's act of 1803

Addington replaced Pitt as prime minister in 1801 and repealed the income tax in 1802,[48] but following renewed hostilities with the French, reimposed it, in amended form, in 1803 (hereafter referred to as the 'act of 1803').[49] This act was based on Pitt's Act of 1799, but was structured differently and contained many significant amendments, of which one jurisdictional change is particularly important. The act imposed tax on income under five different schedules, A to E; a format that is still

[46] The report of the debate of the Committee State of the bill in the House of Commons on 26 May 1800 runs to eleven pages but makes no mention of the clause in question, referring only to the fact that 'the other clauses were then gone through, and the House being resumed, the bill was ordered to be reported tomorrow'. See Great Britain, *The Parliamentary Register: Or History of the Proceedings and Debates of the House of Lords and Commons during the Fourth Session of the Eighteenth Parliament, Volume XII* (J Debrett 1800) 15-26. There is no mention of the debate in William Cobbett (ed), *The Parliamentary History of England from the Earliest Period to the Year 1803* (TC Hansard 1819) vol 35.

[47] The charge was on the individual's income for the full year. However, the Act for the better ascertaining and collecting the Duties 1800 (n 40), s 23 provided that where 'any person whose ordinary residence shall have been out of Great Britain' was chargeable under the Act of 1799 (n 11) 'by reason of temporary residence therein' but departed before the end of the year, the charge was to be for the income of the full year, unless a notice of the time of departure was delivered to the clerk of the Commissioners. The rule provided an objective test for determining liability to income tax that did not rely on the intention of the individual, and so would have obviated the need for any enquiry into that intention by the Commissioners, though this does not necessarily suggest that this practical advantage was the motivation behind the introduction of the rule itself.

[48] An Act for repealing the Duties on Income; for the effectual Collection of Arrears of the said Duties, and accounting for the same; and for charging the Annuities specifically charged thereon upon the Consolidated Fund of Great Britain (42 Geo III c 42) (1802). See Dowell, *A History of Taxation and Taxes in England* (n 13) 230.

[49] Act of 1803 (n 34).

used in Ireland today in the Taxes Consolidation Act 1997.[50] Unlike the other Schedules, Schedule D[51] contained specific jurisdictional limitations. It imposed tax on the

> annual profits or gains arising or accruing to any person or persons residing in Great Britain, from any kind of property whatever, whether situate in Great Britain or elsewhere, or from any profession, trade, or vocation, whether the same shall respectively be carried on in Great Britain or elsewhere

and on the

[50] TCA 1997, ss 17-19 (It should be noted that schedules A and B were abolished in Ireland by Finance Act 1969, and the charge to tax on income from the rent of land is now contained in schedule D case V (TCA 1997, s 18(2) and ss 96-106A)). Schedules A and B charged land situate in Great Britain (Act of 1803 (n 34), s 31), but did not contain any jurisdictional limit as to the persons liable, and so the charge seems to have applied equally to residents and non-residents. However, as outlined in chapter 3, aliens could not own freehold or leasehold interests in land in Great Britain before 1870, and would have forfeited any interest acquired on leaving the realm for anything other than a temporary purpose, so it seems likely that any non-residents subject to the tax on land would have been British subjects, as was the case under the Act of 1799 (n 11). Schedule C imposed tax on profits arising from annuities and dividends payable out of any public revenue (Act of 1803 (n 34), s 66). Section 71 specifically provided that the charge on profits from annuities and dividends payable out of the public revenue under Schedule C did not extend to 'any person not being a subject of His Majesty, and not being resident in Great Britain during such time as the same shall continue the property of such person', and so again only non-resident subjects would have been liable. Stephen Dowell, *The Acts Relating to the Income Tax: With Complete Notes, Cross References, Summaries of Statutory Provisions, Decisions and Sections On Crown Law and Procedure Affecting the Revenue* (John Edwin Piper ed, 6th edn, Butterworth 1908) lii suggests that this was to prevent investors from selling their British loan stock and reinvesting elsewhere, as a tax imposed in 1693 on shares in the East India Company and Hudson's Bay Company had had 'the effect of a caution to the public creditor'. This exemption from tax for non-residents on interest on government borrowings is still to be found in the Irish tax code today. Schedule E charged every 'public office or employment of profit' and every 'annuity, pension, or stipend, payable by His Majesty, or out of the public revenue of Great Britain except annuities before charged to the duties contained in Schedule C' (Act of 1803 (n 34), s 175). Schedule E again did not contain any jurisdictional limitation as to the persons chargeable, though the description of the offices and employments 'within Great Britain' that were chargeable which is contained in the third rule of section 175 (offices of the Houses of Parliament, the courts and civil or local government, military and naval offices, offices of public institutions, foundations and corporations etc) were very unlikely to have been held by aliens ordinarily resident abroad.

[51] Schedule D was subdivided into six cases. Case I charged profits or gains of any trade or manufacture, and the second rule specifically provided that it applied whether the trade or manufacture was carried on in Great Britain or elsewhere. Case II charged profits, gains and emoluments of professions, employments or vocations and Case III charged property of uncertain annual value (such as mines, canals and docks). Case IV was the equivalent of the Act of 1799 (n 11), sch A pt III, Case XVIII and charged 'interest arising from securities in Ireland, or in the British plantations in America, or in any other of His Majesty's Dominions out of Great Britain, and foreign securities'. Unlike the 1799 act, the charge was now levied on the remittance basis. Case V was the equivalent of the Act of 1799 (n 11), sch A pt III, Case XVII and charged income from 'possessions in Ireland, or in the British Plantations in America, or in any other of His Majesty's Dominions out of Great Britain, and foreign possessions', and was, as before, assessed on the remittance basis. Finally, Case VI charged the annual profits or gains not falling under any of the other rules and not charged under any of the other Schedules.

> the annual profits or gains arising or accruing to any person or persons whatever, whether subjects of His Majesty or not, although not resident within Great Britain, from any property whatever in Great Britain, or any profession, trade, employment, or vocation, exercised in Great Britain

other than property or profits chargeable under schedules A, B or C or employments chargeable under Schedule E.

While the charge to tax on residents was imposed on the same the jurisdictional basis as that contained in the act of 1799,[52] the charge imposed on non-residents was revolutionary for two reasons. First, this was the first time that British direct taxation had been expressly imposed on non-resident aliens.[53]. Secondly, this marked a shift from jurisdiction based on personal sovereignty over subjects, arising from the natural allegiance owed by them, to jurisdiction based on territorial sovereignty, not over the recipient of the income, who if he or she were a non-resident alien would not be within the territorial jurisdiction and would owe no allegiance to Britain, but over the property from which the income was derived, which was within the territory of Great Britain.[54]

While much has been written about other important innovations in the act of 1803, such as developments in the deduction of tax at source,[55] this shift in jurisdictional basis appears to have gone unnoticed,[56] both in contemporary and

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[52] Individuals who were resident were now specifically subject to the tax on income from trades carried on abroad. As mentioned in n 39 above, Harris (n 5) 414 suggests that Pitt had not intended to exempt the profits of trades carried on abroad from the 1799 Act. Avery Jones, 'Taxing Foreign Income from Pitt to the Tax Law Rewrite ...' (n 31) 27 notes that it was not until 1889 that it was settled that a trade controlled abroad was taxable as a foreign possession (see *Colquhoun v Brooks* (1889) 14 AC 493 (HL) (Macnaghten L)).

[53] The use of the words 'whether subjects of His Majesty or not' strongly suggests that in the absence of any limiting words it would have been assumed that only non-resident subjects would have been subject to the charge. As argued in chapter 3, although such limitation was frequently absent from direct taxation legislation in earlier historical periods, the charge was only ever imposed on land (which could not have been owned by a non-resident alien), and there is no evidence of any prior intention to tax aliens living abroad.

[54] For a discussion of theories of allegiance and jurisdiction during the period (and before) see chapter 2.

[55] See for example Farnswoth (n 2); Piroska Soos, *The Origins of Taxation at Source in England* (IBFD 1997).

[56] This might to some extent be explained by the fact that the number of aliens who had property in Great Britain, or exercised a profession, trade, employment or vocation there, but who were present for fewer than six months in the year and who did not intend to establish their residence there (see Act of

modern discussions of the act.[57] The reports of the debates on the legislation contain no mention of any such change, although curiously, when asked about why 'foreigners were excepted from the tax on funded property' Addington replied that:

> he wished foreigners to be excepted because they were not chargeable with any other tax. The principle on which British subjects were taxed in this respect was, because they were liable to all other taxes, and it was his object at present to tax all British property in as equal a degree as possible. Foreigners were not represented in that House, but placed a confidence in the honour and justice of the nation, and therefore he thought foreigners were well entitled to the exemption from this tax and to receive their dividend without any diminution whatsoever.[58]

This comment is difficult to reconcile with the legislation itself, which clearly and expressly did impose tax on foreigners, though they were exempt on interest and annuities payable out of public revenue. A contemporary explanation of the act published in the same year did no more than point out the jurisdictional basis of the charge to tax without discussing it,[59] and most modern commentators have done little

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1803 (n 34), s 86 which is discussed later in this section) may have been relatively small; perhaps applying only to alien merchants plying their trade in Great Britain. Also, as Patrick K O'Brien, 'British Incomes and Property in the Early Nineteenth Century' (1959) 12 Economic History Review 255, 267 points out, only a small percentage of the population (15 per cent) were liable to income tax at all. As a result, the extension of jurisdiction to this small additional group may not have appeared to be of great significance. Finally, as noted in chapter 3, the question of the jurisdictional basis of the taxes imposed in earlier historical periods has attracted almost no academic comment in its own right.

[57] Reuven S Avi-Yonah, 'International Tax as International Law' (2004) 57 Tax Law Review 483, 485 does point out that such a change in the jurisdictional basis of taxation has taken place, saying that instead of taxing on the basis of citizenship, 'every country in the world (including the United States) has adopted a definition of nationality for tax purposes that is much broader than how nationality commonly is understood. That definition is residence ...' and that this 'definition is a remarkable expansion of the concept of nationality'; though he does not discuss when this might have taken place. See also Reuven S Avi-Yonah, Nicola Sartori and Omri Marian, *Global Perspectives on Income Taxation Law* (Oxford University Press 2011) 157. Edward A Zelinsky, 'Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile' (2010) 95 Iowa Law Review 1289, 1291, arguing the case in favour of taxation based on citizenship puts the matter the other way around, stating that an 'individual's citizenship is an administrable, if sometimes overly broad, proxy for his domicile, his permanent home'.

[58] Editorial, 'Parliamentary Intelligence' *The Times* (London, 15 June 1803). This reply is not to be found in Cobbett, *The Parliamentary History of England* (n 46), which Farnswoth (n 2) 51 says was a result of 'the accidental exclusion of the reporters from the public gallery of the House of Commons, an exclusion which was apparently so resented that those reporting the subsequent debates of that Session for *The Parliamentary History* were most sparse in their accounts'.

[59] Great Britain, *Exposition of the Act for a Contribution on Property, Professions, Trades, And Offices* (I Gold 1803).

else.[60] Even Farnsworth, who devoted an entire work to the subject of Addington's role in the development of the income tax, made no mention at all of this development of the tax jurisdictionally.[61]

The reason for this change in jurisdictional basis is not readily apparent. There does not seem to have been any contemporaneous judicial decision or academic writing that indicated a change in theory, policy or practice regarding fiscal jurisdiction, or even jurisdiction generally.[62] Indeed, according to the theories of allegiance and jurisdiction as they had been espoused at the time and previously,[63] there does not appear to be any reason that a tax could not have been imposed on property, or on income from property, situated in Great Britain in the previous two hundred years. It seems very unlikely that the change was unintended, as the change in wording from the 1799 act appears quite marked, and because it seems that Addington was said to have 'a profound knowledge of taxation history',[64] and so presumably would have been aware of the significance of the change that was being made.

One possible explanation for the change in jurisdictional basis may be that it was a logical development considering the changes that had been made by the act of 1799. As mentioned in section 4.2(a) above, that act imposed a charge to tax on British subjects who were not ordinarily resident in Great Britain, and many of those

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[60] See for example Seligman, *The Income Tax* (n 2) 89-101; Arthur Hope-Jones, *Income Tax in the Napoleonic Wars* (Cambridge University Press 1939) 21; Dowell, *A History of Taxation and Taxes in England* (n 13) 99-102; Sabine, *A History of Income Tax* (n 13) 34-37; Sabine, 'Great Budgets' (n 6).

[61] Farnswoth (n 2). In fact, Farnsworth (ibid 56) quotes Addington's comments in the House of Commons about the non-taxation of foreigners mentioned in n 58 above and just two pages later sets out the jurisdictional basis of the charge in section 2 of the act, including the provision for the taxation of 'any person or persons whatever, whether subjects of His Majesty or not, although not resident within Great Britain, from any property whatever in Great Britain', with no comment as to the inherent contradiction. Even Harris (n 5) 433, virtually the only academic writer who has examined the evolution of connecting factors in taxation, makes no comment other than to say that in 'Schedule D these rules largely followed the general rules for the 1799 income tax law. However, non-resident aliens were now clearly covered by the source-based tax'.

[62] At least, none that the present author has been able to discover, though John W Salmond, 'Citizenship and Allegiance – Part I' (1901) 17 Law Quarterly Review 270, 271 suggests that this is part of an ongoing historical process, stating that '[v]iewing the matter historically, we may say that citizenship is a legal conception the importance of which is continuously diminishing. The consistent tendency of legal development is to minimize the peculiar rights and liabilities of subjects, and to make residence rather than citizenship the essential and sufficient title of state-membership'.

[63] See chapter 2.

[64] Sabine, *A History of Income Tax* (n 13) 37. Farnswoth (n 2) x, also described Addington as having an 'unusual knowledge of the historical development of taxation' in Great Britain.

individuals may have had little connection to the country, other than that they derived income from property located there, or from a profession, trade, employment, or vocation exercised there. If individuals with such a limited connection to Great Britain were being taxed on their sources of income there, perhaps it was felt that non-resident aliens, whose connection may have been qualitatively no different, and who also derived income from Great Britain, should also be called upon to contribute.

Whether this was the motivation behind the change or not, it was certainly its effect as regards the taxation of income from sources in Great Britain. However, one important difference in treatment between aliens and subjects subsisted in the act of 1803. Section 85 of the act of 1803 was a copy of section 10 of act of 1799,[65] and provided that subjects who were ordinarily resident in Great Britain but who were abroad for the purpose of only occasional residence, were to be deemed to be resident for the purposes of the act. Thus the act of 1803 continued to impose tax based on three forms of connection to Great Britain, but subject to the jurisdictional change noted in the preceding paragraphs. Liability to the income tax now depended on whether the individual was *resident* (for subjects and aliens), *ordinarily resident* (for subjects only) or *not resident* (for subjects, who also had to be not ordinarily resident; and for aliens).

Section 86 of the act of 1803 was an amalgamation of section 8 of the act of 1799 and the amendment contained in section 19 of the act of 1800, and applied to any person who was actually 'in Great Britain for some temporary purpose only, and not with any view or intent of establishing his or her residence therein, *and* who shall not actually have resided in Great Britain for the period of six successive calendar months' (emphasis added).[66] Under the act of 1799, such an individual was deemed not to be liable 'as a person actually residing in Great Britain'; in other words, he or she was to be treated as being non-resident.[67] Section 85 of the act of 1803 however, provided

[65] See section 4.2(a) above.

[66] This confirms that the six month rule was in addition to the test that already existed in Act of 1799 (n 11), s 8, and there were two ways that an individual with a short-term connection to Great Britain might be considered resident for tax purposes: First, if the individual was in Great Britain with the intention of establishing residence there, then he or she would be resident for the purposes of the act regardless of the time physically spent in the country. Secondly, if the individual was in the country for six successive calendar months, he or she would be deemed to be resident in Great Britain regardless of any intention to establish residence there. See n 45 above for a discussion on this point.

[67] Act of 1799 (n 11), s 8.

that such an individual was not to be charged as a resident 'in respect of the profits or gains received from or out of any possessions in Ireland, or any foreign possessions, or from securities in Ireland, or foreign securities'. In other words, such an individual was not *necessarily* deemed not to be resident; instead he or she was exempt from tax on certain types of income. Although the provision was phrased 'in the language of exemption',[68] one would have thought it was clear that the intention was that such an individual was only to be subject to income tax on his or her British sources of income, and not on foreign income. However, the 'exemption' did not include income from a trade or vocation carried on abroad,[69] nor did it include 'interest arising from securities ... in the British Plantations in America, or in any other of His Majesty's Dominions out of Great Britain' (Schedule D Case IV) or 'possessions in ... in the British Plantations in America, or in any other of His Majesty's Dominions out of Great Britain', which were neither securities or possessions in Ireland nor foreign securities or possessions as specified in section 86 of the act of 1803. This may have been unintentional,[70] and in 1805 the provision was amended so as to include all income taxable under Schedule D Cases IV and V, though there was no such amendment regarding income from foreign trades.[71] As Shand L pointed out some eighty years later, if the provision was intended to be 'an exempting clause only the result would be that a person coming for a temporary purpose only, and residing therein as described, would remain liable for income tax upon profits upon a trade or vocation',[72] and it is difficult to understand why this would be the case. Nevertheless, as

[68] *Lloyd v Sulley* (n 28) 44 (Shand L). See also section 4.3(b) below.

[69] Act of 1803 (n 34), s 84, Schedule D Case I, rule 2 included within the charge under that case 'every art, mystery, adventure or concern' carried on 'in Great Britain or elsewhere', and so income was taxed under Case I and not under Cases IV or V.

[70] Great Britain, *Exposition of the Act for a Contribution on Property, Professions, Trades, and Offices* (I Gold 1803) 29 states that the intention was that such individuals not be chargeable in respect of their profits arising under Cases IV and V, not part only of those profits.

[71] An Act for granting to His Majesty additional Duties in Great Britain, on the Amount of Assessments to be charged on the Profits arising from Property, Professions, Trades and Offices (45 Geo III c 15) (1805), s 95), which provided that individuals in Britain for fewer than six months and with no intention of establishing their residence there was not liable in respect of 'profits or gains received from or out of any possessions in Ireland, *or any other of her majesty's dominions*, or any foreign possessions, or from securities in Ireland, *or any other of her majesty's dominions* or foreign securities ...' (emphasis added). It may not have been appreciated that income from a foreign trade was not income from a 'foreign possession', and so was taxable under Schedule D Case I and was not included within the provisions of this section.

[72] *Lloyd v Sulley* (n 28) 44 (Shand L). See also section 4.3(b) below

Olowofoyeku points out, 'Lord Shand is a lone voice' with 'most of the authorities assume that the rule is an exempting clause'.[73]

Section 85 of the act of 1803 went on to provide that individuals who were present for the requisite six months were chargeable from the beginning of the year or from the date of their arrival, if this was after the beginning of the tax year.[74] Income tax was reimposed in 1805[75] and again in 1806[76], and continued until 1815 when it lapsed and was not renewed at the end of the Napoleonic Wars.[77] There were no further developments in the jurisdictional basis of the tax during this time.[78]

4.2(d) Summary and conclusions

The four years from 1799 to 1803 saw a revolution in the jurisdictional basis of direct taxation in Britain, with the introduction of the new concept of ordinary residence, with tax imposed on non-resident aliens for the first time, with residence being defined in terms both of objective physical presence for a set period with the introduction of the six month rule, and being defined in terms of a combination of objective physical presence which is not temporary and an intention to establish residence. Sources of wealth located within Great Britain were no longer subject to direct taxation through the assertion of personal jurisdiction over their owners, but

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[73] Abimbola A Olowofoyeku, 'Where is My Home? Reflections on the Law of Residence' [2003] British Tax Review 306, 313. Olowofoyeku argues that Shand L's view 'is the logically correct view from the viewpoint of the central theme' of residence in reality being a measure of where an individual has his or her home (ibid).

[74] Act of 1803 (n 34), s 87 further provided that any individual who claimed the exemption in section 86 and departed from Great Britain but who, having claimed the exemption, returned before the following fifth of April (ie, before the end of the tax year) was to be chargeable as a resident for the entire year. Act of 1803 (n 34), s 98 provided an exemption for Irish politicians and soldiers who were in Britain to attend parliament or under orders; they were to be taxed as non-residents (ie on their British sourced income only).

[75] An Act for granting to His Majesty additional Duties in Great Britain, on the Amount of Assessments to be charged on the Profits arising from Property, Professions, Trades and Offices (45 Geo III c 15) (1805).

[76] An Act for granting to His Majesty, during the present War, and until the Sixth day of April next after the Ratification of a Definitive Treaty of Peace, further additional Rates and Duties in Great Britain on the Rates and Duties on Profits arising from Property Professions Trades and Offices; and for repealing an Act passed in the Forty-fifth Year of His present Majesty, for repealing certain Parts of an Act made in the Forty-third Year of His Present Majesty, for granting a Contribution on the Profits arising from Property Professions Trades and Offices, and to consolidate and render more effectual the Provisions for collecting the said Duties (46 Geo III c 65) (1806), hereafter referred to as the 'act of 1806'.

[77] See Harris (n 5) 435.

[78] Apart from the technical change mentioned in n 71 above.

rather through the assertion of territorial jurisdiction over the source itself; thus taxation based on residence and source in its modern form was born. This revolution is perhaps unsurprising considering the significant changes to the British economy and to the legal definition of nationality and increasing number of British subjects born abroad who had little connection to the country.

A clear distinction was drawn between individuals who had a long-term connection to Great Britain, such as aliens who were resident there, or subjects who were resident or ordinarily resident there, who were taxed on their worldwide income, and those whose connection was significantly weaker and which may have been purely economic, such as aliens or British subjects born overseas who had never lived in Great Britain, who were only taxed on their income from sources in Great Britain. It is argued in this work that the obligation to bear direct taxation is an incident of membership of the society upon which that tax is levied, and to which the benefits of the public spending financed by that taxation accrue, and that the connecting factors used in taxation are in effect measures of membership of society for this purpose. The connecting factors introduced in the income tax imposed during this period support this contention, with membership of society being measured by residence, in the case of aliens, and residence and ordinary residence in the case of subjects.

It is further argued in this work that the six month rule is, and always was, intended as a measure of short-term connection to a country that is qualitatively different from other, longer-term, measures of connection. This contention appears to be supported by the definition of the rule as it first appeared, as it only applied to individuals who were in Great Britain temporarily and with no intention of establishing their residence there; as if their presence was more than temporary, or if they had such an intention to establish residence, they would have been deemed to be resident under the part of the rule originally introduced in the act of 1799.[79] The six month rule imposed tax on individuals for the year in which they were present in Great Britain, and they were only liable from the time of their arrival in the country. This

[79] The side note on the Act of 1800, s 19 referred to the taxation of 'temporary residents' as did the side notes on all the subsequent legislative enactments of the six month rule.

was a markedly different measure of connection to Britain than ordinary residence, the meaning of which will be discussed in section 4.3 below.

4.3 The reintroduction of income tax and the development of the concept of residence

4.3(a) Legislative developments in the jurisdictional basis of direct taxation

Income tax was reintroduced in Great Britain by the Income Tax Act 1842,[80] which was based on the act of 1806 with several (mostly minor changes). The jurisdictional basis of the charge to tax was, apart from very minor changes in wording, identical to that in the act of 1803 described in section 4.2(c),[81] though section 39 of the Income Tax Act 1842 did contain one change in relation to the six month rule, providing that any individual who 'resided in Great Britain, at one time or several times, for a period equal in the whole to six months in any one year' was to be liable to tax under Schedule D as a person residing in Great Britain 'for the year commencing on the sixth day of April preceding'. Thus such temporary residents were now taxed even if they had not been in Great Britain for six *consecutive* months, and they were now liable from the beginning of the tax year, rather than from the date of their arrival in the country.

Interestingly, during the debate on the bill in the House of Commons Prime Minister Sir Robert Peel responded to criticism that 'a tax upon incomes has a great tendency to drive people from England' by saying that there was nothing in the existing tax code to 'prevent the great landed proprietors of this country from living abroad and from thereby escaping the effects of both direct and indirect taxation', but that with the income tax he 'who chooses either for his amusement or pleasure to travel abroad and evade taxation on consumption at home' would be forced to make a direct

[80] An Act for granting to her Majesty Duties on Profits arising from Property, Professions, Trades and Offices, until the Sixth Day of April, One thousand eight hundred and forty-five (Income Tax Act (5 & 6 Vict c 35) (1842). The tax did not extend to Ireland at that point.

[81] The charge to tax under Schedule D was set out in Income Tax Act 1842, s 1, and varied from the wording used in the act of 1803 only slightly (eg where the words 'exercised in Great Britain' appears in 1803, the words 'exercised within Great Britain' are used in 1842).

contribution of 'his fair proportion towards the revenue of this country', a contribution from which Peel said such a person could not escape.[82]

Given the span of time involved, the rapid pace of change in almost every area of life and economic activity during that period, there were surprisingly few changes of real significance to the jurisdictional basis of direct taxation in the United Kingdom in the following hundred and fifty years. The remainder of this section will highlight the more important ones, though the focus will be the individuals subjected to direct taxation, so changes in the definition of foreign income taxable, or regarding whether income is from a UK source or not, are deliberately not examined.

The Income Tax Act 1853[83] extended the charge to tax to Ireland for the first time, though apart from this extension, the jurisdictional scope of the tax on residents, ordinarily resident subjects and non-residents in Schedule D, and the provisions relating to temporary residence, the six month rule and temporary absence from the United Kingdom, were otherwise unchanged by this act.[84]

[82] HC Deb 23 March 1842, vol 61, col 1184. See also HC Deb 08 April 1842, vol 62 col 161 where Peel said '[b]y the measure I propose, I reach him by means of an Income tax. I touch his landed property through the intervention of his tenantry; and if he have no tenants, I affect him through the funds. He may go abroad, but he is subjected to the charges he ought to bear in meeting the difficulties of the country. But tax his windows, or his house, and he will dismiss his establishment, and reduce the demand for productive labour by going to Milan, Rome, or Paris. The noble Lord will not touch him there; but I shall'.

[83] An Act for granting to Her Majesty Duties on Profits arising from Property, Professions, Trades, and Offices (Income Tax Act 1853) (16 & 17 Vict c 34).

[84] Income Tax Act 1853 (n 83), s 6 provided that individuals who were not resident in the United Kingdom were subject to tax on income from securities and possessions in Ireland. This applied notwithstanding the exemption from such income for individuals who were in Great Britain temporarily and with no intention in establishing their residence there provided by Income Tax Act 1842 (n 80), s 39 (see section 4.2(c) above). Income Tax Act 1853 (n 83), s 7 provided that income from securities and possessions in Ireland was to be 'be charged and assessed in Ireland in the same manner and under the same schedules, rules and regulations respectively as the duties on securities and possessions of the like nature in Great Britain', notwithstanding the fact that under Income Tax Act 1842 (n 80), s 100, such income was to be taxed on the remittance basis (see section 4.2(a) above). Income Tax Act 1853 (n 83) did not actually amend the wording of the provisions of Income Tax Act 1842 (n 80), and so references to Ireland and to income from securities and possessions in Ireland remained until they were deleted by Statute Law Revision Act (No 2) 1874 (37 & 38 Vict c 96), s 1 and sch 1.

4.3(a)(i) The introduction of domicile as a connecting factor for income tax

The most significant change during this period was contained in the Finance Act 1914,[85] section 5 of which provided that income tax 'in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom', which until that point had been computed on the remittance basis,[86] was henceforth to be 'computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not'. The section went on to state that the provision was not to apply 'in the case of a person who satisfies the Commissioners of Inland Revenue that he is not domiciled[87] in the United Kingdom, or that, being a British subject, he is not ordinarily resident in the United Kingdom'.

On introducing the measure in his budget speech, the Chancellor of the Exchequer Lloyd George said that its intention was to charge income which currently escaped tax 'owing to arrangements purposely made by men who are rich enough to leave their incomes abroad for reinvestment'.[88] He also later made it clear that the intention was not to tax the unremitted income of individuals who were only resident temporarily in Britain.[89] In the original draft of the clause, such temporarily resident individuals were defined as aliens and British subjects ordinarily resident in one of the colonies,[90] however this was amended at the committee stage to define temporary

[85] Finance Act 1914 (4 & 5 Geo 5 c 10). The Taxes Management Act 1880 (43 & 44 Vict c 19) was a significant piece of legislation in the evolution of the income tax in the UK, but it dealt with predominantly administrative matters and did not make any changes to the jurisdictional basis of the tax.

[86] See section 3.2(a) above.

[87] The concept of domicile is essentially denotes a form of long-term connection to a country which is acquired at birth and which can only be changed by taking up residence in another country with the intention of residing there permanently or indefinitely, with an individual's domicile of origin (which is described as having an adhesive quality) generally being considered to be retained in cases where the matter is unclear.

[88] HC Deb 4 May 1914 vol 62, col 89. The Chancellor went on to state that 'the decision of the Courts which enabled them to escape payment on this part of their income ought to be overridden by Act of Parliament', presumably a reference *to Colquhoun v Brooks* (1889) 14 AC 493 (HL), which held that a trade carried on wholly abroad was taxable on the remittance basis.

[89] See HC Deb 22 July 1914, vol 65 col 492 where the Chancellor commented that 'the Member for Fulham is still nervous lest every bona-fide Colonial resident in this country—resident temporarily in this country—because that is the point—who comes here to stay for a few years, either to educate his children or for some other temporary purpose, should be hit. I am sure it will be agreed that there is a vast difference between Colonials who come here to make it their permanent abode and Colonials who come for a few years'.

[90] See HC Deb 13 July 1914 vol 64, col 1578: 'Provided that this Section shall not apply in the case of a person who is not a British subject, nor in the case of a person who satisfies the Commissioners of Inland Revenue that being a British subject he is ordinarily resident in a British Possession'.

residents instead as any individual not domiciled in the United Kingdom.[91] The intention was apparently not to extend the category of individuals to be taxed on the arising (as opposed to the remittance) basis to include aliens resident in the United Kingdom who had acquired a domicile of choice there, or British subjects who were ordinarily resident in one of the colonies but who remained domiciled in the United Kingdom, though that would in fact have been the effect.[92] Rather, the aim was to exclude from taxation on the arising basis 'British subjects, Canadians and others, who are ordinarily resident in the United Kingdom, it may be in England or in Scotland, who none the less ought to be exempted though it cannot be said they are ordinarily resident in a British possession'.[93] Avery Jones points out that such individuals might have been resident in the United Kingdom because of owning houses there, and that there was 'no doubt some self-interest in this; those who were resident because they had houses here might otherwise have ceased to be resident'.[94] The final version of the section was introduced by amendment at the report stage of the bill,[95] and sought to exclude two groups of individuals: first, individuals who had a domicile of origin somewhere other than the United Kingdom and who were resident, and perhaps ordinarily resident, in the United Kingdom but were not intending to reside there permanently and so had not acquired a domicile of choice there (eg the 'Canadians and others' referred to in the paragraph above, and aliens); and secondly, individuals who had a domicile of origin in the United Kingdom and who were ordinarily resident

[91] See HC Deb 13 July 1914 vol 64, col 1646.

[92] During the debate both Laming Worthington-Evans MP and Sir John Rees MP spoke of the unfairness of taxing the unremitted income of individuals who had gone to the colonies with the intention of returning at some point, and who had thus retained their domicile of origin in the United Kingdom, but who in the interim returned for a temporary purpose such as the education of their children. The latter read a letter he had received from a retired Anglo-Indian civil servant in just such a position. See HC Deb 13 July 1914 vol 64, col 1586 and 1604-05 respectively.

[93] Comment by the Attorney General John Simon, explaining the purpose of the amendment to the bill (See HC Deb 13 July 1914 vol 64, col 1622). The Attorney General does not seem to have considered that aliens might have acquired a domicile of choice in the United Kingdom, as the intention seems to have remained that they should be excluded. He stated that 'instead of saying that persons are to be exempted who are British subjects ordinarily resident in a British possession, we propose to say that the only persons who are to be included are persons who are domiciled in the United Kingdom, and of course persons who are British subjects' (ibid); which suggests that the intention was that the only persons to be taxed on the remittance basis would be subjects not domiciled in UK and aliens.

[94] Avery Jones, 'Taxing Foreign Income from Pitt to the Tax Law Rewrite ...' (n 31) 47, fn 155. The deeming of an individual to be resident in the UK or Ireland for tax purposes because of owning a house there is discussed in section 4.3(b) below.

[95] HC Deb 22 July 1914, vol 65 col 516.

in one of the colonies (or elsewhere) but who were resident in the United Kingdom, although only intending to reside there temporarily.[96]

Clearly, it was intended that there should be two degrees of connection to the United Kingdom for the purposes of taxing income arising abroad. First, there was a long-term connection to the country, defined in the act by reference to domicile and ordinary residence, with the individuals within this group being subject to income tax whether the income was remitted or not. Secondly, there was a shorter-term connection to the United Kingdom which was intended to apply to individuals who were in the country temporarily, but perhaps for as many as several years, who were intended to be taxed on non-UK income only if it was remitted. In the case of the latter, Lloyd George made it clear that the remittance basis should not apply to

> Members in this House who are Colonial born: those who have cast in their lot finally with this country are Britishers for all practical purposes. I think they should be taxed just in exactly the same way as Englishmen, Welshmen, Scotsmen, or Irishmen, bred or born, but it is a very different thing when they have the intention of returning to the Colonies.[97]

However, defining these two categories proved problematic. In the debate on the bill in the House of Commons there was little discussion on how the categories should be defined, though as already noted several MPs did argue that certain groups of individuals should continue to be taxed on the remittance basis.[98] As outlined in

[96] For example, the Anglo-Indian civil servant referred to in n 92. During the report stage debate on the bill when the addition of the proviso regarding British subjects who were not ordinarily resident in the United Kingdom, the Attorney General John Simon said 'the Anglo-Indian, whose case I think was mentioned by the hon. Member for Nottingham, who spends very little of his time in this country, but who is a British subject, and is usually resident in India, or it may be in any part of the world, is by the Clause, as we propose to apply it, exempt from this tax altogether' (HC Deb 22 July 1914, vol 65 col 473).

[97] HC Deb 22 July 1914, vol 65 col 492-93.

[98] There was considerable opposition to the measure, with Felix Cassel MP noting that '[i]n the first place, there has been criticism in the Press. In the second place, there has been a deputation which went to the Secretary of State for India, representing the views of those interested in the trade and commerce of India. In the next place, there have been representations from the self-governing Dominions, and, lastly, it is interesting to follow the course of the Debate on the Committee stage, because then, apart from the Treasury Bench, there was not a single voice raised in favour of the Clause' (HC Deb 22 July 1914, vol 65, col 464). The main objections to the provision were centred on complaints that it would provide a disincentive to individuals to invest their capital in the colonies, where it was badly needed, that it would cause discontent in those colonies, that it would lead to double taxation where the income taxed in the UK had already been taxed in the colony where it had arisen, and in relation to the taxation

section 4.2(c), there were three forms of connection to the United Kingdom in the income tax code, though the threshold for short-term connection or temporary residence[99] was obviously too short for the present purposes and would have brought within the charge many that it was intended should be exempt from the new provision.[100] Also, the measures of longer-term connection, residence, ordinary residence and nationality, might also charge individuals from the colonies who were only in the United Kingdom for a temporary period. However, adding a fourth form of connection, domicile, which was being used here for the first time expressly in British legislation as a connecting factor for direct taxation,[101] was not an ideal solution either.

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of insurance companies. See HC Deb 13 July 1914 vol 64, cols 1578-1647 and HC Deb 22 July 1914, vol 65, cols 463-518.

[99] ie physical presence of more than six months, more than temporary presence in the United Kingdom, or presence in the United Kingdom with the intention of establishing residence there.

[100] This was especially so considering the very broad definition of the words 'residing in the United Kingdom' in the charging section of the Income Tax Acts 1842 that had been adopted by the courts at that point, and the very narrow circumstances in which an individual was considered to be in the United Kingdom for a temporary purpose only (see section 4.3(b) below).

[101] Of course, domicile was not used in this act to *impose* income tax, but rather to determine an entitlement to a relief from it. For over a hundred years though, domicile had indirectly formed part of the jurisdictional basis of legacy duty. Legacy Duties Act 1796 (An Act for repealing certain Duties on Legacies and Shares of Personal Estates, and for grating other Duties thereon, in certain cases 36 Geo III c 52) (title provided for in the Short Titles Act 1896 (59 & 60 Vict c 14), sch 1), s 2 imposed a duty on 'every legacy, specific or pecuniary, or of any other description, of the amount or value of twenty pounds or more, given by any will or testamentary instrument of any person who shall die after the passing of this act, out of the personal estate of the person so dying', with no limitation in legislation as to the persons or property within the charge (it continued to apply (with several amendments) in the UK until it was abolished by Finance Act 1949 (UK), ss 27-29, and applied in Ireland until abolished by Finance Act 1975, s 47(3) (see Brian Bohan and Fergus McCarthy, *Bohan and McCarthy: Capital Acquisitions Tax* (4th edn, Bloomsbury 2013) 6-7). At the time the duty was introduced, it had already been established that 'personal property follows the person of the owner, and in case of his decease must go according to the law of the country where he had his domicile; for, the actual situs of the goods has no influence' (*Bruce v Bruce* (1790) 2 Bos & Pul 229, 231; 126 English Reports 1251, 1253 (Thurlow LC). See also *Birthwhistle v Vardill* (1826) 5 B & C 438, 108 English Reports 163). This principle was later confirmed in relation to the legacy duty in *Re Ewin* (1830)1 Cromp & Jerv 151, 152; 148 English Reports 1371, 1327 where Alexander LCB held that '[i]t can never be doubted that the Act of Parliament was meant to include the estate of a person who was domiciled in England, a subject of this country, an Englishman, whose executors are living in this country'. See also *Re Bruce* (1832) 2 Cromp & Jerv 436, 149 English Reports 185; United Kingdom, *Report of the Commissioners of Inland Revenue on the Duties Under Their Management for the Years 1856 to 1869 Included* (George Edward Eyre and William Spottiswoode 1870) vol I, 95, 100). Thus, the liability of an individual's personal estate was determined by his domicile at the time of his or her death. Finance Act 1894, s 2(2) provided in relation to estate duty that '[p]roperty passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes', thus incorporating the case law just mentioned, and the rule that personal estate situated abroad was only subject to the duty if the individual had died domiciled in the United Kingdom. See also James Austen-Cartmell, *The Finance Act 1894 (57 & 58 Vict. c.80) So Far as it Relates to the New Estate Duty and Other Death Duties in England, with an Introduction and Notes* (Wildy and Sons 1894) 14-15; Avery Jones, 'Taxing Foreign Income from Pitt to the Tax Law Rewrite ...' (n 31) 47.

The use of domicile as a connecting factor was criticised during the debates on the grounds that it may be difficult to ascertain and that 'there is perhaps no question of law which raises more points than the question of domicile'.[102] During the report stage of the debate, Henry Terrell MP perceptively pointed out the flaw in using domicile to achieve the intended aim of ensuring that individuals who were born in the colonies, and who had a domicile of origin somewhere outside the United Kingdom, who came to the country for a temporary purpose, or who owned houses and were therefore resident there, and who may also have been ordinarily resident there, would continue to not be subject to tax on their income from abroad unless it was remitted to the United Kingdom, saying

> How can you determine whether a foreigner or a Colonial is domiciled in the United Kingdom? You cannot decide it, and you will simply enable all Colonials, whether really domiciled here or not, if they say, "I intend to retain my domicile of origin," to defeat your object, because you could not say that their intention is something different.[103]

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[102] Quotation from Austen Chamberlain MP during the report stage debate on the bill (HC Deb 22 July 1914, vol 65, col 489). See also the comments of William Hayes Fisher MP (HC Deb 22 July 1914, vol 65, col 482) and Laming Worthington-Evans MP (HC Deb 13 July 1914 vol 64, cols 1586-87). See also chapter 6 for a further discussion of these issues in relation to the use of domicile as a connecting factor in direct taxation.

[103] HC Deb 22 July 1914, vol 65, cols 500-01. This proved to be a prescient insight. In 2002, a front page article and a four-page special report in the *Guardian* newspaper provided a detailed analysis of how Britain's richest man, Hans Rausing, had been resident but not domiciled in England for twenty years and had paid no income tax there because of the remittance basis of taxation and the use of various trusts (Nick Davies, 'Hans Rausing is Britain's richest man with £4.5 bn. Today we reveal how he, and tens of thousands like him, use the system to avoid paying millions in tax' *The Guardian* (Manchester, 11 April 2002); Nick Davies, 'Playing the system' *The Guardian* (Manchester, 11 April 2002); Editorial, 'The golden rule that saves the super-rich millions' *The Guardian* (Manchester, 11 April 2002); Editorial, 'Balance of payments' *The Guardian* (Manchester, 11 April 2002)). The following day there was widespread condemnation from politicians of all parties regarding this 'loophole' (Michael White and Kevin Maguire, 'Angry MPs from all parties demand action after Guardian investigation' *The Guardian* (Manchester, 12 April 2002), and in his budget speech the following week, the Chancellor of the Exchequer announced a review of the 'the complex rules on residence and domicile' (HC Deb 17 April 2002 vol 383, col 584). A background paper regarding the review was published with the budget the following year (United Kingdom, 'Reviewing the Residence and Domicile Rules as They Affect the Taxation of Individuals: A Background Paper' (HMSO, April 2003)), and on 6 December 2007 the British government published a consultation document (United Kingdom, 'Paying a Fairer Share: A Consultation on Residence and Domicile' (HMSO, December 2007)), which led ultimately to reform, but not abolition, of the remittance basis for individuals resident but not domiciled in the UK (Finance Act 2008 (UK), s 25 and sch 7 and Finance Act 2013 (UK), s 219 and schs 45 and 46).

One of the contentions in this work is that there was in 1914, and still is, no fully expounded, coherent theory of how one defines connection to a country for tax purposes, and that such theories as do exist fail to acknowledge that connection for tax purposes is in reality an attempt to measure membership of the society which is levying the tax. These deficiencies in the tax theory of the time no doubt contributed to the difficulty in formulating connecting factors that would achieve the stated aims of section 5 of the Finance Act 1914, and, in the present author's view, this continues to be the case today in relation to the taxation on the remittance basis for non-domiciliaries, as it does in relation to solving the tax exile problem.

Theoretical principles regarding connecting factors in taxation were in general not discussed during the debate on the bill, with two interesting exceptions. First, Austen Chamberlain MP invoked a version of the benefit theory of taxation very similar to that espoused by Adam Smith[104] in objecting to the taxation of individuals on unremitted income from abroad saying:

> Here he pays for the protection of his property to the Government which gives him that protection. In the case of a man abroad he does not get protection from the Government except in the sense that every subject of the British Empire is protected by the British Army[105]

This emphasis on the justification of taxation according to the benefit (protection) provided to the source of income, rather than to the individual to whom it belongs, was discussed in chapter 2. Secondly, Sir John Rees MP, who also invoked the notion of taxation being justified by protection,[106] and who commented that the principle underpinning the change to the remittance basis of taxation was

[104] See chapter 2.

[105] HC Deb 22 July 1914, vol 65, col 494. Lloyd George's reply to Mr Chamberlain (ibid col 494-95) was that 'the *person* who is receiving that money and is rolling up his wealth abroad is enjoying the same protection whether he spends the money here or whether he does not. There is the same measure of protection given to a man whether he is economic, or thrifty, or frugal enough to save his money and to roll it up abroad, or the person who brings it here and spends it here' (emphasis added).

[106] HC Deb 22 July 1914, vol 65, col 506: 'I am utterly opposed to this principle of grasping the British subject wherever he is. He should pay taxes where he obtains protection, where he lives, and where his income is received and spent, and he should not be taxed elsewhere'.

> an inversion of another principle, a manifestation of the same principle which would bring the Empire down with a run—I mean the claim that every citizen of every component part of the British Empire has equal rights—and which has led to a tragic comedy which is now being played at Vancouver'.[107]

Presumably, the inversion that was being referred to was that if every citizen of every component part of the British Empire has equal rights as British subjects, then they also have an equal obligation to pay taxes to Britain. At the heart of this observation arguably lies the notion that not all such individuals can be considered to be members of British society, and so should not have the same rights or obligations that attach to such membership.

Taxation of non-domiciled individuals on the remittance basis continues in the Irish tax code today both for income tax and CGT,[108] though there have been several amendments since its introduction in 1914. In 2006, the remittance basis ceased to apply to income from an employment to the extent that the duties were carried out in Ireland.[109] In 2008, the remittance basis was applied in Ireland to income arising in the United Kingdom for the first time, and later that year it was also applied to capital

[107] ibid. The reference to Vancouver, is presumably a reference to the refusal of Canadian authorities to allow the passengers of the *Komagata Maru*, who were from India and were all British subjects, to land in Canada. See *Re Munshi Singh* (1914) 20 BCR 243 (BCCA).

[108] As it does in the UK, see n 103. The remittance basis of taxation was continued after Irish independence, though it was not until 1923 that references to British subjects not ordinarily resident in the UK were replaced with references to citizens of Saorstát Eireann (Finance Act 1923, s 12(6)).

[109] Finance Act 2006, s 15 amending TCA 1997, s 18(2). Such income was from that point onwards taxable under TCA 1997, s 19 (Schedule E). This appears to have been done in response to the alleged exploitation of migrant workers (who were taxed on the remittance basis) by the Turkish construction company Gama (see Dáil Deb 27 April, 2005, vol 601, col 680; Dáil Deb 7 February 2006, vol 614, col 94; Select Committee on Finance and the Public Service Deb 9 December 2008; Ailish O'Hora, 'Major lobby to support tax "remits"' *Irish Independent* (Dublin, 10 January 2006)). Legislation was subsequently enacted to provide for a form of remittance basis for certain individuals posted to work in Ireland for foreign-based employers (see TCA 1997, ss 825B and 825C). The remittance basis had ceased to apply to employment income in the UK in 1956, when Schedule E was reorganised into three cases and included foreign employments (so that they no longer constituted a 'foreign possession' taxable under Schedule D) (Finance Act 1956, s 10). In Ireland, Finance Act 1922 (12 & 13 Geo V c 17), s 18 had provided that all income from offices, employments and pensions previously charged under Schedule D would henceforth be taxable under Schedule E, though income from a foreign employment that constituted a foreign possession continued to be taxed under Schedule D.

gains arising in the United Kingdom.[110] In 2010, the remittance basis ceased to apply to individuals who were not ordinarily resident in Ireland.[111]

4.3(a)(ii) Other changes prior to 1994

Income tax law was consolidated in in the Income Tax Act 1918, though there were no changes to the jurisdictional basis of the tax at that time.[112] Section 24(1) of the Finance Act 1920 provided that no allowances in respect of earned income and no deduction from assessable income would be granted to any individual not resident in the United Kingdom, but that a proportion of such allowances and deductions would

[110] Finance Act 2008, s 18 (income tax) and Finance (No.2) Act 2008, s 42 (CGT). This change was made as a result of a reasoned opinion given by the European Commission on 23 March 2007 that the non-application of the remittance basis to the UK constituted a restriction on the free movement of capital and was in breach of EU law (see European Commission, 'Direct Taxation: Commission requests Ireland to end discriminatory taxation of income sourced in the United Kingdom and asks the United Kingdom for information about similar rules applied in its territory' (IP/07/445, 30 March 2007) <http://europa.eu/rapid/press-release_IP-07-445_en.htm> accessed 5 July 2014; Revenue Commissioners, 'Finance Act 2008: Guidance Notes' (Revenue Commissioners, 2008) <www.revenue.ie/en/practitioner/law/notes-for-guidance/finance-act/2008/sections01-23.pdf> accessed 5 July 2014). Finance Act 1926, sch 1 pt 2 para 1(1) had provided that the remittance basis was not to apply to 'property situate and profits or gains arising in Great Britain or Northern Ireland'. The UK had also ceased to apply the remittance basis on income from Irish sources following Irish independence in 1922 (see Finance Act 1926 (UK) sch 2, pt 2), and Irish income only became taxable on the remittance basis in 2008 (Finance Act 2008 (UK), s 25 and sch 7). Since the time of the introduction of the CGT in the UK, the remittance basis has always applied to gains from the disposal of Irish assets (Finance Act 1965 (UK), s 42(7)).

[111] Finance Act 2010, s 9. Minister for Finance Brian Lenihan said during the committee stage of the bill that the change was to counteract a tax-planning mechanism used by Irish citizens to avail of the remittance basis (Select Committee on Finance and the Public Service Deb 23 February 2010). Presumably, this was a reference to the practice of ceasing to be resident in Ireland every three years so that an individual never became ordinarily resident here (see TCA 1997, s 820 for the definition of ordinary residence). John F Avery Jones, 'Finance Act Notes: Section 5 And Schedule 1 - Abolition Of Personal Reliefs For Non-Residents - The Sun Sets Over The Empire' [2009] British Tax Review 494, 495 points out that HM Treasury, *Final Report of the Royal Commission on the Taxation of Profits and Income* (Cmd 9474, 1955) para 296 recommended that the remittance basis should apply to any non-ordinarily resident individual, and not just British subjects and Irish citizens, and that the Tax Law Rewrite Committee, of which he was a member, 'slipped this in on the 50th anniversary of the recommendation' in the Income Tax (Trading and Other Income) Act 2005 (UK), s 831(4). The remittance basis ceased to apply to individuals who were not ordinarily resident in the UK in 2013 (Finance Act 2013 (UK), sch 46 pt 1 para 2).

[112] There was, however, a minor change in wording in the provision (formerly in section 39 of the Income Tax Act 1842 and now contained in rule 3 of the General Rules Applicable to Schedules A, B, C, D and E) which now stated that '[e]very British subject whose ordinary residence has been in the United Kingdom shall be assessed and charged to tax, notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad ...' The reference to the 'temporary absence' of the individual, and the reference to having 'gone into any parts beyond the seas', were removed. This was presumably done to modernise the language, and Nicholls J held in *Reed v Clark* [1986] Ch 1, 11 that this did not constitute a material change in the wording.

Where an individual leaves Ireland and takes up residence in a country that has very low rates of income tax or CGT (or does not impose these taxes at all), then one could argue that there should be a presumption that, in the absence of evidence to the contrary, the move was tax motivated. The difficulty is that an individual may move to a country that is not normally considered a 'tax haven' and which imposes personal taxes at rates comparable to those in Ireland, but achieve a significant reduction in tax payable as a result of an exemption particular to the tax code of the foreign country, or because of an incongruity between the two tax codes, possibly in conjunction with relief under the relevant DTA. For example, in 2003 Lorraine Kinsella purchased shares in Ryanair Holdings plc from her husband Shane Ryan, son of Ryanair founder Tony Ryan, for in excess of €18 million, funded by a loan from Mr Ryan secured on the shares.[72] This sale was not subject to Irish CGT pursuant to the exemption for transfers between spouses contained in section 1028(5) of the Taxes Consolidation Act (TCA) 1997. Two weeks later, Ms Kinsella sold the shares to a third party. This sale would have been liable to Irish CGT on the difference between their sale price and the cost for which Mr Ryan had originally acquired them pursuant to TCA 1997 s 1028(7), a provision designed to ensure that the inter-spouse exemption could not be used to avoid CGT in circumstances such as these. However, Ms Kinsella was resident in Italy for tax purposes, and was a resident of Italy under the Ireland/Italy DTA. Under Italian tax law, Ms Kinsella was only liable to CGT on the difference between the sale price of the shares and cost for which she had acquired them from her husband, that is €18 million; there was no equivalent to section 1028(7) in the Italian tax code. Her total liability to CGT therefore amounted to approximately €40,000.[73] Determining whether a move to a country was motivated by securing a tax advantage may therefore require detailed specialist knowledge both of the tax regime of the country in question,

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and not be suffocated by journalists and politicians here' (Justine McCarthy, 'Tycoon derides top civil servants for "being suspicious of success"' *The Sunday Times* (Dublin, 21 November 2010)).

[72] The details are taken from the judgment of Kelly J in *Kinsella v The Revenue Commissioners* [2007] IEHC 250, [2011] 2 IR 417, a case seeking declarations as to the applicability, and interpretation, of the Ireland/Italy DTA in relation to her subsequent sale of the shares. See also Gavin O'Flaherty and Cormac O'Neill, 'To Void the Avoidance: the Lessons of Recent Tax Case Law' [2010] Irish Tax Review 78.

[73] TCA 1997, s 1028 was amended by the Finance Act 2006, s 75(1)(a). Section 1028(6A) now denies the inter-spousal exemption in circumstances where the spouse acquiring the asset would not be liable to Irish on a subsequent disposal in the same year. This provision is discussed in more detail in chapter 6. See also Tom Collins, 'The Italian Job' (2008) 21(2) Irish Tax Review 65.

Finance Act 1923, s 12(4) added an additional clause to Schedule D of the Income Tax Act 1918, providing that any person, whether a citizen of Saorstát Eireann or not, although not resident in Saorstát Eireann was to be liable to tax on profits or gains from the sale of any goods, wares, or merchandise, manufactured or partly manufactured by such person in Saorstát Eireann.[119]

Income tax law in the UK was again consolidated in in the Income Tax Act 1952, though as was the case in the 1918, there were no further changes to the jurisdictional basis of the tax. Section 11 of the UK Finance Act 1956 provided that an individual who worked full-time in a trade, profession, or vocation no part of which was carried on the United Kingdom, or in an office or employment all of the duties of which were performed outside the United Kingdom, was not be considered resident in the United Kingdom by virtue of having a place of abode available to him or her.[120] Ireland did not follow suit until 1987, though the provision only applied to individuals who were domiciled in Ireland.[121] The 'place of abode' rule was abolished in the UK in 1993 and in Ireland in 1994.[122]

CGT was introduced in the UK in 1965, and was charged on individuals who were either resident or ordinarily resident in the UK on a worldwide basis. Individuals who were not resident or ordinarily resident were liable to CGT on gains on assets used for the purposes of a trade carried on in the UK through a branch or agency.[123]

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[119] This provision remains in the Irish tax code (see TCA 1997, s 18 para 1(a)(iv)). Finance Act 1929, s 11 and sch 1 provided that income from foreign possessions and securities, which were formerly taxed under Schedule D Cases IV and V, were to henceforth be taxed under either Case I or Case III. Finance Act 1935, s 5(2) provided that rule 3 of the General Rules applicable to Schedules A, B, C, D, and E of Income Tax Act 1918, which provided that individuals who were ordinarily resident in Saorstát Eireann but who were abroad for the purpose of occasional residence should continue to be taxed as residents should apply to all persons, and not just to citizens of Saorstát Eireann.

[120] (4 & 5 Eliz II c 54). The deeming of an individual to be resident in the UK or Ireland for tax purposes because of having a place of abode available there is discussed in section 4.3(b) below.

[121] Finance Act 1987, s 4.

[122] Finance Act 1993 (UK), s 208 and Finance Act 1994, s 150 respectively. The latter introduced a statutory test for residence, which is discussed in section 4.4 below.

[123] Finance Act 1965 (UK), s 20. Finance Act 1962 (UK) (10 & 11 Eliz 2 c 44), s 10 had previously imposed income tax on gains that did not constitute profits of a trade, profession, vocation, office or employment. Finance Act 1965 (UK), s 43 provided that the terms 'resident' and 'ordinarily resident' had the same meanings as in the Income Tax Acts, and that individuals who were in the UK for a temporary purpose and with no intention of establishing their residence there, or who were in the UK for a period of fewer than six months in the tax year, were not to be treated as resident for the purposes of CGT. As outlined in n 110, the remittance basis applied to individuals who were either resident or ordinarily resident in the UK, but who were not domiciled in the UK, in respect of gains from the disposal of assets situated outside the UK (ibid, s 20(7)).

CGT was introduced in Ireland in 1975 and also applied to individuals who were resident or ordinarily resident in Ireland on a worldwide basis.[124] The remittance basis applied to individuals who were not domiciled in Ireland on gains on the disposal of assets situated outside Ireland and the United Kingdom.[125]

Income tax legislation was consolidated in Ireland in 1967, and in the UK in 1970, and again in 1988, income tax and capital gains tax legislation was consolidated. As with previous consolidating acts, there was no change in the jurisdictional basis of the taxes.[126] In 1977 a provision was introduced that deemed an individual, and his or her spouse, who had made a gift of property to Ireland and had become tax resident in another country, to be deemed not to be ordinarily resident in Ireland from the year in which the gift was made.[127] Further, such individual and his or her spouse were permitted to visit Ireland for up to 182 days each year 'for the purpose of advising on the management of the property' so gifted, and to have those visits disregarded 'in determining whether that person is resident or ordinarily resident in the State for the purposes of Irish tax'. This provision appears to have been introduced with a specific donation in mind and no longer applies in relation to gifts made after 4 February 2010.[128] This provision permitted donors to spend very significant amounts of time in Ireland, and to remain in every way members of Irish society, while being treated for tax purposes in the same way as people with no connection to the country at all. It also permitted individuals to move abroad for relatively short periods of time and sell assets without exposure to Irish CGT before returning to live here. This may have been economically justifiable if the value of the gift equalled or exceeded the value of any future tax revenue forgone as a result of the deemed non-residence of the donor,

[124] The charge for non-residents was imposed on land and minerals in Ireland and gains on assets used for the purposes of a trade carried on in the Ireland through a branch or agency.
[125] Capital Gains Tax Act 1975, s 4.
[126] Income Tax Act 1967, Income and Corporation Taxes Act 1970 (UK) and Income and Corporation Taxes Act 1988 (UK) respectively.
[127] Finance Act 1977, s 53.
[128] During the debate on the 1974 Finance Bill, George Colley TD noted that section 53 dealt 'with what appears to be a very particular case, but in contrast with section 48 the person is not named' (Dáil Deb 10 May 1977, vol 299, col 516). Finance Act 1977, s 48 provided a specific stamp duty exemption for the transfer of Russborough House to the Alfred Beit Foundation (see Dáil Deb 10 May 1977, vol 299, col 496). It may be that the exemption in section 53 also had this gift in mind. See also Corrigan (n 158) vol 1, 285, where he states that the 'legislation was, apparently, introduced to accommodate the gift of a very substantial estate to the nation by a wealthy family'. Finance Act 2010, s 151 abolished this provision in relation to gifts made after the passing of the act (4 February 2010).

though there was nothing in the provision that necessitated that this should be so,[129] and it appears to be at odds with the purpose of defining residence in the tax code, and may be another example of legislation that suffered from the absence of a coherent theory of connection for tax purposes. Arguably, it would have been more theoretically sound to grant the donor a tax exemption or a tax credit equal to the value of the gift which could be set against current and future Irish tax liability.[130]

4.3(a)(iii) Recent changes in the United Kingdom

In 2003 the UK government published a discussion document as part of a review of the rules regarding residence and domicile for individuals, which had been announced as part of the 2002 budget.[131] Both the Chartered Institute of Taxation and the Society of Trust and Estate Practitioners replied calling for a statutory definition of residence,[132] though for the next four years the review continued and it seems that little progress was made on the issue.[133] In 2007 the United Kingdom published a consultation document on residence and domicile which made several

[129] Though it may, of course, have been the case in the circumstances of the gift which prompted the introduction of the provision in the first place.

[130] TCA 1997, s 1003 provides for such a tax credit in the case of donation of heritage property to the state. Considering that this provision was introduced in 1995 (Finance Act 1995, s 176), just a year after the introduction of the statutory definition of residence following a lengthy internal review of the area (see section 4.4 below), it is surprising that this provision was not abolished until 2010.

[131] United Kingdom, 'Reviewing the Residence and Domicile Rules as They Affect the Taxation of Individuals: A Background Paper' (n 103). See also Philip Paur, Quantity and Quality' (2003) 152 Taxation 53.

[132] Chartered Institute of Taxation, 'Reviewing the Residence and Domicile Rules as They Affect the Taxation of Individuals: A Background Paper ' (CIOT, 1 August 2003) <http://old.tax.org.uk/attach.pl/1888/3207/ResidenceDomicile%20final010803.pdf> accessed 19 May 2014, 'We consider that residence should be given a statutory basis with an arithmetic formulation. We suggest that 120 days in the UK should constitute residence and less than 120 days non-residence. Days of arrival should be counted and days of departure not counted'; Society of Trust and Estate Practitioners, 'Residence and Domicile: Response to Background Paper from STEP UK Technical Committee' (STEP, 16 June 2003) <http://www.kessler.co.uk/wp-content/uploads/2013/07/Domicile_reform_STEP_response.pdf> accessed 19 May 2014, 'In light of these factors we advocate the enactment of a statutory, objective test of residence. The test we favour is that currently used by the United States for persons who are neither citizens nor green card holders. This test is well known and was indeed advocated in the 1988 consultative document. Under this test an individual would be allowed 180 days per year in the UK before becoming resident, but this 180 days is made up of all the days in the current year, one third of the days in the preceding year and one sixth of the days in the year before that'. Unfortunately, a summary of responses received was not published by HMRC.

[133] There were annual statements in the Chancellor of the Exchequer's budget report that the review was continuing and that further contributions to the debate would be welcome. See HM Treasury, 'Budget 2004' (HC 301 March 2004) para 5.103; HM Treasury, 'Budget 2005' (HC 372 March 2005) para 5.116; HM Treasury, 'Budget 2006' (HC 968 March 2006) para 5.104.

recommendations regarding the remittance basis of taxation, but proposed only one change regarding the residence of individuals: that both the day of arrival and the day of departure should be counted when determining the extent of an individual's presence during a year.[134]

In 2006 and 2007, in two separate cases, individuals were found to be resident in the United Kingdom notwithstanding that they had been present in the country for fewer than 91 days each tax year within the terms of the UK Revenue's leaflet IR20[135], and in both cases they were unsuccessful in having the assessments overturned on appeal.[136] Kamal notes that a consensus had grown that although IR20 'may have never represented the law, it had become legitimised through the process of being relied upon',[137] and one of the unsuccessful appellants, Mr Gaines-Cooper, brought (ultimately unsuccessful) judicial review proceedings arguing that he was entitled to rely on the Revenue practice which provided a more beneficial interpretation of the law on the grounds of legitimate expectation.[138] In April 2009, the UK Revenue withdrew IR20 and replaced it with the guidance document HMRC6, which explicitly stated that any practices described therein are 'subject to periodic review and may subsequently be altered or withdrawn'.[139]

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[134] United Kingdom, 'Paying a Fairer Share: A Consultation on Residence and Domicile' (n 103) paras 2.19 to 2.23. This provision was implemented by Finance Act 2008 (UK), s 21(4) which inserted Income Tax Act 2007 (UK), ss 832(1A) and (1B).

[135] HM Revenue & Customs, 'IR20 - Residents and Non-Residents: Liability to Tax in the United Kingdom' (HMRC, March 2009) <http://www.britishcouncil.org/new/PageFiles/8535/ir20.pdf> accessed 10 July 2014.

[136] *Shepherd v Revenue and Customs Commissioners* [2006] EWHC 1512 (Ch); [2006] STC 1821; *Gaines-Cooper v HMRC* [2007] STC (SCD) 23. See also Christopher Sly, 'Gaines-Cooper v HMRC: Residence - Are You Coming or Going?' [2007] Private Client Business 181; Aoife Walsh, 'Review of UK Residence: Robert Gaines-Cooper - from Selling Hamsters for Pocket Money to a Quest to Find Clarity and Certainty for UK Taxpayers' (2010) 23(5) Irish Tax Review 61.

[137] Kamal (n 158) 11.

[138] *R (on the application of Davies and another) v Revenue and Customs Commissioners; R (on the application of Gaines-Cooper) v Revenue and Customs Commissioners* [2011] UKSC 47; [2012] 1 All ER 1048. See also Sandra Eden, 'R. (on the application of Davies) and R. (on the application of Gaines-Cooper) v HMRC: The Limits of Legitimate Expectation Remain Uncertain' [2010] British Tax Review 322; David Welsh and Sandra Eden, 'R. (on the application of Davies) v Revenue and Customs Commissioners: How Far Can the Taxpayer Rely on HMRC Guidance?' [2011] British Tax Review 643; Aoife Walsh, 'UK Residence Update: Robert Gaines-Cooper Held to be UK-Resident by the Supreme Court' (2011) 24 Irish Tax Review 70.

[139] HM Revenue & Customs, 'HMRC6 - Residence, Domicile and the Remittance Basis' (HMRC March 2009).
<http://www.hmrc.gov.uk/cnr/hmrc6.pdf> accessed 10 July 2014. See also Gary Heynes, 'Practice Guide — Establishing Non-UK Residence' (2010) 1019 Tax Journal 10.

Nathan points out that as a result, Revenue guidance could not 'safely be relied upon by practitioners' who were 'forced to revert to, and rely upon, the case law in this area'. This led to a 'clamour from practitioners for greater certainty'[140] to which the UK government responded in 2011 by issuing yet another consultative document, this time on the implementation of a statutory definition of residence.[141] This was ultimately followed by the enactment of the statutory definition in 2013.[142] A detailed examination of this statutory definition, and of the public consultation process that preceded it, is beyond the scope of this work,[143] but the following points in relation to the definition are worthy of note. Schedule 45 of the Finance Act 2013 provides for a number of different tests which may determine that an individual is resident in the United Kingdom, or that may determine that he or she is definitively not resident. Each of these tests involves physical presence in the United Kingdom as a component, though most also rely on some additional form of connection. Physical presence in the United Kingdom is sufficient by itself to render an individual resident for a year, and equally, physical absence is sufficient for an individual to be considered non-resident, regardless of these other connecting factors.

In essence, an individual will be considered resident if he or she is present in the United Kingdom for more than 183 days in the tax year. This physical presence threshold is reduced according to the number of 'ties' the individual has to the United Kingdom and whether the individual was resident in any of the previous three tax years, with an individual who has four or more such ties and who was resident in the previous year being deemed resident if he or she is present in the United Kingdom for

[140] Aparna Nathan, 'The Statutory Residence Test Consultative Document' [2011] British Tax Review 509, 510. See also Lara Crompton and Christopher Groves, 'UK Residency Rules Close to Certain Under Proposed Statutory Residence Test' (2012) 25 Irish Tax Review 104.

[141] United Kingdom, 'Statutory Definition of Tax Residence: A Consultation' (HMSO, June 2011). The government's summary of responses noted that '[a]lmost all respondents welcomed the Government's aim of introducing a statutory residence test and providing clarity for the taxpayer' though a ' few argued that a pure day counting test would be preferable, mainly on the grounds that it would be simpler'. Also, a 'majority were in favour of abolishing ordinary residence for tax purposes and felt it would represent a significant simplification of the tax system' (United Kingdom, 'Statutory Definition of Tax Residence and Reform of Ordinary Residence: A Summary of Responses' (HMSO, June 2012) paras 1.9 and 1.11 respectively). A further period of consultation was announced in June 2012, and a summary of the responses to it can be found in United Kingdom, 'Statutory Definition of Tax Residence and Reform of Ordinary Residence: Summary of Responses to the June 2012 Consultation' (HMSO, December 2012).

[142] Finance Act 2013 (UK), s 281 and sch 45.

[143] For a comprehensive examination, see Nathan (n 140); Aparna Nathan, 'Finance Act Notes: Section 218 and Schedule 45 – The Statutory Residence Test' [2013] British Tax Review 516.

more than fifteen days during the year. An individual will also be considered resident if he or she has a home in the United Kingdom that is occupied for more than 30 days during the year, and does not have a home overseas that is occupied for more than 30 days, or if he or she works sufficient hours in the United Kingdom during the year.[144] An individual will be non-resident, regardless of the other tests, if he or she works a sufficient number of hours overseas and is physically present in the United Kingdom for fewer than 91 days in the year.[145] An individual is treated as present in the United Kingdom for a day if he or she is present at the end of the day, however, if the individual has at least three 'ties' to the United Kingdom and was resident there for one of the three previous years, the individual will be deemed to be present in the country if he or she was there at any point during the day, though the first thirty days in which he or she was present but absent by midnight may be ignored,[146] and all such days may be ignored in determining if the individual is present in the United Kingdom for more than 91 days where he or she works a sufficient number of hours overseas.

There are five types of tie to the United Kingdom which might reduce the number of days an individual can be present in the country while remaining non-resident there. These are a 'family tie' (the individual's spouse, partner or minor child is resident in the United Kingdom),[147] an 'accommodation tie' (the individual has a 'place to live' available for his or use for at least ninety-one days during the year and spends at least one night there),[148] a 'work tie' (the individual works for more than three hours in the United Kingdom on at least forty occasions during the year),[149] a '90-day tie' (the individual was present in the United Kingdom for ninety days or more in the penultimate or pre-penultimate year)[150] and a 'country tie' (the individual is

[144] A home is occupied if the individual is physically present in it at any point during the day. Any type of accommodation can constitute a home regardless of whether the individual has any interest or estate in it, but somewhere used only periodically as nothing more than a holiday home or temporary retreat will not constitute a home (Finance Act 2013 (UK), sch 45 paras 8(6) and 25).

[145] There are variations on some of these tests if the individual dies during the year in question (Finance Act 2013 (UK), sch 45 paras 10, 15 and 16).

[146] Finance Act 2013 (UK), sch 45 para 23.

[147] Finance Act 2013 (UK), sch 45 para 32.

[148] ibid para 33. A place to live includes a home, a holiday home and any other accommodation in which the individual can live, whether he or she has any estate or interest in it. Where the accommodation is the home of a close relative (parent, grandparent, sibling, child or grandchild, including in-laws), the individual must occupy it for 16 nights during the year for it be treated as a tie.

[149] ibid para 34.

[150] ibid para 37. Days on which the individual was present during the day, but not present at midnight, are ignored in computing whether he or she was present for more than ninety days in a previous year.

present at midnight on more occasions in the United Kingdom than in any other country during the year).[151]

In addition to the short-term connection of physical presence in the United Kingdom during a particular year, the statutory definition also utilises a number of longer-term connecting factors, including whether the individual has a home or available accommodation, or has family members who are resident, or the individual works, in the United Kingdom. Connections to other countries, such as physical presence, a home and work there, are also taken into account, though the definition does not rely on very long-term connecting factors such as citizenship or domicile, and prior residence is only examined over a period of three years. Thus, there is a clear distinction drawn between those who have long-term connections to the United Kingdom and who could be considered to be members of British society, such as individuals whose home and family are located there, and those who have only short-term connections and who would normally not be so considered, such as individuals coming to work in the United Kingdom for a period of time. For individuals with some connection to the United Kingdom beyond physical presence, the number of days in which he or she must be present in the country in order to be deemed to be resident there is relatively small,[152] and so the jurisdictional scope of UK income tax and CGT remains broad, as it was prior to the introduction of the statutory definition.[153]

The tests of residence are also entirely objective, with the intention of the taxpayer and the purpose of his or her presence in, or absence from, the United Kingdom no longer being relevant.[154] While the definition is objective, it is not necessarily straightforward, with the text of the provision running to over six thousand words, and with the computation of what might amount to sufficient hours worked in

[151] ibid para 38.

[152] Certainly compared to the average of 139 days per year an individual can be present in Ireland without becoming resident. See section 4.4 below.

[153] See section 4.3(b) for a discussion of the breadth of the definition of residence under the jurisprudence prior to the 2013.

[154] Two exceptions to this are contained in Finance Act 2013 (UK), sch 45 para 22. First an individual will not be treated as present in the UK for a day where he or she arrives as a passenger and leaves the next day and between arrival and departure, the individual does not 'engage in activities that are to a substantial extent unrelated' to his or her passage through the UK. Secondly, an individual will not be treated as present in the UK where the individual would not have been present at the end of the day were it not for exceptional circumstances beyond his or her control such as a national or local emergency, a natural disaster, or a sudden or life-threatening illness or injury.

the United Kingdom or abroad potentially complex for someone trying to determine in advance if he or she will be resident for a particular year.

Under the definition, it is more difficult for an individual to acquire tax residence in the United Kingdom than it is to lose it, as an individual who was resident in the previous year and who has four ties to the United Kingdom will be resident if he or she spends more than fifteen days there, while an individual who was not resident in the three previous years and who has no such ties can spend up to 183 days and remain non-resident.[155] For someone wishing to become a tax exile, it will be very difficult to maintain significant connections to the country and even a relatively small amount of physical presence. Once the individual has been non-resident for three consecutive years, he or she will still only be able to spend a maximum of forty-five days in the United Kingdom and remain non-resident if he or she has four or more ties to the country.

4.3(b) Jurisprudence on the meaning of 'resident' and 'ordinarily resident'

The jurisprudence on the meaning of 'resident' and 'ordinarily resident' is largely of historical interest only since the introduction of a statutory test of residence in Ireland in 1994 and, more recently, in UK in 2013,[156] and has previously been examined and summarised in other works.[157] The purpose of this section is not replicate that work, but rather to examine the way in which the legislation outlined in section 4.3.(a) was interpreted by the courts, the extent to which coherent principles regarding the meaning of 'resident' and 'ordinarily resident' can be extracted from their decisions, and the theoretical basis upon which those decisions, and those principles, were based. There were very few Irish cases on the meaning of the 'residence' and 'ordinary residence', though those decisions, and the interpretation of

[155] In the latter case, this is subject to the individual not being deemed to be resident by virtue of having a home or working sufficient hours in the UK in the year in question.

[156] Finance Act 1994, s 150 (now TCA 1997, ss 819 and 820) and Finance Act 2013 (UK), ss 218 and 219 and schs 45 and 46 respectively. See section 4.3(a)(iii) above and section 4.4 below.

[157] See for example AJ Easson, *Cases and Materials in Revenue Law* (Sweet and Maxwell 1973); Olowofoyeku (n 73); John Tiley, *Revenue Law* (6th edn, Hart Publishing 2008); Natalie Lee (ed), *Revenue Law: Principles and Practice* (28th edn, Bloomsbury Professional 2010); Michael Sherry (ed), *Whiteman and Sherry on Income Tax* (4th edn, Sweet & Maxwell 2010); Setu Kamal, *Individual Tax Residence* (Sweet and Maxwell 2011).

those terms in practice, drew heavily on the decisions of the British courts, which are predominantly examined in this section.[158]

4.3(b)(i) The 'place of abode' cases

The earliest cases on the meaning of 'resident' and 'ordinarily resident' examined the meaning of 'resident' and the second proviso of section 39 of the Income Tax 1842,[159] which dealt with individuals who were in Great Britain for a temporary purpose and with no intention of establishing their residence there. In *AG v Coote*,[160] a man who divided his time between periods of approximately nine months in his house in Ireland and periods of approximately ten weeks in his house in London was unanimously held to be resident in Great Britain. The defendant was held not to fall within the terms of the 'exemption' in the second proviso,[161] because, as Wood B said it was 'no uncommon thing for a gentleman to have two permanent residences', and his house in London was not a 'temporary residence', with Graham B stating that the defendant's residence in England was not 'occasional, or for a temporary purpose' as at 'any period of the year he might have come to Connaught Place, where he would have found his house ready for him'.[162] The words 'residing in' used in the Schedule D thus appear to have been interpreted as meaning 'having a *residence* in', that is, having a place of abode available in Great Britain, and it seems that an individual

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[158] The decision of the Irish High Court in *Iveagh v Revenue Commissioners* [1930] IR 386 (HC) drew heavily on the decisions of the House of Lords in *Levene v IRC* [1928] AC 217 and *IRC v Lysaght* [1928] AC 234 decided a few years earlier (see the judgement of Sullivan P (414) and O'Byrne J (429)). See also Norman Ernest Judge and Susan Keegan, *Income Tax* 1993-94 (Butterworths 1993) 45-48; Kieran Corrigan *Revenue Law* (Roundhall 2000) vol 1, 263-76.

[159] Income Tax Act 1842 (n 80), s 39: 'no person who shall on or after the passing of this act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resident in Great Britain, at one time or several times, for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in schedule (D.) as a person residing in great Britain, in respect of the profits or gains received from or out of any possessions in Ireland, or any other of her majesty's dominions, or any foreign possessions, or from securities in Ireland, or any other of her majesty's dominions or foreign securities ...'

[160] (1817) 4 Price 183, 146 English Reports 433.

[161] In this case, contained in the Act of 1806 (n 76), s 51. For a discussion of the view that the second proviso is in the nature of an exemption, see section 4.2(c) above.

[162] (1817) 4 Price 183, 188; 146 English Reports 433, 435: 'It is no uncommon thing for a gentleman to have two permanent residences at the same time, in either of which he may establish his abode at any period, and for any length of time. This is just such a case: the defendant has two residences, and they are equally permanent. There is no pretence therefore for contending, that he comes within the exemption. If this were a temporary residence, he would probably change it sometimes, but in fact it is his own house'.

could not be viewed as being in Great Britain for a *temporary purpose* unless the place of abode in question was only *temporarily available*. The fact that the defendant could potentially reside in London at any time apparently meant that any actual residence by him was other than temporary.[163]

In the Scottish case *Lloyd v Sulley*[164] an individual who had a business in Italy where he and his family had lived for many years, but who spent several months in the United Kingdom each year either in his castle in Scotland, or, during several years when it was leased to an unrelated party, in furnished rented accommodation in England, was held to be resident in the United Kingdom. The court followed the reasoning in the *Coote* case in interpreting the words 'residing in' as meaning 'having a place of abode in', with Glencorse LP stating that if an individual occupied a 'place of residence', by which he meant a place 'to which it is quite easy for the person to resort as his dwelling place whenever he thinks fit, and to set himself down there with his family and establishment', for a portion of the year, then he was subject to income tax as a person residing in Great Britain in the course of that year.[165] In interpreting the meaning of the words 'residing in the United Kingdom', Shand LJ appears to have imported the concept of ordinary residence from section 39 of the Income Tax Act 1842, stating that he was disposed to hold that an individual was not liable to the tax assessed unless it could be said that he had *an* 'ordinary residence' within the United

[163] Richards CB took the view that the defendant was prima facie liable, and had failed to discharge the burden of proving that he was 'within the exemption' of the second proviso ((1817) 4 Price 183, 187; 146 English Reports 433, 435). He said that the length of time spent in London was irrelevant ('if the defendant came here for the purpose of establishing a residence, it were enough, although he should reside only two weeks' ibid), though he gave no reason for considering the defendant to be resident other than saying that it was 'a strong fact, that the same servants who lived with him in town went to Ireland, and returned with him' (ibid). The reason for Garrow B's decision is unclear, though, like Graham B, he showed concern that the six month rule might be used as a method of avoiding income tax, by staying for up to six months, leaving and then returning again (since the individual would not then have been resident for six consecutive months; as noted in section 4.3(a), this defect in the legislation was remedied by Income Tax Act 1842 (n 80), s 39) even though there was no indication that this was what had happened in the present case: '[M]ay any man come here and stop till within a week of the six months, and then go to Ireland, and return for the purpose of avoiding the duty?' ((1817) 4 Price 183, 188; 146 English Reports 433, 435 (Graham B)); 'Is then a man, having a magnificent establishment, to be permitted to evade this tax on property, by continuing to reside on it just so long as may be sufficient to bring him within the case to which it is argued this exemption applies?' ' ((1817) 4 Price 183, 189; 146 English Reports 433, 435 (Garrow B)).

[164] n 28.

[165] *Lloyd v Sulley* (n 28) 41. Glencorse LP in fact began his judgment by stating that the fact that the appellant had resided in Scotland from 6 July to 31 October 1883 was a fact that was 'conclusive of the whole case' (ibid). Lord Mure stated that appellant and his family 'certainly all the appearance of a regular residence' during their time in Scotland, noting that it was 'his own property' and that 'the five months residence of that sort brings the case within the decision of the case of *Coote*' (ibid 44).

Kingdom,[166] and holding that the appellant was resident in Great Britain as he 'had an ordinary residence as distinguished from a temporary residence in Great Britain' because he came to his property in Scotland 'as his home with his family and establishment, the only distinction being that in Scotland he was not carrying on business'.[167] Section 39 of the Income Tax Act 1842 did not apply to the appellant, as he was assessed to tax on his income from his trade in Italy under Schedule D Case I,[168] so demonstrating that he was in Great Britain for a temporary purpose would have been to no avail, though the Lord President did take the opportunity to emphasise that the second proviso in that section was in the nature of an exemption, and to suggest that it was intended to apply to 'foreigners' only.[169]

In *Cooper v Cadwalader*[170] an American citizen, who it was agreed had his 'ordinary residence' in New York, and who rented a house and shooting rights in Scotland which he occupied continuously for approximately two months each year, was held to be resident in Scotland. The court unanimously held that Mr Cadwalader

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[166] *Lloyd v Sulley* (n 28) 44. Shand LJ first described the necessary test as being that an individual have *his* ordinary residence, but then corrected himself ('I am disposed to hold that a person is not liable to the assessment which has been here imposed unless it can be fairly said that he has his ordinary residence within the United Kingdom, an ordinary residence I shall rather say within the United Kingdom, during the period for which the taxation is imposed'). Shand LJ in his judgment stated that the words 'ordinary residence' in the first proviso of section 39 of the Income Tax Act 1842 'ought to be read in connexion with section 2 of the statute so as to bring the case up to a substantial reading of the word ordinary residence into section 2', though this conflation of 'residence' and 'ordinary residence' is somewhat confusing. The first proviso of section 39 of the Income Tax Act 1842 states: that 'any subject of her majesty, whose ordinary residence shall have been in Great Britain and gone into any parts beyond the seas, for the purpose only of occasional residence, at the time of the execution of this act, shall be deemed, notwithstanding such temporary absence, a person chargeable to the duties granted by this act as a person actually residing in Great Britain ...' This, it is submitted, is almost the precise opposite of the circumstances of the appellant in *Lloyd v Sulley*.

[167] ibid 45.

[168] See section 4.3(c) above.

[169] As outlined in section 4.3(c) above, Lord Shand disagreed with the Lord President and felt that the second proviso of section 39 of the Income Tax Act 1842 was not in the nature of an exemption, but rather was a charging section, though Glencorse LP called the notion that a person who came to Great Britain for a temporary purpose was thereby not resident 'a fallacy', saying 'if a foreigner comes here for merely temporary purposes connected with business or pleasure, or something else' he is exempt from a portion of the charge imposed by Schedule D, but that were it not for this exemption the individual would have been liable as 'a person de facto residing in Great Britain' (*Lloyd v Sulley* (n 28) 42). It is far from clear on what grounds a foreigner in Great Britain for only a temporary purpose could be considered to be de facto resident there for tax purposes, as this suggests that any measure of physical presence there constituted residence. Shand LJ also considered that the second proviso was intended to not to apply to British subjects ('although the provision in section 39 is in the language of exemption, as I have indicated in the course of the argument, it rather appears to me to be a section which is intended to impose liability, or to show that liability will be imposed upon persons who come to this country, but *who are the subjects of other realms*' (ibid 44, emphasis added by the present author)), though there appears to be nothing in the legislation to suggest such a limitation was intended.

[170] (1904) 5 TC 101.

was residing in the United Kingdom according to the meaning of the term in the section 2 of the Income Tax Act 1842, and could only avoid liability if he came within the exception in the second proviso of section 39 that act.[171] Following the previous decisions just outlined, he was held to be resident because he occupied the house personally for a considerable portion of the year, so that his occupation was 'not of a casual or temporary character' but was 'substantial, and as regards some of its incidents' continuous.[172] The claim that Mr Cadwalader was in the United Kingdom for a temporary purpose or with no view to establishing his residence there was also unanimously dismissed, with McLaren LJ saying that temporary purposes meant 'casual purposes as distinguished from the case of a person who is here in the pursuance of his regular habits of life' and were the opposite of 'continuous and permanent residence', but that it was not 'the negation of perpetuity, but means that it is casual or transitory residence, as distinguished from a residence, of which there may be more than one, but which may be habitual or permanent', and that Mr Cadwalader could not fall within the exception when he went 'year after year during the currency of his lease to spend the shooting season in Scotland'.[173] The decision in *Cooper v Cadwalader* was followed in *Loewenstein v De Salis*[174] where a Belgian national who occupied a 'hunting box'[175] owned by a company in which he was the majority shareholder for various periods not exceeding four and half months each year was held to be resident in the United Kingdom.[176] It was also followed in *Thomson v Benstead*

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[171] McLaren LJ said 'I think the important question in this case is whether Mr. Cadwalader comes within the exception, because if he does not come within the exception there is the strong presumption, supported by, I think, previous decisions, that the general enacting words are broad enough to apply to his case' going on to cite both the *Coote* case and *Lloyd v Sulley*' (ibid 108). Adam LJ expressed a similar sentiment saying that 'Mr. Cadwalader was residing in this country, and was liable to assessment. That is, unless his case comes under section 39 of the Act of 1842' (ibid).

[172] Kinross LP (ibid 105). See also Adam LJ, who said 'I cannot draw a distinction between the ten weeks in *Coote's* case and the three and a half months in *Lloyd's* case; and in this case there is a residence in each country, and it is not a question of principal residence at all. It is simply a question of residence in this country. Is the person residing in this country? In my humble opinion Mr. Cadwalader was residing in this country, and was liable to assessment' (ibid 108).

[173] ibid 109. See also the comments of Kinross LP that Mr Cadwalader took the lease with the intention of 'establishing his residence there during a material part of each year and maintaining his connection with it as tenant during the rest of the years, and he has a residence always ready for him if he should choose to come to it' (ibid 106).

[174] (1926) 10 TC 424 (HC).

[175] This consisted of 'of gardens, stables, garage, tennis court, seven houses, including a farm house, a fox cover known as "Adam's Gorse," a spinney known as "Wood Close Spinney," and two farms the whole containing about 342 acres of land' (ibid 427).

[176] Rowlatt J held that 'If he had been the leaseholder of that place, there could not be a shadow of doubt, upon Cadwalader's case, that the Court would ... have supported a finding that he resided there', and that even though the Mr Loewenstein had no proprietary interest in the property, he had the 'house at his disposal, with everything in it or for his convenience, kept going all the year round, although he

where an agent for a Nigerian company spent eight months a year in Nigeria and the remainder in the United Kingdom with his wife and family.[177]

In *Turnbull v Foster*[178] the appellant was a merchant in Madras whose wife and children lived in Scotland where he visited them each year. He was in the United Kingdom for six months, three and a half months and eight months respectively in each of the three previous tax years, but neither he, his wife nor his eldest daughter were in the United Kingdom at all for the tax year under consideration. Kingsburgh LJC, with whom Young LJ agreed, held that it would 'require a pretty strong case indeed' for a person to be assessable to tax who had not been in the country for the whole of the year of assessment in question, and that he was 'not according to sound reading of the statute to hold that his usual residence during the whole of that year was' in Scotland.[179] This case appears to be the origin of the 'rule' that if an individual was absent from the United Kingdom for an entire year of assessment, then he or she was not resident for that year, and of the converse proposition that if an individual had a place of abode available in the United Kingdom then he or she would be resident if physically present in the United Kingdom, regardless of how short the length of stay.[180]

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only wanted it for a short time' and was therefore resident there' (ibid 437). Corrigan, (n 158) vol 1, 272 suggests that in the Irish case *Hewson v Kealy* (1945) 2 ITR 286, in which an individual spent most of a tax year in the Isle of Man but returned to Ireland at Christmas of that year, '[t]he short High Court judgement, which upheld the Circuit Court decision, does not expand on the reasons why the taxpayer was held resident in the State for that year but the place of abode test seems to have prevailed for the Revenue'.

[177] (1918) 7 TC 137. Dundas and Salvesen LJJ both cited *Cooper v Cadwalader* (n 170), with the former also distinguishing the case of *Turnbull v Foster* (1904) 6 TC 206, which is discussed in the next paragraph of the text. However, Dickson LJC seems to have based his decision on the fact that the appellant's 'ordinary or principal residence was all the time where his wife and family were' and so his absences from the United Kingdom were not for occasional residence ((1918) 7 TC 137, 144). See section 4.3(b)(ii) below.

[178] n 177.

[179] ibid 209-210. Traynor and Moncrieff LJJ also added that the appellant did not have his ordinary residence in Great Britain, and so the first proviso of Income Tax Act 1842 (n 80), s 39 did not apply to him. See section 4.3(b)(ii) below.

[180] See for example Anthony Sumption, 'Residence' [1973] British Tax Review 155, 157; Natalie Lee (ed), *Revenue Law: Principles and Practice* (28th edn, Bloomsbury Professional 2010), 442. In the Irish case *Iveagh v Revenue Commissioners* [1930] IR 386 (HC) 415 Sullivan P said 'No doubt the late earl had a residence in the Free State in the years 1922-23 and 1923-24, but that fact is not sufficient to establish his liability to tax' and '[i]n view of the fact that at no time during the two years in question was the late earl in this country, I think the Special Commissioners were right in coming to the conclusion that he was not a person residing in Saorstát Éireann in those years' (ibid 415-16). See also Corrigan (n 158) vol 1 276.

In *Peel v IRC*[181] the appellant, who had lived for many years in Egypt with his wife and family, bought a house in Scotland in which he stayed on regular visits to the United Kingdom, and which was also used by his children who were in school there. Although the facts of the case was very similar to those in *Lloyd v Sulley*, the case appears to have been decided without reference to that case, and not primarily on the basis of the appellant having a place of abode available for his use in the United Kingdom, but rather on the basis of his frequent visits there following the decision in *Reid v IRC*.[182]

The judgements in these cases, which established what came to be known as the 'place of abode' rule, made little or no attempt to analyse or define the words 'residing in' as used in the Income Tax Acts, but each took an extraordinarily broad view of their meaning. It seems that an individual was treated as 'residing in Great Britain' if he or she occupied a residence or place of abode available for his or her use for a period of the year in question, though arguably it was necessary that this property be available, and availed of, over number of years. The exemption for an individual who was in Great Britain for a temporary purpose and with no intention of establishing his or her residence there was interpreted very narrowly. 'Temporary' appears to have been viewed as meaning 'not regular', and was in some judgments linked to the availability of accommodation, so that an individual who had a place of abode that was more than temporarily available for his or her use was not within the exception. This would appear to have ignored the intentional aspect of this part of the test, that is, whether the *purpose* of the visit to Great Britain was a temporary one, and focused instead on the objective frequency and duration of those visits. In *Cooper v Cadwalader* two of the judges took an even narrower view of the meaning of 'temporary purpose' in section 39 of the Income Tax Act 1842. Kinross LP expressed the view that the provision was 'directed to prevent temporary residents for less than six months in *one year* from being charged in respect of profits received from abroad' (emphasis added), while Adam J said that coming to the United Kingdom for a few months in the year was not a 'temporary purpose' because 'evidently this part of the

[181] (1928) 13 TC 443.
[182] (1926) 10 TC 673. See Section 4.3(b)(iii) below, which also discusses whether the place of abode rule was still good law following the decision in *Reid v IRC*.

Act applies to much more temporary purposes than that...'[183] There does not appear to be anything in the legislation to suggest such a limitation, and indeed, if this interpretation were correct the six month rule would have been entirely redundant.

An equally narrow interpretation was taken of the meaning of the words 'not with any view or intent of establishing his residence' in section 39 of the Income Tax Act 1842, with Kinross LP in *Cooper v Cadwalader* adopting the rather circular argument that Mr Cadwalader must have intended to establish his residence in Great Britain as he took the house in Scotland 'with the view of establishing his residence there during a material part of each year'. McLaren J, in the same case said that the wording was somewhat vague but it seemed to recognise what he termed 'constructive residence as distinguished from actual residence', suggesting that it might apply in a situation where an individual took a house intending to establish '*a* residence' (emphasis added) there but had not yet had time to do so, saying 'if you are looking forward to it, apparently that makes you liable to taxation'.[184] If this were so, considering that any available accommodation constituted residence, it hard to conceive of a set of circumstances in which the 'exemption' could ever apply.

Although the meaning of the term 'residing in' was not defined or discussed in any great detail in these cases, it seems that the concept of residence as a connecting factor for taxation was interpreted as encompassing everyone physically present in Great Britain other than those with only a very limited presence which was spent in accommodation that was only temporarily available. It is notable that Glencorse LP and Shand LJ in *Lloyd v Sulley* took the view that the exception in section 39 of the Income Tax Act 1842, which included the six month rule, was intended only to apply to aliens, though this did not avail Mr Cadwalader or Mr Loewenstein, as they could not bring themselves within the terms of the exception. It should be noted that this interpretation by the courts was not altered by any legislative provision until 1956 in the United Kingdom and 1987 in Ireland, and then only to exclude from residence

[183] (1904) 5 TC 101, 106 and 108 respectively.
[184] ibid 106 and 109 respectively. It is notable that Lord McLaren misquoted the legislation, referring to a 'view or intent of establishing *a* residence' rather than '*his* residence' (emphasis added).

those who worked full-time abroad. The place of abode rule was not abolished until 1993 in the United Kingdom and 1994 in Ireland.[185]

4.3(b)(ii) The 'occasional residence abroad' cases: Homeowners

In *Re Young*[186] a Master mariner who spent most of the year of assessment abroad and had only been present in the United Kingdom for eighty-eight days, but who had a house in Glasgow which was occupied by his wife and family and by him when he was not at sea, was held to be resident in Scotland.[187] The decision was based primarily on two grounds. First, Ardmillan LJ emphasised that Captain Young had 'done nothing to change his residence' and had no other residence in any part of the world, and so the choice was 'betwixt his having no residence, and that residence which he has engaged for his wife and family, which I believe is his true residence'.[188] This appears to proceed on the basis that an individual must be resident somewhere, though there was nothing in the legislation to suggest that this was so.

The second ground was that Captain Young's ordinary residence was in Great Britain but that he had gone abroad for the purpose of occasional residence only and so was taxable as a person actually resident in Great Britain within the terms of the first proviso of section 39 of the Income Tax Act 1842.[189] Glencorse LP equated the

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[185] See section 4.3(a)(ii) above.

[186] (1875) 1 TC 57.

[187] Glencorse LP held that the words 'residing in Great Britain' did not connote continuous residence or 'constant personal presence in one place' and that the jurisprudence in relation to the Poor Law Acts which had been opened in the case, and which is discussed in chapter 2, was therefore not relevant (ibid 60). The other judges agreed that these cases were not relevant with Lord Deas commenting that 'reference to the Poor Law Acts is only calculated, if it is calculated for anything at all, to mislead. If you get any light from these decisions at all it is very apt to leave you uncertain' (ibid 61).

[188] ibid 63. Mure LJ similarly stated that the appellant was in the house in Glasgow 'for a period of 88 days, or about three months out of 13 months, and that during the whole of that time he never resided elsewhere' (ibid). Deas LJ stated that he could not 'see how it can be doubted that this man is residing in Great Britain if he has a residence anywhere. He is residing in Great Britain, and I do not think it requires the aid of decisions or authority to come to the conclusion that he has a residence' (ibid 61). Ardmillan LJ also observed that 'Captain Young is a British subject. He is in the service of a Clyde shipping company. He commands a Clyde ship, and while he is on the deck of that Clyde ship and discharges his duty in the service of that Clyde shipping company he is certainly doing nothing to weaken his connection with the Clyde, on the margin of which he leaves his wife and family. The ship hails from the Clyde and is registered there as a Clyde vessel, and Captain Young is a British captain doing duty on deck of a British ship belonging to a British shipping company', though it is not clear whether he considered the appellant to be resident in the UK as a result any of these factors (ibid 62).

[189] Income Tax Act 1842 (n 80), s 39: 'any subject of her majesty, whose ordinary residence shall have been in Great Britain and gone into any parts beyond the seas, for the purpose only of occasional residence, at the time of the execution of this act, shall be deemed, notwithstanding such temporary

notion of ordinary residence with that of residence, saying that section 39 showed that 'the meaning of residence in this statute is ordinary residence, *an* ordinary residence' (emphasis added) and that it was 'clear beyond all doubt' that Captain Young had 'in the ordinary and plain meaning of the words, *a* residence in Glasgow' (emphasis added).[190] Thus 'ordinary residence' appears to have been taken to mean a place of abode (*a* residence) which was available for use by an individual and which was *ordinary*, though the meaning of 'ordinary' in this context was not explored. Regarding the meaning of 'occasional residence' abroad, or 'temporary absence' from Great Britain within the meaning of section 39 of the Income Tax Act 1852, Glencorse LP said that Captain Young's absence from Scotland depended on the 'briskness or dulness of trade' and so it was 'a mere accident that calls on a captain to be absent from his residence in any one part of the year' and that these were therefore temporary absences, noting that a temporary absence didn't necessarily mean 'something shorter than the presence of the party in this country' and that it could be 'for a very long time' where it was 'in prosecution of some special purpose', and could be 'of a very prolonged description, although not being of a necessarily prolonged description'.[191] Similar views were expressed by Mure and Deas LJJ, even though they had apparently held that Captain Young was resident in Great Britain, and so the first proviso of section 39 ought not to have arisen.[192]

The decision in *Re Young* was followed in *Rogers v IRC*[193] where a master mariner who owned a house in Scotland in which his wife and children lived was at sea, and therefore outside the United Kingdom, for an entire year of assessment. Glencorse LP, with whom Deas, Mure, and Shand LJJ agreed, again placed emphasis

absence, a person chargeable to the duties granted by this act as a person actually residing in Great Britain ...'

[190] (1875) 1 TC 57, 59.

[191] ibid 60. Glencorse LP expressed a similar view in *Lloyd v Sulley* (n 28) 42, saying of the first proviso in section 39 of the Income Tax Act 1842: 'Now that is a very important provision as extending the meaning of the words in the taxing clause, "residing in the United Kingdom". It extends it to a person who is not for a time actually residing in the United Kingdom, but who has constructively his residence there because his ordinary place of abode and his home is there, although he is absent for a time from it, however long continued that absence may be'.

[192] Deas LJ said that Captain Young had not gone 'into foreign parts beyond the seas for the purpose of occasional residence' or for 'residence at all, but for the purposes of his trade' (ibid 62), while Mure LJ said 'It is a nice question, in view of the words "occasional "residence" to say whether a man who takes command of a ship and takes it to another place goes there for that purpose' and that 'this part of the statute seems to have been framed to meet such cases' (ibid 63-64).

[193] (1879) 1 TC 225.

on the fact that the appellant had 'no other residence, and a man must have a residence somewhere', and held that the absence was not temporary or for occasional residence but was 'a mere accident' and arose a result of the 'exigencies of his business'.[194]

In *Reed v Clark*[195] the appellant, who up until that point had been resident and ordinarily resident, left the United Kingdom for a period of just in excess of an entire tax year for the deliberate purpose of avoiding income tax on the sale of musical recording rights. He owned a flat in Mayfair which was unlet and unoccupied throughout this period. The Special Commissioners found that the appellant's 'journey to America on 3 April 1978 was not made as a matter of "passing opportunity"', and that the decisions in *Re Young* and *Rogers v IRC* constituted an exception to the general rule that an individual is not resident in the United Kingdom if he or she is not physically present during the year, and those decisions were 'probably confined to wanderers with no other place of residence than the base from which they started and to which they would return'.[196] Nicholls J found that 'the true and only reasonable conclusion from the primary facts found by the commissioners was that the taxpayer was not residing in the United Kingdom'. He also held that section 49 of the Income and Corporation Taxes Act 1970 (UK) (formerly the first proviso of section 39 of the Income Tax Act 1842) was a substantive charging provision, and that there was nothing in the language or context of the section 'to show that regardless of the circumstances a person can never be said to have left for the purpose only of occasional residence abroad if his residence abroad extends throughout an entire tax year'.[197] Nicholls J also held that the appellant remained ordinarily resident in the United Kingdom, and expressed the view that 'a British resident's departure abroad for a period of a few weeks or months with the firm intention of returning at the end of the period to live here as before would be likely always to be for the purpose only of occasional residence', but that a year was a 'long enough period for a person's purpose of living where he does to be capable of having a sufficient degree of continuity for it

[194] ibid 226. This case can be contrasted with the case of *Turnbull v Foster* (n 177) discussed in section 4.3(b)(i) above. In that case, the appellant was abroad for an entire tax year, but was not taxable because he was not ordinarily resident in the United Kingdom, and so the first proviso of section 39 of the Income Tax Act 1842 had no application (see the judgment of Trayner LJ), although confusingly Moncrieff LJ found that if the appellant 'had been travelling, or had been a mariner and had been absent the whole of the year' it would not have prevented him being considered resident'.
[195] n 112.
[196] ibid 6 and 7-8.
[197] ibid 9 and 15-16.

to be properly described as settled'. He went on to state that in the present case there had been 'a distinct break in the pattern of the taxpayer's life which lasted, as from the outset he intended, for just over a year' and so the appellant could not 'be said to have left the United Kingdom for the purpose only of occasional residence abroad'.[198]

These cases seem to indicate that although the word 'temporary' used in the context of an individual's purpose for being in the United Kingdom was interpreted extremely narrowly to mean a very short period of time, something less than six months occurring in just one year, the words 'temporary' or 'occasional' used in the context of an individual's absence or residence abroad were interpreted extremely broadly to indicate a period that could be prolonged, perhaps in excess of a year, and occurring regularly over a number of years.

4.3(b)(iii) The 'occasional residence abroad' cases: Non-homeowners

In *Reid v IRC*[199] the appellant had for many years shared a house in Glasgow with her two sisters during the summer months and spent most of the year abroad. Following the death one of her sisters, the house was sold and from that point onwards the appellant stayed in various hotels when visiting the United Kingdom, and so did not have *a* residence in the United Kingdom, and, on the basis of the decided case law at that point, would appear therefore not to have been 'residing in the United Kingdom' nor to have had *an* 'ordinary residence' there. The appellant had claimed an exemption from income tax on British government stock pursuant to section 46 of the Income Tax Act 1918 on the grounds that she was 'not ordinarily resident in the United Kingdom'.

Clyde LP, with whom Ashmore LJ agreed, began his judgment by noting that the courts 'right to interfere with the determination of the Commissioners is limited to matters of law', though he did not express a view as to whether a determination that in individual was ordinarily resident in the United Kingdom was such a question, or a

[198] ibid 17 and 18. The concept of a 'distinct break' appears to have first arisen in *CIR v Combe* (1932) 17 TC 405, as does the concept of 'passing opportunity' which test the Commissioners applied but Nicholls J rejected. *CIR v Combe* is discussed in section 4.3(b)(iii) below.
[199] n 182.

question of fact, or a mixed question.[200] He said that the meaning of the word 'reside' could often be determined with the 'helpful connotation which is often provided by the circumstance that the person who is said "to reside" in a place is possessed of some house or habitation there, open, or at least available, for him to "reside" in'. However, he went on to say that the 'relation between a person and a place which is predicated by saying that a person "resides" there includes inter alia the element of time, duration, or permanence', and that having a place in which to reside available was 'not the sole criterion'.[201] The Lord President did not give a reason for believing that the appellant was 'resident' in the United Kingdom,[202] but as regards the meaning of 'ordinarily resident' said that it was possible for an individual to be ordinarily residing in two or more places, and that the word 'ordinarily' was to be contrasted with the word 'casually' and that 'the Appellant is not a "casual" visitor to her home country; on the contrary she regularly returns to it, and "resides" in it for a part-albeit the smaller part-of every year'. On this basis, and on the basis of the 'qualities as well as the durability of the relation between a person and the place', the Lord President felt that he could not find the Commissioners were mistaken in their findings.[203] Blackburn LJ held that the Commissioners' finding was one of fact and that there was evidence upon which it could be reached, though he said that he would have reached a different conclusion. He said that the only fact that was 'material in construing the expression "ordinarily resident"' was whether an individual had physically resided in the United Kingdom, and that where an individual had more than one 'ordinary residence' the place where

[200] ibid 678. Sands LJ did view the determination as a question of fact, and since he felt that there was no evidence that the Commissioners had misconstrued the statute, found against the appellant (ibid 681).
[201] ibid.
[202] Though he must have so held, since he found her also to be ordinarily resident there. The Lord President did note that the 'Appellant is a British subject, her family ties are with this country; her business matters (including her banking) are conducted here; the address by which she can be found at any time is in this country; and her personal belongings not required when she is travelling are kept in store in London' (ibid), but rather than deeming this sufficient for the appellant to be resident, merely stated that it had been contended that 'if these facts are consistent with her being held to "reside" in the United Kingdom, they are inconsistent with the view that she "ordinarily" so resides' and then proceeded to examine that question (ibid 679). The Lord President also observed that a 'homeless tramp' may wander all over the United Kingdom, yet no one would say that he did not live in the United Kingdom, and it would not be a 'misuse of language to say he resides in the United Kingdom'. Of course, whether someone would say that Ms Reid lived in the United Kingdom is quite a different matter, and not, it is submitted, analogous.
[203] ibid 680.

he or she ordinarily resided would be the place 'in which in the ordinary course of things he spent the greater part of the year'.[204]

In two subsequent, and very similar cases, individuals who had no place of abode available and who were in the United Kingdom for a few months each year were held not to be resident in the United Kingdom.[205] In *IRC v Zorab*[206] a British subject who was born and had lived all his life in India retired and spent several months a year in the United Kingdom staying in a hotel, with the remainder of the time in continental Europe staying in hotels. The Commissioners for the Special Purposes of the Income Tax Acts held that Mr Zorab was not 'residing in the United Kingdom'. On appeal, Rowlatt J held said that

> it is perfectly right to say that a man has not got to have a residence in the shape of a building to be resident in this country. That is quite clear. But I think that one has to consider not only the time that he is in this country but the nature of his visit and his connection with the country. I think the cases quite bear that out[207]

He went on to say that it was for the Commissioners to judge the 'significance of the length of time and other circumstances' of an individual's presence in the United Kingdom, and that this was a question of fact. He said that Ms Reid had had stronger connections to the country, as her 'furniture was stored and her banking account was kept' there and that although these 'small things', they had to be taken into consideration. In *IRC v Brown*[208] an individual who had previously spent two or three

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[204] ibid 682. Cave LC took a different view in *Levene v IRC* (n 158) 225, where he said 'the suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance'. This view was repeated by Pearce LJ in *Miesegaes v IRC* (1957) 37 TC 493, 500-01: 'The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance'.

[205] See also *Peel v IRC* (n 181), where Clyde LP refused to disturb the findings of the Commissioners saying that he assumed that they had 'directed themselves in accordance with the principles of the decision in *Reid v The Commissioners of Inland Revenue*'; and *Kinloch v IRC* (1929) 14 TC 736, the facts, and outcome, of which were quite similar to those in *Reid v IRC*.

[206] (1926) 11 TC 289.

[207] ibid 291.

[208] (1926) 11 TC 292.

months outside the United Kingdom for the sake of his health, sold his house and commenced spending three months in the United Kingdom in hotels and the remainder of the year in continental Europe staying in hotels. The Commissioners for the Special Purposes of the Income Tax Acts held that Mr Brown had been previously been ordinarily resident in the United Kingdom, but that there had been 'a definite break in his habit of life' when he sold his house, and that he was not resident in the year of assessment in question as he was in the United Kingdom for a temporary purpose. On appeal Rowlatt J noted that the case was like that of *Reid v IRC* and that there as 'a stronger case in favour of residence' than in *IRC v Zorab*, as Mr Brown 'had some furniture and a banking account and he had connections with England'. However, as these were findings of fact by the Commissioners, he would not disturb them.[209]

The question of residence and ordinary residence for income tax purposes came before the House of Lords in two cases which were heard consecutively: *Levene v IRC* and *IRC v Lysaght*[210]. In *Levene v IRC*, the appellant had left England to live abroad on medical advice, but returned for approximately five months each year, staying in hotels both in England and when overseas. Cave LC, with whom Atkinson LJ concurred, drew a parallel between the facts of the case and those in *Reid v IRC* and held that it was open to the Commissioners to find the appellant to be 'resident in the United Kingdom' saying that it was probable that rule 3 of the General Rules applicable to Schedules A, B, C, D, and E of Income Tax Act 1918 applied,[211] that is that the appellant's ordinary residence was in the United Kingdom and he had left for the purpose only of occasional residence abroad. This is somewhat surprising, as Cave LC went on to say that 'ordinary residence'

> connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word "residence" as used in the Acts; and I find it difficult

[209] Of course in *Reid v IRC* (n 182) Ms Reid had appealed against a finding that she was ordinarily resident in the UK, as this was what the specific exemption she sought was based on. However, there is no evidence that the Commissioners distinguished the case on this basis, and indeed it seems that the court had found Ms Reid to be both resident and ordinarily resident.
[210] n 158. *IRC v Lysaght* is discussed in section 4.3(b)(iv) below.
[211] *Levene v IRC* (n 158) 224.

> to imagine a case in which a man while not resident here is yet ordinarily resident here.[212]

It is difficult to see how an individual could be resident as a result of being ordinarily resident if it is not possible for that individual to be ordinarily resident without being resident.

Sumner LJ, with whom Buckmaster LJ agreed, found that the appellant was ordinarily resident in the United Kingdom when he sold his house and began spending the majority of his time overseas, and that 'there was ample evidence before the Commissioners' to show that he had 'left the United Kingdom for the purpose of occasional residence only'. He further stated that in the following years '[n]o material change occurred in his way of living' and that he had 'changed his sky but not his home', and there was 'no error in law in saying of each year, that his purpose in leaving the United Kingdom was occasional residence abroad only'.[213] He went on to say that 'so far as it is permissible to express an opinion on the facts', the appellant was 'at all material times resident in the United Kingdom',[214] though no reason was given for this conclusion. Warrington LJ took a similar view, saying that the appellant's 'ordinary residence was unquestionably in the United Kingdom' until he sold his house, and he could not see how 'his subsequent departure from the United Kingdom in any of the years in question was otherwise than for the purpose of occasional residence abroad'.[215]

In *IRC v Combe*[216] an individual who had previously been resident and ordinarily resident in the United Kingdom went to New York for a three year apprenticeship with a brokerage firm, returning for business purposes for periods of several months each year, during which he stayed in hotels. He had no fixed place of abode in the United Kingdom. The Commissioners for the General Purposes of the Income Tax Acts found that Mr Combe was not residing in, but was ordinarily resident

[212] ibid.
[213] ibid 225-27.
[214] ibid 228-29.
[215] ibid 233. Curiously, Warrington LJ stated that he was not resting his 'opinion upon the third of the General Rules applicable to All Schedules', though it is expressed in those terms and he gives no other ground upon which it could rest.
[216] n 198.

in, the United Kingdom and that his absences from the United Kingdom were not for the purpose only of occasional residence abroad, and the court upheld this ruling. Clyde LP said that '"occasional residence" is residence taken up or happening as passing opportunity requires' and should be contrasted with residence or ordinary residence,[217] while Sands LJ held that there had been a 'distinct break' in Mr Combe's residence in the United Kingdom, as in the first year of his apprenticeship his presence in the country 'might have been accounted for by simply not very prolonged holidays' and so his residence in New York was not 'occasional'.[218]

Ordinary residence was considered in *R v Barnet London Borough Council, ex parte Shah*[219] a case concerning entitlement to local authority education grants. Templeman LJ endorsed the views of Sumner LJ and Buckmaster LJ in *IRC v Lysaght*[220] holding that a foreign student who had come to the United Kingdom only for the purpose of undertaking a defined course of study was not ordinarily resident as he was not residing in the United Kingdom 'as part of the regular order of his life adopted voluntarily and for settled purposes or in the ordinary course of his life'.[221]

The decision in *Reid v IRC* and in the cases which followed it, in particular *Levene v IRC*, marked a significant departure from the jurisprudence that predated them. Up until that point, the words 'residing in the United Kingdom' had been almost universally interpreted as referring to having *a* residence, or place of abode there, to

[217] ibid 410.
[218] ibid 411.
[219] [1982] 1 All ER 698.
[220] n 158. *IRC v Lysaght* (n 158) is discussed in section 4.3(b)(iv) below.
[221] [1982] 1 All ER 698, 713. This is very similar to the test that McLaren LJ adopted to determine what did not constitute presence in the United Kingdom for a 'temporary purpose' in *Cooper v Cadwalader* (n 170) 109: 'I should say that temporary purposes means casual purposes as distinguished from the case of a person who is here in the pursuance of his regular habits of life'. See also the more recent cases of *Genovese v Revenue and Customs Commissioners* [2009] STC (SCD) 373 and *Tuczka v Revenue and Customs Commissioners* [2011] STC 1438, regarding whether an individual coming to the United Kingdom had to be resident for any particular period of time before he or she became ordinarily resident there. David Welsh, 'Tuczka v Revenue and Customs Commissioners: the end for ordinary residence?' [2010] British Tax Review 223, 232 said that the result of the latter case was that the law was 'back to the point at which nothing is known in advance about the way in which HMRC are going to decide an individual's residence status. It is more than possible that, as the law currently stands, an individual could do something in their 34th month in the UK which will cause HMRC to determine that that individual was ordinarily resident in the UK from the moment of their arrival'. As mentioned in section 4.3(a), the concept of ordinary residence, and its significance, was dramatically altered in Ireland in 1994, and was abolished as a connecting factor for income tax in the UK in 2013. These more recent cases are accordingly not considered further.

which the comments of Trayner LJ in *Turnbull v Foster*, that in the charging section of the Income Tax Act 1842 the test is not 'having a residence in the United Kingdom. He is to reside in the United Kingdom', appear to have marked a lone exception.[222] Following the decision in *Reid v IRC*, having accommodation available in the United Kingdom was no longer the 'sole criterion'[223] and an individual did not have to have 'a residence in the shape of a building to be resident' in the United Kingdom.[224] The place of abode rule was not abolished by these decisions, though the premise upon which it was based does appear to have been significantly undermined.[225]

These cases were not marked by any greater analysis of the meaning of the words 'residing in the United Kingdom' than had been the case heretofore, rather it had been decided that these words had 'no technical or special meaning for the purposes of the Income Tax Act'[226] and that the question of an individual's residence was one of fact for the Commissioners to decide. The decisions themselves do mark an extension in the meaning of 'residence' for tax purposes, though, as an individual could now be considered to be residing in the United Kingdom even if he or she had no place of abode there. However, apart from physical presence and ownership of property, the basis on which residence was determined is unclear. Rowlatt J in *IRC v Zorab* did express the view that 'one has to consider not only the time that he is in this country but the nature of his visit and his connection with the country'[227] and the Commissioners did mention other factors in their cases stated, such as the individual's nationality, previous periods of living in the United Kingdom, family members living there, whether the individual had a bank account or kept any belongings in storage

[222] n 177 210. Though Salvesen LJ in *Thomson v Benstead* (n 177) 146, a case decided shortly before *Reid v IRC*, did approve of Trayner LJ's view, saying: 'I agree with Lord Trayner in the case of *Turnbull*, 1904, 7 F., p. 3,(3) where he says:-"The test of this question is not having a residence in the United Kingdom but is residing in the United Kingdom"'.

[223] *Reid v IRC* (n 182) 678 Clyde LP.

[224] IRC v *Zorab* (n 206) 291 Rowlatt J. See also the comments of Sumner LJ in *IRC v Lysaght* (n 158) 244: 'Grammatically the word "resident" indicates a quality of the person charged and is not descriptive of his property, real or personal. To ask where he has his residence is often a convenient form of inquiry but only as leading to the question "then where is he resident himself?" I think this distinction, though often pointed out, has too often been overlooked in the arguments in the reported cases'. *IRC v Lysaght* is discussed in section 4.3(b)(iv) below

[225] As noted in section 4.3(b)(i), the place of abode rule was not abolished until 1993 in Ireland and 1994 in the UK.

[226] *Levene v IRC* (n 158) 232 (Warrington of Clyffe LJ).

[227] IRC v *Zorab* (n 206) 291.

there etc, but the extent to which these factors influenced the decision that an individual was residing in the United Kingdom is impossible to determine.

The meaning of 'ordinarily resident' was equally not examined in detail in these cases, and it continued to be more or less equated with residence.[228] It was considered to apply to any form of residence that was not casual, accidental, temporary or irregular, and since any such residence would result in an individual being considered to be 'residing in' the United Kingdom, it is hard to see any difference between the terms. Indeed, Cave LC went so far as to say that there was none.[229] This equating of residence and ordinary residence was problematic, as it made it very unclear the circumstances and manner in which the provision formerly contained in the first proviso of section 39 of the Income Tax Act 1842 could apply.[230] The definition of ordinary residence that had been adopted meant that there were few, if any, circumstances under which the the provision formerly contained in the second proviso of section 39 might apply, as if ordinary residence was any residence that was not casual, this would indicate that casual residence was still residence for tax purposes, making it difficult to see how an individual might be considered to be residing in the United Kingdom but there for a temporary purpose only.

It appears that once an individual was considered to be resident in the United Kingdom, this connection could only be broken if there was a distinct break or a material change in the individual's way of living, and if the individual's residence abroad was not 'occasional', which appears to have required a lengthy period away from the United Kingdom. While the connection of to the United Kingdom necessary for an individual to be considered resident was insubstantial, once residence was acquired it took a much more significant presence in another country to break it.

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[228] Though not with having *a* residence, as was suggested by Glencorse LP in *Re Young* (n 186) 59.
[229] *Levene v IRC* (n 158) 224. Cave LC said ordinary residence 'connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word "residence" as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here'. See also *Reid v IRC* (n 182) 680 (Clyde LP) 'From the point of view of time, "ordinarily" would stand in contrast to "casually". But the Appellant is not a "casual" visitor to her home country; on the contrary she regularly returns to it, and "resides" in it for a part-albeit the smaller part-of every year'.
[230] By this point the provision in question was contained in rule 3 of the General Rules applicable to Schedules A, B, C, D, and E of Income Tax Act 1918.

4.3(b)(iv) The 'habitual and substantial visits' cases

In *IRC v Lysaght*[231] an individual who had partially retired from business and returned to live permanently in Ireland with is family, returning to the England for board meetings of a company of which he was an 'advisory director' once a month and staying for approximately a week on each occasion, was held by the Special Commissioners to be resident and ordinarily resident in Great Britain. This view was upheld by the House of Lords, with Cave LC dissenting.

Sumner LJ said that the word 'resident' indicates a 'quality of the person charged and is not descriptive of his property, real or personal' and that to ask where an individual 'has his residence is often a convenient form of inquiry but only as leading to the question "then where is he resident himself?"', a distinction that he noted had 'too often been overlooked in the arguments in the reported cases'.[232] Sumner LJ said that the 'shortness of the aggregate time' during which Mr Lysaght was in the UK was the 'principal, though by no means the only point in his favour', however, he expressed the view that if Mr Lysaght had come for three months consecutively there would be evidence upon which the Commissioners could hold him to be resident, and that the 'discontinuity of the days' would not prevent him being resident where 'the obligation to come, as required, is continuous and the sequence of the visits excludes the elements of chance and of occasion'.[233] He further stated that, viewed from the Irish perspective, Mr Lysaght's presence in England would have satisfied the expression 'occasional residence abroad', but that 'residence is still residence, though it is only occasional' and there was 'no such fundamental antithesis between "residence" and "temporary visits" as would prevent Mr. Lysaght's visits, periodic and short as they are, from constituting a residence in the United Kingdom'.[234] This appears to state what, in the present author's view was implicit from the previous jurisprudence, that what constitutes 'occasional residence' in the context of an individual who spends time outside the United Kingdom does not constitute presence

[231] n 158.
[232] ibid 244.
[233] The question of whether Mr Lysaght was in the United Kingdom for a temporary purpose or with no intention of establishing his residence there (within the meaning of rule 2 of the Miscellaneous Rules applicable to Schedule D in the Income Tax Act 1918) did not arise as Mr Lysaght did not have any income from foreign possessions.
[234] ibid 245.

in the United Kingdom for a 'temporary purpose'. This made the jurisdictional scope of income tax so broad that it is perhaps unsurprising that Sumner LJ commented that 'a man is taxed where he resides. I might almost say he resides wherever he can be taxed'. Sumner LJ concluded that the converse to 'ordinarily' in the context of ordinary residence was '"extraordinarily" and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not "extraordinary"', and accordingly 'having regard to the times and duration, the objects and the obligations of Mr Lysaght's visits to England' there was 'evidence to support, and no rule of law to prevent, a finding, that he was ordinarily resident' in the United Kingdom.[235]

Buckmaster LJ, with whom Atkinson LJ concurred, stated that if 'the incidents relating to visits in this country are of such a nature that they might constitute residence and their prolonged or repeated repetition would certainly produce that result' then the question was one of degree for the Commissioners to decide, and if such residence was established, 'ordinarily resident means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life'.[236] Warrington of Clyffe LJ noted that Mr Lysaght's visits to the United Kingdom were 'frequent and regular' and although he said he was not sure that he would have reached the same view, he could not say that there was no evidence on which the Commissioners could properly arrive at their conclusion.[237] Cave LC held that the Commissioners findings were based 'on the facts already found by them and on their view of the law' and were subject to review by the courts. He rejected their findings, and further held that even if the Commissioners findings were findings of fact alone, they had 'no evidence upon which that finding could properly be based'.[238] Viscount Cave distinguished the case from *Levene v IRC* on the basis that Mr Levene had no home outside the United Kingdom, whereas Mr Lysaght had a permanent home in Ireland where he lived with his family, and said that though Mr Lysaght came to the United Kingdom at regular intervals and for recurrent business purposes, these facts 'while they explain the frequency of his visits, do not make them

[235] ibid 243-44. This is very similar to the test that McLaren LJ adopted to determine what did not constitute presence in the United Kingdom for a 'temporary purpose' in *Cooper v Cadwalader* (n 170) 109: 'I should say that temporary purposes means casual purposes as distinguished from the case of a person who is here in the pursuance of his regular habits of life'.
[236] ibid 247-48.
[237] ibid 250.
[238] ibid 241.

more than temporary visits or give them the character of residence in this country', going on to note that if Mr Lysaght were held to be resident there was 'no reason why those many foreigners who periodically visit this country for business purposes, and having concluded their business go away, should not be made subject to a like burden'.[239]

Sumption describes *IRC v Lysaght* as a 'curious case',[240] while Olowofoyeku says that the decision does not make any sense, and that the Commissioners 'clearly strayed outside the central, organising principle of where the taxpayer had a home', further arguing that the principle which came to be based upon the decision, 'that anyone making "substantial" (91 days or more in a tax year) and "habitual" (for four consecutive years) visits to the United Kingdom' was resident there, is 'arguably arbitrary and questionable' and 'cannot be supported either by logic or necessary implication from the statutory language'.[241] Certainly, the decision does not appear to be based on any of the principles established in the previous jurisprudence, and appears to have further broadened the jurisdictional basis of income tax by adding yet another measure according to which an individual might be considered to be resident, and ordinarily resident, in the United Kingdom; that is, short and regular visits by an individual whose connection to the United Kingdom was such that he would not otherwise have been considered resident there.

This further expansion of the meaning of 'residing in the United Kingdom', was in effect made by the Commissioners for the Special Purposes of the Income Tax Acts,[242] as the House of Lords found that the residence and ordinary residence of Mr Lysaght was a question of fact with which they could not interfere. Indeed, Cave LC, dissenting, had found that it was a mixed question of fact and law and had overturned the decision,[243] Warrington of Clyffe LJ disagreed with the conclusion of the

[239] ibid 239 and 240.
[240] Sumption (n 180) 162.
[241] Olowofoyeku (n 73) 319-320.
[242] The Special Commissioners did not provide any reason for the decision they reached in the case stated, merely outlining the facts and the principal arguments of each side and then stating: 'We held that the Appellant was both ordinarily resident and resident in the United Kingdom for each of the two years ended the 5th April, 1923, and the 5th April, 1924, respectively' (the case stated is contained in the report of the case in *Lysaght v IRC* (1927) 13 TC 511, 512-515).
[243] In the immediately previous case before the court, *Levene v IRC* (n 158) 222, Cave LC had said that was 'obvious that the conclusions of the Commissioners above quoted are so worded as not to be mere

Commissioners but felt he could not disturb it and Buckmaster LJ and Atkinson LJ based their decision on the fact that the Commissioners' decision could not be interfered with, but without indicating whether they agreed with it or not. Only Sumner LJ expressly stated that the Commissioners were correct.[244] The latter judge, in *Levene v IRC* had bemoaned this state of affairs, saying that individuals were chargeable to tax 'according as they are deemed by this body of Commissioners or that to be resident' but that the 'tribunal thus provided is neither bound by the findings of other similar tribunals in other cases nor is it open to review, so long as it commits no palpable error of law' and that the legislature as a result 'practically transfers' to the Commissioners 'the function of imposing taxes on individuals, since it empowers them in terms so general, that no one can be certainly advised in advance, whether he must pay or can escape payment'. This, he said, meant that the application of the words 'residing in' was 'haphazard and beyond all forecast'.[245] The effect of this, according to Sumption, was that

> [t]he very circumstance that each individual case has to be decided upon its facts has led to what seem strikingly illogical and inconsistent decisions and the necessity to extract from these some principles for general application has necessarily created a certain degree of technicality and artificiality.[246]

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inferences in law from the facts found in the earlier part of the Case, but to be themselves substantive findings of fact; and accordingly under the well-established rule those findings cannot be disturbed by the Courts unless there was no evidence to support them'.

[244] Sumption (n 180) 162 says that it was 'apparent that their Lordships were somewhat uneasy at the decision (Lord Cave dissented) but found that they could not interfere with it'.

[245] *Levene v IRC* (n 158) 229. See also the comments of Warrington of Clyffe LJ in *IRC v Lysaght* (n 158) 250, where he quoted Clyde LP in *Reid v Inland Revenue Commissioners*, saying 'It is obvious that the more general and wide the scope of expressions used in a statute, the more difficult it may become to convict those whose duty it is to interpret it of an error or misdirection in applying it to a given state of facts ... The result is to make the question of law become (as it were) so attenuated, and the field occupied by the questions of fact become so enlarged, as to make it difficult to say that a decision arrived at by the Commissioners, with respect to a particular state of facts held proved by them, is wrong'.

[246] Sumption (n 180) 155. See also HM Treasury, *Report of the Income Tax Codification Committee* (Cmd 5131, 1936) para 59: '[T]he present state of affairs, under which an enquirer can only be told that the question whether he is resident or not is a question of fact for the Commissioners, but that by the study of the effect of a large body of case law he may be able to make an intelligent forecast of their decision, is intolerable and should not be allowed to continue'; HM Treasury, *Final Report of the Royal Commission on the Taxation of Profits and Income* (n 111) para 292, which endorsed the view expressed in the 1936 report and recommended further statutory provisions in the area.

In 1955 the Royal Commission on the Taxation of Profits and Income outlined how the 'established practice of the Revenue' was capable of being reduced to several working principles, which included the observations that

> (1) It is necessary to approach questions involving the residence of a man who has previously been ordinarily resident in the United Kingdom but has then gone abroad in a different way from questions involving the residence of a man who begins his connections as a visitor;
>
> (2) A visitor who does not maintain a place of abode here and does not make habitual visits to the country is not resident unless he is present for more than six months in all during the tax year;
>
> (4) ... visits are treated as "habitual" if they have occurred in four more or less consecutive years, and "substantial" if they have averaged three months a year.[247]

The Royal Commission went on to note that these working principles were not statutory and that they could not give any 'positive confirmation' of the claim that they were 'properly deductions from the few statutory rules that do exist and from decided cases'.[248] In 1973 the UK Revenue first published its 'IR20' leaflet outlining its practice in relation to the residence and ordinary residence of individuals.[249] Kamal notes that the leaflet was introduced as a result of 'confusion in the area of individual tax residence' which had stemmed partly from 'the impressionistic test which had been employed by the courts throughout the history of income tax and partly from the failure of parliament to provide an overriding rule which might have brought lucidity to an area where there was otherwise none' though he notes that the rules in IR20 were 'of the Revenue's own making and were divorced from the common law in this area (which tended towards an altogether more comprehensive assessment of the

[247] HM Treasury, *Final Report of the Royal Commission on the Taxation of Profits and Income* (n 111) para 290.
[248] ibid para 291.
[249] This leaflet was updated many times from its first publication until its withdrawal in 2009. The last published version is HM Revenue & Customs, 'IR20 - Residents and Non-Residents: Liability to Tax in the United Kingdom' (n 135).

individual's circumstances)'.[250] One of the rules outlined in IR20 was that an individual was to be 'treated as resident for a tax year' if her or she visited 'the UK regularly and after four tax years' those visits during those years averaged '91 days or more a tax year'.[251] This rule appears to be based solely on the decision in *IRC v Lysaght*.

4.3(c) Summary and conclusions

There was remarkably little change in the jurisdictional basis of income tax from 1803 until modern times. This is particularly surprising when, as Sumner LJ pointed out in *Levene v IRC* the 'facility of communications, the fluid and restless character of social habits, and the pressure of taxation have made these intricate and doubtful questions of residence important and urgent in a manner undreamt of by Mr. Pitt, Mr. Addington or even Sir Robert Peel'.[252] The rate of change in the communications and in the mobility of individuals and their capital was, if anything, even greater between 1928 and the present day than it had been between 1803 and 1928, and yet it was not until 1994 in Ireland, and 2013 in the United Kingdom, that any significant change was made by the legislature.

There seems to have been a substantial difference between what the legislature appear to have intended should be meant by the term 'ordinary residence' and the interpretation given to it by the courts. It is clear from the House of Commons debates on the committee and report stages of the Finance Bill 1914 that it was intended that individuals who had retained their domicile of origin in the United Kingdom and who had moved abroad but had returned there for a temporary purpose lasting perhaps a few years should continue to be taxed on the remittance basis.[253] However, under the interpretation given by the courts, unless such an individual's residence in the United

[250] Kamal (n 158) 9 and 10.
[251] HM Revenue & Customs, 'IR20 - Residents and Non-Residents: Liability to Tax in the United Kingdom' (n 135) para 3.3.
[252] *Levene v IRC* (n 158) 229.
[253] See HC Deb 22 July 1914, vol 65 col 492 where the Chancellor of the Exchequer commented that 'the Member for Fulham is still nervous lest every bona-fide Colonial resident in this country—resident temporarily in this country—because that is the point—who comes here to stay for a few years, either to educate his children or for some other temporary purpose, should be hit. I am sure it will be agreed that there is a vast difference between Colonials who come here to make it their permanent abode and Colonials who come for a few years'.

Kingdom could be regarded as casual or 'extraordinary' and not part of the regular order of the individual's life, such an individual would be ordinarily resident in the United Kingdom and therefore not entitled to be taxed on the remittance basis.[254] This would almost certainly have ruled out a person returning for a period of a few years. As Sumption points out, it seems that the only individual likely to be viewed as resident but not ordinarily resident in the United Kingdom was one who 'qualifies as a resident perhaps because he has spent 183 days and one hour in the United Kingdom, but whose ordinary mode of life is to dwell elsewhere and who is merely extraordinarily here during the time in question'.[255] Under this conception, few if any individuals who were domiciled in the United Kingdom would ever be entitled to the remittance basis on the grounds that they were not ordinarily resident there, and yet the legislation was not amended until relatively recently.[256]

The jurisprudence on the area contains little real analysis of the meaning of the term 'residence' for tax purposes, with many references to it having no 'special or technical meaning' and the necessity of it being given its plain and ordinary meaning,[257] and Cave LC in *Levene v IRC* approving in this regard the Oxford English Dictionary definition, 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in a particular place',[258] even though one expects that few people would have said that Messrs Coote, Cadwalader, Loewenstein or Lysaght could have been considered to be residing in the United Kingdom under this plain and ordinary meaning of the term.

Rowlatt J in *Loewenstein v De Salis* said that when you are 'considering a question like residence, you are considering just a bundle of actual facts ...',[259] though which facts were in the bundle, and which were relevant, and to what extent, is far from clear from the decided cases. A place of abode available for use in the United Kingdom or Ireland was sufficient for an individual to be considered resident, even

[254] See Clyde LP in *Reid v IRC* (n 182) 680; Sumner LJ in *IRC v Lysaght* (n 158); Templeman LJ in *R v Barnet London Borough Council, ex parte Shah* (n 219) 713.
[255] Sumption (n 180) 172.
[256] In 2008 and 2010 in Ireland, and in 2005 and 2013 in the UK. See nn 110 and 111 above.
[257] See for example *Re Young* (n 186) 59 (Glencorse LP); *Reid v IRC* (n 182) 681 (Sands LJ); Levene *v IRC* (n 158) 232 (Warrington of Clyffe LJ); *IRC v Lysaght* (n 158) 529 (Sumner LJ).
[258] *Levene v IRC* (n 158) 222.
[259] *Loewenstein v De Salis* (n 174) 437.

though the rationale for the rule was based on a conception of residence that appears to have been later abandoned. Physical presence might also be sufficient if it were regular or frequent or prolonged or not casual, though beyond the statutory six month rule, precisely how much physical presence was necessary for residence to be acquired is also unclear, hence the 'rule of thumb' of 91 days per year for four years found in IR20. Other factors, such as nationality, previous residence, family and other personal ties and economic ties were mentioned in various cases stated, though as Sumption notes '[n]ot all the same factors are to be found in every case and in most they differ in degree', and it is not clear what their relative importance was in the Commissioners reaching their decisions.[260]

Direct tax legislation seems to have envisaged different levels of connection to the United Kingdom (and Ireland), and it seems clear from the debates regarding the remittance basis of taxation in 1914, and from provisions imposing CGT,[261] that it was intended that residence and ordinary residence should denote different degrees of attachment for tax purposes. From the decided cases, however, it seems that short-term connection for tax purposes was very short indeed, and even a person who was present for fewer than six months in a single year might be treated as resident if he or she had made visits to the United Kingdom (or Ireland) in previous years, while an individual who was present for six months and a day was, in almost every regard, treated no differently from one who had spent his or her lifetime in the country, except that if such an individual was a national, it may have been more difficult to sever the connection once established, as the individual would have to demonstrate a distinct break in his or her habit of life, and residence abroad that was more than occasional. The jurisprudence might almost be summarised by saying that the question posed was not 'who is resident for tax purposes?' but 'which persons who are physically present in the United Kingdom are not so resident, and in what (very limited) circumstances?' The sharp dividing line between the tax treatment of subjects and resident aliens which had existed for hundreds of years prior to 1803 had now become one with very unclear borders. One thing that is clear, however, is that the six month rule appears to have

[260] Sumption (n 180) 156.

[261] Finance Act 1965 (UK), s 20 imposed CGT on individuals who were either resident or ordinarily resident in the UK and Capital Gains Tax Act 1975, s 4 made a similar provision regarding CGT in Ireland.

intended to apply to 'foreigners' or 'visitors' or non-nationals, or individuals who otherwise had no connection to the United Kingdom or Ireland which would make them resident for tax purposes.[262]

It is difficult to estimate what the effect would have been if there had been a fully expounded theory of connection for direct tax purposes upon which the legislature could have drawn in drafting the jurisdictional provisions in the tax code, and upon which the judiciary could have drawn in interpreting them, but it is not unreasonable to suggest that the resulting rules would have been far more coherent, there would have been less of a discrepancy between what appears to have been the intention of the legislature and the courts', or Commissioners', interpretation of it, the meaning of 'ordinary residence' and the way in which it differed from residence would have been clear, and resort would not have had to have been made to the formulation of a set of rules by the Revenue which, although more comprehensible, were not based on the statutory provisions themselves. If the decisions of the Commissioners and the courts had focused less on the meaning of words such as 'residence', 'ordinary', 'occasional' and 'temporary' and instead had taken into account that the purpose of the concept of tax residence is really to establish who is sufficiently connected to the United Kingdom (ie is a member of British society) for an obligation to pay direct taxation to arise, then a more pronounced difference between short-term and long-term connecting factors may have emerged from the jurisprudence, and concepts such as 'occasional residence abroad', a 'distinct break', and visiting the UK in the ordinary course of an individual's life may have been more meaningful and their relative importance clearer in determining liability to tax.

[262] See the comments of Glencorse LP and Shand LJ in *Lloyd v Sulley* (n 28) 42 and 44 outlined in n 169 and the accompanying text above. In HM Treasury, *Final Report of the Royal Commission on the Taxation of Profits and Income* (n 111) para 290, the six month rule is clearly stated to apply to 'visitors', as it is in HM Revenue & Customs, 'IR20 - Residents and Non-Residents: Liability to Tax in the United Kingdom' (n 135) para 3.3, where the heading is 'Short term visitors'. See also Sumption (n 180) 165 who refers to a pamphlet issued by the Board of the Inland Revenue in September 1960 entitled 'Visitors from other Countries: Liability to United Kingdom Income Tax', which similarly refers to the six month rule as applying to 'visitors'. Olowofoyeku (n 73) 312, says that '[i]f the visitor to the United Kingdom does not stay for up to six months in the tax year, then he/she will not be considered resident if he/she is here only for temporary purposes and does not have a view to establishing his/her residence here'.

The difficulty of extracting a set of coherent principles from the jurisprudence is perhaps unsurprising considering the lack of a fully-formulated theoretical basis upon which those principles might have been grounded, and so perhaps the replacement of the common law rules with a single, statutory, objective definition of residence for tax purposes was in some ways inevitable. What is surprising is that it took so long for the legislature to act. The 1936 Codification Committee felt that there are 'advantages which, from the point of view of a taxing authority, lie in the absence of a statutory definition',[263] a view echoed by Kamal, who said that it was highly probable that the

> reason why successive parliaments refrained from producing legislation was the fear that the introduction of a straightforward test (such as one based on day-counts) would be to [sic] tantamount to providing individuals with an all too sure method of negating the most fundamental basis on which their liability to UK tax might arise. From the point of view of the Treasury, an amorphous and multi-pronged test ... was preferable as it left open many possibilities as to how the target might be approached in any given situation.[264]

4.4 Taxation in modern Ireland

In 1993 Minister for Finance Bertie Ahern announced that he had requested his department to carry out 'a thorough examination' of the 'rules governing residents for tax purposes' with a view to 'Government consideration of appropriate legislative amendments for the 1994 Finance Bill', saying that he accepted 'the case for maximum simplification and updating of the rules'. He noted that the UK had 'carried

[263] HM Treasury, *Report of the Income Tax Codification Committee* (n 246) para 59. However, HM Treasury, *Final Report of the Royal Commission on the Taxation of Profits and Income* (n 111) para 292 expresses partial disagreement with this view, stating that 'fixed rules would simplify the work of the administration even if they worked unreasonably in some instances' and that such fixed rules would make the 'devotion of a great deal of time and skill to considering and adjudicating upon individual cases' unnecessary 'without giving any individual a serious cause of complaint'.

[264] Kamal (n 158) 9-10. See also Olowofoyeku (n 73) 306 who expressed the view that 'it may well be that the absence of a definition is a blessing in disguise' considering the results of an attempted statutory definition of the word 'trade', but who said that 'it is only a blessing if the courts do a better job of defining the term than one would imagine the statutory draftsman would have done', which he felt they manifestly had not done (ibid 307).

out a similar exercise' but had 'decided not to make any changes because it was too complex'.[265] The UK examination of the area was dissimilar from that envisaged, and in fact carried out in Ireland, in that it was done by way of public consultation rather than by internal committee review.[266] The UK consultative document had recommended significant changes to the remittance basis of taxation, and it seems the rejection of these recommendations was, at least in part, the reason that no changes were made to the UK tax code following the consultation process.[267]

In December 1993 the Institute of Taxation in Ireland's pre-Budget submission dealt exclusively with residence for tax purposes, calling on the Minister to abolish the place of abode rule, to extend the period during which an individual could be present in Ireland before being deemed resident under the 'habitual and substantial visits test' and calling on Revenue to issue a detailed statement of practice,[268] but by

[265] Dáil Deb 13 May 1993, vol 430, col 1808.

[266] The consultative document Inland Revenue, 'Residence in the United Kingdom: The Scope of UK Taxation for Individuals – A Consultative Document' (Inland Revenue 28 July 1988) was published on 28 July 1988 (see Erica Stary, 'Residence: Individuals' [1988] British Tax Review 565).

[267] During the debate on the 1989 UK Finance Bill the following year, Financial Secretary to the Treasury Norman Lamont said that 'considerable concern was expressed about the implications of moving to a world income basis of liability for certain categories of people not domiciled here' in the responses to the consultation, and that 'the world income approach would not provide a satisfactory basis of taxation for non-United Kingdom domiciled foreigners' resident in the UK and 'and in those circumstances it is not our intention to bring forward any proposals at this time' (HC Deb 15 March 1989 vol 149, cols 501-02). John F Avery Jones, 'Finance Bill Notes: Not in the Finance Bill' [1989] British Tax Review 173 noted that one could assume that 'the proposals are dead for the foreseeable future, rather than just for "this time"', which proved to be the case, going on to say that '[l]osing all the proposals means that we are still left with the extraordinary rule that accommodation and one day's stay is enough to make one resident, whereas under the proposals an average of four months could have been spent in the United Kingdom without becoming a resident. But if the choice was all or nothing, we prefer nothing'. Erica Stary and Marion Lonsdale, 'Non-domiciliaries: Residence' [1989] British Tax Review 565, 566 pointed out that a 'total of about 270 comments and representations were received on the proposals outlined in the document' and several years later when the taxation of non-domiciliaries on the remittance basis was discussed in the House of Commons, Financial Secretary to the Treasury Stephen Dorrell said of the responses received to the 1988 consultative document that '[v]irtually with one voice, the representations to the Government on that subject, from those of all political persuasions, were that it would be damaging to Britain's interests to go down the route that had been suggested in the consultative document' and that 'the overwhelming majority of the representations were hostile to the ideas that Ministers of this Government had tabled' (HC Deb 13 July 1993, vol 228, col 867).

[268] Letter from president of the Institute of Taxation in Ireland Gearoid Griffin to Bertie Ahern, Minister for Finance (14 December 1993). The submission noted that the case law upon which the practice of the time was based came from a 'time when modes of international travel were completely different to present ones, and international labour mobility was much less common', that the place of abode rule discouraged 'Irish people from retaining homes in Ireland while living and travelling overseas' and 'non-Irish persons from acquiring second homes in Ireland and visiting here for short periods of time'. It further argued that the habitual and substantial visits test discouraged 'individuals working abroad from spending more time and money in Ireland'.

April of 1994 it had become clear that the Finance Bill would go much further.[269] In May 1994 the Minister for Finance Bertie Ahern tabled an amendment to the Finance Bill which introduced a new statutory definition of 'resident' and 'ordinarily resident' for tax purposes and which abolished the previous tests and rules, both statutory and derived from case law.[270] The purpose of the provisions, the Minister said, was 'to simplify, as far as possible, existing rules of residence and to place them on a statutory footing for the first time', and to put in place 'a more transparent and equitable set of rules with more certainty and less complexity for the taxpayer and the administration'. The place of abode rule was abolished as it had the effect that 'persons with holiday homes in the State and making short visits here could be resident for tax purposes' and its abolition would 'facilitate wealthy people who wish to visit Ireland and spend money here but do not wish to be regarded as resident for tax purposes'. The measures were also intended to 'close off exploitation possibilities', in particular in relation to individuals making a 'clean break'. This, the Minister said, was a 'system used by high fliers' whereby 'someone could leave the country on 4 April one year and return on 7 April a year later, so that they could dispense with their investments and not be liable for capital gains tax here'.[271]

Section 150 of the Finance Act 1994 provided that for the purposes of income tax and CGT an individual was resident for a particular year if that individual was present in Ireland 'for a period in the whole amounting to 183 days or more' during that year, or was present in Ireland in the year in question and in the previous year for a period 'in the aggregate amounting to 280 days or more'. An individual was not resident in Ireland in any year in which he or she was present in Ireland for a period 'in the aggregate amounting to not more than 30 days'. An individual was deemed to be present in Ireland for a day if he or she was 'present in the State at the end of the

[269] Brendan Keenan, 'Finance Bill may bring changes for our tax exiles' *Irish Independent* (Dublin, 9 April 1994); Editorial, 'Residence omission most interesting aspect of package' *Irish Independent* (Dublin, 12 April 1994); Brendan Keenan, 'Finance Bill may place upper limit on inheritance tax' *Irish Independent* (Dublin, 13 April 1994).

[270] Select Committee on Finance and General Affairs Deb, 6 May 1994. The amendment was tabled at the end of the committee stage of the debate, though officials from the Department of Finance had met with members of the Committee to discuss the changes a few days before. The new sections 149 to 158 of the Finance Act 1994 are now contained in TCA 1997, ss 818 to 824.

[271] Select Committee on Finance and General Affairs Deb, 6 May 1994.

day'.[272] Section 151 of the Finance Act 1994 provided that an individual was ordinarily resident in Ireland in a particular year if the individual had been 'resident in the State for each of the 3 years' preceding that year. An individual only ceased to be ordinarily resident in Ireland for a particular year once the individual had not been 'resident in the State in each of the 3 years' preceding that year'.[273] From this point onwards, connection to Ireland for tax purposes was measured solely by an individual's physical presence in the country, whether in a single year or over a number of years. An individual could spend an average of 139 days in Ireland, or more if he or she had left by midnight, in each year and not be resident regardless of whether that individual had a place of abode, or had family living in Ireland, or had any other connection to the country, and regardless of whether the individual's presence here was for a temporary purpose or not.

The Minister for Finance noted that the amendments were based on 'over a year's deliberation by officials of the Revenue Commissioners and of my Department on this complex issue', though in essence the statutory definition of residence appears to have been based almost entirely on the recommendations made in the UK's 1988 consultative document on residence.[274] That document had proposed a statutory definition of residence based solely on physical presence, with an individual being resident if he or she was present in the United Kingdom for 183 days in a single year, or for183 days between the current year and the previous two years, but with only fractions of the days in the previous years being counted, thereby allowing an individual a presence of an average of approximately 120 days each year over a three year period, and with no individual who was present for fewer than 30 days in any

[272] This provision is now contained in TCA 1997, s 819, though an individual is now deemed to be present in Ireland for a day if he or she is present in Ireland at any time during that day. This change is discussed in chapter 6.

[273] This provision is now contained in TCA 1997, s 820 and is unchanged.

[274] Select Committee on Finance and General Affairs Deb, 6 May 1994. The statutory definition of residence in Finance Act 1994, s 150 appears to have been based on Inland Revenue, 'Residence in the United Kingdom: The Scope of UK Taxation for Individuals – A Consultative Document' (n 266), though there were other, related, provisions also introduced at this time that were not discussed in the UK consultative document, such as a relief for individuals who were not resident but who were ordinarily resident in Ireland but who were engaged full time in a trade, profession or employment abroad (Finance Act 1994, s 152), the placing of the formerly concessionary 'split year treatment' for individuals coming to or leaving Ireland on a statutory footing (Finance Act 1994, s 153) and the new 'foreign earnings deduction' for individuals who were resident in Ireland but carried on some of their employment duties abroad (Finance Act 1994, s 154). A statutory definition of ordinary residence was also not discussed in that document.

year being resident for that year.[275] The document had also severely criticised the place of abode test[276] and the possibility that the existing rules might permit an individual to move abroad for a single tax year, dispose of assets without exposure to UK CGT and then 'return to the united Kingdom a year later, and remain here for the rest of his life'.[277]

The 1988 consultative document had stated that, as a matter of fairness and equity, the obligation to pay taxes should 'bear less heavily on those whose connection with the United Kingdom is limited, than on those with permanent and substantial connections with this country' and that 'people in similar circumstances should be liable to a similar extent' and that this norm was breached by the tax code as it then existed because 'people with the closest possible connections with this country' paid tax 'on only their UK income' while others 'with very little connection' to the United Kingdom were 'liable on all sources'.[278] However, having correctly identified the necessity of an individual's obligation to pay tax being matched to his or her connection to a country, the document, without considering or discussing the implications with regard to this important principle, recommended a test whereby connection was measured solely by physical presence in the United Kingdom. As appears to be acknowledged in the consultative document, the recommendation for a definition of residence based on physical presence was based on the 'substantial presence test' used in the United States.[279] However, as Hauser points out, the United

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[275] Inland Revenue, 'Residence in the United Kingdom: The Scope of UK Taxation for Individuals – A Consultative Document' (n 266) para 6.14. The 'look back' element of the test was based on all of the days the individual was present in the UK in the current year, one third of the days he or she was present in the previous year and one sixth of the days he or she was present in the year before that. If the individual was present for 120 days in each of those years, he or she would be deemed to have been present for 180 days (ie 120 + (1/3 of 120) + (1/6 of 120) = 180), which is less than 183, so the individual would not be considered resident.

[276] ibid para 4.4, 'The existence of accommodation available for someone's use may make him resident for a year even if he is in the United Kingdom for only one day. This extreme result gives rise to frequent disputes about the meaning of "available". The rule is criticised because it does not take account of the possibility that many visitors to the United Kingdom consider that buying a house or flat meets their requirements better than the alternatives'.

[277] ibid para 4.11.

[278] ibid paras 3.2 and 5.1. The consultative document also examined the question from the perspective of neutrality (the tax system 'should not needlessly discourage people from coming to live and invest in this country or encourage people already living here to invest abroad or to leave'; ibid para 3.2), simplicity and certainty ('the rules for determining liability should be as clear as possible and based on objective tests'; ibid para 3.2) and enforceability ('whatever rules are laid down should be capable of being reasonably enforced'; ibid para 3.2). These broadly correspond to the Adam Smith's four 'canons' of taxationwhich are discussed in chapter 2.

[279] ibid para 6.14. The substantial presence test is (still) contained in 26 USC § 7701(b)(3)(A).

States 'taxes individuals on the basis of citizenship as an alternative to taxing on the basis of residence' and so the substantial presence test only applies to 'non-citizens (ie "aliens")'.[280] Further, even for this group 'the United States rules do not use as their principal definition of residence the number of days an individual is physically present in the United States during the tax year', but rather whether the alien has been 'lawfully admitted for permanent residence in the United States'.[281]

The consultative document acknowledged that 'citizenship seems a suitable test to determine the extent of an individual's tax liability' because 'more than any other, it reflects the degree of association which an individual has with a country', but ultimately rejected using it on the grounds that there were many British citizens who had 'never set foot in this country or who were born here but have spent the whole of their lives abroad', that individuals might renounce their citizenship or refrain from applying for it to avoid tax, and that there would be many practical and administrative difficulties, in particular with assessing citizens living abroad.[282] However, the document did not seek to replace this long-term connecting factor with any other, and instead recommended that residence in the United Kingdom for tax purposes be determined solely by a test which had been designed to measure the connection of aliens who would not otherwise have been treated as subject to taxation.

As has been argued in this work, the imposition of taxation based on an individual's physical presence in the United Kingdom and Ireland originally applied only to aliens. This was in accord with the theories of allegiance of the time, as aliens only owed temporary and local allegiance to the monarch, and with theories of jurisdiction, which was based solely on an alien's physical presence within the realm;

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[280] Paul Hauser, 'Residence and the Consultative Document: the U.S. Experience' [1989] British Tax Review 29, 30.

[281] ibid 32. See 26 USC § 7701(b)(1)(A)(i). There is also a provision that treats aliens who are physically present for less fewer than 183 days in the tax year, and whose 'tax home (as defined in section 911 (d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States' as non-residents (26 USC § 7701(b)(3)(B)). Hauser (n 280) 32 also notes that the day-counting test for determining the residence of aliens was 'a legislative response to suspicions that "many aliens manage to live for relatively long periods of time in the United States while claiming that they are non-residents for tax purposes"' (citing the statement of David R Tillinghast to the United States Congress Committee of Ways and Means in 1983), and that it was 'not possible for an individual to live in the United Kingdom for many years while remaining a nonresident for tax purposes' (ibid 33).

[282] See Inland Revenue, 'Residence in the United Kingdom: The Scope of UK Taxation for Individuals – A Consultative Document' (n 266) paras 6.5 to 6.11.

whereas subjects, who owed a permanent allegiance to the monarch which was not locally limited, were subject to the crown's jurisdiction and liable to taxation regardless of where they happened to be at the time it was levied. As has been argued in this chapter, the six month rule was also intended to apply to aliens or foreigners, and to subjects who had been born overseas or who had moved there long before, and who thus had no other connection to the United Kingdom from which a liability to taxation might have arisen. It was a short-term, annual test aimed at, and only appropriate to, individuals temporarily in the United Kingdom, while individuals with a longer-term connection to the country, because of qualitatively different factors such as their nationality, or their ownership of a house there, or the presence of their family there, or their spending time there in the ordinary course of their lives, were subject to taxation whether they were physically present in the country for fewer than six months or not.

When Ireland implemented a statutory test based on the recommendations of the 1988 consultative document, it thus abandoned a principle of measuring residence according to two different sets of criteria: those appropriate for individuals with only a short-term connection to the country, and those appropriate for individuals with a longer-term connection. Indeed, the legislation went further. Ordinary residence, a form of longer-term connection to Ireland, was, according to the statutory definition, also determined solely in terms of physical presence,[283] and so solely in terms of a criteria designed to measure short-term connection only. None of these issues were debated during the passage of the Finance Act 1994, nor were they discussed academically in Ireland following the implementation of the statutory test of residence.[284] If there had been a coherent and fully expounded theory of connection for the purposes of taxation, and if the rationale behind the existing tests of residence had been clear from such a theory, perhaps these issues would have been more deeply considered and a different definition of residence may have resulted; one that contained some measure of longer-term connection to Ireland which more accurately

[283] Because it was based on residence over a period of three years, and residence was based solely on physical presence, it was determined solely by physical presence in Ireland over a period of three years.
[284] Commentators confined their observations primarily to the practical aspects of the legislation. See for example Deloitte & Touche, 'New Residence Rules: FA 1994' (1994) 7 Irish Tax Review 996; Deirdre Keegan, 'The New Residence Rules' (1994) 7 Irish Tax Review 1115; Eoin Kennelly, 'Residence for Irish Tax Purposes - New Rules' (1994) 6 Private Client Business 397; John Ward, 'The New Irish regime' (1995) 136 Taxation 279.

reflected whether an individual could be considered to be a member of Irish society from which an obligation to pay tax arose or not.

The ramifications of the introduction of the statutory test of residence in 1994 for the tax exile problem are clear.[285] Whereas before an individual who moved abroad and wished not to be resident could not spend a single day in Ireland if he or she had a place of abode available for his or her use, and could not visit Ireland regularly or frequently, even for relatively short periods, and may have had to demonstrate that his or her presence abroad was for more than occasional residence, and may still have not have been certain that he or she would not be treated as resident as a result of other connections such as nationality, residence of close family members in Ireland etc, now an individual had merely to ensure that he or she was absent from Ireland at midnight on two hundred and twenty six occasions during the year. The statutory test was not just one that was appropriate for short-term connection to Ireland, it was inherently manipulable by those who had a long-term connection to the country and who wished to avoid liability to Irish taxation.[286]

The issue of tax exile was raised during the passage of the Finance Bill 1994 through the Dáil, both in the media and by politicians. Pat Rabbitte TD said that the new rules were 'tantamount to a significant relaxation of the residence requirement' noting that 'some of our prominent citizens have decided to fly the coop' and that 'under the new arrangements of having an abode available here' they could 'become permanent tax exiles who will probably pay no tax to any jurisdiction' and 'can pick a tax haven of their choice'.[287] Journalist Shane Ross went further, accusing the

[285] Though, as outlined in chapter 5, while some high profile individuals had been reported to have gone into tax exile at this point (eg Michael Smurfit in the late 1980s and, just the previous year, JP McManus, Dermot Desmond and Tony Ryan), the issue was not necessarily viewed as a 'problem' at this point.

[286] As noted in section 4.3(a)(iii) above, the UK statutory definition of residence is quite different in this regard, as it takes into account a number of other, longer-term, connections such as having ones' home or family in the UK, in addition to the short-term connection of physical presence in the year in question.

[287] Select Committee on Finance and General Affairs Deb, 6 May 1994. He expressed similar sentiments during the report stage of the bill, arguing that it was 'difficult to explain to ordinary people how we can relax the tax code for the high fliers in the tax exile category. We have made special arrangements to facilitate the super-rich while, at the same time, the short-time workers and the unemployed are savagely hit' (Dáil Deb 12 May 1994, vol 442, col 1446). See also Brendan Keenan, 'Finance Bill may bring changes for our tax exiles' *Irish Independent* (Dublin, 9 April 1994) 'Wealthy individuals who recently decided to live abroad, such as colourful bookmaker JP McManus, will be counting on next week's Finance Bill to contain the expected provisions relaxing the rules for exiles'; Jim Dunne, 'Wall Street arrogance sank GPA but Ryan's air remains defiant' *Irish Times* (Dublin, 26 May 1995) saying

Minister for Finance of having 'capitulated to a tiny but rich and powerful lobby group' noting that the amendment would 'benefit the jet setters, a tiny minority' but have no positive impact on exchequer revenues.[288] The Minister himself argued that it did not' make it easy for tax exiles. They require three years of non-residence before they shed ordinary residence'.[289]

It is somewhat ironic that Ivan Yates, an opposition TD who had described the amendment to the law as 'a very substantial easing of the basis of qualification as a tax exile' and who had called on the government to state what revenue would be lost through 'the opening of the opportunity for the super-rich to move abroad, while still being able to spend at least 20 weeks a year in Ireland',[290] was the person responsible for the provision in the bill that an individual should only be considered to be present in Ireland for a day if he or she was present at the end of the day.[291] This provision, which subsequently became known as the 'Cinderella rule', perhaps more than any other aspect of the new statutory definition of residence, helped to facilitate wealthy

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of Tony Ryan a 'relaxation in the tax exile laws means that he can now spend 140 nights a year in Kilboy. He plans to spend as much of the summer there this year as he can'.

[288] Shane Ross, 'Taxing the patience of full-time residents' *Sunday Independent* (Dublin, 8 May 1994). Other media commentators took a more measured view, pointing out that the provisions were 'to persuade more wealthy foreigners to come here and bring some of their funds with them' but that 'the tax exile issue has complicated the matter, both politically and financially' (Editorial, 'Residence omission most interesting aspect of package' *Irish Independent* (Dublin, 12 April 1994)), and that the provisions were also attempting to make 'it easier for tax exiles to maintain investments and businesses in the country' Brendan Keenan, 'Finance Bill may place upper limit on inheritance tax' *Irish Independent* (Dublin, 13 April 1994)). See also Cliff Taylor, 'Government seeks to attract wealthy holidaymakers' *Irish Times* (Dublin, 4 May 1994).

[289] Select Committee on Finance and General Affairs Deb, 6 May 1994.

[290] Cliff Taylor, 'Government seeks to attract wealthy holidaymakers' *Irish Times* (Dublin, 4 May 1994).

[291] Section 150 as originally presented during the committee stage of the Finance Bill 1994 had provided that an individual would be treated as present in Ireland if he or she were present at any time during the day, as recommended in Inland Revenue, 'Residence in the United Kingdom: The Scope of UK Taxation for Individuals – A Consultative Document' (n 266) para 6.14. However, Mr Yates argued that this was 'more rigorous than anything we have had heretofore. People coming home for, say, 40 days, 180 days or 90 days do not take those days consecutively. They might come back for a meeting or to take in a particular event. If someone came home at 11 p.m. and left the country again at 6 a.m. the next morning that would count as two days, since part of a day constitutes a whole day. I do not think that is the intention of the legislation. That is worded in such a way as to be unfair. People have said that they would much prefer the old rules than have that clause in the legislation' (Select Committee on Finance and General Affairs Deb, 6 May 1994). The final wording was as a result of an amendment that Mr Yates tabled at the report stage of the bill (a similar amendment was also tabled by the Minister for Finance). See Dáil Deb 24 May 2005, vol 602, col 1710 where the then Taoiseach and former Minister for Finance Bertie Ahern said of this amendment 'Former Deputy Ivan Yates expressed concern that if a person came to the State at 11 p.m. and left the following day at 6 a.m., that person would be treated as being in the State for two days. He and I, the then Minister for Finance, tabled similar amendments on Report Stage'.

individuals in being tax exiles while maintaining a significant physical presence in, and other connections to, Ireland.[292] It is also worth noting that the introduction of the statutory definition did not solve the problem of individuals moving abroad temporarily to avoid Irish CGT.[293] In fact, one might argue that the new definition if anything made it easier for an individual to achieve this goal, as now there was no 'clean break' needed and an individual could maintain his or her principal residence and a significant physical presence in Ireland during the necessary period of 'non-residence' abroad; though admittedly that period was extended by virtue of the definition of 'ordinary resident' in the act.[294] It is again worthy of note that the solution to this problem suggested in the 1988 UK consultative document, that of imposing tax on individuals who returned to live in the UK after a period of absence on 'gains which were realised during the period of non-residence' was the one that was ultimately implemented to address this issue in Ireland in 2003.[295]

During the committee stage of the debate on the Finance Bill 1994 the Minister for Finance Bertie Ahern stated that the government had taken account of, among other things, 'developments in comparable OECD countries' in formulating the new statutory definition of residence.[296] In the past decade during which the tax exile problem has been a subject of regular commentary and debate, all four Ministers for Finance have stated that Ireland's 'residency rules are in line with those pertaining in the rest of the world'[297] or are 'in line with international practice', or are 'in line with OECD norms regarding non-residency rules'[298] or that Ireland's 'approach to

[292] The 'Cinderella rule' is discussed in chapter 6.

[293] In fact, this became a central element of the tax exile problem, as is outlined in chapter 5.

[294] It is possible for an individual to become a resident *of* a country with which Ireland has a double taxation agreement (DTA), and so avoid a liability to Irish CGT before such an individual had ceased to be ordinarily resident in Ireland.

[295] Finance Act 2003, s 69, which inserted TCA 1997, s 29A. This section is discussed in detail in chapter 6. In the UK, a similar provision was inserted by Finance Act 1998 (UK), s 127 into the Taxation of Chargeable Gains Act 1992 (UK) (s 10A).

[296] Select Committee on Finance and General Affairs Deb, 6 May 1994.

[297] Minister for Finance Charlie McCreevy in Select Committee on Finance and the Public Service Deb 24 February 2004. The Minister also said 'I will list countries with an 183 day residence rule. They are, Australia, Austria, Canada, Czech Republic, Denmark, Finland, Germany, Italy, New Zealand, Norway, Portugal, Sweden' and that Ireland is 'not any less stringent in regard to residency than anywhere else, we are probably more stringent'.

[298] Minister for Finance Brian Cowan in Select Committee on Finance and the Public Service Deb 22 February 2006. The Minister also stated that '[v]ariations of the 183-day residency rule apply in Australia, Austria, Canada, the Czech Republic, Denmark, Finland, Germany, Italy, New Zealand, Norway, Portugal, Spain, Sweden and the United Kingdom' and that the decision to introduce the statutory definition of residence in 1994 was 'taken after due consideration of a major and full review

determining residence status is broadly in line with most other OECD countries'[299] or that the 'present rules are considered to be consistent with international practice and in particular with OECD standards' and that 'our interests would be best served by operating our residence rules within the best practice guidelines of the OECD'.[300] Similar views were expressed by both chairpersons of the Revenue Commissioners during that period,[301] by officials in the Department of Finance[302] and by tax practitioners.[303] These statements have gone unquestioned and unchallenged, and they are not factually correct.

The 1988 UK consultative document had examined the definition of residence for tax purposes in eleven of the (then twenty four) OECD member countries and although it noted that '[m]ost of the countries listed have a combination of time tests and more subjective criteria, but the tests in Denmark and USA are purely of the objective type', it failed to point out that none of the regimes considered defined residence purely in terms of physical presence during a tax year, as was clear from the summaries in the document itself.[304] In 2003, a UK background paper on reviewing

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and enacted by the then Administration, not for the purposes the Deputy has ascribed to it, but for the reasons I have outlined, namely, that the scheme is in line with OECD norms regarding non-residency rules'. See also Select Committee on Finance and the Public Service Deb 19 February 2008 where the Minister said that Ireland's rules on residence for tax purposes were 'in line with international practice'.

[299] Minister for Finance Brian Lenihan in Dáil Deb 3 February 2009, vol 673, col 308.

[300] Minister for Finance Michael Noonan in Dáil Deb 19 November 2013 (unpublished) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail20131119 00001?opendocument> accessed 4 July 2014.

[301] See Joint Committee on Finance and the Public Service Deb 10 November 2004, where chairman Frank Daly said '[o]ur rules of residency, generally speaking, and I am open to correction on this, are pretty much in line with those of member states of the EU and those of OECD countries. I do not believe they are any less onerous, although whether they are right is another matter, but I do not believe they are very much out of line with those applying in those other countries'; Committee of Public Accounts Deb 19 February 2009, where chairwoman Josephine Feehily said that the 'model we have, whereby tax residence is judged on the number of days of residence, is a standard model across OECD countries and across the world'.

[302] See for example appendix A.2(c)(xxii).

[303] See Joint Committee on Finance and the Public Service Deb 10 November 2004, where the taxation spokesman for the Institute of Chartered Accountants in Ireland Kieran Ryan said 'The rules on residence were changed in 1994, bringing Ireland into line with prevailing practices in other jurisdictions ... These rules are common to the standard OECD approach to the issue'; Kimberley Rowan 'Numbering Their Days: Treatment of Tax Exiles in Irish Tax Legislation' (2010) 42 Accountancy Ireland 62; Submission of the Society of Trust and Estate Practitioners to the Department of Finance Public Consultation on Tax Residence Rules (July 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Nora-Lillis-STEP-Ireland.pdf> accessed 4 July 2014, which stated that the 'tax residency rules in Ireland are ... broadly comparable to the rules in other jurisdictions'.

[304] Inland Revenue, 'Residence in the United Kingdom: The Scope of UK Taxation for Individuals – A Consultative Document' (n 266) annex D.

the residence and domicile of individuals for tax purposes examined the tax regimes of all of the (then twenty nine) OECD member countries. It noted that most of the countries based tax residence 'at least in part, on some degree of physical presence in the taxable period', in the majority of cases, 183 days.[305] The paper incorrectly, or at the very least in an incomplete and somewhat misleading manner, listed six countries other than Ireland in which an individual was said to be resident solely on the basis of physical presence: Denmark, Finland, Iceland, Norway, Poland and Sweden. In fact, although under the law of each of these countries an individual is resident for tax purposes if he or she is physically present for six months during a tax year, each of them also utilises at least one other form of long-term connecting factor to determine tax residence. In Denmark, an individual who owns or leases residential property and is physically present for any period of time, other than for the purposes of a holiday or recreation, is resident in Denmark.[306] In Finland, an individual will be resident for tax purposes if his or her permanent or principal place of abode is in Finland.[307] In Iceland, an individual who is domiciled or permanently resides in Iceland is resident for tax

[305] United Kingdom, 'Reviewing the Residence and Domicile Rules as They Affect the Taxation of Individuals: A Background Paper' (n 103) 11.

[306] Such an individual will also be resident if he or she is in Denmark for more than three consecutive months, or 180 days in a 12-month period. See the Danish Tax Authority website: Full tax liability section <http://www.skat.dk/SKAT.aspx?oId=2153813&vId=0> accessed 8 July 2014. See also Nikolaj Bjørnhold and Anders Oreby Hansen, *Denmark in International Tax Planning* (IBFD 2005) 221-22, which points out that an 'individual leaving the country will remain taxable in Denmark until he has given up his residence in Denmark'; KPMG, 'Thinking Beyond Borders: Denmark' (KPMG 2013) <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/thinking-beyond-borders/Documents/denmark-2013-v1.pdf> accessed 8 July 2014; Nordisk eTax website: Denmark section <https://www.nordisketax.net/main.asp?url=files/dan/eng/i02.asp&c=dan&l=eng> accessed 8 July 2014; Ernst & Young, '2013-2014 The worldwide personal tax guide: Denmark' (Ernst & Young, 1 May 2013) <http://www.ey.com/GL/en/Services/Tax/The-worldwide-personal-tax-guide---XMLQS?preview&XmlUrl=/ec1mages/taxguides/TGE-2013/TGE-DK.xml> accessed 8 July 2014.

[307] An individual will also be resident if he or she is in Finland for a continuous period of at least six months. See Marjaana Helminen, 'Finland' in Luc De Broe (ed), *The Tax Treatment of Transfer of Residence by Individuals* (Kluwer Law International 2002) 231; Janne Juusela and Jonna Yli-Äyhöu, 'Finland' in Dale R Johnson (ed), *International Taxation of Low-Tax Transactions* (2nd edn, Juris Publishing 2013). See also KPMG, 'Thinking Beyond Borders: Finland' (KPMG 2012) <http://www.kpmg.com/global/en/issuesandinsights/articlespublications/thinking-beyond-borders/documents/finalnd.pdf> accessed 8 July 2014Nordisk eTax website: Finland section <https://www.nordisketax.net/main.asp?url=files/suo/eng/i02.asp> accessed 8 July 2014; Ernst & Young, '2013-2014 The worldwide personal tax guide: Finland' (Ernst & Young, 1 May 2013) <http://www.ey.com/GL/en/Services/Tax/The-worldwide-personal-tax-guide---XMLQS?preview&XmlUrl=/ec1mages/taxguides/TGE-2013/TGE-FI.xml> accessed 8 July 2014; PKF, 'Finland Tax Guide 2013' (PKF, May 2013) <http://www.pkf.com/media/1954368/finland%20pkf%20tax%20guide%202013.pdf> accessed 8 July 2014.

purposes.[308] In Poland, an individual who has his or her 'centre of personal or economic interests in the Republic of Poland (centre of vital interests)' is resident there for tax purposes.[309] An individual will be resident in Sweden if his or her 'real home and domicile' is located there.[310] Norway is the only country on the list that appears at first glance to impose tax solely on the basis of physical presence in the country, as an individual who is physically present there for more than 183 days in any 12-month period, or for more than 270 days in any 36-month period, is resident for tax purposes. However, once an individual has become resident in Norway, he or she will only cease to be resident there for tax purposes if the he or she is physically present in Norway for fewer than 61 days in the relevant tax year, and provided that neither the individual,

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[308] An individual will also be resident for tax purposes if he or she is in Iceland for more than 183 days in a 12-month period). This is set out in Income Tax Act 2003 (Iceland), art 1 (English translation available on the Icelandic Ministry of Finance and Economic Affairs website: <http://eng.fjarmalaraduneyti.is/media/Act_no_90_2003_01022012.pdf> accessed 8 July 2014. See also Nordisk eTax website: Iceland section <https://www.nordisketax.net/main.asp?url=files/isl/eng/i02.asp&c=isl&l=eng> accessed 8 July 2014; Ernst & Young, '2013-2014 The worldwide personal tax guide: Iceland (Ernst & Young, 1 May 2013) <http://www.ey.com/GL/en/Services/Tax/The-worldwide-personal-tax-guide---XMLQS?preview&XmlUrl=/ec1mages/taxguides/TGE-2013/TGE-IS.xml> accessed 8 July 2014; KPMG, 'Thinking Beyond Borders: Iceland' (KPMG 2013) <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/thinking-beyond-borders/Documents/iceland-2013.pdf> accessed 8 July 2014.

[309] Polish Information and Foreign Investment Agency website: Unlimited tax obligation in Poland section <http://www.paiz.gov.pl/polish_law/taxation/pit> accessed 8 July 2014. An individual will also be resident for tax purposes if he or she is 'physically present in the Republic of Poland for more than 183 days during a tax year' (ibid). See also Society of Trust and Estate Practitioners, 'Jurisdiction Reports: Poland' (STEP.org, February 2014) <http://www.step.org/jr-poland> accessed 8 July 2014; KPMG, 'Thinking Beyond Borders: Poland' (KPMG 2013) <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/thinking-beyond-borders/Documents/poland-2013.pdf> accessed 8 July 2014; Ernst & Young, '2013-2014 The worldwide personal tax guide: Poland (Ernst & Young, 1 May 2013) <http://www.ey.com/GL/en/Services/Tax/The-worldwide-personal-tax-guide---XMLQS?preview&XmlUrl=/ec1mages/taxguides/TGE-2013/TGE-PL.xml> accessed 8 July 2014; Deloitte, 'Poland Highlights 2014' (Deloitte, 2014) <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-polandhighlights-2014.pdf> accessed 8 July 2014.

[310] Mikael Holmgren and Kristina Benjaminsson, 'Sweden' in Luc De Broe (ed), *The Tax Treatment of Transfer of Residence by Individuals* (Kluwer Law International 2002) 509, 509-10. An individual will also be resident in Sweden for tax purposes if he or she 'permanently stays' in Sweden, which is generally considered to occur after physical presence for more than six continuous months (ibid). See also Natasha Alexander, Karl Cherepanya and Igor S Oleynik, *Sweden: Business Law Handbook* (International Business Publications 2013) 189; Ernst & Young, '2013-2014 The worldwide personal tax guide: Sweden' (Ernst & Young, 1 May 2013) <http://www.ey.com/GL/en/Services/Tax/The-worldwide-personal-tax-guide---XMLQS?preview&XmlUrl=/ec1mages/taxguides/TGE-2013/TGE-SE.xml> accessed 8 July 2014; PwC, 'International Assignment Services: Taxation of International Assignees – Sweden' (PwC, July 2013) <http://www.pwc.com/us/en/hr-international-assignment-services/assets/sweden-folio.pdf> accessed 8 July 2014; Deloitte, 'Taxation and Investment in Sweden 2013' (Deloitte, 2013) <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-swedenguide-2013.pdf> accessed 8 July 2014.

nor his or her partner or children, has any residential accommodation in Norway available for their use. If the individual had been resident in Norway for a period of ten years, these conditions must be satisfied for three successive years before the individual will cease to be resident.[311]

Contrary to what has been repeatedly stated by Irish politicians, Ireland is in fact the only member country of the OECD which imposes tax on individuals solely on the basis of physical presence.[312] When Ireland introduced the statutory definition of residence in 1994, it did more than simply abandon a tradition of imposing tax on individuals based on both short-term and long-term connecting factors which had been in existence since the earliest forms of direct taxation, it also established a system of taxation that was virtually unique among its major trading partners. This system could not, by any interpretation, be considered to be in line with OECD norms or international practice.[313]

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[311] See KPMG, 'Thinking Beyond Borders: Norway (KPMG 2013) <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/thinking-beyond-borders/Documents/norway-2013.pdf> accessed 8 July 2014; Ernst & Young, '2013-2014 The worldwide personal tax guide: Norway' (Ernst & Young, 1 May 2013) <http://www.ey.com/GL/en/Services/Tax/The-worldwide-personal-tax-guide--XMLQS?preview&XmlUrl=/ec1mages/taxguides/TGE-2013/TGE-NO.xml> accessed 8 July 2014; Nordisk eTax website: Norway section <https://www.nordisketax.net/main.asp?url=files/nor/eng/i02.asp&c=nor&l=eng> accessed 8 July 2014. The provisions are contained in the General Tax Act of 26 March 1999 no 14 (*Lov om skatt av formue og inntekt*) § 2-1 and have applied since 1 January 2003. Prior to that time, an individual was resident in Norway if he or she was in Norway with the intention of establishing his or her residence there, or for more than a temporary purpose, or for more than six months (see Mette Oien and Sverre Hveding, 'Norway' in Luc de Broe (ed) *The Tax Treatment of Transfer of Residence by Individuals* (International Fiscal Association 2002) 459, 460). See also Handboka.no website <http://www.handboka.no/Sak/Lover/Skatteloven/Kb/p01.htm> accessed 8 July 2014, which has the text of the original (1999) version of the General Tax Act in Norwegian, and Lovdata.no website <http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19990326-014.html&emne=SKATTELOV*&&> accessed 8 July 2014, a website run by the Norwegian Department of Justice and the Law Faculty of the University of Oslo, which has the current version of the General Tax Act in Norwegian. The contents of the relevant provision of this legislation was examined by the present author using the Google translate website.

[312] Though there are several non-OECD countries that do so. There are two EU Member States that define residence in terms of physical presence alone (Cyprus and Malta) and several others across the globe (for instance India, Malaysia and Singapore). As outlined in section 4.3(a)(iii) above, the statutory definition of residence in the UK in 2013 includes both measures of physical presence and longer-term forms of connection.

[313] Indeed, the OECD's commentary on its Model Tax Convention makes it clear that in the domestic laws of member states liability is generally 'not imposed *only* on persons who are "domiciled" in a State' but is '*extended* to comprise also, for instance, persons who stay continually, or maybe only for a certain period in the territory of the State' (OECD, *Model Tax Convention on Income and on Capital 2010* (OECD Publishing 2012) C(4)-1, para 4(3)(emphasis added)).

Of course, the implementation of the statutory definition of 'resident' and 'ordinarily resident' in Ireland did not create the tax exile problem here. The phenomenon of tax exile existed in Ireland prior to 1994, and it also existed, and exists, in countries that do not have a definition of residence for tax purposes that is based solely on the physical presence of an individual within the country in question.[314] What is beyond doubt, however, is that the statutory definition made it considerably easier for an individual to be a tax exile, and so can be said to have facilitated the problem. That is not to say that the definition had purely negative effects. The Minister for Finance outlined when introducing the measure that making Ireland more attractive to non-residents to spend time and invest in, and to facilitate Irish residents carrying on some of their employment activities abroad were two of the goals it was hoped to achieve, as was facilitating emigrants in retaining houses in Ireland and returning occasionally to visit, and possibly to invest here. As is discussed in chapter 5, having a straightforward and objective definition of residence for tax purposes plays a valuable role in attracting foreign direct investment, and this, and the tax treatment of the Irish diaspora, are important policy considerations that must be weighed in evaluating any solution to the tax exile problem.

[314] See chapter 5.

CHAPTER 5

THE EXTENT OF THE TAX EXILE PROBLEM

For God's sake, madam, don't say that in England, for if you do, they will surely tax it.

Jonathan Swift, responding to Lady Carteret's admiration for the quality of the air in Ireland
Quoted in Clifton Fadiman and André Bernard (eds),
Bartlett's Book of Anecdotes (Little Brown & Co 2000)

5.1 Background to tax exile in Ireland

The phenomenon of moving from one place to another to avoid or reduce the burden of taxation is certainly not a modern one. Fear describes how in the second century AD one Lucius Memmius Probus became a *Grammaticus Latinus*, a teacher of poetry, history and basic elocution to pupils aged between twelve and fifteen, in a town in the Rioja region of Northern Spain some fifty miles from his home town. Memmius took the position because 'the most important aspect of being a *grammaticus*' was that the post provided 'an exemption from local municipal duties or *munera*' and that the 'search for such exemptions was one of the main preoccupations of local life in the ancient world'. It seems that Memmius was one of a number of 'enterprising individuals, who presumably had not managed to gain exemption at home' and had instead taken 'the opportunity to teach elsewhere and so hopefully to avoid their *munera* in this way'.[1] In 1523 legislation in England provided that anyone who moved to one of the shires, universities, colleges or ports which were exempt from direct taxation with the intent to avoid his or her liability to tax was to be assessed and charged in the place that the individual was previously resident.[2]

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[1] AT Fear, 'A Latin Master from Roman Spain' (1995) 42 Greece & Rome 57, 61.

[2] An Act of Subsidy (14 &15 Hen VIII c 16) (1523), s 22. Section 7 of the act also provided that individuals who avoided assessment by claiming to have already been assessed in another district was to be charged at a double rate. BEV Sabine, *A History of Income Tax: The Development of Income Tax from Its Beginning in 1799 to the Present Day Related to the Social, Economic and Political History of the Period* (Routledge 2006) 44 notes that in 1817 a petition presented to parliament during debates on a proposed reintroduction of income tax 'claimed that out of 50 French passports granted to Englishmen, 45 were "emigrants flying from the weight of taxation at home"', and Mark Spoerer, 'The Evolution of Public Finances in Nineteenth-Century Germany' in José Luís Cardoso and Pedro Lains (eds), *Paying for the Liberal State: The Rise of Public Finance in Nineteenth-Century Europe* (Cambridge University Press 2010) 103, 121 says that in nineteenth-century Germany 'tax-induced

The term 'tax exile' appears to date from the late 1960s or early 1970s,[3] a time when income tax rates were extremely high in the United Kingdom[4] and many of those whose source of income was not fixed, or whose earning of that income did not require their physical presence in the UK, such as writers and musicians, moved to so-called 'tax havens'.[5] Some of these exiles, such as authors Robert Archibald Shaw and Len Deighton,[6] left the UK for Ireland where they were able to avail of the exemption from income tax for artists provided by section 2 of the Finance Act 1969.

There is a lengthy history of economically driven emigration from Ireland, with net outward migration in every decade from the 1850s until the late 1990s with the sole exception of the 1970s.[7] From 1996 until 2010 there was net inward migration, though since that year the pattern has returned to its traditional form as a result of the

migration and tax competition became increasingly important' and that at the beginning of the twentieth century 'wealthy taxpayers seized the opportunity to decrease their income tax load by choosing a different place of residence, and in doing so, they forced the municipalities to react'.

[3] JA Simpson and ESC Weiner (eds), *The Oxford English Dictionary* (2nd edn, Clarendon Press 1989) dates the earliest use of the term to an article in the Manchester Guardian Weekly of 22 November 1969.

[4] From 1974 to 1979 the top rate of income tax was 83% (on incomes above £20,000) and there was a surcharge of up to 15% on 'unearned' income such as interest and dividends. See Tom Clark and Andrew Dilnot, 'Long-Term Trends in British Taxation and Spending' (The Institute For Fiscal Studies, Briefing Note No 25, 2002) <http://www.ifs.org.uk/bns/bn25.pdf> accessed 19 May 2014, 7-8. See also the table of historical rates of income tax in the UK on the website of the National Archives <http://webarchive.nationalarchives.gov.uk/20090909205015/http://hmrc.gov.uk/stats/tax_structure/incometaxrates_1974to1990.pdf> accessed 19 May 2014

[5] The novelist Jack Higgins describes how, on hearing from his agent that he had made a million pounds from his novel *The Day of the Jackal*, he 'upped sticks almost overnight – leaving his wife and kids back in Leeds until he could sort out somewhere to live – and moved to Jersey' (see John Crace, 'A life in writing: Jack Higgins' *The Guardian* (Manchester, 31 July 2010).

[6] David Parkinson, 'Shaw, Robert Archibald (1927–1978)' in HCG Matthew and Brian Harrison, *Oxford Dictionary of National Biography* (Oxford University Press 2004); Des Hickey, 'Why Len's leaving his tax-free hideaway' *Sunday Independent* (Dublin, 19 February 1978). Flechner suggests that one of reasons that Saint Patrick became a clergyman was to avoid having to serve as a *decurion*, or tax collector, a role he had inherited from his father and which was both difficult and risky during that time, prompting one journalist to suggest that 'St Patrick also pioneered another tradition, by becoming the first British celebrity to move here as a tax exile' (see Roy Flechner, ''Patrick's Reasons for Leaving Britain' in F Edmonds and P Russell (eds), *Tome: Studies in Medieval History and Law in Honour of Thomas Charles-Edwards* (Boydell 2011) 125 and Frank McNally, 'Was St Patrick of the tall tales a tax exile and a spin doctor?' *Irish Times* (Dublin, 17 March 2012).

[7] JJ Sexton and others, The Economic and Social Implications of Emigration (National Economic and Social Council 1991) <http://files.nesc.ie/nesc_reports/en/NESC_90_1991.pdf> accessed 19 May 2014, 55, 56 and 58; Alan Barrett, 'Irish Migration: Characteristics, Causes, and Consequences' in Klaus F Zimmermann (ed), *European Migration: What Do We Know?* (Oxford University Press 2005) 89, 91.

economic downturn.[8] The first recorded instance of individuals leaving Ireland for taxation rather than economic reasons appears to have been following the passage of the Wealth Tax Act 1975, which imposed an annual charge of one per cent on the net market value of all property, wherever situate, to which an individual was beneficially entitled in possession on the fifth of April of each year. In April 1975 it was reported that 27-year-old Viscount Petersham was leaving his principal estate in county Limerick to avoid the charge which was estimated to be approximately £200,000 per annum on his fortune of £20 million.[9] Subsequent statements by Petersham's father, Lord Harrington, that it was best for his son to leave because of the tax, which was 'too harsh', and that if he were younger he would do the same, were reported without comment,[10] however Michael English, a Fine Gael county councillor from county Limerick, responded by saying that he intended to request the Minister for Lands to instruct the Land Commission to acquire Viscount Petersham's lands and dispose of them to local farmers, saying that there 'is something wrong with a system in which a wealthy man like Lord Petersham can quit the country to evade the new capital tax net and still retain possession of his lands' and that people like him had 'had the freedom of Ireland for far too long and now, when they are asked to pay extra taxes, they flee the country that helped to make them millionaires'.[11] While the tone of Councillor English's comments, and the sentiments that he expressed, would be by no means unusual today, the editorial response in the same newspaper the following day stands in very stark contrast to that which prevails in the public discourse of the twenty-first century. It was suggested that Councillor English had 'reddened faces' in his party, Fine Gael, that his suggestion marked a turning away 'from the very base on which the party has stood for so long, the farmers and their sons and daughters' and that it was more in keeping with the 'advanced socialist views' of the Labour Party.

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[8] See Corona Joyce, 'European Migration Network Annual Policy Report on Migration and Asylum 2007: Ireland' (Research Study Prepared for the European Migration Network 2008) <http://webir.tcd.ie/bitstream /2262/27867/1/SUSTAT005.pdf> accessed 19 May 2014, 55; Martin Ruhs and Emma Quinn, 'Ireland: From Rapid Immigration to Recession' (2009) Migration Information Source <http://www.migrationpolicy.org/article/ ireland-rapid-immigration-recession> accessed 19 May 2014; CSO, 'Population and Migration Estimates' (Central Statistics Office statistical release, 29 August 2013) <http://www.cso.ie/en/releasesandpublications/er/ pme/populationandmigrationestimatesapril2013/#.U3puaiiONRA> accessed 19 May 2014.

[9] Noel Smith, 'Millionaire peer to flee tax grab' *Irish Independent* (Dublin, 8 April 1975).

[10] Noel Smith, 'I'd do Same - Father of Tax Exile' *Irish Independent* (Dublin, 11 April 1975).

[11] Noel Smith, 'Millionaire Wealth Tax exile peer to forfeit his estates' *Irish Independent* (Dublin, 2 May 1975).

Far from criticising Viscount Petersham, the article stated that the country was fortunate to have people like him who were 'providing employment and money and producing the basic raw material, livestock/bloodstock, which help to bring millions to the country' and without whom 'there would be thousands of small farmer breeders in Ireland who would find no market for their half-bred horses'.[12]

The Wealth Tax was abolished by section 38 of the Finance Act 1978, and during the debate on the Finance Bill of that year it was suggested that it had resulted both in capital outflow and in the emigration of 'people of extraordinary wealth', which Labour Party TD Ruari Quinn described as the flight of the 'fat geese' (as opposed to the wild geese).[13] A study by the Economic and Social Research Institute in 1985 agreed that its own enquiries confirmed that there were 'cases of individuals migrating and, where it was situated in Ireland, taking their wealth with them to avoid the wealth tax', but that it was arguable that 'such instances were less a product of the wealth tax as such than of the growing overall weight of Irish taxes' and that it was 'highly unlikely, however that a significant number of residents emigrated to avoid the wealth tax' and 'that for those contemplating emigration for other reasons, the wealth tax provided a popular excuse'.[14] While the media trumpeted the fact that 'the "wealthy ones," who fled the Coalition wealth tax for balmy havens abroad, are now set to return', Viscount Petersham did come back to live in Ireland as had been expected.[15]

In the years following 1978 there were infrequent references in the media to various individuals said to have left Ireland and gone into tax exile.[16] The tone of these

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[12] Editorial, 'Has Mr. English reddened faces in F.G.?' *Irish Independent* (Dublin 3 May 1975).

[13] Dáil Deb 15 June 1978, vol 307, col 1229. The 'Flight of the Wild Geese' refers to the exile of the army of Patrick Sarsfield in France under the terms of the Treaty of Limerick of 1691.

[14] Cedric Sandford and Oliver Morrissey, *The Irish Wealth Tax: A Case Study in Economics and Politics* (Economic and Social Research Institute 1985) 126-127.

[15] Raymond Smith, 'The big spenders – coming home from their tax havens' *Irish Independent* (Dublin, 2 February 1978)

[16] For example Garech Brown (Trevor Danker, 'Guinness heir Garech may go into tax exile' *Sunday Independent* (Dublin, 15 May 1983)); Jerry Jones (Editorial, 'Jones joins the tax haven set' *Irish Independent* (Dublin, 8 September 1984)); Jeff Smurfit, Catherine Gaskin and Albert Gubay (Jim Farrelly, 'Basking in a Tax Haven' *Irish Independent* (Dublin, 21 June 1985)); Lord Mount Charles (Laurence Rich, 'Hard times keeping a roof over the castle' *Irish Independent* (Dublin, 2 December 1987)); Frank Cosgrove (Martin Fitzpatrick, 'Taking Stock' *Sunday Independent* (Dublin, 4 August 1991)); Michael Smurfit (Patsy McGarry, 'Calm retreat of the jet set aristocrats' *Irish Independent* (Dublin, 30 January 1993)); Tony Ryan (Jim Dunne, 'Wall Street arrogance sank GPA but Ryan's air remains defiant' *Irish Times* (Dublin, 26 May 1995)); Geoff Read, Aidan Heavey and Howard Kilroy

references was almost uniformly neutral, normally simply stating that the individual in question was a tax exile, and there was rarely any discussion of the reasons for the exile, much less any condemnation of it. Section 4 of the Finance Act 1987 provided that an individual was not to be considered as resident for tax purposes merely by reason of having a place of abode in Ireland where that individual was engaged full-time in a trade, profession, office or employment which was carried out or exercised entirely abroad. The section was broadly welcomed, and entirely reflected the prevailing economic conditions of the time, with all discussion focused on the provision's stated intent, 'to encourage nonresidents, and especially expatriates, to invest in the Irish economy' because it was 'entirely appropriate that Irish people working abroad should be able to visit home and transfer their savings here without being subject to tax simply by virtue of such visits'.[17] There was no mention either in the Dáil or Seanad as to whether, or to what extent, the measure might impact on individuals seeking to move abroad as tax exiles.[18]

There were some exceptions. In 1994 the legislative changes to the definition of residence for individuals for income tax and CGT purposes contained in the Finance Act were discussed in the context of tax exiles,[19] and journalist and senator Shane Ross questioned the rationale behind the change[20] and the government's contention that it would 'provide an inducement to foreigners to spend longer in Ireland and to buy holiday homes here' and identified that enforcing the number of days in individual spent in Ireland would be difficult as any 'nominal exile can slip in and out of the Republic of Ireland through Belfast, or even London, without detection' and that an individual could 'depart out shores for a year, in theory, move in and out at will in practice, avoid all capital gains on sales of assets, establish a network of accounts

(Martin Fitzpatrick, 'Tax exiles lead the merry lives of Windsor' *Sunday Independent* (Dublin, 29 January 1996)).

[17] Minister for Finance Ray McSharry introducing the measure in his budget speech (Dáil Deb 31 March 1987, vol 371, cols 780 and 795).

[18] See Dáil Deb 9 June 1987, vol 373, col 1019-20; Seanad Deb 24 June 1987 vol 116 col 1290; Seanad Deb 25 June 1987 vol 116 cols 1377, 1433; Seanad Deb 2 July 1987 vol 116 col 1681.

[19] This legislative change is discussed in detail in chapter 4.

[20] As noted in chapter 1, Ross suggested that the Minister for Finance had 'capitulated to a tiny but rich and powerful lobby group' noting that henceforth life would 'become even more comfortable for the Irish super-rich. He can live in Ireland for a healthy proportion of the year without paying tax here. He can buy a house here, but rank as a non-resident for tax purposes' (Shane Ross, 'Taxing the patience of full-time residents' *Sunday Independent* (Dublin, 8 May 1994)).

overseas and return to Ireland. He has beaten the system',[21] thus identifying two issues, the 'Cinderella rule' and temporary non-residence for CGT, which were only much later addressed by amending legislation.[22]

This was an isolated example however. In the same year journalist Matt Cooper, who would later become a harsh critic of tax exiles, quoted financier Dermot Desmond as having said in 1990 '[m]y investment is in Ireland. I want to live here. I want my children to grow up here. I want it to be a better place and I'm going to promote the development of Ireland and I'm not going to be ashamed of that', yet, although having already reported earlier in 1994 that Desmond had left Ireland and would 'be spending the majority of his time outside the country', he went on to assert uncritically that Mr Desmond was 'not a tax exile and still invests considerable sums locally'.[23] In 1996 Michael Smurfit, who had reportedly been in tax exile in Monaco since 1989,[24] was honoured by the Ireland Fund as the first recipient of the 'Wild Geese Award' and was lauded in the media for having 'supported Ireland with both patriotism and hard cash' with his move abroad being described as having been publicly announced in advance and based on 'double-taxation from Ireland and the United States' and noting that he was 'loathe to leave'.[25] In 1997 Minister for Finance Ruari Quinn was 'somewhat impressed' by a caller during an interview on the Pat Kenny radio show who suggested 'a maximum tax amount of £250,000 for super rich business people who were, as tax exiles, "driven out of the country"', replying that he 'would look at any proposal that would encourage tax exiles to return or increase revenue'.[26] In 1998 journalist Róisín Ingle writing about 'gambler-philanthropist JP McManus', who was widely reported to have been a tax exile in Switzerland since

[21] ibid.
[22] In 2008 (Finance (No 2) Act, s 15) and 2003 (Finance Act 2003, s 69) respectively. These issues are discussed in detail in chapter 6.
[23] Matt Cooper, 'Desmond is reappointed chairman of NCB brokers' *Irish Independent* (Dublin, 31 March 1994); Matt Cooper, 'Cleared for take-off again: Desmond's airport – taking a long view' *Irish Independent* (Dublin, 2 November 1994).
[24] John Maher, 'Outstanding business career under a cloud' *Irish Times* (Dublin, 21 September 1991).
[25] Stephen Dodd, 'The King of the deal' *Sunday Independent* (Dublin, 18 February 1996). Journalist Kevin Myers did criticise Smurfit the following year for making a speech regarding the increasing social divisions in Ireland considering that he was one of the 'fleet of foot Monagesques waving their admonitory fingers at us before returning to Rainierville faster than you can say tax exile', again an isolated criticism (Kevin Myers, 'An Irishman's Diary' *Irish Times* (Dublin 30 April 1997)).
[26] Maol Muire Tynan, 'Quinn takes time out for Kenny phone in' *Irish Times* (Dublin 24 January 1997).

1993,[27] praised him for his legendary generosity and wrote that 'Irish people generally reserve a mix of awe and admiration' for him.[28]

Things began to change following the sale in December 2000 by telecoms entrepreneur Denis O'Brien of his shares in Esat Telecom to British Telecom for approximately €286 million.[29] O'Brien had moved to Portugal in February 2000 and was resident in both Ireland and Portugal for the tax year 2000/01, the year of the disposal for CGT purposes. He claimed not to be liable to Irish CGT on the disposal pursuant to article 13.5 of the Ireland/Portugal Double Taxation Agreement (DTA)[30] on the grounds that, for the purposes of the DTA, he was a resident of Portugal for the tax year in question as this was the country in which he had a 'permanent home available to him' within the meaning of article 4.2. While some friends cautioned O'Brien that moving to Portugal and thus not paying tax on a profit that had effectively been made as a result of the award of a mobile phone licence by the Irish government to Esat in May 1996 might be damaging to his image, his public relations consultant pointed out that other prominent Irish businessmen had 'become tax exiles and there wasn't much of a deal made about that'.[31] This advice initially proved correct, and early references to O'Brien being a tax exile were in no way condemnatory.[32] In June 2001 he was called to give evidence before the Moriarty Tribunal, which was investigating, among other things, allegations of payments from O'Brien to Michael Lowry TD, the Minister in charge of the department which awarded the mobile phone

[27] See for example, Damien McElroy, 'Peak to cap it: National send off for exile McManus' *Irish Independent* (Dublin, 4 April 1994); Myles McWeeney, 'Somebody Up There likes lucky Herb' *Irish Independent* (Dublin, 6 April 1994); Angela Phelan, 'All the faces at the Galway Races' *Irish Independent* (Dublin, 30 July 1994); Myles McWeeney, 'Festival Specialist trots out winners' *Irish Independent* (Dublin, 27 December 1994).

[28] Róisín Ingle, 'From betting shillings to millions, then giving it away' *Irish Times* (Dublin, 17 October 1998).

[29] These details are taken from the judgment of Laffoy J in *O'Brien v Quigley* [2013] IEHC 398, an appeal by case stated to the High Court concerning a challenge by Mr O'Brien to an assessment for CGT on the sale of his shares in Esat Telecom.

[30] Convention Between Ireland and the Portuguese Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (Double Taxation Relief (Taxes on Income) (Portuguese Republic) Order 1994, SI 102/1994).

[31] Siobhán Creaton, *A Mobile Fortune: The Life and Times of Denis O'Brien* (Aurum Press 2010) 169-170.

[32] See for example Editorial, 'Denis takes a deserved bow' *Irish Independent* (Dublin, 20 May 2000) 'Denis and his wife Catherine will be tax exiles in Portugal for the next few years ... I suppose £300 million is as good as [sic] reason as any to take to the sunshine for a while.'.

licence to Esat in 1996,[33] and although references to him being a tax exile in the media were frequent at this time, they were notable in that they were not accompanied by any further comment on the point, either positive or negative.

The tide of public opinion was beginning to turn however. In 1999 Socialist Party TD Joe Higgins had spoken in the Dáil of millionaires 'who do not spend as much time in Ireland because their sense of patriotism is such that they are tax exiles from the country'[34] and in April 2000 he responded to the news that JP McManus was to donate £50 million towards a new national stadium by asking whether 'if people such as Mr McManus had not chosen to become tax exiles in Switzerland to avoid paying tax ... the £50 million would long ago have accrued to the Exchequer at a time when it was badly needed'.[35] A fundraising golf tournament hosted by McManus in Limerick in July which raised €19.8 million for charity was almost universally praised,[36] but drew condemnation from one commentator who described how 'the millionaire tax exiles swan in from Monaco and the Bahamas ... quite unaware of their vulgarity as they bid a million for this and a million for that', contrasting it with examples of insufficient funding of public services.[37] In November 2002 Labour Party leader Pat Rabbitte called on the Taoiseach[38] to 'review the legislation relating to tax exile status which he introduced in 1994 to make it easier for those living abroad and not paying tax here to visit more frequently' as part of a planned review into tax reliefs,[39] and later that month it was announced that the Department of Finance was 'considering closing off a tax loophole which allows Irish businessmen who sell their companies to avoid paying Capital Gains Tax by taking up residence in Portugal',

[33] The terms of reference of the tribunal are set out in the Tribunals of Inquiry (Evidence) Acts 1921 and 1979 (No. 2) Order 1997 <http://www.moriarty-tribunal.ie/asp/displayall.asp?ObjectID=310&Mode=0&RecordID=1> accessed 19 May 2014.
[34] Dáil Deb 30 September 1999, vol 508, col 632.
[35] Dáil Deb 11 April 2000, vol 517, col 1220.
[36] See for example Eugene Hogan, 'Millions roll at JP's sale of the century' *Irish Independent* (Dublin, 13 July 2000). The figure for the sum raised is taken from the charity's website: <http://www.jpmcmanusproam.com/
tournament-information/overview.html> accessed 19 May 2014.
[37] Gene Kerrigan, 'Welcome to the pay and display society' *Sunday Independent* (Dublin, 16 July 2000). See also Patricia Feehily, 'Sick as a parrot at millionaire's bash' *Limerick Leader* (Limerick 22 July 2000).
[38] The leader of the government, equivalent to the prime minister.
[39] Dáil Deb 2 November 2002, vol 556, col 478. Journalist John Drennan described this as '*Sunday Tribune*-type wails about tax exiles' that were 'so worthy and so harmless' (John Drennan, 'That cuddly Rabbitte has to pack a harder punch' *Sunday Independent* (Dublin 10 November 2002)).

referring specifically to the fact that 'Denis O'Brien and a number of others have already availed of the concession'.[40]

The real turning point came in late 2003. In May of that year it had been reported that Revenue were examining Denis O'Brien's 'compliance with rules governing tax residence'[41] and in September O'Brien sought an injunction restraining the publication of a further article in relation to his tax affairs on the grounds that it would constitute a breach of confidentiality in relation to the dealings between a member of the public and the Revenue. On appeal to the Supreme Court he was successful in preventing publication of the article pending a full hearing, however the injunction proceedings, both in the High Court and the Supreme Court, had been heard in public and O'Brien was unsuccessful in preventing publication of details regarding the proceedings themselves.[42] Ten days later, Kieran Crowley, the chairman of the Small Firms Association, in a speech to the Waterford Chamber of Commerce said, '[i]t absolutely appals me that we look up to role models in Irish business and of Irish success who live abroad and only come back to receive honorary doctorates. I don't think these people deserve that kind of respect as they don't pay their whack'. He described an 'absolute disproportion and lack of equity' in the tax regime which was 'enjoyed by the really truly wealthy, successful and enormously capital-rich people of this country in terms of going offshore with capital gains' and specifically referred to Denis O'Brien's avoiding tax on the sale of his Esat shares because he moved to Portugal.[43] O'Brien was described as 'apoplectic with rage' and referred to Crowley's remarks as 'the ill-informed jumping on the bandwagon' and stated, 'I can live anywhere in the world and nobody is going to stop me' and 'I make no apologies for

[40] Charlie Weston, 'Finance eyes tax loophole in Portugal' *Irish Independent* (Dublin 21 November 2002). The closing of this 'loophole' was subsequently announced by the Minister for Finance in his budget speech (Dáil Deb 4 December 2002, vol 558, col 1271) and outlined in the summary of budget measures (<http://budget.gov.ie/budgets/2003/Summary.aspx> accessed 19 May 2014), and the measure was put into effect in Finance Act 2003, s 69. This provision is discussed in detail in chapter 6.

[41] Ian Kehoe, 'Revenue probe into O'Brien's tax residency' *Sunday Business Post* (Dublin, 25 May 2003). In fact, it much later emerged that Revenue had assessed O'Brien to CGT in the amount of €56.86 million on 8 October 2002 and an appeal against that assessment was heard on in July of 2003 (*O'Brien v Quigley* (n 29)).

[42] The case was later settled, with the *Sunday Business Post* apologising for publishing confidential information relating to O'Brien's dealings with the Revenue (see Creaton (n 31) 223-24). A report of injunction proceedings in the Supreme Court can be found in Mary Carolan, 'O'Brien fails to have hearing in private' *Irish Times* (Dublin 11 October 2003).

[43] Carol Duffy, 'SFA attacks O'Brien and other tax exiles' *Irish Times* (Dublin, 22 October 2003).

where I live', also pointing out the significant inward investment, job creation and profits made by other Irish individuals and institutions as a result of Esat telecom. He went on to decry the leaking of his private tax affairs and the pervasive negative attitude towards politicians, government and entrepreneurs saying, 'we are fast turning into a communist state, we are fast moving towards a communist doctrine'.[44]

Journalist Sam Smyth wrote that O'Brien was 'behaving like a brat throwing his toys out of the pram' and criticised him for his 'quick flit to Portugal shortly before selling Esat' saying that he should have been 'glad to pay 20pc capital gains tax back to the people who enriched him' and naming Dermot Desmond, JP McManus, Michael Smurfit and Tony Ryan as other prominent businessmen who had 'moved to tax havens to avoid tax', but noting that 'other multi-millionaires such as Michael O'Leary chose to pay their taxes in the Republic, one of the most benevolent tax regimes in Europe'.[45] Another journalist, Michael Clifford, described Kieran Crowley's comments as marking a significant change from the prevailing attitudes of the previous twenty years because a 'reputable member of that caste' of business people was now 'saying to his fellows that tax is not a nuisance, but a responsibility, and those who legitimately welch on a huge scale, should get short shrift'. He described Denis O'Brien's chairing of the Special Olympics in Ireland as ironic, considering that the area of disability was underfunded yet 'fronting the Special Olympics was a man who has to pay nothing in taxes because he is above all that'. He also named Dermot Desmond, Michael Smurfit and JP McManus as tax exiles, and writing of the latter's donation of €5 million to Limerick University on the understanding that it would be used to fund a business school named after the late Labour Party TD Jim Kemmy said, '[t]he socialist, who spent his life fighting for the little guy, would have been either amused or angry'. He questioned Smurfit's representation of Ireland as the honorary consul in Monaco saying '[s]urely we could get somebody who pays their whack'.[46]

From this point onwards, the issue of tax exiles was firmly on the political and media agenda. References to individuals as tax exiles in the media increased

[44] Jamie Smyth, 'Angry O'Brien hits back at his critics' *Irish Times* (Dublin, 24 October 2003).
[45] Sam Smyth, 'No haven in Portugal from those taxing questions for O'Brien' *Irish Independent* (Dublin, 25 October 2003).
[46] Michael Clifford, 'Tax exiles get a right roasting from SFA' *Sunday Tribune* (Dublin 26 October 2003).

enormously in the decade following, and there were frequent, and increasingly hostile, articles criticising them for not paying tax in Ireland, and reproaching the government for failing to addressing the problem. For some, the term 'tax exile' did not convey the requisite degree of public odium, and there have been references to such individuals as 'tax fugitives',[47] with one TD going so far as to say '[i]t is high time that we began to describe those who claim Irish citizenship but decline to contribute to this country's exchequer as tax traitors, and not just tax exiles'.[48] The chairperson of the Revenue has been questioned about the issue on four separate occasions before the public accounts committee and once before the joint committee on finance and public service, it has been the subject of proposed amendments to the Finance Bill in each year from 2004 to 2012, it has been the subject of over seventy parliamentary questions and references in the Dáil and Seanad during the debate of other Bills, it formed part of the submissions to, and the report of, the Commission on Taxation in 2009, there have been Revenue audits and investigations into the residence status of certain High Wealth Individuals (HWIs), it has been included in the pre-budget submissions of various bodies over a number of recent years, addressing the issue was one of the commitments in the programme for government of the current administration, there was a public consultation on the rules for residence for tax purposes as a result of the issue in 2012, in late 2012 a 'Labour party poll identified tax exiles as a key budget issue for voters',[49] the interdepartmental Tax Strategy Group recommended amending the definition of residence for the purposes of income tax and CGT to address the issue in 2013 and those proposals were brought to the cabinet (but not yet implemented), and there has been a number other legislative provisions introduced in relation to the issue.[50]

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[47] Fintan O'Toole, 'When "tax fugitives" set tone for business' *Irish Times* (Dublin, 24 February 2009); Senan Molony, 'Irish tax 'fugitives' cost State €150m' *Irish Independent* (Dublin, 25 March 2009); Deirdre Falvey, 'Are the well-off few ruining it for the rest?' *Irish Times* (Dublin, 12 September 2009); Dáil Deb 10 December 2009, vol 698, col 47 (Ruari Quinn TD, 'The phrase "tax exiles" does them an honour they do not deserve. They are not exiles, they are tax fugitives'); The Workers' Party, '2011 Pre-Budget Submission' (December 2010) <http://www.workerspartyireland.net/id547.html> accessed 19 May 2014.

[48] Labour Party TD Aodhan O'Riordain, quoted in Mike Dwane, 'Tax exile rule changes "a terrible idea", says UL expert' *The Limerick Leader* (Limerick, 17 July 2013)

[49] Niall Brady, 'Tax exiles face tougher rules' The Sunday Times (Dublin, 30 September 2012).

[50] These are discussed in chapter 6. It remains to be seen whether the recent (at the time of writing) election of Joan Burton TD, probably the the strongest proponent of change and the harshest political critic of the current law and of the phenomenon of tax exile, as leader of the Labour Party and Tánaiste (deputy prime minister) of the current coalition government (see Harry McGee, 'Joan Burton elected as 11th leader of Labour Party' *Irish Times* (Dublin, 5 July 2014)) will see a further increase of political focus on the tax exile problem.

5.2 The extent of the tax exile problem

5.2(b) Determining the extent of the tax exile problem in general

To date, there has been no systematic investigation into the extent of the tax exile problem in Ireland. In fact, as will be argued in section 5.2(c) below, its extent has been publicly overstated to a significant degree. As outlined in section 1.3, the problem can be seen as principally encompassing two disparate elements: the breach of equity or fairness in the tax system that is perceived to result from individuals moving abroad for tax reasons, and the loss of revenue to the exchequer.

Estimating the amount of income tax and CGT that is lost as a result of individuals moving abroad, or estimating the additional tax revenue that would accrue if such individuals were subject to Irish taxation on all of their income and capital gains, requires establishing both the number of such individuals (and their identity) and the amount of income and capital gains that arises to them in any given year.[51] These data are quantifiable, and so such a measurement is theoretically possible, though it is fraught with considerable difficulties. First, individuals ceasing to be resident in Ireland for the purposes of direct taxation are not required to notify the Revenue Commissioners of this change in status, and so Revenue will only become aware that this has occurred if the individual is required to file an annual return in the years following the cessation of residence.[52] Figures reported by the Revenue of the number of non-resident individuals filing returns do not distinguish between those who were previously resident Ireland and those who were not, and so it is not possible to determine how many individuals become non-resident for tax purposes in any given year. Migration estimates published by the Central Statistics Office (CSO) provide the approximate number of individuals emigrating from Ireland each year, though it is not possible to determine from these figures how many émigrés had previously been liable

[51] In essence, this includes income gains arising from sources outside Ireland, but also include some Irish sourced income (such as dividends and interest) and gains on Irish assets other than land or companies that derive their value from Irish land..

[52] This obligation might arise where the individuals is not resident but is ordinarily resident, or where the individual has income arising in Ireland.

to income tax or CGT in Ireland, or had been required to file a return, [53] or how many continue to be resident in Ireland for tax purposes for one or more years following emigration.[54]

The second difficulty in quantifying the tax loss due to individuals moving abroad is that it requires a determination of the amount of income and capital gains arising to such individuals which is not subject to Irish taxation. This predominantly, but not exclusively, consists of income and gains arising from sources outside Ireland,[55] information relating to which is not required to be reported to the Revenue Commissioners even where an individual is under an obligation to file an Irish tax return.[56] This is information that is not otherwise generally available and which is difficult to acquire or to estimate. Although mechanisms do exist for the exchange of certain taxpayer data between revenue authorities under the provisions of DTAs, Tax Information Exchange Agreements (TIEA),[57] and pursuant to the OECD Convention on Mutual Administrative Assistance in Tax Matters,[58] this requires a written request detailing the name of the individuals in question and the specific details being sought, and would not necessarily provide complete details in relation to an individual's total worldwide income and capital gains.[59] Computing the extent to which such income or

[53] Individuals whose entire taxable income is subject to the pay-as-you-earn (PAYE) system of deduction at source are not required to file a return (Taxes Consolidation Act (TCA) 1997, s 959B(1)).
[54] For example, an individual who spent more than thirty days in Ireland in the year of emigration would be resident for income tax and CGT purposes if he or she had spent at least two hundred and fifty days in Ireland in the previous year (TCA 1997, s 819(1)(a) and (2)).
[55] The loss in indirect taxation, such as VAT, as a result of an individual moving abroad is not considered here, other than to observe that quantifying such loss would also pose significant problems.
[56] Revenue might get some estimate of the total worldwide income of a particular non-resident individual from the last return filed when that individual was still resident in Ireland, though this would not include information regarding assets owned by the individual which might be later sold giving rise to capital gain, or regarding any income that might arise from the reinvestment of the proceeds of such a sale. Obviously, the greater the period of time that has elapsed since an individual has ceased to resident, the less accurate any estimate based on a prior tax return is likely to be.
[57] Ireland is a party to twenty-two such agreements. See <http://www.revenue.ie/en/business/tax-information-exchange-agreements.html> accessed 19 May 2014.
[58] Mutual Assistance in Tax Matters Order 2013, SI 24/2013.
[59] Information can only be obtained from the signatories to such agreements, for example, and may not detail income or assets held through corporate or tax structures of which the Revenue are unaware. The Irish government has reiterated its commitment to 'bring forward legislation to enable Revenue (with the consent of the Minister) to make regulations to implement the automatic exchange of information agreements' once the OECD completes its report, which is expected in mid-2014 (Ireland, 'Ireland's International Tax Strategy' (Department of Finance, 15 October 2013) <http://budget.gov.ie/Budgets/2014/Documents/Department%20of%20Finance%20International%20Tax%20Strategy%20Statement.pdf> accessed 19 May 2014, para 5.3). Revenue made a total of one thousand mutual assistance requests in 2013, the vast majority of which were to other EU member states, with just twenty-one made to countries outside the EU. See Revenue Commissioners,

gains would have been liable to Irish taxation if the individual had not moved abroad would be further complicated by the fact that relief may have been available under a DTA, or that the realisation of the income or gains may be within the control of the individual, and that control may have been exercised differently if there had been Irish tax consequences (eg the individual might not have withdrawn income from a controlled company, or not have disposed of a chargeable asset).

As already mentioned, the United States imposes tax on its non-resident citizens on their income arising in foreign countries, and the Internal Revenue Service (IRS), which is considerably better resourced than the Irish Revenue Commissioners, has faced significant problem both in establishing the number of non-resident US citizens and in estimating the amount of foreign income accruing to them that should be subject to US taxation. Schneider says that there is no accurate measure of how many US citizens live abroad 'because there has never been a complete, systematic count' with various estimates ranging 'from three to seven million', and goes on to note that '[d]etecting overseas income is very difficult for the Service' and that although 'the Service receives information records from some of its treaty partners through exchange of information programs, much of the data is unusable because of different tax years or the absence of U.S. taxpayer identification numbers'. He summarises that 'the Service must investigate a range of unknowns' and that in the absence of specific information, 'such investigations are very labor intensive at best. The investigation of nonfilers would be even more difficult, and most nonfilers are probably not even known to the Service'.[60] The annual report to Congress of the Taxpayer Advocate Service for 2011 states that 'the IRS has no way to accurately identify international taxpayers and assess their filing compliance rate. It also lacks a reliable and accurate estimate of the international tax gap'.[61] In 2005 Joe Higgins TD

'Annual Report 2013' (Revenue Commissioners 2013) <www.revenue.ie/en/about/publications/annual-reports/2013/ar2013.pdf> accessed 19 May 2014, 49.

[60] Bernard Schneider, 'The End Of Taxation Without End: A New Tax Regime For U.S. Expatriates' (2013) 32 Virginia Law Review 1, 8, 55 and 56 respectively.

[61] Nina E Olsen (ed), '2011 Annual Report to Congress' (Taxpayer Advocate Service 11 January 2012) <http://www.taxpayeradvocate.irs.gov/Annual-Reports-To-Congress/FY-2011-Annual-Report-To-Congress> accessed 19 May 2014, 131. See also Staff of the Joint Committee on Taxation, 'Review of the Present-Law Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency' (Report to Congress JCS-2-03, 28 February 2003) <https://www.jct.gov/publications.html?func=startdown&id=1694> accessed 19 May 2014, 96-98; Michael S Kirsch, 'Taxing Citizens in a Global Economy' (2007) 82 New York University Law Review 443, 496; Cynthia Blum and Paula N Singer, 'A Coherent

asked the chairman of the Revenue Commissioners whether a calculation was done on 'the tax foregone as a result of the tax exile "legal scam"'. Mr Daly replied 'The Deputy is referring to what tax they would pay to us on their worldwide income as opposed to their Irish sourced income. We would not have that figure. They do pay tax on their Irish sourced income'.[62]

Even if these difficulties could be overcome, and one could establish broadly accurate figures for the number of individuals ceasing to be resident for tax purposes in Ireland in a given year, there remains the problem of determining which of those individuals had left Ireland predominantly for the purpose of reducing or avoiding a liability to Irish taxation, and could therefore be categorised as tax exiles, and which left for other reasons (eg economic migrants, former immigrants returning to their country of origin). In the United States, individuals renouncing their citizenship were formerly subject to income tax on US source income as if they continued to be citizens for a further period of ten years.[63] In order for the charge to apply, the (IRS) had to establish 'that the relinquishment of an expatriate's citizenship had as one of its principal purposes the avoidance of federal income, estate, or gift tax' by demonstrating that 'expatriation resulted in a substantial reduction of the former citizen's tax liability'. The burden then 'shifted to the expatriate to establish a non-tax-avoidance motive'.[64] The IRS had been unable to meet this evidentiary burden in at least one high-profile case,[65] and in 1995 the US Joint Committee on Taxation (JCT) made up of five members of congress and five senators with a full-time staff carried out a two-month long investigation into the issue of tax motivated expatriation which

Policy Proposal for U.S. Residence-Based Taxation of Individuals' (2008) 41 Vanderbilt Journal of Transnational Law Volume 705, 713.

[62] Committee of Public Accounts Deb 21 July 2005.

[63] 26 USC § 877(e) (1966) as inserted by Foreign Investors Tax Act of 1966, Pub . No 89-809, 80 Stat 1541 (1966). This charge was higher than that applying to non-resident aliens, and the act also provided for an extended liability to gift and estate tax. See Bradford Craig, 'Congress, Have a Heart: Practical Solutions to Punitive Measures Plaguing the Heart Act's Expatriate Inheritance Tax' (2012) 26 Temple International and Comparative Law Journal 69, 77-79. Individuals expatriating after 16 June 2008 are subject instead to the provisions of 26 USC § 877A (as inserted by the Heroes Earnings Assistance and Relief Tax (Heart) Act of 2008, Pub L No 110-245, 122 Stat 1624 (2008)), which imposes an exit tax on the unrealised gains on all chargeable assets whether located in the US or abroad (ibid 94-97).

[64] Craig (n 63) 79.

[65] *Furstenberg v Commissioner*, 83 TC 755 (1984) (US). There appears to be just one reported case in which the IRS was successful in establishing a tax motive: *Kronenberg v Commissioner*, 64 TC (1975) 428 (US), and William L Dentino and Christine Manolakas, 'The Exit Tax: A Move in the Right Direction' (2012) 3 William and Mary Business Law Review 341, 354 say that these are the 'only two significant cases' published concerning the original 26 USC § 877.

included correspondence with, and written and oral testimony in public hearings before both the Subcommittee on Oversight of the House Committee on Ways and Means and the Senate Finance Committee, from senior members of the IRS, the Treasury Department and the State Department, together with full access to all relevant documentation held by these and other government departments, and consultation with academics, practitioners, and other organisations. The JCT concluded that it was 'unable to find evidence that quantified the extent to which U.S. citizens are relinquishing citizenship for tax avoidance purposes' and that 'with respect to the relatively small group of individuals who have relinquished their U.S. citizenship, their actual motives cannot be readily ascertained, thus making it difficult to determine the extent to which tax avoidance is a motivating factor'.[66] While there have been significant changes in the availability and accessibility of information on taxpayers in the intervening years, both through exchange of information provisions in DTAs, TIEAs and the OECD Convention on Mutual Administrative Assistance in Tax Matters and otherwise, establishing the subjective intent of an individual who is resident in another country objectively using indirect evidence (ie evidence other than the stated intention of the individual in question) remains both problematic and labour intensive. As Commissioner of Internal Revenue Margaret Richardson put it

> In order to meet our own burden of proof in disputing the taxpayer's allegation of lack of tax avoidance motive, the IRS generally must investigate the taxpayer's personal motivations regarding expatriation, compile family histories, and examine the tax regime of the new country or countries of residence. Such an examination is tedious and requires the cooperation of taxpayers who no longer live in the United States and who generally are no longer otherwise subject to U.S. law.[67]

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[66] Staff of the Joint Committee on Taxation, 'Issues Presented by Proposals to Modify the Tax Treatment of Expatriation' (Report to Congress JCS-17-95, 1 June 1995) <https://www.jct.gov/publications.html?func=startdown&id=2944> accessed 19 May 2014, 46 and 65 respectively.

[67] Letter from Margaret Milner Richardson, Commissioner of Internal Revenue IRS, to Kenneth J Kies, Chief of Staff of the Joint Committee on Taxation, 26 April 1995 in Joint Committee on Taxation (1995) (n 66) G45. These difficulties were subsequently addressed by providing that the tax regime for expatriates was to apply to individuals who had an average annual net income tax liability for the five years preceding expatriation of more than $124,000 or had a net worth of at least $2 million at the time of expatriation, regardless of whether they had renounced their citizenship for tax purposes or not. 26 USC § 877(a) as amended by the American Jobs Creation Act of 2004, Pub L No 108-357, 118 Stat.

This intentional component of the definition of a tax exile has been cited by government ministers as a key difficulty in addressing the tax exile problem.[68] Individuals who have been publicly described as tax exiles, and who have refuted the accuracy of such descriptions, have also focused on their motives for moving abroad, and stated that these motives did not include the avoidance of tax. Denis O'Brien has claimed that he 'moved to Portugal some time before the sale of Esat Telecom to British Telecom and did so for perfectly valid and legitimate personal and business reasons'[69] and in February 2013 during evidence in High Court defamation proceedings taken by him said '[i]t is incorrect to say I am a tax exile. I spend three-quarters of my time visiting my businesses around the world', adding '[i]t is my business where I live. I have gone abroad to make investments' and 'I don't work in Ireland — 95 per cent of my businesses are scattered around the world from Fiji to the Caribbean'.[70] JP McManus has also denied that he is a tax exile, stating that '[w]hen I left Ireland, I didn't leave in order to avoid any particular tax in Ireland. I paid my taxes fully, I had no impending capital gains tax or anything like that. I paid in full, and then I left'.[71]

1571 (2004). This objective monetary test also now applies to the exit tax provisions in 26 USC § 877A. See Craig (n 63) 91 and 95.

[68] See Dáil Debate 27 May 2009, vol 683, col 743 where Minister for Finance Brian Lenihan said it was erroneous to suggest that 'one can simply identify those who choose to live outside the State because of our tax system as being in that capacity' and that it was a fundamental point that '[v]ery many Irish citizens choose to live abroad for reasons other than the tax system, so it is not self-evident that those who emigrate do so simply as a result of the tax system'; Dáil Deb 26 January 2011, vol 727, col 716, where Minister of State at the Department of Finance Martin Mansergh, said '[a]s there is no definition of tax exile in Irish law, nor any way of determining how many non-resident taxpayers are non-resident for tax reasons, it is difficult to prepare a report on the subject'.

[69] Vincent Browne, 'Questions and answers on Denis O'Brien and his tax' *Irish Times* (Dublin, 27 February 2013).

[70] Liam Collins, 'O'Brien turned down right of reply and said Press Council "has no teeth"' *Sunday Independent* (Dublin, 10 February 2013).

[71] Alan English, 'JP McManus talks of admiration for the late Limerick TD Jim Kemmy, next week's Pro-Am - and his "exile" status' *Limerick Leader* (Limerick, 2 July 2010). McManus has however admitted that he maintains a physical presence in Ireland of fewer than requisite number of days per year so as to remain non-resident for tax purposes. When asked during an interview on *Newstalk 106-108* how much time per year he spent in Ireland he replied, 'I spend a fair share. I can't spend more than the required amount' (Ivan Yates, Interview with JP McManus (*Newstalk 106-108*, 13 December 2010)). He later criticised this number of days he can spend in Ireland as being too few, saying '[t]he biggest difficulty I see is when you are entertaining people. You'd like to bring them to Waterville, or the like. But when you bring them, you've got to be there — so you have to block that time out. Instead, you can say to yourself, "It's a bit difficult with the time, let's bring them to play golf in Scotland or somewhere else." And it's a pity, it doesn't achieve anything. It's a negative effect' (Kathryn Hayes, 'Bill's return visit, but without 40,000 fans' *Sunday Independent* (Dublin, 18 November 2012)). Dermot Desmond has also denied moving abroad for tax reasons, saying that despite 'the oft-repeated, incorrect claim that this was tax driven, it was actually because I wanted to pursue international opportunities

Where an individual leaves Ireland and takes up residence in a country that has very low rates of income tax or CGT (or does not impose these taxes at all), then one could argue that there should be a presumption that, in the absence of evidence to the contrary, the move was tax motivated. The difficulty is that an individual may move to a country that is not normally considered a 'tax haven' and which imposes personal taxes at rates comparable to those in Ireland, but achieve a significant reduction in tax payable as a result of an exemption particular to the tax code of the foreign country, or because of an incongruity between the two tax codes, possibly in conjunction with relief under the relevant DTA. For example, in 2003 Lorraine Kinsella purchased shares in Ryanair Holdings plc from her husband Shane Ryan, son of Ryanair founder Tony Ryan, for in excess of €18 million, funded by a loan from Mr Ryan secured on the shares.[72] This sale was not subject to Irish CGT pursuant to the exemption for transfers between spouses contained in section 1028(5) of the Taxes Consolidation Act (TCA) 1997. Two weeks later, Ms Kinsella sold the shares to a third party. This sale would have been liable to Irish CGT on the difference between their sale price and the cost for which Mr Ryan had originally acquired them pursuant to TCA 1997 s 1028(7), a provision designed to ensure that the inter-spouse exemption could not be used to avoid CGT in circumstances such as these. However, Ms Kinsella was resident in Italy for tax purposes, and was a resident of Italy under the Ireland/Italy DTA. Under Italian tax law, Ms Kinsella was only liable to CGT on the difference between the sale price of the shares and cost for which she had acquired them from her husband, that is €18 million; there was no equivalent to section 1028(7) in the Italian tax code. Her total liability to CGT therefore amounted to approximately €40,000.[73] Determining whether a move to a country was motivated by securing a tax advantage may therefore require detailed specialist knowledge both of the tax regime of the country in question,

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and not be suffocated by journalists and politicians here' (Justine McCarthy, 'Tycoon derides top civil servants for "being suspicious of success"' *The Sunday Times* (Dublin, 21 November 2010)).

[72] The details are taken from the judgment of Kelly J in *Kinsella v The Revenue Commissioners* [2007] IEHC 250, [2011] 2 IR 417, a case seeking declarations as to the applicability, and interpretation, of the Ireland/Italy DTA in relation to her subsequent sale of the shares. See also Gavin O'Flaherty and Cormac O'Neill, 'To Void the Avoidance: the Lessons of Recent Tax Case Law' [2010] Irish Tax Review 78.

[73] TCA 1997, s 1028 was amended by the Finance Act 2006, s 75(1)(a). Section 1028(6A) now denies the inter-spousal exemption in circumstances where the spouse acquiring the asset would not be liable to Irish on a subsequent disposal in the same year. This provision is discussed in more detail in chapter 6. See also Tom Collins, 'The Italian Job' (2008) 21(2) Irish Tax Review 65.

and the provisions of any DTA between it and Ireland, and would be further complicated if the individual in question held investments through corporate or trust structures the details of which might not be known.

The second principal element of the tax exile problem is a perceived breach of equity or fairness in the tax system. Equity and fairness are not concepts that lend themselves to any quantitative measure or analysis, and so determining the extent to which these norms have been violated is clearly a much more complicated task than estimating the loss of revenue that might arise as a result of an individual moving abroad. There are, however, some criteria that might at least give an indication of the extent of any resulting inequity. First, the number of tax exiles might be indicative, as arguably a widespread problem poses a greater risk of unfairness in the tax system than an isolated one. Secondly, the wealth of the tax exiles is relevant, because the income tax system in Ireland, as in many countries, is progressive, with those with higher incomes expected to contribute proportionally more of their income than those with more modest earnings. Finally, because the result of individuals moving abroad will be that a smaller amount of income tax and CGT is collected by the Irish exchequer than would otherwise be the case, the government will be required to either cut public spending accordingly or to recoup the lost revenue by imposing a larger tax burden on the remaining base of taxpayers. The larger the amount of revenue that is lost as a result of tax exile, the greater the additional tax burden on each individual taxpayer, or the greater the diminution in publicly funded services, and the greater the sense of injustice that is likely to be felt. Assessing the extent of any breach of equity in the tax system using these indices would require a determination of the number and the identity of, and the total worldwide income and capital gains arising to, tax exiles each year. The difficulties in obtaining or estimating these data have already been outlined earlier in this section. To these difficulties can be added the further complication of attempting to interpret the extent to which the measures in question do in fact indicate that a breach of fairness has occurred.

5.2(c) The extent of the tax exile problem in Ireland

There has been no systematic investigation of the extent of the tax exile problem in Ireland, either by academic writers, nor, it appears, by the relevant governmental bodies. An extensive search of publicly available materials and comprehensive requests by the author to the Revenue Commissioners and the Department of Finance pursuant to the Freedom of Information Act 1997, as amended by the Freedom of Information Act 2003 ('FOI request') revealed few documents in relation to the issue, none of which indicated that there had been any report commissioned or detailed investigation carried out into the number of individuals who might be considered tax exiles, the income or gains of such individuals or the loss of revenue to the Irish exchequer occasioned by their moving from Ireland.[74]

In 2005 the *Primetime* television programme referred to an internal Revenue document from 1999 which warned of 'the risk that some of the richest 100 may be officially non-resident for tax purposes and yet in reality live here'.[75] However, an FOI request by the author to the Revenue Commissioners revealed that Revenue are not able to located the document referred to.[76] There is evidence that the High Wealth Individual's (HWI) business unit of Revenue's Large Cases Division, which deals with the tax affairs of 'individuals who own or control net assets in excess of €50m or whose income is over €1.3m and non-residents with substantial economic interests in Ireland'[77] has actively investigated whether certain individuals are or are not, in fact,

[74] See Appendix A.1. The fact that the response to many aspects of the FOI requests was that no records existed indicates that no such records were ever created. For example, as can be seen in the response to the present author's FOI request contained in appendix A.2(e)(i) demonstrate that there are no documents showing how many of the non-resident individuals dealt with by the HWI unit were previously resident in Ireland or are domiciled in Ireland, and figures for the amount of income tax and CGT paid by non-residents whose affairs are dealt with by the unit exist only for 2006 and 2007. One cannot necessarily conclude that Revenue or the Department of Finance are not capable of compiling the information in question, nor can one infer that these matters have not been verbally discussed at meetings without any minute or note being taken. What can be stated is that the lack of records indicates that no systematic or comprehensive assessment of the extent of the problem has been carried out by these bodies, or by any other governmental body with their assistance.

[75] See Paul O'Brien, 'Identifying tax exile numbers "impossible"' *Irish Examiner* (Cork, 3 October 2005); Matt Cooper, *Who Really Runs Ireland?: The Story of the Elite Who Led Ireland from Bust to Boom ... and Back Again* (Penguin Ireland 2010) 115.

[76] See appendix A.2(e)(i). Neither the makers of the *Primetime* programme nor journalist Paul O'Brien were unable to locate the document in question. The present author attempted to contact journalist Matt Cooper to procure a copy of the document, but without success.

[77] See the response to the author's FOI request in appendix A.2(e)(i). The HWI unit also deals with the tax affairs of a number of individuals who have 'net assets less than €50m, but have been brought into the High Wealth Individuals District as they had substantial connections to a person already dealt with in the District' and since 2010 has included '600 partners and their associated entities in 9 professional firms' (ibid). See also Comptroller and Auditor General, 'Report on the Account of the Public Services 2012' (September 2013) <http://www.audgen.gov.ie/documents/annualreports/2012/report/

resident in Ireland for tax purposes and the Irish tax liabilities of those individuals. In 2004 Revenue indicated its intention to monitor more closely the presence in Ireland of 'taxpayers ... who claim non-residence' because it had become 'easier to get in and out of the country ... as transport improves'.[78] The individuals in question were 'mainly Irish domiciled' and in 2005 the HWI unit carried out audits on 'a cross section of these taxpayers'. This cross-section consisted of nine individuals 'selected on the basis of internal risk criteria' who had 'claimed to be non-resident either on Returns of Income or in correspondence with Revenue'.[79] The general objective was 'to ascertain if the absences claimed were compatible with claims to non-residence under the rules and were consistent with other data and intelligence available to Revenue' and to test Revenue's 'ability to verify claims of non-residence and qualification for such status'.[80]

According to Breda Ruddle, the then head of the HWI unit, the 'records kept by the individuals were very detailed and complex', and it was concluded by the chairman of the Revenue Commissioners Frank Daly that 'all the taxpayers under audit had taken particular care to document their movements in and out of the State and to ensure that the rules were not breached', and in some cases 'a specific member of the taxpayer's staff had responsibility for monitoring that taxpayer's travels to ensure that the taxpayer did not breach the residence rules'.[81] The chairman went on to state that 'no conflict was found between any Revenue intelligence and claims by taxpayers to be abroad on particular dates' and that there was 'no reason to conclude

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en/Report2012xx.pdf> accessed 19 May 2014, 297.

[78] Remarks by Revenue Commissioners chairman Frank Daly (Committee of Public Accounts Deb 25 March 2004).

[79] See the letter from Revenue Chairman Frank Daly to Minister for Finance Brian Cowan (obtained in response to the author's FOI request) in appendix A.2(e)(vi). The fact that the individuals were stated to have claimed to be non-resident 'either on Returns of Income or in correspondence with Revenue' suggests that at least some of these nine individuals did not file Irish tax returns; presumably because they had no liability to Irish income tax or CGT.

[80] See appendix A.2(e)(vi) and the remarks of Revenue Commissioners chairman Frank Daly (Committee of Public Accounts Deb 20 October 2005) respectively. See also the comments of Minister for Finance Brian Cowan, describing it as a 'monitoring exercise' consisting of a 'series of audits on a cross-section of those taxpayers' (Select Committee on Finance and the Public Service Deb 22 February 2006); Paul O'Brien, 'Identifying tax exile numbers "impossible"' *Irish Examiner* (Cork, 3 October 2005).

[81] See Simon Carswell, 'Large Cases Division – HWIs and audits of non-residents' *Sunday Business Post* (Dublin, 28 May 2006) and appendix A.2(e)(vi) respectively. See also the chairman's comments in Committee of Public Accounts Deb 20 October 2005.

that the individuals concerned failed to comply with the statutory rules governing non-resident status'.[82]

There has been a continuing programme of scrutiny of the affairs of non-residents who are dealt with by the HWI unit since 2005, including risk profiling regarding claims of non-residence,[83] monitoring 'the movements of high worth individuals using various devices ... including media monitoring', monitoring data to which Revenue 'have access through the Customs and Excise', assurance checks involving a review of 'substantial documentary evidence' provided by the individuals in question,[84] including 'the examination of ATM transactions and credit card statements' and 'an intelligence dimension which, for obvious reasons, they do not publicise',[85] but which is reported by 'senior Revenue sources' to include routinely visiting 'the Irish homes of tax exiles to check if they are in the jurisdiction', and monitoring 'flights by private jets into Dublin and Shannon to ensure that all records are correct'.[86] There has also been a continuing programme of audits of non-residents. Documents received by the author in response to FOI requests show that in 2009 the HWI unit undertook '27 interventions which appeared to have a residence issue' of which one was at appeal and five were ongoing in 2013, and in 2011 there were seven 'audit enquiries into filed returns involving a residence related issue' all of which were being 'progressed through the appeals system' in 2013.[87] There have also been audits and enquiries in relation to the domicile levy, which is predominantly, though not

[82] See appendix A.2(e)(vi). See also the comments of Minister for Finance Brian Cowan in Select Committee on Finance and the Public Service Deb 22 February 2006. Minister Cowan has repeated these conclusions on a number of occasions. See Dáil Deb 16 October 2007, vol 639, col 1175; Dáil Deb 19 December 2007, vol 644, col 1161-62; Dáil Deb 24 April 2008, vol 653, col 118.

[83] See the remarks of Minister for Finance Charlie McCreevy (Dáil Deb 25 November 2003, vol 575, col 590), Chairman of the Revenue Commissioners Frank Daly (Committee of Public Accounts Debate 25 March 2004; Joint Committee on Finance and the Public Service Deb 10 November 2004) and Minister for Finance Brian Cowan (Dáil Deb 16 October 2007, vol 639, col 1175; Dáil Deb 19 December 2007, vol 644, col 1161-62; Dáil Deb 24 April 2008, vol 653, col 118).

[84] Remarks of Chairwoman of the Revenue Commissioners Josephine Feehily (Committee of Public Accounts Deb 19 February 2009).

[85] Remarks of Minister for Finance Brian Cowan (Dáil Deb 24 April 2008, vol 653, col 118). See also Dáil Deb 16 October 2007, vol 639, col 1175 and Dáil Éireann Deb 19 December 2007, vol 644, col 1162 where Minister Cowan's made similar remarks.

[86] Ian Kehoe, 'Tax havens lure super-rich' *Sunday Business Post* (Dublin, 20 January 2008).

[87] See appendices A.2(c)(i) and A.2(a)(vii) respectively. Of the latter seven cases, five involved the application of the general anti-avoidance provision contained in TCA 1997, 811, and one involved the application of a provision aimed at the prevention of avoidance of income tax through the transfer of assets abroad contained in TCA 1997, s 806. As such, these cases may not relate solely to whether or not the individual in question is resident in Ireland.

exclusively, aimed at wealthy non-residents who are domiciled in Ireland.[88] Responses to the FOI requests made by the author show that in 2010 there were thirty four such enquiries, with forty four enquiries in 2011 and two enquiries having begun in relation to 2012 at the time the response was furnished.[89]

The fact that Revenue has carried out investigations, audits and risk analysis in relation to the residence status of tax exiles does demonstrate that a potential risk of non-compliance with Irish tax law was identified, at least in relation to certain individuals, though it does not of itself give any indication of the extent of the tax exile problem. Audits are typically only carried out on a sample of taxpayers from within a particular category or group, though the fact that only nine individuals were audited as to their residence status may suggest that the size of the potential 'tax exile' group identified by Revenue is not particularly large.[90] The results of these Revenue audits and investigations demonstrate that there is no evidence that individuals are claiming to be non-resident for tax purposes when they are in fact resident, and that to this extent Irish tax law is being fully complied with. Of course, this does not suggest that tax exile is not a problem, merely that compliance with existing statutory law does not appear to form any part of that problem. What the results these audits and investigations do show is that there are certainly some individuals who very carefully manage the extent of their physical presence in Ireland in order to ensure that they are not resident here for tax purposes, and that they compile and retain considerable documentary evidence to support this position. This could be interpreted as evidence that these individuals are tax exiles and they have moved abroad, and remain abroad, mainly for tax purposes.

The details of Revenue investigations and audits in relation to tax exiles that have been released in response to FOI requests or that are publicly available are

[88] The domicile levy is discussed in detail in chapter 6.

[89] See appendix A.2(d)(i). There were sixty one cases in total that were the subject of an enquiry, so some individuals were the subject of an enquiry in relation to the levy for 2010 and 2011. Returns for 2012 were not due until 31 October 2013, so compliance in relation to the levy for that year had only begun at the time of the FOI request. See also Ian Kehoe and Philip Connolly, 'Revenue challenges several tax residencies' *Sunday Business Post* (Dublin 21 April 2013); Dáil Deb 18 July 2013, vol 812 (not yet published) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013071800051?opendocument#WRG02150> accessed 19 May 2014.

[90] The criteria for selection of these individuals for audit is not available publicly or pursuant to the Freedom of Information Acts 1997 and 2003.

unsurprisingly lacking in detail and are therefore of limited use in determining the extent of the tax exile problem.[91] However, using this material, and other publicly available information, the remainder of this section will attempt to provide a broad estimate of the extent of the problem and to dispel a significant misunderstanding regarding, and overstatement of, its extent that has emerged in the public discourse in the last number of years.

5.2(c)(i) Estimates of the extent of the problem in the public discourse

Traditionally, it had always been believed, and reported in the media, that there was a relatively small number of tax exiles. A typical newspaper article on the issue published in 1999 described there being a 'select group of people' who were tax exiles and stating that the names of these 'wealthy Irish people who have chosen to reside outside the State in an effort to avoid high taxation rates is well-known and features many prominent businessmen'.[92] In 2003, and again in 2005, parliamentary questions were tabled for the Minister for Finance requesting the number of individuals who claimed to be 'non-resident for tax purposes'. On each occasion the Minister replied that it was not possible to identify the number of Irish domiciled persons claiming to be non-resident for tax purposes as these data were 'not captured electronically',[93] and on each occasion it was reported in the media that the government did not know 'how many people are availing of "tax exile" status'.[94]

In 2007, for the first time the notion that there might be a large number of tax exiles began to circulate, prompted by another parliamentary question to the Minister for Finance. On this occasion, the Minister was asked for the 'the number of persons

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[91] Details in relation to the affairs of specific taxpayers are confidential and may not be disclosed by Revenue without the consent of the individual in question except in very limited circumstances (TCA 1997, s 851A). Nor, of course, are these investigations intended to measure the extent of the tax exile problem, but rather to ensure the compliance of particular individuals with the provisions of the Irish tax code.

[92] Jane O'Sullivan, 'Sheltered housing: Jane O'Sullivan discovers it is not just the rich and famous who are exploring the option of tax exile status' *Irish Times* (Dublin, 15 October 1999). See also Liam Reid, 'Revenue to carry out residency audits on tax exiles' *Irish Times* (Dublin, 8 March 2006) stating that the 'number of tax exiles is believed to be quite small, although the Revenue Commissioners have never released the exact figure'.

[93] See the responses of Minister for Finance Charlie McCreevy (Dáil Deb 25 November 2003, vol 575, col 590) and Minister for Finance Brian Cowan (Dáil Deb 28 September 2005, vol 606, col 367).

[94] Mark Hennessy, 'Revenue to bring in new measures on tax exiles' *Irish Times* (Dublin, 27 November 2003). See also Paul O'Brien, 'Identifying tax exile numbers "impossible"' *Irish Examiner* (Cork, 3 October 2005).

registered as availing of tax exile status in the country' and responded that he assumed this was a reference to 'Irish domiciled individuals claiming to be non-resident for tax purposes' and that there were 3,030 such individuals in 2005.[95] Shortly afterwards it was reported in the media that '[a]ccording to the Revenue Commissioners, Ireland now has more than 3,000 tax exiles', and this notion began to permeate.[96] In 2009 the chairwoman of the Revenue Commissioners Josephine Feehily, when being questioned about the tax exile issue, told the Committee of Public Accounts that according to the 2007 tax returns, '5,803 people have declared that they are non-resident for tax purposes',[97] and all of the principal Irish newspapers and several politicians responded by misinterpreting this statement as meaning that there were 5,800 (or 6,000) tax exiles.[98] Even academics were not immune from this misunderstanding, with Dr Elaine Doyle, a lecturer in taxation in the University of Limerick, uncritically repeating the assertion that there were 5,800 tax exiles both in the national press and in one of the only academic papers published on the tax exile problem in Ireland.[99]

This confusion stems originally from Ministers responding to requests for the number of tax exiles by providing figures for the number of non-residents filing Irish tax returns, however, in a subsequent debate on the 2009 Finance Bill, and in the

[95] Dáil Deb 11 December 2007, vol 643, col 880. This was the first year for which this information was electronically captured by the Revenue.

[96] Quotation from Ian Kehoe, 'Tax havens lure super-rich' *Sunday Business Post* (Dublin, 20 January 2008). This claim was repeated in the media, with the updated figure of non-residents for 2006 of almost 4,000 individuals. See Ian Kehoe, 'Irish living as tax exiles' *Sunday Business Post* (Dublin, 18 May 2008); Colin Coyle, 'Government expects to raise €1m from country's 4,000 non-resident taxpayers' *The Sunday Times* (Dublin, 26 October 2008).

[97] Committee of Public Accounts Deb 19 February 2009.

[98] See Matt Cooper, 'Everyone must pay their share of tax' *The Sunday Times* (Dublin, 22 March 2009); Editorial, 'Tax-exile perks for the gilded few must end' *The Sunday Times* (Dublin, 28 March 2009); Stephen O'Brien, 'Tax exiles face budget crackdown' *The Sunday Times* (Dublin, 28 March 2009); Ian Kehoe, 'Tax exiles feel the heat' *Sunday Business Post* (Dublin, 29 March 2009); Michael Brennan, 'Tough at the top but no pain for tax exiles' *Irish Independent* (Dublin, 8 April 2009); Marie O'Halloran, 'Minister defends Christmas bonus cancellation' *Irish Times* (23 April 2009) quoting Róisín Shorthall TD; Dáil Deb 8 April 2009, vol 679, col 125 (Joe Costello TD); Dáil Deb 27 May 2009, vol 683, col 200 (Joan Burton TD).

[99] See Leonard Durac and Elaine Doyle, 'Think Tank: New ideas for the 21st century' *The Sunday Times* (Dublin, 30 September 2009) and Elaine Doyle, 'The Irish experience of tax exile: a modern-day anachronism?' (2010) 9 Accountancy Business and the Public Interest 1, 3; and 5. The other academic paper, Kimberley Rowan 'Numbering Their Days: Treatment of Tax Exiles in Irish Tax Legislation' (2010) 42(5) Accountancy Ireland 624, points out that there is no definition of the term tax exile in Irish legislation and that 'Revenue's record of "tax exiles" is obtained from the number of individuals who declare themselves as non-resident on their Irish tax returns' and cites this number as 5,803 for 2008. Although it stops short of stating that there are 5,803 tax exiles, it does not analyse the issue beyond these comments.

responses to six of a further seven parliamentary questions of a similar nature, the government stressed that the figure for non-residents who filed Irish tax returns includes many individuals who are 'foreign nationals or have a foreign domicile' and that many of the 'non-resident Irish citizens or Irish domiciled individuals included in this figure may have become non-resident for reasons unrelated to taxation, but have retained Irish investments such as rental property' and that they could not reasonably be considered tax exiles.[100] Despite this repeated clarification, a plethora of reports in the media, and statements by politicians, in recent years have continued (almost) uniformly to declare that there are many thousands of tax exiles, equating their number with the most recently released figures of non-residents filing tax returns in Ireland.[101]

Although the taxation of non-residents, and their obligation to file an Irish tax return is somewhat technical and complex, it is nonetheless surprising that the myth

[100] Dáil Deb 10 November 2009, vol 694, col 137-38 (Minister for Finance Brian Lenihan). See also Dáil Deb 27 May 2009, vol 683, col 742 (Minister for Finance Brian Lenihan in the debate on the Finance Bill 2009); Dáil Deb 19 January 2010, vol 699, col 201-02 (Minister for Finance Brian Lenihan in response to a parliamentary question by Niall Collins TD); Dáil Deb 14 July 2011, vol 738, col 863-64 (Minister for Finance Michael Noonan in response to a parliamentary question by Richard Dowds TD); Dáil Deb 19 July 2011, vol 739, col 190 (Minister for Finance Michael Noonan in response to a parliamentary question by Pearse Doherty TD); Dáil Deb 23 October 2012 (not yet published) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2012102300053?opendocument#WRD04250> accessed 19 May 2014 (Minister for Finance Michael Noonan in response to a parliamentary question by Joe Higgins TD); Dáil Deb 18 July 2013, vol 812 (not yet published) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013071800051?opendocument#WRG02150> accessed 19 May 2014 (Minister for Finance Michael Noonan in response to a parliamentary question by Patrick Nulty TD). This additional information was not provided in the response of Minister of Finance Brian Lenihan to the earlier parliamentary by Joe Costello (Dáil Deb 11 March 2009, vol 677, col 862).

[101] See most recently the description of JP McManus as 'one of 13,000 Irish tax exiles' in Editorial, 'Former mayor bids to help JP McManus stay in Ireland a bit longer' *Irish Examiner* (Cork, 13 March 2014). A sample of similar statements in the other major Irish newspapers includes, Fionnan Sheahan, 'Tax exiles to calculate own liability for €200,000 levy' *Irish Independent* (Dublin, 18 March 2010) ('6,000 tax exiles'); Ian Guider, 'Tax exile €200,000 levy will not raise income this year' *Sunday Tribune* (Dublin, 12 December 2010) ('6,000 tax exiles'); Brenda Power, 'Obey the law? You might as well deal with the devil 'The Sunday Times (Dublin, 24 April 2011) ('6,000 tax exiles'); Maeve Sheehan, 'One in eight of our super-rich are tax exiles, reveals Revenue' *Sunday Independent* (Dublin, 28 October 2012) ('the official number of "tax exiles" is 10,781'); Christopher McKinley, 'Number of tax exiles rises by 27% in two years' *Irish Times* (Dublin, 20 August 2013) ('Number of tax exiles rises by 27% in two years', 'In 2009 almost 10,300 people filed tax returns indicating that they were non-resident for tax purposes ... This increased to 11,594 in 2010 and 13,093 in 2011'). Similar comments have also been made by several politicians such as Joan Burton TD (Dáil Deb 9 February 2010, vol 701, col 609, '6,000 tax exiles'); Arthur Morgan TD (Dáil Deb 10 February 2010, vol 701, col 909, '6,000 people currently registered with the Revenue Commissioners as tax exiles'); Joe Costello (Dáil Deb 10 December 2010, vol 701, col 754, '7,000 tax exiles). An isolated example of accurate reporting of the issue can be found in Ian Kehoe, 'Taxing Ireland's exiles' *Sunday Business Post* (Dublin, 2 October 2012) ('In truth, the number of people who have moved off shore purely for taxation purposes in relatively small').

that there are thousands of Irish tax exiles has persisted in the public discourse. However, it does not appear that this view is based on a belief that all non-resident individuals with a liability to Irish income tax or CGT are tax exiles, as the government have repeatedly made it clear that this group includes 'foreign nationals who never resided here but who have investments (including property) here' and 'foreign nationals who worked here for a period and who may have acquired Irish tax residence for that period' and who retained a tax liability after ceasing to be resident 'in respect of investments made in Ireland during their period of residence'.[102] Equally, there does not appear to be any suggestion in the public discourse that an intention to reduce or avoid a liability to taxation is not a necessary component of an individual being considered a tax exile, or that all individuals moving from Ireland are tax exiles regardless of their motivation in so doing.[103] Again, it has been emphasised by successive Ministers for Finance that many non-residents who file Irish tax returns are 'Irish nationals who have moved abroad for work reasons' and who may have rental income in respect of their former home, and that 'it is likely that a high proportion of non-residents who file Irish tax returns are or have become non-resident for reasons unrelated to taxation'.[104] The notion that there are thousands of Irish tax exiles, and that this is confirmed by Revenue figures for the number of non-residents filing Irish tax returns, may simply be based on a misunderstanding or misinterpretation of the relevant tax law, though one cannot rule out a deliberate attempt to sensationalise the tax exile problem on the part of some.

A further significant misunderstanding regarding the extent of the tax exile problem that has emerged in recent years is the notion that there is a large number of extremely wealthy tax exiles. Again, this appears to be based on a misinterpretation of Revenue figures that is difficult not to view as wilful in some cases. The confusion

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[102] Quotation from the most recent statement of Minister for Finance Michael Noonan on the matter, in response to a parliamentary question from Patrick Nulty TD (Dáil Deb 18 July 2013, vol 812 (not yet published) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail20130718 00051?opendocument#WRG02150> accessed 19 May 2014).

[103] Quite the contrary in fact, as this appears to be a key element of the problem: that individuals reason for moving is to avoid paying their fair share of Irish taxes. See chapter 1.

[104] Quotation from the most recent statement of Minister for Finance Michael Noonan on the matter, in response to a parliamentary question from Patrick Nulty TD (Dáil Deb 18 July 2013, vol 812 (not yet published) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail20130718 00051?opendocument#WRG02150> accessed 19 May 2014).

appears to have begun as a result of the comments made by the chairwoman of the Revenue Commissioners before the Public Accounts Committee in 2009. She said that tax exiles were a 'particular category of non-resident taxpayers' dealt with by the HWI unit of Revenue's Large Cases Division. When asked how many people were in this particular category she responded 'I do not know the number off the top of my head' adding '[t]he high worth individuals unit monitors 440 cases but I do not have figures on that subset'.[105] It was subsequently reported in all the major Irish newspapers that Revenue believed that there were 440 extremely wealthy tax exiles.[106] Others, including some politicians, went further, declaring that there were thousands of wealthy tax exiles,[107] and again this misinterpretation was repeated as fact by Doyle both in the national media and in her academic discussion, where she stated that 'a solitary one of the thousands of wealthy Irish tax exiles could (in effect) single-handedly fund' a cancelled €6 million per annum cervical cancer-screening programme for pre-teenage girls by 'voluntarily coming back within the domestic tax net' and that of the 5,803 people who 'declared themselves to be non-resident for tax purposes on their tax returns' in 2007 'some 440 of these exiles are defined as high worth individuals'.[108]

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[105] Committee of Public Accounts Deb 19 February 2009.

[106] See for example Fintan O'Toole, 'When "tax fugitives" set tone for business' *Irish Times* (Dublin, 24 February 2009); Stephen O'Brien, 'Tax exiles face budget crackdown' *The Sunday Times* (Dublin, 28 March 2009); Ian Kehoe, 'Tax exiles feel the heat' *Sunday Business Post* (Dublin, 29 March 2009); Michael Brennan, 'Tough at the top but no pain for tax exiles' *Irish Independent* (Dublin, 8 April 2009); Carl O'Brien, 'Tax exile levy applied to only 10 individuals: Average sum of 147,000 was paid after write-offs' *Irish Times* (Dublin, 19 November 2011); Sarah McInerney, 'Tax exiles levy "derisory"' *The Sunday Times* (Dublin, 20 November 2011); Sarah McInerney, 'Government gears up for clampdown on tax exiles' *The Sunday Times* (Dublin, 11 March 2012).

[107] For media reports of thousands of wealthy tax exiles see Stephen O'Brien, 'Crackdown on tax exiles demanded' *The Sunday Times* (Dublin, 6 September 2009); Justine McCarthy, 'Call to account those who won't support Burton' *The Sunday Times* (Dublin, 6 March 2011). Politicians making such statements include Joan Burton TD (Dáil Deb 27 May 2009, vol 683, col 200, col 717, 'The chairperson of the Revenue Commissioners reported to the Committee of Public Accounts that there are approximately 6,000 wealthy tax exiles'; Joan Burton, 'Tax Exiles Not Asked to Pay a Red Cent in 2010' (Joanburton.ie, 21 November 2010) <http://www.joanburton.ie/economy-jobs-finance/tax-exiles-not-asked-to-pay-a-red-cent-in-2010> accessed 19 May 2014, 'We know from the Revenue Commissioners that there are up to 7,000 so-called 'high net worth individuals', including many multi-millionaires, who are technically living abroad but who continue to do business in this country and live here for long periods during each year'); Joe Costello TD (Dáil Deb 10 December 2010, vol 701, col 754, 'The Labour Party identified 7,000 tax exiles, who are virtually all millionaires, not paying a tax in this country').

[108] Doyle (n 99) 4 and 5 respectively. The latter claim was supported by a reference to Ian Kehoe, 'Tax exiles feel the heat' *Sunday Business Post* (Dublin, 29 March 2009), though Commissioner Feehily's original comments before the Public Accounts Committee were not referred to. See also Leonard Durac and Elaine Doyle, 'Think Tank: New ideas for the 21st century' *The Sunday Times* (Dublin, 30 September 2009).

This misinterpretation of Revenue figures is particularly perplexing, since not only were Commissioner Feehily's comments unambiguous, but, more importantly, the number of individuals dealt with by Revenue's HWI unit who were non-resident had previously been made publicly available. In 2004 chairman of the Revenue Commissioners made a presentation to the Joint Committee on Finance and the Public Service on a number of matters, including residence and the tax exile issue. When Paul McGrath TD asked him '[o]n the non-residents with tax liabilities here, are we talking about thousands of people or fewer than 100?', Commissioner Daly replied 'in the large cases division, and it would not deal exclusively with non-residents, there would be about 30 to 40 people whom we keep an eye on'.[109] In 2007 Minister for Finance Brian Cowan, replying to a parliamentary question from Joan Burton TD, said that in 2005 nineteen of the individuals whose affairs were dealt with by the HWI unit were non-resident.[110] Considering that Deputy Burton was also present at Commissioner Daly's presentation to the Joint Committee in 2004, it makes it all the more difficult to understand how she could later state that '[w]e know from the Revenue Commissioners that there are up to 7,000 so-called 'high net worth individuals' ... who are technically living abroad but who continue to do business in this country and live here for long periods during each year'.[111]

The most recent publicly published figures show that fifty four non-resident individuals have their tax affairs dealt with by the HWI unit,[112] and yet despite this

[109] Joint Committee on Finance and the Public Service Deb 10 November 2004. Commissioner Daly was misreported in the Irish Independent as having said that there were 'three-dozen super-rich exiles are worth in excess of £50m each, with a further 250 individuals under scrutiny here who are worth a similar amount apiece' (Susan Molloy, 'Revenue keeping an eye on tax exiles TDs told' *Irish Independent* (Dublin, 11 November 2004)).

[110] Dáil Deb 19 December 2007, vol 644, col 1161. At the time, the HWI unit dealt with the affairs of 250 individuals in total (Simon Carswell, 'Large Cases Division – HWIs and audits of non-*residents*' *Sunday Business Post* (Dublin, 28 May 2006)).

[111] Joan Burton, 'Tax Exiles Not Asked to Pay a Red Cent in 2010' (Joanburton.ie, 21 November 2010) < http://www.joanburton.ie/economy-jobs-finance/tax-exiles-not-asked-to-pay-a-red-cent-in-2010> accessed 19 May 2014.

[112] Dáil Deb 23 October 2012 (not yet published) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2012102300053?opendocument#WRD04250> accessed 19 May 2014 (Minister for Finance Michael Noonan in response to a parliamentary question by Joe Higgins TD). The HWI unit now deals with the affairs of a total of approximately 450 individuals (see appendix A.2(e)(i)). See also Louise McBride, 'Super-wealthy only pay "tiny fraction" in tax' *Sunday Independent* (Dublin 29 July 2012).

figure being reported in the national media,[113] the myth that there is a large number of extremely wealthy non-residents persists. In late 2012 the chairman of the government-established Forum on Philanthropy, Frank Flannery, put a proposal to the Taoiseach and Minister for Finance that, in return for investing €5 million in an Irish business or donating it to a philanthropic activity within five years, and making an additional payment of income tax of €1 million per year for ten years, tax exiles should be permitted to be physically present in Ireland for up to 183 days per year and remain non-resident, instead of only being able to spend a fewer than 280 days over two years under the current rules – in effect an offer of an additional forty-three days per year. Mr Flannery said that 'if the proposal succeeded in getting 400 Irish tax exiles' to take part it would 'create a €2 billion fund for charities and SMEs, and an extra 400 million per annum in tax revenue'. He claimed that he knew of ten individuals who were 'prepared to sign up to it with a potential €150 million "windfall" to the State' saying 'I know that next year I would be able to deliver a minimum of €200 million into our system through this scheme and I would back myself to get in €500 million over time'.[114] Despite being based on the notion that there were four hundred tax exiles who were sufficiently wealthy to be able to contribute an additional €1.5 million per year in return for being able to spend an additional forty-three days in Ireland, the Minister for Finance Michael Noonan wrote to the Oireachtas Joint Committee on Finance asking it to consider the proposal, describing it as 'attractive'.[115] This is even more surprising when one considers that the same minister had said only a few months previously that Revenue believed there to be just fifty-four non-resident high wealth individuals. While the proposal itself was questioned by a number of commentators

[113] See for example Maeve Sheehan, 'One in eight of our super-rich are tax exiles, reveals Revenue' *Irish Independent* (Dublin, 28 October 2012); Niamh Horan, 'Call for rich tax exiles to return and "help State"' *Sunday Independent* (Dublin, 7 April 2013).

[114] Quotations from Colm Keena, 'Tax exile rich 'can't be ignored' in drive to encourage philanthropy' *Irish Times* (Dublin, 16 July 2013) and Ronan McGreevy, 'Department of Finance refuses to back scheme for wealthy tax exiles' *Irish Times* (Dublin, 12 October 2013) respectively. See also Mike Dwane, 'Tax exile rule changes "a terrible idea", says UL expert' *The Limerick Leader* (Limerick, 17 July 2013). The definition of residence for tax purposes is contained in TCA 1997, s819.

[115] Harry McGee, 'Philanthropy forum members raised concerns about Frank Flannery's tax exile concession proposal' *Irish Times* (Dublin 14 April 2014). Minister Noonan is said to have considered including the proposals in the 2014 budget, though this plan seems to have been abandoned as a result of misgivings by officials in the Department of Finance and members of the Oireachtas Joint Committee on Finance (ibid). See also Ronan McGreevy, 'Department of Finance refuses to back scheme for wealthy tax exiles' *Irish Times* (Dublin, 12 October 2013).

on a variety of grounds, none seem to have expressed the view that there might not be a sufficient number of wealthy tax exiles to make the proposal feasible.[116]

It is not clear to what extent, if any, this misinterpretation of Revenue figures regarding the number of wealthy non-residents with a connection to Ireland has otherwise informed fiscal policy, or whether it played any role in the introduction of the domicile levy in 2010,[117] although it is certainly the case that criticism of the levy has been based to some extent on the notion that there is a large number of wealthy non-resident domiciliaries who should be liable to the domicile levy but who have not paid.[118]

Two other comments regarding the extent of the tax exile problem that have appeared in Irish national newspapers bear mentioning. First, there is the statement that the 'estimated tax "lost" or not collected' from the four hundred and forty 'extremely wealthy' tax exiles in 2006 was €91 million.[119] No source for this figure was cited in the article in question, and no government estimate of the tax loss or tax cost arising as a result of the tax exile problem has ever been made public, nor is there anything to suggest that any attempt has ever been made to compile such an estimate. In fact, the Minister for Finance had previously explicitly stated that 'it is not possible to establish' the tax forgone in respect of tax exiles in response to a parliamentary question on the matter.[120] It is possible that the figure of €91 million was taken from

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[116] For quotations from a variety of commentators criticising the proposal see Mike Dwane, 'Tax exile rule changes "a terrible idea", says UL expert' *The Limerick Leader* (Limerick, 17 July 2013); Sarah McInerney and Samantha McCaughren, 'Tax exiles "cannot buy a longer stay"' *The Sunday Times* (Dublin, 28 July 2013); Ronan McGreevy, 'Department of Finance refuses to back scheme for wealthy tax exiles' *Irish Times* (Dublin, 12 October 2013); Harry McGee, 'Philanthropy forum members raised concerns about Frank Flannery's tax exile concession proposal' Irish Times (Dublin 14 April 2014).

[117] The domicile levy is discussed in detail in chapter 6.

[118] See for example Steven Carroll, '10 wealthy non-resident Irish citizens paid €200,000 domicile levy in 2011' *Irish Times* (Dublin, 23 November 2012); Justine McCarthy, 'We still suffer the corrosive effect of cronyism and elitism' *The Sunday Times* (Dublin, 21 July 2013).

[119] Stephen O'Brien, 'Tax exiles face budget crackdown' *The Sunday Times* (Dublin, 28 March 2009). This claim was repeated in Michael Brennan, 'Tough at the top but no pain for tax exiles' *Irish Independent* (Dublin, 8 April 2009) 'Around 440 of the 5,800 tax exiles are thought by Revenue to be "extremely wealthy", with an estimated €91m lost in tax in 2006'. A later estimate puts the amount at €150 million (Justine McCarthy, 'Pay tax or lose your passport' Sunday Times (Dublin, 25 July 2010) 'More than 5,800 Irish people are claiming exile status, at a cost to the state of about €175m a year').

[120] Dáil Deb 19 December 2007, vol 644, col 1161. Joan Burton TD asked for the 'number of Irish domiciled residents who are non-resident for tax purposes here and are high net worth individuals who have been identified by his Department or the Revenue Commissioners ... [and] if he has an estimate of the tax foregone in respect of such individuals'. The Minister for Finance Brian Cowan replied 'I am advised by the Revenue Commissioners that its Large Cases Division looks after the tax affairs of

another newspaper article which had appeared a few days previously and which stated that 'Revenue recognises three categories – amounting to more than 12,000 people – who are legally avoiding paying tax in this country while enjoying at least some of its benefits' and giving these three categories of 'tax avoiders' as '1. A citizen of Ireland, resident but not ordinarily resident in the State; 2. A person resident but not domiciled in Ireland; 3. A non-resident'. The article went on to state that in category two, the 'amount of tax lost to the public finances was €91m in 2006'.[121] The article states that there is 'no definition of "tax exiles" or "tax fugitives" in Irish legislation' but goes on to state that the 'overall cost of all tax fugitives in 2007 was more than €150m', though it does not provide any breakdown of this figure for the various categories given.

It seems clear that the article in question confuses two disparate groups of individuals: first, those who are resident in Ireland for tax purposes but who are domiciled elsewhere, and who therefore only pay Irish tax on their Irish source income and capital gains and on foreign income and gains to the extent that the proceeds from them are remitted to Ireland (the 'remittance basis of taxation'),[122] and secondly, tax exiles, who are not resident in Ireland, though they may be domiciled here, and who are not liable to Irish tax on their non-Irish income or capital gains at all, whether remitted or not, and may not be liable to tax on certain of their Irish sourced income and gains. Individuals who are resident but not domiciled in Ireland include the large

high wealth individuals. The 2005 income tax returns show that 19 of these individuals filed returns on which they claimed non-residency for Irish tax purposes ... There is no statutory obligation on these citizens to return details of income or gains arising anywhere else in the world. Therefore, it is not possible to establish the amount of these incomes or gains, including any associated tax'.

[121] Senan Molony, 'Irish tax 'fugitives' cost State €150m' Irish Independent (Dublin, 25 March 2009). The article does not give the source of the information, though the present author has been unable to find any reference to these figures in any publicly available documents, and they have been obtained pursuant to an FOI request. Although €91 million is close to the amount that might be collected from the annual domicile levy of €200,000 if all of the four hundred and forty individuals said to be 'extremely wealthy' tax exiles were required to pay in full (and with no credit for any Irish income tax paid), the report of the loss to the Irish exchequer in relation to these individuals appeared eight months before the levy was announced by the government. Further, Minister for Finance stated explicitly that 'it is not possible to estimate the potential yield from the levy' (Seanad Deb 24 March 2010, vol 201, col 762).

[122] TCA 1997, ss 29 and 71. See McAvoy & Associates, *Irish Income Tax* (Bloomsbury Professional 2011) 1577-1591. The legal concept of domicile is discussed in chapter 6. It should be noted that individuals who are resident, but not domiciled, in Ireland are required to declare their worldwide income and capital gains on their Irish tax returns, and so the total amount of such income and gains that are subject to the remittance basis of taxation, and Irish tax forgone as a result, can be estimated. As mentioned in section 5.2(b) above, individuals who are non-resident in Ireland are not required to provided details of their non-Irish income or gains, and so it is extremely difficult to compile such estimates; and there is no evidence that any attempt has been made to do so.

number of workers who have come here temporarily or on secondment, particularly to work for large multinational companies, and longer-term immigrants who have retained their domicile in their countries of origin (because they do not intend to reside in Ireland permanently or indefinitely). It is therefore incorrect to describe these individuals as 'tax avoiders' much less as tax exiles or 'tax fugitives'; at least as far as Irish taxation is concerned. There are some individuals who are, or were in the past, resident in Ireland for tax purposes who have been described as tax exiles in their countries of origin, and they may have retained their domiciles abroad while living here. John Dorrance III, for example, came to Ireland from the United States in 1994 and is currently estimated to be Ireland's sixth wealthiest man, with a net worth of €1.65 billion, though he was criticised in the US by politicians and in the media as it was perceived that he moved here to avoid paying CGT on the sale of his 10.5% stake in Campbell Soup Company in 1996.[123]

A more realistic statement on the financial cost of the tax exile problem appeared just after the two newspaper articles just discussed and stated that '[d]ue to the lack of available data, the Revenue Commissioner is unable to determine just how much tax the state is losing each year as a result of tax exiles. However, experts believe the amount that would be recouped is relatively small in overall terms'.[124]

Finally, it has been publicly reported that 'Department of Finance figures show that the spouses of almost half of Ireland's tax exiles choose to remain in Ireland while their partners move abroad for tax reasons'.[125] It is not entirely clear what Department

[123] Editorial, 'Rich List 2014' *Sunday Independent* (Dublin, 9 March 2014). It is not publicly known whether Mr Dorrance has acquired an Irish domicile, though as he was resident in Ireland in 1996, if he had also been domiciled here at that point he would have been liable to Irish CGT on the disposal of his Campbell Soup Company shares, so one assumes that he was not. Congresswoman Patricia Schroeder said 'every time you buy a jar of soup, think of that can of soup and the guy living in Ireland, thumbing his nose at American taxpayers' (141 Cong Rec H3989 (March 30, 1995)). In Editorial, 'Deserting Principle: Don't Change a Basic Tenet of Tax Law Just Because a Few Rich Americans Jump Ship' *The Philadelphia Inquirer* (Philadelphia, 11 July 1995) it said '[t]ake an all-American product, add a preppy-sounding guy born with a silver spoon in his mouth, watch him flee to the land of St. Patrick and low taxes, and watch taxpayers boil over'. As mentioned in section 5.1 above, Robert Archibald Shaw and Len Deighton were also described as tax exiles resident in Ireland, and may not have acquired an Irish domicile during their time living here.

[124] Ian Kehoe, 'Tax exiles feel the heat' *Sunday Business Post* (Dublin, 29 March 2009).

[125] Ian Kehoe, 'Irish living as tax exiles' *Sunday Business Post* (Dublin, 18 May 2008). This claim was repeated in Brenda Power, 'Obey the law? You might as well deal with the devil' *The Sunday Times* (Dublin, 24 April 2011) 'Consider our 6,000 tax exiles ... [a]lmost half these tax exiles have a spouse and children resident in Ireland'.

of Finance data are being referred to, or how they are being interpreted, but it may be a misunderstanding of a reply given by Minister for Finance Brian Cowan to a parliamentary question some weeks earlier where he said that the Revenue Commissioners had advised 'that the number of individuals who show they are not domiciled in the State on their 2005 return of income is 4,955. In addition, the 2005 returns show 2,239 spouses as non-domicile [sic]'.[126] Of course, the Minister did not say that the 4,955 non-domiciliaries were non-resident for tax purposes in Ireland in 2005, let alone that they were tax exiles. There must be many immigrants or temporary workers who are resident in Ireland but who have not acquired a domicile of choice here, and who therefore remain domiciled abroad.[127] Indeed, an individual's domicile is only recorded on an Irish tax return if that individual is resident but claims to be domiciled abroad and therefore taxable on the remittance basis.[128] Nor did the Minister say that the non-domiciled spouses were married to the individuals who had declared themselves to be non-domiciled on their 2005 returns. Presumably, there are many immigrants who are resident but not domiciled in Ireland and who are married to Irish domiciled individuals.

5.2(c)(ii) Estimate of the extent of the problem using publicly available materials

Despite the repeated references in the public discourse to there being a large number of 'extremely wealthy' tax exiles, an extensive search of Irish media publications, of Oireachtas debates and of other sources reveals that the number of individuals who have been publicly described as tax exiles is, in fact, quite small. There are just eleven individuals who have been named as tax exiles on more than two occasions in the past twenty years: Denis O'Brien, JP McManus, Dermot Desmond, Michael Smurfit, John Magnier, Jim Kennedy, Sir Anthony O'Reilly, Bono, Michael Flatley, Tony Ryan and Joseph Murphy, the latter two of whom died in 2007 and 2000

[126] Dáil Deb 24 April 2008, vol 653, col 118.

[127] The legal concept of domicile is discussed in chapter 6.

[128] See the most recent individual tax return (Form 11, available from the Revenue Commissioners website: <www.revenue.ie/en/tax/it/forms/form11.pdf> accessed 19 May 2014). Sections 17 and 213(b)(i) ask individuals to indicate if they are 'resident but not domiciled in Ireland'. The form does not require individuals to state the country in which they are domiciled, nor is domicile relevant to, or referred to, in any other part of the return.

respectively.[129] Of individuals who have ever been described as tax exiles in the past twenty years, just fifteen additional names can be added to that list: Tony Quinn, Gerry McCaughey, Gary McCaughey, Jim McBride, Tony Smurfit, Hugh MacKeown, Derek Quinlan, Joe Donnelly, Cardinal Cathal Daly, Martin Bates, Paddy Halligan, David O'Farrell, Lorraine Kinsella, David Doyle and David Austin, the latter of whom died in 1998. Of the twenty-three of these individuals still alive, seven are said to have become temporarily resident abroad in order to avoid CGT on the sale of shares in Irish companies: Lorraine Kinsella, who became temporarily resident in Italy and disposed of Ryanair shares acquired from her husband,[130] Gerry McCaughey, Gary McCaughey and Jim McBride, whose wives are also said to have taken up temporary residence in Italy and disposed of shares in Century Homes that they acquired from their husbands,[131] and Martin Bates, Paddy Halligan and David O'Farrell, who are said to have moved to Portugal and sold their shares in the Unicare chemist chain.[132]

Arguably, four of these individuals are not tax exiles. Cardinal Daly appears to have been described as such solely because he wrote a book in which he criticised the Irish taxation system though he was not tax-resident in Ireland at the time.[133] Bono is described as a tax exile even though he is resident for tax purposes in Ireland, because a company controlled by him and the other members of the band U2, and holding its royalty rights, moved its corporate seat to the Netherlands to avail of a lower tax rate.[134] Michael Flatley was born in Chicago and lived in the United States

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[129] The names are listed according to the frequency with which the individuals are described as tax exiles.

[130] *Kinsella v The Revenue Commissioners* (n 72).

[131] Emer O'Kelly, 'When it pays to spend time in land of la dolce vita' *Irish Independent* (Dublin 29 March 2009).

[132] Charlie Weston, 'Portugal loophole on tax closed off' Irish Independent (Dublin, 5 December 2002). The article says it is not known 'if any of these individuals have availed of this particular tax concession', but implies that the move was tax-motivated, pointing out that they had 'taken up residence in the exclusive golf and residential estate Quinta do Lago' which is owned by Denis O'Brien. Justine McCarthy, 'Cosy capitalism must become history for Ireland to thrive' *The Sunday Times* (Dublin, 15 November 2009) refers to the case of another individual, who is not named and is described as a businessman but 'not one of the usual suspects', who moved abroad temporarily to avoid Irish CGT on the sale of an Irish business. FOI material reveals that there was at least one case of an individual claiming exemption the disposal of shares without having ceased to be resident in Ireland by virtue of being a resident *of* a country with which Ireland has a DTA. See appendix A.2(b)(xv).

[133] Shane Ross, 'Give us this day our Daly bread' *Sunday Independent* (Dublin, 29 August 2004).

[134] See Ronan McGreevy, 'Protest at U2's tax exile status' *Irish Times* (Dublin, 25 February 2009); Niamh Horan, 'Bono's preaching is a bit rich given the band's efforts to pay less tax' *Sunday Independent* (Dublin, 1 March 2009). This personal criticism of Bono has been described as harsh by some commentators. See Shaun Connolly, 'Hundred thousand digs at "pimp" Enda' *Irish Examiner*

until his success with the musical *Riverdance* when he was thirty-six years old. He has a large stately home in Ireland which he acquired in 2001 but has been described as resident in Monaco for tax purposes on a number of occasions since then.[135] Arguably, if Mr Flatley has moved abroad to reduce or avoid taxes, he has moved from the US and not Ireland, and so arguably should not be seen as a tax exile from an Irish perspective. Sir Anthony O'Reilly left Ireland in 1969 to take over as the head of the UK arm of the HJ Heinz Company, and moved to the United States in 1971 where he later became president and chief executive of the company, a role he held until 2000.[136] He is said to own three houses in Ireland and others in the United States, France and the Bahamas, and his principal source of wealth is said to consist of his interests in two Irish companies: Independent News and Media plc and the now defunct Waterford Wedgewood plc.[137] It seems clear that Sir Anthony did not leave Ireland for tax reasons, yet he is regularly referred to as a tax exile.[138] It is not clear whether this view is based on the fact that he did not choose to return to live in Ireland following his resignation as chief executive of HJ Heinz, or because he is sometimes said to reside in the Bahamas, a country that does not impose income tax or CGT.[139]

(Cork, 20 June 2013); Michael Clifford, 'Bono's either making hits or taking hits ...' *Irish Examiner* (Cork 22 June 2013).

[135] See Róisín Ingle, 'Save the tiger' Irish Times (Dublin 17 November 2007); Ralph Riegel, 'Michael Flatley shocked after €400,000 raid on mansion' *Irish Independent* (Dublin 28 January 2014). He is described as a tax exile in Brian Carey, 'Down and out on billionaires' row' *The Sunday Times* (Dublin, 26 October 2008); Ian Kehoe, 'Tax exiles feel the heat' *Sunday Business Post* (Dublin, 29 March 2009); and Maeve Sheehan, 'Lobbyists tell Noonan to leave tax exiles alone' *Sunday Independent* (Dublin, 2 September 2012).

[136] See Elaine Lafferty, 'O'Reilly departs Heinz as boom times seem a thing of the past' *Irish Times* (Dublin 15 September 2000); Editorial, 'Rugby greats who made it in business: Tony O'Reilly' *Irish Independent* (Dublin, 25 October 2013).

[137] See Jane O'Sullivan, 'Sheltered housing: Jane O'Sullivan discovers it is not just the rich and famous who are exploring the option of tax exile status' *Irish Times* (Dublin, 15 October 1999); Editorial, 'Rich List 2014' *Sunday Independent* (Dublin, 9 March 2014). However, Sir Anthony has more recently been forced to sell his estate at Castlemartin in Co Kildare to satisfy debts to Allied Irish Bank and is said to be considering bankruptcy. See Dearbhail McDonald, 'End of an empire as Tony O'Reilly considers bankruptcy in Bahamas' *Irish Independent* (Dublin, 28 June 2014).

[138] See for example Mark Hennessy, 'Revenue to bring in new measures on tax exiles' *Irish Times* (Dublin, 27 November 2003); Michael O'Regan, 'Media group 'abused' its position- SF' *Irish Times* (Dublin, 25 February 2005); Sarah Carey, 'Doing justice to O'Brien' *The Sunday Times* (Dublin, 26 November 2006); Vincent Browne, '"Consistent poverty" of politicians' *Irish Times* (Dublin, 21 March 2007); Kathleen Barrington, 'Pension issues must be sorted before any Waterford bailout' *Sunday Business Post* (Dublin, 11 May 2008); Brian Carey, 'Down and out on billionaires' row' *The Sunday Times* (Dublin, 26 October 2008); Matt Cooper, 'Revenue crackdown won't tax Irish exiles' *The Sunday Times* (Dublin, 23 November 2008); Justine McCarthy, 'Pay tax or lose your passport' *The Sunday Times* (Dublin, 25 July 2010); Maeve Sheehan, 'Lobbyists tell Noonan to leave tax exiles alone' Sunday Independent (Dublin, 2 September 2012).

[139] See Colin Coyle, 'O'Reilly feels the pinch' *The Sunday Times* (Dublin, 22 August 2010); Vincent Ryan, 'End of an era in Irish media' *Irish Examiner* (Cork, 20 April 2012). For taxation in the Bahamas see Victor Thuronyi, *Tax Law Design and Drafting* (IMF 1998) 1043; Ronan Palan, Richard Murphy

An alternative explanation might be that as a result of his significant economic and personal connections to Ireland, Sir Anthony is considered to be a member of Irish society; and that as such he ought to bear an equal responsibility with other members to pay taxes towards the funding of that society. Such an explanation would tally with the view that has been expressed in the public discourse that tax exiles' non-residence is purely technical rather than factual, or is a legal fiction, and would also be consonant with the argument advanced in this work that central to the tax exile problem is a mismatch between how the current rules in the tax code measure the connection of individuals for direct taxation purposes (the definitions of 'resident' and 'ordinarily resident' in TCA 1997, ss 819 and 820) and what is viewed by politicians, the media and other commentators as a sufficient connection for an obligation to pay direct taxation to arise.[140] This explanation places less emphasis on the intention of the individual in ceasing to be resident in Ireland for tax purposes, and greater emphasis on the individual's level of continued connection to the country and, perhaps, the extent to which that connection is perceived as being deliberately managed to avoid an Irish tax liability arising. This view might also explain why Michael Flatley is described as a tax exile,[141] and may suggest that the reason that Bono is considered a tax exile is that he is a member of Irish society but is seen to be using a legal technicality to reduce his exposure to Irish taxation (in this case, a Netherlands-based company).[142]

Even if one includes Sir Anthony O'Reilly and Michael Flatley, one is left with just fourteen living individuals who have been publicly described as tax exiles in the

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and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010) 127-28; International Monetary Fund, *The Bahamas: Tax Reforms for Increased Buoyancy* (IMF Country Report 14/17, 2014).

[140] See chapter 1.

[141] Though perhaps unjustly, as Mr Flatley says that he comes to Ireland as often as he can and would like to spend more time here, but has said '[m]y son goes to school in London because my businesses are based here. My wife lives here (London) and there is no way I would want to spend serious time away from my family'. See Ralph Riegel, '"Lord of the Dance" Michael Flatley puts foot down over false report he wants a UK passport' *The Belfast Telegraph* (Belfast, 23 May 2013).

[142] See for example Niamh Horan, 'Bono's preaching is a bit rich given the band's efforts to pay less tax' *Sunday Independent* (Dublin, 1 March 2009) where it was stated that a poll showed that 'the vast majority of respondents, 84 per cent, believe that all U2's business operations should be based in Ireland and that they should pay tax here too'. However, the use of foreign-resident corporate vehicles by Irish resident individuals is a separate issue to the tax exile problem and is not considered further in this work.

past two decades and who were non-resident for more than a temporary period. Ten of these individuals are very wealthy and feature on the annual 'rich list' compiled by the *Sunday Times* and the *Sunday Independent*, and have an estimated combined net worth of between €8.775 billion and €9.008 billion.[143] It has been reported that of the 'top 20 individuals on the Irish Rich List, at least half are tax resident outside Ireland', and, unsurprisingly considering Ireland's history of outward migration, this appears to be the case, though most of these have not been described as tax exiles.[144] Of the fifty richest from both of the most recent lists, in addition to seven of those who have been publicly described as tax exiles there are a further nineteen individuals or families who are said to be resident abroad. All but three live in countries with rates of direct taxation comparable to those in Ireland and which are not normally considered to be 'tax havens', and it has never been suggested that any of these individuals left Ireland for tax reasons.[145] These people appear to be viewed as expatriates rather than as

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[143] According to the most recent list compiled by the *Sunday Independent* (Editorial, 'Rich List *2014*' *Sunday Independent* (Dublin, 9 March 2014)), the net worth of these individuals is as follows (their rank in the top three hundred richest Irish people is given in brackets): (2) Denis O'Brien, €4.36 billion; (7) Dermot Desmond, €1.45 billion; (12) JP McManus, €1 billion; (13) John Magnier, €950 million; (35) Michael Flatley, €330 million; (45) Michael Smurfit, €270 million; (57) Sir Anthony O'Reilly, €200 million; (78) Joe Donnelly, €145 million; (159) Hugh MacKeown, €70 million; coming to a total of €8.775 billion. David Doyle does not feature on this list, but does appear on the most recent list compiled by the *Sunday Times* (Editorial, 'Rich List 2014' *The Sunday Times* (Dublin, 18 May 2014)). According to that list, the net worth of these individuals is as follows: (2) Denis O'Brien, €4.702 billion; (4) Dermot Desmond, €1.79 billion; (11) John Magnier, €678 million; (12) JP McManus, €671 million; (25) Sir Anthony O'Reilly, €395 million; (34) Michael Smurfit, €293 million; (44) Michael Flatley, €235 million; (52) Hugh MacKeown, €189 million; (208) David Doyle, €55 million; coming to a total of €9.008 billion (the amounts are converted from sterling at a rate of STG£1 = €1.22). Joe Donnelly does not appear on the latter list. Derek Quinlan, Jim Kennedy, Tony Quinn and Tony Smurfit do not appear on either list. Of course, if more recent newspaper reports are accurate, Sir Anthony O'Reilly may no longer have sufficient wealth to be categorised among Ireland's most wealthy individuals (see n 137).

[144] Ian Kehoe, 'Tax havens lure super-rich' *Sunday Business Post* (Dublin, 20 January 2008). The implication appears to have been that these individuals are all tax exiles, as the comment was made in the context of the discussion of the comment that 'figures prepared by the Revenue Commissioners finally reveal just how many tax exiles have decamped Ireland for other jurisdictions', though this was not expressly stated. See also Kathy Foley, 'MacKeown joins Swiss roll of wealthy Irish tax exiles' *The Sunday Times* (Dublin, 3 April 2005); Matt Cooper, 'The tax breaks that mean the rich pay less than anyone else' *The Sunday Times* (Dublin, 2 July 2006); Colin Coyle, 'Irish tax exiles can't escape property levy' *The Sunday Times* (Dublin, 26 October 2008).

[145] Pallonji Mistry and Family (India); Hilary Weston (Canada); Pearse Lyons (US); Paul Coulson (France); Ned Guinness, the Earl of Iveagh (UK); Ray & Des O'Rourke (UK); John & Patrick Collison (US); The Flatley Family (US); Sir David McMurtry (UK); Mark Getty (UK); Mike Lynch (UK); Paddy McNally (UK); John Griffin (UK); Shane Smith (US); The Green Family (New Zealand). Luke Comer is said to be 'Monaco-based' (Tom Lyons and Nick Webb, 'Comers sell up German empire to fund buying spree at Nama' *Irish Independent* (Dublin, 22 January 2012)), Michael O'Flaherty is described as 'Guernsey resident' (Editorial, 'Rich List 2014' *The Sunday Times* (Dublin, 18 May 2014)) and Dominic Sylvester is said to be 'Bermuda-based'. (All references from Editorial, 'Rich List 2014' *Sunday Independent* (Dublin, 9 March 2014) except where otherwise stated). It should be noted that the *Sunday Times* list does not include individuals such as Pallonji Mistry, 'six members of the Getty family, Texas billionaire John Grayken and the 11 members of the Saudi banker Sheikh Khalid bin

exiles, though in some cases the difference appears to be slight. Taking just one example, Dr Pearse Lyons, much like Sir Anthony O'Reilly before him, left Ireland first for the United Kingdom and then for the United States where he became chairman and chief executive of a billion-dollar corporation; in this case, one that he founded himself. Both the company, Alltech, and Dr Lyons personally, have significant investments in Ireland, though it appears that he does not spend a significant amount of time here and continues to live in the US.[146] It is not entirely clear why one of these individuals is repeatedly described as a tax exile in the public discourse and the other is not, though perhaps the key difference is the extent to which they are perceived to continue to be members of Irish society.

As mentioned in section 5.2(b), Revenue's HWI unit deals with the tax affairs of individuals who own or control net assets in excess of €50m or whose income is over €1.3m, non-residents with substantial economic interests in Ireland and partners and their associated entities in nine professional firms, and the most recently released figures show that of the four hundred and fifty individuals dealt with by the unit, fifty-four are not resident in Ireland for tax purposes.[147] Presumably, this figure includes many, if not most, of the ten wealthy individuals described as tax exiles, and many of the nineteen wealthy non-residents, mentioned in the preceding paragraphs and accompanying footnotes. In addition, an examination of the two most recent rich lists reveals that there are a further forty-six Irish individuals with a net worth of more than €50 million who are said to be resident abroad. Virtually all of them appear to be living either in the UK or in the US, though there are eight who are described as being based in Switzerland, Monaco or Gibraltar, countries noted for their low-tax regimes.[148]

Mahfouz family and several others' who are Irish citizens but were not born in Ireland and are not resident here, whereas some of these individuals do appear on the list compiled by the *Sunday Independent*.

[146] See Pearse Lyons, 'Beer could be the answer to all our economic woes' *Irish Independent* (Dublin, 7 July 2013). See also Frank Mulrennan, 'Alltech aiming for Lyons share of the feed market' *Irish Independent* (Dublin, 20 May 1999); Tom Prendeville, 'Billionaire Pearse Lyons plans to build distillery in the Liberties' *Irish Independent* (Dublin, 23 March 2014). According to from Editorial, 'Rich List 2014' *Sunday Independent* (Dublin, 9 March 2014) Lyons spends 'around 300 days of the year travelling around the globe in his bombardier jet visiting Alltech's operations'.

[147] See section 4.2(c)(i) and n 112 above.

[148] Switzerland does charge income tax and CGT, though with many exceptions in relation to foreign dividends and real property. Rates are very low by comparison to Ireland and other OECD countries. See Xavier Oberson and Howard Hull, *Switzerland in International Tax Law* (4th edn, IBFD 2011)3, 30-31, 49-50; International Business Publications, *Switzerland: Business Law Handbook Volume 1* (International Business Publications 2013) 47. There is no income tax or CGT in Monaco, and income which is not accrued in or derived from Gibraltar is not taxed in Gibraltar. See John Rhodes, *Private*

Of course, some of the individuals mentioned on the rich lists may not have a sufficient level of Irish investment or tax liability to be dealt with by the HWI unit, and equally there may be other individuals who are not Irish nationals and who have never been resident here, and who are not mentioned on the rich lists, but who have significant investments in Ireland and so are dealt with by the HWI unit. There may also be wealthy Irish individuals who are non-resident and who are not included in either of the rich lists because they have not come to media attention. Also, since an individual's tax affairs are confidential, and an individual's residence in Ireland for income tax and CGT purposes is based purely on physical presence here during the year,[149] there may be wealthy Irish individuals who are non-resident without this being publicly known, and some may have become non-resident for tax purposes. On balance however, it seems reasonable to suggest that a large number of the fifty-four non-resident individuals whose affairs are dealt with by the HWI unit are made up of expatriates rather than tax exiles, and that the number of very wealthy Irish tax exiles is relatively small.

Returns for the domicile levy, which was introduced in 2010, also suggest that the number of wealthy tax exiles is not large. The levy is discussed in detail in chapter 6, but in brief it is payable by every individual who is domiciled in Ireland, who has a worldwide income of greater than €1 million, who owns Irish property valued at more than €5 million (excluding shares in Irish trading companies, or holding companies of trading groups) and who has a liability to Irish income tax of less than €200,000.[150] Figures obtained by the author in response to an FOI request show that for each of the years 2010, 2011 and 2012 there were just nine non-resident individuals who filed domicile levy returns.[151] In 2010, six of these nine non-residents had their tax affairs dealt with by the HWI unit, and in 2011 and 2012 seven of the nine were in the HWI case base.[152] Of course there may be individuals who are tax exiles but whose

Client Tax: Jurisdictional Comparisons (2nd edn, Sweet and Maxwell 2012) 268 and 119 respectively. It has not been suggested that any of the individuals on the rich lists moved to these countries for tax reasons.

[149] TCA 1997, ss 851A and 819 and 820 respectively.

[150] TCA 1997, ss 831AA and 831AB.

[151] See appendix A.2(d)(i). The bulk of the returns were filed by residents in that period, as the levy is based on the domicile of the individual and does not distinguish between residents and non-residents.

[152] See appendix A.2(e)(i).

investments in Ireland are all made through trading companies, or who do not file domicile levy returns because their Irish income tax liability exceeds €200,000, but there is nothing to suggest that the number of such individuals is large. Although Revenue carried out investigations into the affairs of sixty individuals in relation to the levy between 2010 and 2012, many of those would appear to have concerned resident individuals.[153] Equally, there may be non-residents who are not tax exiles but who are liable to the levy as a result of owning valuable houses here, without having any other personally-held taxable assets in Ireland.[154]

There appears to be nothing to suggest that, in addition to the ten individuals who have been named as such, there is a large number of wealthy tax exiles who have not been publicly identified. An accurate estimate of the number is not possible using publicly available materials, but considering that in 2004, at a time when the HWI unit dealt with the affairs of two hundred and fifty individuals and nineteen were non-resident, the chairman of the Revenue Commissioners said that in relation to the tax exile issue there were '30 to 40 people' that Revenue kept an eye on,[155] it is not unreasonable to contend that the number of wealthy tax exiles is not much greater than this figure today. Figures obtained by the author in response to an FOI request show that in 2006 there were forty non-residents out of a total of three hundred and fifty individuals whose affairs were dealt with by the HWI, and that the proportion of individuals dealt with by the unit who are non-resident has not varied significantly since that time, though the overall number of non-resident cases has increased as case base of the unit has been expanded.[156] The reason for the increase from nineteen non-

[153] ibid. Initially there were just eleven returns for the levy in 2010, four from Irish residents, and just ten returns in 2011 of which two were made by Irish residents (See Dáil Deb 8 May 2013 (not yet published)<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013050800050?opendocument#WRG01150> accessed 19 May 2014; Steven Carroll, '10 wealthy non-resident Irish citizens paid €200,000 domicile levy in 2011' *Irish Times* (Dublin, 23 November 2012)). Of the twenty-four additional returns subsequently made in relation to those years, the vast majority (twenty-one) were made by residents. It is therefore not unreasonable to suggest that the main focus of Revenue's investigations into the domicile levy returns was into the potential liability of resident individuals.

[154] This point is discussed further in chapter 6. Giving just a small sample, Paul Coulson, Peter Sutherland, William Bollinger and Brian Long are all said to be non-resident but to have expensive homes in Ireland. None has been described as a tax exile. See Editorial, 'Who is Ardagh's Paul Coulson?' *Sunday Business Post* (Dublin 14 January 2013) and Editorial, 'Rich List 2014' *Sunday Independent* (Dublin, 9 March 2014).

[155] Joint Committee on Finance and the Public Service Deb 10 November 2004.

[156] See appendix A.2(e)(i). In 2006 11.4 per cent of the individuals dealt with by the HWI unit were non-resident (40 individuals out of total 350). In 2007 it was 10.5 per cent (42 out of a total of 400 individuals). In 2008 it was 9.5 per cent (41 out of a total of 430 individuals). In 2009 it was 10.6 per

residents in the case base in 2005 to forty in 2006 is not clear, though it may be related to the fact that the residence of individuals was not electronically captured by Revenue prior to this point, and to an expansion in the size of the unit at that time.[157]

It is not possible to further verify this estimate of forty to fifty wealthy tax exiles using publicly available materials or material obtained pursuant to FOI requests by the author. Minister for Finance Brian Lenihan, when questions on the issue, stated that he was 'informed by the Revenue Commissioners there is no register or list of so called "tax exiles"; there is nothing in Irish tax law that makes reference to "tax exile status"',[158] and Minister for Finance Michael Noonan, when asked 'the number of Irish passport holders who claim Irish tax exile status' replied that

> [N]othing in Irish tax law makes reference to the term "tax exile". I am assuming that in referring to "tax exile status" the Deputy is thinking of Irish citizens or Irish domiciled individuals claiming to be non-resident for tax purposes and who are living abroad primarily for tax reasons[159]

before providing the number of non-residents who filed Irish tax returns, but with no breakdown as to how many were Irish domiciled or were considered to be living abroad for tax reasons. In response to a further parliamentary question in 2013 seeking 'the number of Irish citizens or Irish domiciled persons claiming to be non-resident for tax purposes who are living abroad for tax reasons', Minister Noonan replied that

> [T]he relevant available information is the total number of persons who have filed tax returns indicating that they are non-resident for tax purposes, rather than the number of Irish citizens or Irish domiciled persons who have filed tax returns indicating they are non-resident.[160]

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cent (46 out of a total of 430 individuals). In 2010 it was 12 per cent (54 out of a total of 450 individuals). In 2011 it was 11.1 per cent (50 out of a total of 450 individuals). In 2012 it was 12 per cent (54 out of a total of 450 individuals see Dáil Deb 23 October 2012 (not yet published) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2012102300053?opendocument#WRD04250 > accessed 19 May 2014.

[157] See Dáil Deb 28 September 2005, vol 606, col 367.

[158] Dáil Deb 10 November 2009, vol 694, cols 137-38.

[159] Dáil Deb 19 July 2011, vol 739, col 190.

[160] Dáil Deb 18 July 2013, vol 812 (not yet published)

Indeed, material received in response to the author's FOI requests, or the lack thereof, makes clear that no document has been created by Revenue or by the Department of Finance that indicates how many non-residents who file Irish tax returns, either in the case base of the HWI unit or otherwise, are Irish domiciled or were previously Irish resident; information without which one could not begin to compile a list of tax exiles.[161]

The amount of CGT said to have been lost as a result of named individuals moving abroad is relatively modest in the context of the overall CGT receipts for the years in question. Denis O'Brien successfully appealed an assessment for €56.86 million in CGT in 2000, a year in which the total CGT collected by the Irish Revenue was €782 million.[162] In 2002 Martin Bates, Paddy Halligan and David O'Farrell sold their shares in Unicare for a total of €58 million. The maximum CGT payable would have been €11.6 million in a year when the total CGT collected was €636 million.[163] Lorraine Kinsella sold her shares in Ryanair in 2003 for €19 million, giving rise to a maximum CGT liability of €3.8 million in a year when the total CGT collected was €1.45 billion.[164] In 2005 Gerry McCaughey, Gary McCaughey and Jim McBride sold their shares in Century Homes for a total of €71 million and were reported to have saved a total of €14 million in Irish CGT by first transferring the shares to their wives,

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail20130718 00051?opendocument#WRG02150> accessed 19 May 2014.

[161] See Appendix A.1(iii) and (iv) and A.2(c)(i).

[162] See *O'Brien v Quigley* (n 29); Revenue Commissioners, 'Annual Report 2000' (Revenue Commissioners 2000) <www.revenue.ie/en/about/publications/annual-reports/archive/annualreport2000.pdf> accessed 19 May 2014, 18 (converted from Punt to Euro at a rate of €1 = IR£0.787564).

[163] See Charlie Weston, 'Portugal loophole on tax closed off' *Irish Independent* (Dublin, 5 December 2002); Revenue Commissioners, 'Annual Report 2002' (Revenue Commissioners 2002) <www.revenue.ie/en/about/ publications/annual-reports/archive/annualreport2002.pdf> accessed 19 May 2014, 11. The figure of €11.6 million is based on the full sale proceeds being subject to CGT at the then prevailing rate of 20 per cent, with no allowable deductions. If the three individuals had been subject to Irish CGT, the actual liability would most likely have been smaller.

[164] See *Kinsella v The Revenue Commissioners* (n 72); Revenue Commissioners, 'Annual Report 2003' (Revenue Commissioners 2003) <www.revenue.ie/en/about/publications/annual-reports/archive/annualreport2003.pdf> accessed 19 May 2014, 12. Again, the maximum CGT liability is based on the full sales proceeds being taxed at the rate then prevailing of 20 per cent (see n 163).

who had become tax-resident in Italy. The total CGT collected by Revenue in 2005 was €2 billion.[165]

The annual worldwide income of those individuals who have been described as tax exiles is not publicly known; and of course the income of those tax exiles that have not been identified is not knowable. However, the most recent figures released by Revenue show that those with the highest annual incomes in Ireland are a group of one hundred and thirty individuals who earned more than €2 million each in 2013 (the average for the group was €4.4 million). This group paid a total of almost €187 million in income tax and universal social charge (USC); an average of €1.44 million each.[166] Some of these one hundred and thirty individuals may be resident abroad but have significant income arising from sources in Ireland, but even if one were to assume that every one of them was tax-resident here, and they were all to become tax exiles and as a result to cease to have any taxable income in Ireland at all, the resulting decrease in income tax and USC collected would still be just 1.22 per cent of the total.[167] As mentioned earlier in this section, the ten individuals who have been named as tax exiles and who feature in the most recent rich lists, are among Ireland's wealthiest citizens and have an estimated combined net worth of approximately €8.5 billion, and so they may well have annual incomes in excess of the average of €4.4 million earned by Ireland's wealthiest taxpayers. However, there is nothing to suggest that the putative thirty to forty tax exiles referred to by Revenue Commissioners chairman Frank Daly have a combined income which exceeds that of the one hundred and thirty top earners paying tax in Ireland in 2013, and one would expect that it is in fact considerably lower.

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[165] See Senan Molony, 'Gormley's man quits in €4.7m tax loophole storm' *Irish Independent* (Dublin, 25 March 2009); Emer O'Kelly, 'When it pays to spend time in land of la dolce vita' *Irish Independent* (Dublin 29 March 2009); Revenue Commissioners, 'Annual Report 2005' (Revenue Commissioners 2005) <www.revenue.ie/en about/publications/annual-reports/archive/annualreport2005.pdf> accessed 19 May 2014, 9.

[166] Letter from chairwoman of the Revenue Commissioners Josephine Feehily to Niamh Maguire, secretary to the Committee of Public Accounts (12 March 2014) <http://www.oireachtas.ie/parliament/media/committees/pac/correspondence/2014-meeting1200304/%5BPAC-R-1308%5D-Correspondence-3A.4---Josephine-Feehily,-Office-of-the-Revenue-Commissioners.pdf> accessed 19 May 2014.

[167] This is, of course, an entirely unrealistic assumption, as many tax exiles presumably continue to have taxable sources of income in Ireland, and is made solely for illustrative purposes. The one hundred and thirty wealthiest individuals with an income of more than €2 million paid 1.22 per cent of the income tax and USC collected in 2013 (ibid).

While the amount of income tax or CGT lost as a result of the tax exile problem may be relatively small in the context of the exchequer's overall annual tax revenue, this is not to say that the sums themselves are insignificant. In 2000 the €56.86 million assessed on Denis O'Brien in relation to his sale of his shares in Esat would have been sufficient to fund the entire courts service and the office of the Attorney General for the year, with almost enough left over to pay for the cost of running the National Gallery.[168] A sale of significant business assets by one of the very wealthy individuals described as a tax exile, some of whom are said to have a net worth of close to, or over, €1 billion, might give rise to more significant gains and potential CGT liability.

If one were to assume that there are forty wealthy tax exiles, who, like the one hundred and thirty wealthiest Irish taxpayers, have an average annual income of approximately €4.4 million each, the Irish income tax and USC payable on that income in 2013, if it were subject to Irish tax, would have been €57.6 million, more than enough to fund the offices of the Attorney General and the Director of Public Prosecutions (DPP) for the year.[169] While €57.6 million represents just 0.38 per cent of the total income tax and USC collected in 2013, it is the equivalent of the tax paid by 14,433 workers earning an average salary.[170] If there were over fourteen thousand individuals in Ireland who earned an average income but paid no income tax or USC,

[168] See Department of Finance, 'Budget Statistics and Tables' (Department of Finance, 2000) <http://www.budget.gov.ie/Budgets/2000/Tables.aspx> accessed 19 May 2014, table 4. The budgets for the courts service, office of the Attorney General and the National Gallery were €45,291,557, €8,634,219 and €3,174,345 respectively, coming to a total of €57,100,121 (figures converted from Punt to Euro at a rate of €1 = IR£0.787564).

[169] The average income tax and USC paid by the group of one hundred and thirty taxpayers was €1.44 million. Forty such taxpayers would have paid €57.6 million in tax (this, perhaps unrealistically, assumes that none of the tax exiles income would have already been subject to Irish income tax or USC). The costs of running the offices of the Attorney General and DPP were €15,498,000 and €38,563,000 respectively. See Department of Finance, 'Expenditure Report 2013' (Government Stationery Office, 2013) <http://budget.gov.ie/budgets/2013/Documents/Expenditure%20Report%202013%20Parts%20I%20-%20IV.pdf> accessed 19 May 2014, 126.

[170] The average annual wage in Ireland in 2013 was €35,782 (see Central Statistics Office, 'Earnings and Labour Costs' (CSO 2014) <http://www.cso.ie/quicktables/GetQuickTables.aspx?FileName=EHQ03.asp&TableName=Earnings+and+Labour+Costs&StatisticalProduct=DB_EH> accessed 19 May 2014 (the average weekly earnings for each quarter of 2013, multiplied by fifty-two). According to the most recent Revenue figures (see Letter from chairwoman of the Revenue Commissioners Josephine Feehily to Niamh Maguire, secretary to the Committee of Public Accounts (n 166), there were 302,643 individuals who earned income of between €30,000 and €40,000 in 2013 who together paid a total of €1,207,942,302 in income tax and USC; an average of €3,991 each. It would take 14,433 individuals paying €3,991 in tax to raise €57.6 million.

it seems likely that the government, and commentators, would view the matter as sufficiently serious to warrant a legislative response.

Although it appears that the number of tax exiles is relatively small, and that the amount of tax lost as a result of their moving abroad represents a small percentage of the overall tax take, it is not clear whether public anger or perceptions of inequity would be considerably lessened if a more accurate assessment of the extent of the problem were widely disseminated. While it is reasonable to suggest that a larger number of tax exiles avoiding their perceived responsibility to contribute to the Irish exchequer constitutes a greater breach of fairness than a smaller one, this does not necessarily mean that ten, or thirty to forty, very wealthy individuals moving abroad for tax reasons is insignificant. Much of the anger that has been expressed in the public discourse about tax exiles has not been based on the erroneous estimates of the extent of the problem, but on the personal wealth of the individuals described as exiles and on the perceived breach of their fiscal obligation to Ireland.

Sheffrin, drawing predominantly on the work of social psychologists such as Skitka,[171] says that phenomena such as the public anger in the United States over tax motivated expatriation can only partly be explained in terms of what he calls 'equity theory': the notion that judgments of fairness are 'based on the relationship between efforts and expenditures on the one hand and rewards and outcomes on the other', because this leaves out of account the 'the sense of moral outrage that brings these episodes repeatedly to our attention', and the level of vitriol in the public discourse.[172] He suggests that the reason for this is that such phenomena collide with 'socially determined moral mandates', which are 'psychologically nonnegotiable and ... fundamental truth[s] about right and wrong', which give rise to a 'sense of outrage, disruption, and disorientation when they are violated'.[173] Sheffrin argues that the way that an issue 'is viewed and whether it is the subject of strong moral mandates will be socially determined in a process that typically transcends mere facts and or studies'

[171] Steven M Sheffrin, *Tax Fairness and Folk Justice* (Cambridge University Press 2013) 43-48. He references in particular Linda J Skitka and Elizabeth Mullen, 'Understanding Judgments of Fairness in a Real-World Political Context: A Test of the Value Protection Model of Justice Reasoning' (2002) 28 Personality and Social Psychology Bulletin 1419.
[172] ibid 6 and 44 respectively.
[173] ibid 48 and 45 respectively.

and that '[s]ocial and religious values, economic trends, and differing perceptions in the media' will all form part of this process. In some cases, the 'sheer magnitude of the sums involved' can trigger the outrage, but this does not appear to be a necessary component.[174] It may well be that in Ireland, as Sheffrin suggests is the case in the United States, an individual moving abroad for tax purposes is a breach of such a moral mandate, and so it provokes moral outrage among members of the public, the media and other commentators and politicians. Thus, regardless of whether the tax exile problem is significant in economic terms or according to standard measures of distributional justice, it may be significant in terms of the perceived breach of fairness in the tax system that it causes.[175]

Studies have shown that there is a statistically significant positive correlation between the imposition of progressive taxation in a country and subjective measures of individuals' happiness within that country,[176] and a negative correlation between perceived inequality in a society and the happiness of members of that society.[177] These studies appear to demonstrate that requiring the wealthy to bear a proportionally higher burden of taxation is psychologically, and perhaps morally, important to other members of society. This suggests, as one would intuitively expect, that when a very wealthy individual is seen not to be making a contribution to the exchequer, this gives rise to a greater inequality, and therefore to a greater level of public discontent, than if

[174] ibid 47 and 48 respectively.

[175] Sheffrin calls these views of tax fairness held by ordinary individuals 'folk justice', and distinguishes them from 'expert justice', the influential writings, theories, and general ideas of philosophers and economists such as John Rawls and James Mirrlees, which he says are 'centred squarely on redistribution' and have 'deeply penetrated into the thinking of a large segment of our society's opinion makers, becoming their instinctive view of tax fairness' (ibid 2). Sheffrin argues that there are substantive areas of taxation in which deep differences emerge between popular and expert views of taxation, and argues for a serious consideration of folk justice as a way to provide insights into both ideal and existing tax policies and to guide reform of those policies.

[176] See Shigehiro Oishi, Ulrich Schimmack and Ed Diener, 'Progressive Taxation and the Subjective Well-Being of Nations' (2011) 23 Psychological Science 86. There was no correlation between happiness and the tax rate for average earners or government spending in the countries examined. See also Thomas D Griffith, 'Progressive Taxation and Happiness' (2004) 45 Boston College Law Review 1363, 1392-93; Marjorie E Kornhauser, 'Educating Ourselves towards a Progressive (and Happier) Tax: A Commentary on Griffith's Progressive Taxation and Happiness' (2004) 45 Boston College Law Review 1399; Diane Ring, 'Why Happiness: A Commentary on Griffith's Progressive Taxation and Happiness' (2004) 45 Boston College Law Review 1413.

[177] This affect appears to be stronger among Europeans than Americans, and its strength appears to vary according to the individual's political viewpoint. See Griffith (n 176); Alberto Alesina, Rafael Di Tellab and Robert MacCulloch, 'Inequality and Happiness: Are Europeans and Americans Different?' (2004) 88 Journal of Public Economics 2009; Rafael Di Tella and Robert MacCulloch, 'Partisan Social Happiness' (2005) 72 Review of Economic Studies 367.

there was a non-payment of taxes by an individual earning an average income. One would therefore also expect that if very wealthy members of society are believed to be tax exiles, the resulting inequality will be sufficient to give rise to a perception of significant unfairness, and possibly to provoke moral outrage, even if it were known and accepted that the number of such individuals is relatively small.

5.3 Solving the tax exile problem

Any solution to the tax exile problem will need to balance several, possibly conflicting, policy considerations.[178] First, it will be important to ensure that any solution does not impact negatively on attracting foreign direct investment (FDI), which is vital to the Irish economy. According to the most recently available figures, client companies of the Industrial Development Agency (IDA), the body charged with the attraction and development of foreign investment in Ireland, had 152,189 full-time employees in Ireland in 2013.[179] In 2012 these companies had exports of €124.14 billion and their direct expenditure in the Irish economy was €22.99 billion, of which €8.65 billion was on payroll, and they created 12,722 new jobs.[180] In 2011, these companies paid a total of €2.7 billion in corporation tax, 64 per cent of the total collected for that year.[181]

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[178] There may be many other potential policy considerations other than those which are considered in this section. For example, in a 2003 public consultation on residence and domicile the UK Treasury stated that the rules on residence should be 'transparent, non-discriminatory and simple to apply. They should be applied in a consistent manner, and should not impose unnecessary compliance costs. Ideally, they should be based on objective observable characteristics, rather than subjective or uncertain factors (see United Kingdom, 'Reviewing the Residence and Domicile Rules as They Affect the Taxation of Individuals: A Background Paper' (HMSO, April 2003) para 4.12). Other factors may include the ease with which any solution may be implemented and its likelihood of success.

[179] Forfás, 'Annual Employment Survey 2013' (Forfás, 14 April 2014) <http://www.forfas.ie/media/14042014-Annual_Employment_Survey_2013-Publication.pdf> accessed 19 May 2014, 3. Forfás is a government-funded policy advisory board for enterprise, trade, science, technology and innovation.

[180] See Forfás, 'Annual Business Survey of Economic Impact 2012' (Forfás, 24 March 2014) <http://www.forfas.ie/media/20032014-Annual_Business_Survey_of_Economic_Impact-Pulication.pdf> accessed 19 May 2014, 4 and 33; IDA Ireland, 'IDA Ireland: Annual Report & Accounts 2012 (IDA Ireland, 2012) <http://www.idaireland.com/news-media/publications/annual-reports/2012/IDA_Annual_Report_2012.pdf> accessed 19 May 2014, 3.

[181] IDA Ireland, 'IDA Ireland: Annual Report & Accounts 2012 (IDA Ireland, 2012) <http://www.idaireland.com/news-media/publications/annual-reports/2012/IDA_Annual_Report_2012.pdf> accessed 19 May 2014, 6. The total corporation tax collected in 2011 was €4.173 billion (see Revenue Commissioners, 'Annual Report 2012' (Revenue Commissioners 2012) <http://www.revenue.ie/en/about/publications/annual-reports/2012/index.html> accessed 19 May 2014.

A public consultation on 'possible revisions to the current residence rules for the taxation of individuals' was carried out by the Department of Finance between May and August 2012 with a view to ensuring that tax exiles make a fair contribution to the Exchequer, as promised in the programme for government of the executive of the thirty-first Dáil. It was specifically stated in the consultation document that 'proposals should have due regard to ... the continued promotion of Ireland as a location for inward investment'.[182] Of the eight submissions received, six emphasised the importance of FDI to the Irish economy and the role that the current statutory definition of residence, and in particular the clarity and certainty of that definition, plays in attracting FDI to Ireland.[183] The Irish Taxation Institute pointed out in their submission that FDI projects typically involve the posting of foreign workers to Ireland, especially in the start-up phase, and that the 'ability to project with some degree of certainty the likely cumulative tax costs for the duration of the assignment is a key decision factor for the overseas parent', in particular where a tax equalisation policy is operated. The Institute noted that under the current rules 'individuals coming to Ireland can clearly understand the statutory residence test' and that this 'certainty is extremely important', going on to say that uncertainty in this area 'will influence and affect the people who are critical to securing the investment for Ireland in the face of intense competition from other countries'.[184] Similar views were expressed by the

[182] Department of Finance, 'Public consultation on tax residence rules' (Department of Finance, 1 May 2012) <http://www.finance.gov.ie/sites/default/files/Public-consultation-on-tax-residence-rules.pdf> accessed 19 May 2014. For the programme for government, see Department of An Taoiseach, 'Government for National Recovery 2011-2016' (Government Publications, 6 March 2011) <http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Programme_for_Government_Publications.html> accessed 19 May 2014.

[183] FDI was not mentioned in the submissions of Cormac Doyle, an Irish individual living abroad for economic reasons, or in the submission of Sensible Money, a group advocating seigniorage as a solution to the Euro zone debt crisis, and whose submission appears to have nothing whatsoever to do with the definition of residence for tax purposes of any of the issues on which views were sought in the consultation document. See Submission of Cormac Doyle to the Department of Finance Public Consultation on Tax Residence Rules (31 July 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Mr-Cormac-Doyle.pdf> accessed 19 May 2014; Submission of Sensible Money, to the Department of Finance Public Consultation on Tax Residence Rules (July 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Mr-Paul-Ferguson-Sensible-Money.pdf> accessed 19 May 2014.

[184] Submission of the Irish Taxation Institute to the Department of Finance Public Consultation on Tax Residence Rules (1 August 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Mary-Healy-Irish-Tax-Institute.pdf> accessed 19 May 2014. Tax equalisation is a process that seeks to ensure that the tax liability incurred by an individual posted to work in another country is approximately the same as it would have been if the individual had remained in his or her home state. The posting should therefore be tax neutral for the employee, with any additional tax cost being borne by the employer.

Consultative Committee of Accountancy Bodies Ireland, the Society of Trust and Estate Practitioners, Mazars, the American Chamber of Commerce Ireland and Matheson Ormsby Prentice (now Matheson) solicitors.[185] This view is to some extent supported by a survey by the Economist Intelligence Unit into FDI in Ireland, where, of three hundred and fifteen executives with responsibility for, or familiarity with, their employers' investment decisions and existing or prospective investments in Ireland, 34 per cent described fiscal certainty as very significant to their investment decisions in Ireland, with 53 per cent describing it as somewhat significant.[186] This view has also been endorsed by the current Minister for Finance, Michael Noonan.[187] In 2007 in a public consultation into residence and domicile the UK Treasury expressed a similar view stating that

> In an increasingly globalised economy it is crucial for the UK's competitiveness that the UK continues to attract international talent to this country. In key sectors, such as financial services, IT and public services, the UK's capacity to compete internationally is underpinned by large numbers of highly skilled workers who come here from abroad. As well as contributing directly to economic activity, international workers contribute to wider

[185] See Submission of the Consultative Committee of Accountancy Bodies Ireland to the Department of Finance Public Consultation on Tax Residence Rules (July 2012) <http://www.finance.gov.ie/sites/default/files/CCAB-I-Submission-on-Residency-Rules-2012.pdf> accessed 19 May 2014; Submission of the Society of Trust and Estate Practitioners to the Department of Finance Public Consultation on Tax Residence Rules (July 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Nora-Lillis-STEP-Ireland.pdf> accessed 19 May 2014; Submission of Mazars to the Department of Finance Public Consultation on Tax Residence Rules (30 July 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Mr-Frank-Greene-Mazars.pdf> accessed 19 May 2014; Submission of the American Chamber of Commerce Ireland to the Department of Finance Public Consultation on Tax Residence Rules (1 August 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Jonathan-Small-American-Chamber-of-Commerce.pdf > accessed 19 May 2014; Submission of Matheson Ormsby Prentice (now Matheson) solicitors to the Department of Finance Public Consultation on Tax Residence Rules (1 August 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Turlough-Galvin-Matheson-Ormbsy-Prentice.pdf> accessed 19 May 2014.

[186] Economist Intelligence Unit, 'Investing in Ireland: A survey of foreign direct investors' (The Economist Intelligence Unit 2012) <http://www.idaireland.com/news-media/publications/library-publications/external-publications/Investing_in_Ireland_-_A_survey_of_Foreign_Direct_Investors.pdf> accessed 19 May 2014, 25. This compares with the figures for tax incentives for investors (which 39 per cent described as very significant and 49 percent somewhat significant), an access to locally skilled labour (38 per cent and 48 percent).

[187] See Dáil Deb 19 November 2013 (unpublished) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013111900001?opendocument> accessed 19 May 2014. See also Conor Kennedy and Diarmuid Rossa Phelan, 'O'Flynn Construction: The Need for Tax Certainty' (2014) 27(2) Irish Tax Review 100 which highlights the importance of tax certainty in, among other things, attracting FDI.

> economic growth by bringing skills which complement those in the existing workforce. Moreover, people from abroad make a significant contribution both to GDP and to UK tax revenues.[188]

In 2011 a public consultation identified the lack of certainty regarding rules on residence as being 'a deterrent to individuals and businesses looking to invest in the UK' and advocated the introduction of a statutory definition of residence for tax purposes that would 'increase the attractiveness of the UK for the internationally mobile' but also 'ensure that those with close connections to the UK pay their fair share of tax and that the rules do not give rise to unfair outcomes or opportunities for tax avoidance'.[189]

The second requirement for any solution to the tax exile problem, is that it ensures that it is only tax exiles that are subjected to any additional Irish taxation, and not what might be described as 'genuine expatriates' or emigrants who have left Ireland for non-tax reasons, or employees of Irish companies who have been temporarily posted to work abroad. Documents received by the author in response to FOI requests from the Department of Finance show that in examining the tax exile issue officials have been mindful of the fact that '[i]n the current climate, when individuals might feel compelled to emigrate to find work, it would not be well received if the Irish Government continued to seek tax from the income of people who were unable to obtain work in our economy'.[190] The Department of Foreign Affairs recently carried out a public consultation on Ireland's engagement with the Irish diaspora, noting that in the past this engagement has 'built economic links resulting in trade, investment and tourism' and has 'enhanced Ireland's profile and reputation internationally' and noting the 'structured engagement with the Diaspora geared towards economic development, through the Global Irish Network and Global Irish

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[188] United Kingdom, 'Paying a Fairer Share: A Consultation on Residence and Domicile' (HMSO, December 2007) para 1.

[189] United Kingdom, 'Statutory Definition of Tax Residence: A Consultation' (HMSO, June 2011) paras 1.6 and 1.9.

[190] See the Information note entitled 'Citizenship-based Taxation' from Liam Smith, Capital and Savings Taxation Policy, Department of Finance to Derek Moran, Assistant Secretary, Budget, Taxation and Economic Division, Department of Finance dated 5 March 2009 in appendix A.2(c)(i). This point was repeated in Tax Strategy Group, 'Residence Issues' (Department of Finance, 18 September 2012) <http://www.finance.gov.ie/sites/default/files/12-02-Residence-issues.pdf> accessed 19 May 2014 para 5.2.1.

Economic Forum' since the beginning of the recent economic crisis in 2008. One of the issues specifically considered in the review was the 'role of the Diaspora in social and economic development in Ireland'.[191] Any solution to the tax exile problem that imposed a new, or additional, tax burden on members of the Irish diaspora might operate to undermine efforts to foster greater social and economic links with the Irish abroad. Submissions to the Consultation on Residence in 2012 also highlighted the importance of ensuring that any change to the definition of residence for tax purposes in order to address the tax exile problem did not 'impact on genuine commercial situations where individuals are assigned abroad either to generate new business opportunities for the Irish company or to gain more experience/skills overseas' or give rise to 'unintended and undesirable complexities for the Irish Diaspora'.[192]

Thirdly, as stated in the public consultation on residence, any proposal to address the tax exile problem will need to have due regard to the 'need to ensure that Exchequer tax yields are not undermined'.[193] Non-residents with economic interests in Ireland do pay tax here, though in many cases these investments are likely to be made through corporate vehicles, and so corporation tax rather than income tax or USC might be paid. As pointed out in section 5.2(c)(ii) above, responses to the author's FOI requests in relation to the domicile levy show, from 2010 to 2012 there were only nine non-residents with Irish assets worth more than €5 million and a worldwide income in excess of €1 million who paid less than €200,000 in income tax.[194] In addition non-residents who are regularly physically present in Ireland and have social and family connections here are likely to pay indirect taxes in Ireland. Other figures obtained by the author in response to FOI requests show that in each of the years 2006 and 2007, the only years for which figures are available, the forty (forty-two in 2007) non-resident individuals whose tax affairs were dealt with by the

[191] Department of Foreign Affairs, 'Review of Ireland's Engagement with the Diaspora Consultation Paper' (Department of Foreign Affairs, 18 March 2014) <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/Review-of-Irelands-Diaspora-Strategy-Consultation-2014.pdf> accessed 19 May 2014.

[192] Submission of the Irish Taxation Institute to the Department of Finance Public Consultation on Tax Residence Rules (1 August 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Mary-Healy-Irish-Tax-Institute.pdf> accessed 19 May 2014, 6 and 7.

[193] Department of Finance, 'Public consultation on tax residence rules' (n 182)

[194] The figures for 2013 are not yet available.

HWI unit paid a total of €8 million in Irish income tax, which amounted to 18 per cent of the total income tax paid by all non-residents.[195]

It is the view of some tax practitioners that a number of individuals will tailor their circumstances to ensure that they are non-resident for tax purposes regardless of what changes are made to the law to address the tax exile problem, including severing all ties with Ireland if necessary.[196] This appears to have been the experience in the United States, where a requirement to formally renounce one's US citizenship and to limit one's visits to the US to fewer than thirty days per year was not effective in deterring tax motivated expatriation and prompted further legislative changes and recent proposals for yet further amendments.[197] Even under the current regime, expatriates are limited in the time they can spend in the United States by the requirement to obtain a visa to enter the country and the limits that apply depending on the type of visa obtained. They may even be denied re-entry to the US, and yet the numbers expatriating have increased significantly in recent years.[198]

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[195] See appendix A.2(e)(i). In 2006, 5,993 non-resident individuals filed Irish tax returns and paid a total of €44.5 million in Irish income tax (see Dáil Deb 19 January 2010, vol 699, col 201-02). In 2007, 7,229 non-resident individuals paid a total of €43 million in Irish income tax (see appendix A.2(a)(xi)).

[196] See for example Submission of the Irish Taxation Institute to the Department of Finance Public Consultation on Tax Residence Rules (n 184); Submission of Mazars to the Department of Finance Public Consultation on Tax Residence Rules (n 185). See also John Burns, 'How millionaire exiles were given an easy way out' *The Sunday Times* (Dublin, 21 February 2010) detailing comments to this effect made at a meeting between representatives of PricewaterhouseCoopers and officials of the Department of Finance in November 2009.

[197] 26 USC § 877(g) was introduced by the American Jobs Creation Act of 2004, Pub L No 108-357, 118 Stat. 1571 (2004) and reduced the number of days an former US citizen could spend in the country and remain outside the tax net to a maximum of thirty days per year, though an additional thirty days was allowed for individuals employed by an unconnected company. Further legislation was introduced in 2008 (Heroes Earnings Assistance and Relief Tax (Heart) Act of 2008, Pub L No 110-245, 122 Stat 1624 (2008)) and yet further proposals were recently introduced (the Ex-PATRIOT Act, see chapter 1.

[198] The so-called 'Reed amendment' (Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub L No 104–208, 110 Stat. 3009-546 (1996) inserting 8 USC § 1182(a)(10)(E)) provided that individuals who are determined by the Attorney General to have renounced United States citizenship for the purposes of avoiding taxation should not be readmitted to the US, though it appears that no regulations to implement the provision were never introduced by the Attorney General and it has never been applied. (see David Buss, David Hryck and Alan Granwell, 'The U.S. Tax Consequences of Expatriation: Is It a Tax Planning Opportunity or a Trap for the Unwary?' (2007) 85(8) Taxes – The Tax Magazine 7). A similar proposal was contained in the Ex-PATRIOT Act in 2012 but the bill was defeated (see chapter 1). A former citizen could be refused access on the grounds of failing to rebut the presumption that he is in immigrant (ie not an alien having a residence in a foreign country which he has no intention of abandoning) (8 USC §1101(15) and § 1184(b)). Figures published in the Federal Register in accordance with 26 USC § 6039G show that the number of individuals renouncing their passports has increased from fewer than three hundred in the whole of 2008 to over one thousand in the first quarter of 2014, though the number of those considered to be doing so for tax reasons is not made available (see United States, 'Quarterly Publication of Individuals Who Have Chosen to Expatriate' (2014) 79 Federal Register 25176). Recent high-profile wealthy expatriates include Eduardo Saverin

If a solution to the tax exile problem caused some of the current tax exiles to reduce or sever their economic and social links with Ireland, this would result in a loss to the exchequer of the Irish direct and indirect taxation, and possibly the domicile levy, already paid by them. There would also be wider ramifications, as in addition to taxation paid to the exchequer, many of those publicly named as tax exiles, and presumably at least some of those who are tax exiles but who have not been so identified, also provide a variety of other economic and social benefits to Ireland. Some of these individuals have made significant investments in Irish businesses, which in turn provide employment and contribute pay-related social insurance (PRSI) on behalf of those employees, pay corporation tax and contribute to the wider Irish economy through the consumption of Irish goods and services. For example, Denis O'Brien is the largest individual investor in Aer Lingus and in Independent News and Media, is the owner of the Irish-based Communicorp Group which owns and manages radio stations and other media and broadcasting companies in Ireland and Europe and he has investments in many other Irish companies, including many start-up ventures.[199] Michael Smurfit is the largest individual shareholder and the former chief executive and chairman of the Irish-based multinational packaging company Smurfit Kappa plc, and has investments in many Irish companies, including four recent start-ups. He is credited with investing in over seventy Irish companies during the economically difficult years that preceded the 'Celtic Tiger' era of the late 1990s and early 2000s.[200] John Magnier's Coolmore stud farm in Co Tipperary has been previously been estimated to be worth €4 billion.[201] If wealthy individuals were to sever their economic ties with Ireland in response to a solution to the tax exile problem, future investments of this type might be made abroad rather than in Ireland, and

(see n 100) and Denise Rich (see Siobhan Hughes, 'Denise Rich Gives Up U.S. Citizenship' *Wall Street Journal* (New York, 9 July 2012)).

[199] See for example Editorial, 'O'Brien lifts stake in Aer Lingus' *Sunday Business Post* (Dublin, 2 June 2012); John McManus, 'Australians in little doubt on O'Brien control of INM' *Irish Times* (Dublin, 24 February 2014); Editorial, 'Denis O'Brien: a complicated career and dubious ethics' *The Village* (Dublin, 14 December 2011); Siobhán Creaton, 'O'Brien's loans to struggling radio group hit €94.4m, accounts reveal' Irish Independent (Dublin, 21 November 2011); Richard Curran, 'O'Brien silent on possible Portugal stay' Irish Independent (Dublin, 18 October 2002).

[200] See for example Justine McCarthy, 'What's up, Doc?' *Irish Independent* (Dublin, 22 June 2002); Tom Lyons, 'Smurfit predicts recovery as Noonan "proves his mettle"' *Irish Times* (Dublin, 4 April 2014); John Walsh, 'Smurfit predicts strong recovery over next 5 years' *Irish Examiner* (Cork, 4 April 2014).

[201] John Reynolds and Nick Webb, '€4bn value put on Magnier's Coolmore Stud' *Sunday Independent* (Dublin, 30 March 2008).

businesses currently based in Ireland might be moved overseas. If the government's stated policy in addressing the tax exile problem is to ensure the continued promotion of Ireland as a location for inward investment, then careful consideration ought to be given to the potential loss of existing investment, or future investment, by tax exiles themselves.

In addition to the tangible economic return to the Irish economy from investment in domestic businesses by tax exiles, many provide other valuable economic and social benefits. For example, Sir Anthony O'Reilly was a co-founder of the Ireland Fund (later the Ireland Funds) which has raised in excess of $100 million to promote peace and culture on the island of Ireland and to which he has made significant personal contributions. He has also given money towards the establishment of the John and Aileen O'Reilly Library at Dublin City University, the O'Reilly Hall in University College Dublin and the O'Reilly Institute in Trinity College Dublin, together with providing annual scholarships for Irish students through the O'Reilly Foundation and making various other contributions to Irish education.[202] Michael Smurfit has contributed towards the Michael Smurfit Graduate Business School in University College Dublin and has made many other contributions to Irish educational establishments, including an estimated donation of £2 million to University College Dublin and the National University of Ireland, Galway in 1989 alone.[203] Mr Smurfit is also credited with bringing the 2006 Ryder Cup to the K Club, the golf course which he founded, generating an estimated benefit of €143 million for the Irish economy.[204] Denis O'Brien was the chairman of the 2003 Special Olympics World Summer Games which were held in Ireland, and was instrumental in raising the €60 million needed to host the games, including making a large personal donation. He is the founder of the Iris O'Brien charitable foundation, chairman of the Irish-based charity Front Line

[202] See Colman Cassidy, 'Dr Tony O'Reilly Knighted for services to North' *Irish Times* (Dublin, 30 December 2000); Carol Coulter, 'O'Reilly gives $5m to Ireland Funds' *Irish Times* (Dublin, 25 January 1997); Editorial, 'O'Reilly Library officially opened' *Irish Independent* (Dublin, 9 May 2007); Editorial, 'Anger over wealth as a corrupt "political class" promotes pay inequality' *The Southern Star* (Cork, 13 October 2007); John Walshe, 'The best and brightest our nation has to offer' *Irish Independent* (Dublin, 22 March 2007); Jim Dunne, 'O'Reilly gives $1/4m for Jewish studies' *Irish Times* (Dublin, 16 May 1997) respectively.

[203] John Maher, 'Outstanding business career under a cloud' *Irish Times* (Dublin, 21 September 1991).

[204] See Fiona Gartland, 'Despite weather, Ryder Cup overfloweth to £15 million profit' *Irish Times* (Dublin, 25 September 2006); Charlie Mulqueen, 'Ryder Cup injected €143m into economy' *Irish Examiner* (Cork, 27 April 2007); Sean Farrell, 'Smurfit biography reveals making of a tycoon' *Irish Independent* (Dublin, 5 April 2014).

Defenders, a director of the charity Concern and, according to the chief executive of the Irish branch of the charity Barnardo's, has made charitable donations of 'far more — a multiple, probably — of the tax he didn't pay on the Esat transaction' which amounted to more than €55 million.[205] Mr O'Brien also contributed half of the annual salary of €1.2 million of the former manager of the Republic of Ireland football team Giovanni Trapattoni, and makes a similar contribution towards the salary of the current manager, and has contributed towards the cost of bringing rugby player Johnny Sexton back to Leinster from France.[206] JP McManus donated €5 million towards the Kemmy Business School in the University of Limerick and a further €30 million in scholarships to Irish students to enable them to attend university.[207] He made a binding offer to contribute £50 million towards the building of a national stadium, though the project did not proceed.[208] The JP McManus Invitational Pro-Am charity golf event which has been held in Ireland every five years since 1990 is estimated to have raised more than €95 million for charities in the mid-West region of Ireland, and Mr McManus is said to have personally donated €140 million to Irish charitable causes and sporting organisations.[209] If a solution to the tax exile problem were to cause tax exiles to sever, or significantly reduce, their social and economic links to Ireland, this could result in a substantial loss to Irish educational, sporting and charitable bodies. Indeed, there is evidence that to some extent this may have already occurred, with the announcement that the 2015 JP McManus Invitational Pro-Am will not take place as Mr McManus is unable to spend a sufficient amount of time in Ireland because of the

[205] See Siobhán Creaton, *A Mobile Fortune: The Life and Times of Denis O'Brien* (Aurum Press 2010) 179-180 and 220-228; Fergus Finlay, 'Give Denis O'Brien an Ireland shirt and show his critics the red card' *Irish Examiner* (Cork, 19 February 2008); Justine McCarthy, 'O'Brien ensures Moriarty can't fail to spot his luck' *The Sunday Times* (Dublin, 24 January 2010); Editorial, 'Denis O'Brien: a complicated career and dubious ethics' *The Village* (Dublin, 14 December 2011); Fergus Finlay, 'Nobody should be admired for their philanthropy if they are tax exiles' *Irish Examiner* (Cork, 10 April 2012).

[206] See Tom Humphries, 'Word class as Delaney leaves us awed' *Irish Times* (Dublin, 14 February 2008); Editorial, 'O'Brien to make funds available for new manager' *Irish Times* (Dublin, 11 September 2013); Malachy Clerkin, 'Is there no end to Denis O'Brien's intervention in Irish sport?' *Irish Times* (Dublin, 18 September 2014).

[207] See Eugene Hogan, 'Tax exile's gift turns up ironic twist' *Irish Independent* (Dublin, 20 December 2005); Niall Murray, 'McManus to fund scholarships with €30m scheme' *Irish Examiner* (Cork, 20 March 2008); John Downes, 'Minister praises McManus's funding of third-level scholarship scheme' *Irish Times* (Dublin, 21 March 2008).

[208] See Dáil Deb 11 April 2000, vol 517, col 1218-21; Editorial, 'Gambler JP to stake £50m in giant stadium' *Irish Independent* (Dublin, 15 October 1998); Róisín Ingle, 'From betting shillings to millions, then giving it away' *Irish Times* (Dublin, 17 October 1998).

[209] See Kathryn Hayes, 'McManus insists he is serving State better from abroad' *Irish Times* (Dublin, 21 November 2011); Editorial, 'Profile: JP McManus' *The Sunday Times* (Dublin, 27 November 2011).

Irish tax residency rules. The loss to local charities has been estimated to be approximately €60 million.[210]

Some individuals who have been described as tax exiles also engage in activities that promote trade and investment in Ireland. For example, Dermot Desmond is credited with being the driving force behind the establishment of the International Financial Services Centre in Dublin which is now the location of more than five hundred firms who pay over €1 billion in corporation tax and over €900 million in payroll taxes on behalf of their more than 35,000 employees, and for which he was awarded the 2012 Outstanding Contribution to Ireland Award at the Business & Finance Awards as well as several other honours.[211] Denis O'Brien was instrumental in setting up Ireland Inc and the Irish American Business Association, which promotes investment in Irish businesses.[212] Some of those described as tax exiles also spend significant amounts of money in the Irish economy. Michael Flatley is said to have spent €30 million in restoring his home in Ireland, and JP McManus is said to have spent €120 million on building his, and paid €4.5 million to purchase a 145-acre estate in Co Limerick as a wedding present for his daughter.[213]

Clearly, one of the purposes of any solution to the tax exile problem is to raise additional revenue for the exchequer either by deterring individuals from becoming tax exiles in the future or by subjecting at least some of those who are currently non-resident for taxation purposes to a greater liability to Irish taxation. As noted in the 2012 public consultation on residence any such solution must ensure that its overall effect does not result in exchequer yields being undermined, whether as a result of tax

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[210] See Jimmy Woulfe, 'Cancelled golf event means "€60m loss"' *Irish Examiner* (Cork, 17 January 2014); Editorial, 'Former mayor bids to help JP McManus stay in Ireland a bit longer' *Irish Examiner* (Cork, 13 March 2014).

[211] See Michael Buckley, 'Haughey's determination the driving force behind IFSC' *Sunday Business Post* (Dublin, 18 June 2006); Financial Services Ireland, 'The IFSC: the international financial services sector in Ireland' (Financial Services Ireland, September 2010) <http://www.fsi.ie/Sectors/FSI/FSI.nsf/vPages/Media_and_Publications~Publications~fsi-accenture-ifsc-report/$file/FSI-Accenture+IFSC+Report.pdf> accessed 19 May 2014; Editorial, 'FS 50: Dermot Desmond, International Investment & Underwriting (IIU)' *Business and Finance* (20 June 2012); Ciarán Hancock, 'Employment at Dublin's IFSC increases 6.7% to 35,698' *Irish Times* (Dublin, 4 April 2014).

[212] Niamh Sweeney, 'Green aplenty for Ireland Day at NYSE' *Irish Times* (Dublin, 20 March 2012).

[213] Ralph Riegel, 'Lord of the Dance Michael Flatley chased rhino horn thieves in sports car' *Belfast Telegraph* (Belfast, 29 January 2014); Editorial, 'Profile: JP McManus' *The Sunday Times* (Dublin, 27 November 2011); Barry Duggan and Catriona Murphy, 'JP McManus's daughter shells out millions on lavish new home' *Irish Independent* (Dublin, 22 October 2009).

exiles severing their economic connection or otherwise. In evaluating the effect of any solution to the tax exile problem, the wider economic and social costs of wealthy individuals severing their connections to Ireland should also be considered. Of course, even if it were determined that the economic cost of a solution to the tax exile problem exceeded the economic gains accruing from it, it may still be decided that the solution should be implemented, possibly on the grounds that it addresses a perceived breach of fairness in the tax system. However, such a decision could only properly be reached if a solution had been subjected to a comprehensive cost-benefit analysis, ideally by the Department of Finance or Revenue Commissioners, who have access to the requisite taxpayer information which is not publicly available. Comprehensive FOI requests made by the author to these two bodies revealed no records of any analysis of the costs associated with any potential solution to the tax exile problem, indicating that such an analysis has neither been carried out by these bodies, nor has the relevant information to enable such an analysis been provided to any other individual, group or government agency.[214]

5.4 Summary and conclusions

Despite the prevalence of its discussion in the public discourse, and the fact that it remains firmly on the legislative agenda of the current government, there has been virtually no analysis, academic or otherwise, of the extent of the tax exile problem in Ireland. In contrast, the issue has generated a considerable amount of academic debate in the United States, and this chapter has sought to draw on this work, together with a detailed analysis of parliamentary debates, media and political commentary and materials obtained in response to the author's FOI requests, in order to make a first step towards addressing this lacuna by examining the extent of the problem in Ireland, and the difficulties in establishing its extent, and by identifying the policy considerations that must be balanced in formulating any solution to the problem.

[214] See appendix A.1.

The tax exile problem is not a new, or even particularly recent, phenomenon in Ireland. In fact, of the nine living individuals who are regularly described in the Irish media as tax exiles, four left Ireland more than two decades ago, and the individual most frequently referred to as a tax exile left in 2000.[215] With the exception of some isolated commentary, tax exile was not widely discussed, nor was it treated as a problem in the public discourse, prior to 2003, and it has only formed part of the agenda of political parties since that time. As has been argued, the changes to the definition of residence for tax purposes in the Finance Act 1994 have facilitated tax exile as a phenomenon, and no doubt changes to the cost, availability and ease of travel and communication have also played a role.[216] However, while these factors may help to explain the emergence of tax exile as a phenomenon, they all predate its emergence as an issue in Ireland by a considerable period of time. It has been said that 'every government knows that capital is evading taxation, but the situation is quietly ignored unless and until it becomes egregious enough to stir the public consciousness'.[217] With regard to the tax exile problem, it seems that the stirring of the public consciousness, and the identification of the issue as egregious, occurred in late 2003.

This chapter has identified that the extent of the tax problem in Ireland, at least as regards the number of individuals who are tax exiles, and the number of such individuals who are extremely wealthy, has been consistently overstated to a significant degree, both by media and other commentators and by politicians. This has occurred notwithstanding attempted clarification by government officials and the availability of information which demonstrates that the stated numbers are wildly inaccurate. Measuring the extent of the tax exile problem is fraught with considerable practical difficulties, in addition to several theoretical ones such as how one establishes whether an individual's intention in moving abroad was to reduce to avoid exposure

[215] See section 5.2(b). Sir Anthony O'Reilly left in 1969 (see Elaine Lafferty, 'O'Reilly departs Heinz as boom times seem a thing of the past' *Irish Times* (Dublin 15 September 2000)); Michael Smurfit left in the late 1980s (see John Maher, 'Outstanding business career under a cloud' *Irish Times* (Dublin, 21 September 1991)); Dermot Desmond left in 1993 (see Matt Cooper, 'Desmond is reappointed chairman of NCB brokers' *Irish Independent* (Dublin, 31 March 1994)); JP McManus left in 1993 (see Damien McElroy, 'Peak to cap it: National send off for exile McManus' *Irish Independent* (Dublin, 4 April 1994)); Denis O'Brien left in 2000 (see *O'Brien v Quigley* [2013] IEHC 398).

[216] See Kirsch (n 60) 466 for a discussion of how exile does not represent the isolation from home that it once did.

[217] Allison Christians, 'Networks, Norms and National Tax Policy' (2010) 9 Washington University Global Studies Law Review 1, 23, fn 106 citing Charles I Kingson, 'The Great American Jobs Act Caper' (2005) 58 Tax Law Review 327 (though the wording is that of Christians).

to Irish taxation and how one estimates the extent of the resulting inequity in the tax system. While an accurate estimate of the number of tax exiles is virtually impossible to compile using publicly available materials or materials obtained in response to FOI requests, this chapter has sought to demonstrate that the number of wealthy Irish tax exiles is unlikely to exceed thirty to forty individuals.

Any solution to the tax exile will need to take into account of a number of considerations, not least of which is ensuring that any additional tax revenue generated is not outweighed by the economic and social costs of some individuals further diminishing, or even severing, their ties with Ireland. This chapter has identified that such costs may significant.

In a 2007 public consultation into residence and domicile the UK Treasury admitted that 'HMRC has no reliable means of knowing' how much foreign source income and gains accrued to resident but non-domiciled individuals, and that 'HMRC cannot estimate it, let alone with any precision. The difficulties of trying to establish this figure are such that the Government has not routinely sought to make an estimate of it'. Of an estimate made in 2003 using the information available to Revenue, it further commented that the 'lack of administrative or other official data on the very wealthy' which are in any event 'inherently subject to very wide margins of uncertainty' and 'the need to use sources where we know little about how they were constructed, and the very many assumptions and judgements that need to be made on top of that' meant that it was 'not a robust estimate of the sort required for policy making'.[218] This chapter has identified that in Ireland no comprehensive investigation into the extent of the tax exile problem, and no cost/benefit analysis of any potential solutions to the problem, have been carried out by the Revenue Commissioners or the Department of Finance or by any other individual or body on their behalf. Thus it appears that there are no data available, robust or otherwise, which could inform the policy choices needed to formulate a solution to the tax exile problem. Since it appears that the tax exile issue remains firmly on the legislative agenda, with a public consultation and recommendations for legislative change from the Tax Strategy Group

[218] United Kingdom, 'Paying a Fairer Share: A Consultation on Residence and Domicile' (HMSO, December 2007) paras B.6 and B.12.

to government in 2013, it is suggested that the government should take no further action until such an analysis has been carried out.

Of course, merely because the number of wealthy tax exiles is not large, and because there may be costs associated with any solution does not of itself suggest that tax exile is an issue that ought not to be addressed. As journalist Martin Wolf observed in relation to the taxation of non-domiciled individuals on the remittance basis in the United Kingdom:

> If we take the principle that successful people are too important and too mobile to pay tax to its logical conclusion, political community will collapse ... [T]he case for a simple, neutral and stable fiscal system, which taxes the worldwide incomes of all long-stay residents on the basis of ability to pay, is overwhelming. As soon as one departs from that principle one enters in a maze of special pleading or invidious distinctions ... If the application of that great principle means some rich people leave the country, so be it.[219]

[219] Martin Wolf, 'Leona Helmsley is alive in Britain' *Financial Times* (London, 7 March 2008).

CHAPTER 6

SOLVING THE TAX EXILE PROBLEM

Take notice, I have cut the throats of all my horses – I have shot all my dogs – I have burned all my carriages – I have dismissed all my servants except my wife, and therefore, I conceive that I cannot be liable to any assessment whatever ...

Letter reputedly written by an Irishman in the early 1700s
Quoted in Harold M Groves, *Tax Philosophers: Two Hundred Years of Thought in Great Britain and the United States* (Donald J Curren ed, University of Wisconsin Press 1974)

6.1 Introduction

This chapter will examine the legislative measures which have been introduced thus far in an attempt to address the tax exile problem. These measures are considered from a variety of perspectives. First, an examination of the connecting factors employed and whether they distinguish between long-term and short-term connection to Ireland, and an assessment of their effectiveness or otherwise in measuring membership of Irish society for the purposes of direct taxation. Secondly, the effect of the measures on the three key policy considerations identified in chapter 5: attracting foreign direct investment, not targeting 'genuine emigrants' unnecessarily and addressing the tax exile problem itself are considered. Finally, the effectiveness of the measures in solving the tax exile problem is discussed. These questions have to date received virtually no academic consideration or commentary, and, when they have been discussed at all, the measures appear to have been considered only in respect of outlining their practical operation. The chapter draws on documents released to the author in response to requests to the Revenue Commissioners and Department of Finance pursuant to the Freedom of Information Act 1997, as amended by the Freedom of Information Act 2003 ('FOI material'), which has not previously been made public.

6.2 Ireland's approach to the problem to date

6.2(a) The 'Cinderella rule'

As outlined in chapter 4, when the statutory definition of residence was introduced in Ireland in 1994 it was provided that an individual was not to be considered present in Ireland for a day unless he or she was present here at the end of that day (ie at midnight). Originally it had been intended that presence in Ireland at any time during a day would be considered to be presence for that day for tax purposes, but the Finance Bill was amended at the report stage because of a concern expressed by Ivan Yates TD that Irish people returning to Ireland during the year might not make their visits on consecutive days, and that if 'someone came home at 11 p.m. and left the country again at 6 a.m. the next morning that would count as two days', which, he suggested, would be unfair.[1] As early as 1996 it was noted that as a result of this rule, and the geographical convenience of the United Kingdom, tax exiles could 'spend their days hopping between the two jurisdictions',[2] and by 2003, when the tax exile issue had become firmly placed on the political agenda, this had become known as the 'Cinderella rule'.[3] The rule was a source of regular complaint in the media and by politicians, in particular that it enabled wealthy individuals who had private jets to spend an unlimited amount of time in Ireland provided they had left the country by midnight on a sufficient number of occasions.[4] The artificiality of such an arrangement was also emphasised, with Joan Burton TD noting that

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[1] Select Committee on Finance and General Affairs Deb, 6 May 1994.

[2] Martin Fitzpatrick, 'Tax exiles lead the merry lives of Windsor' *Sunday Independent* (Dublin, 29 January 1996).

[3] Labour Party leader Joan Burton claims to have coined this phrase (see Dáil Deb 26 January 2011, vol 727, col 716) and she appears to have been the first to use it in the Dáil in December 2003 (Dáil Deb 3 December 2003, vol 576, col 450). The earliest reference the present author can find to the phrase in print is in an article of 27 November 2003 (Mark Hennessy, 'Revenue to bring in new measures on tax exiles' *Irish Times* (Dublin, 27 November 2003)), reporting a parliamentary question asked by Deputy Burton seeking information on 'the way in which persons claiming to be non-resident for tax purposes are monitored by the Revenue Commissioners in respect of spending fewer than 183 days in one year in the jurisdiction, spending fewer than 270 days over two years in the jurisdiction and day time visits by such persons not involving being in the jurisdiction at midnight; and the estimated number of such persons' (Dáil Deb 25 November 2003, vol 575, col 590). Although Deputy Burton did not use the phrase during this parliamentary question, she may have subsequently used it in conversation with the journalist who wrote the article, though this is not recorded in the article itself.

[4] See for example the comment by Joan Burton TD in Select Committee on Finance and the Public Service Deb 24 February 2004, 'They have their private jets at various airports around the State. Once they leave by midnight, in effect it does not matter how many days they spend in the country'. See also Dáil Deb 6 May 2004, vol 585, col 82; Joint Committee on Finance and the Public Service Deb 10 November 2004; Mark Hennessy, 'Revenue to bring in new measures on tax exiles' *Irish Times* (Dublin, 27 November 2003); Marie O'Halloran, 'Moving one-third into top tax band "biggest stealth tax"' *Irish Times* (Dublin, 4 December 2003); Susan Molloy, 'Revenue keeping an eye on tax exiles TDs told' Irish Independent (Dublin, 11 November 2004); Paul O'Brien, 'Identifying tax exile numbers

> [w]hen the Cinderella clause came in approximately 18 years ago ... most very wealthy people in Ireland then did not have personal helicopters to take a little ride out over Lambay island or Howth Head out of the jurisdiction for a couple of hours and then hop back again[5]

The definition of 'resident' in the Taxes Consolidation Act 1997 (TCA) was amended in 2008 to provide that henceforth an individual would be 'deemed to be present in the State for a day if the individual is present in the State at any time during that day', a move that was broadly welcomed.[6] Minister of Finance Brian Lenihan described the reason for the amendment as being the view that 'some wealthy individuals are organising their affairs to ensure they are not resident in Ireland to avoid paying tax on their worldwide income or capital gains, especially those who have access to private aircraft which enable them to enter and exit the State with some ease',[7] and Martin Mansergh TD noted that the rule had been 'excessively elastic' and stated that the change would 'mainly affect high-wealth individuals who can fly into the State in the morning and fly back out by midnight', but would not 'affect cross-Border workers who are employed in the State'.[8]

As noted in chapter 4, the remittance basis of taxation had ceased to apply to employment income in 2006, and so a foreign worker who had been posted to work in Ireland would have been subject to Irish income tax on his or her employment income whether he or she was resident here or not. Further, the majority of such workers are not likely to have been entering and leaving Ireland with sufficient regularity, and

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"impossible"' *Irish Examiner* (Cork, 3 October 2005); Liam Reid, 'Revenue to carry out residency audits on tax exiles' *Irish Times* (Dublin, 8 March 2006);

[5] Dáil Deb 26 January 2011, vol 727, col 716. See also Deputy Burton's comment in Select Committee on Finance and the Public Service Deb 22 February 2006 that 'Recent statistics suggest that, alongside the United States, Ireland now has the largest number of private helicopters. According to the midnight or Cinderella rule, somebody who leaves before midnight is not counted as being here for a full day. However, we do not know the length of time a person must spend outside the jurisdiction. Do they take a twirl over the Irish Sea for half an hour or do they quit the territory?'.

[6] TCA 1997, s 819(4)(b) as inserted by Finance (No 2) Act 2008, s 15, with effect from 1 January 2009. For media and political response, see Dáil Deb 25 November 2008, vol 668, col 457; Dáil Deb 26 November 2008, vol 668, cols 837, 841, 846-47; Fionnan Sheahan, 'Midnight fairytale over as Cinderella clause abolished' Irish Independent (Dublin, 21 November 2008); Matt Cooper, 'Revenue crackdown won't tax Irish exiles' *The Sunday Times* (Dublin, 23 November 2008); Cliff Taylor, 'High earners in the line of fire' *Sunday Business Post* (Dublin, 13 December 2009).

[7] Select Committee on Finance and the Public Service Deb 9 December 2008.

[8] Dáil Deb 25 November 2008, vol 668, col 493.

therefore present here during a day but not at midnight on that day, for a sufficiently large number of days for the abolition of the Cinderella rule to have had any effect on their residency status. As a result, it seems unlikely that the abolition had any effect on the ability to attract FDI to Ireland, and there do not appear to have been any comments or representations regarding any such effect following the amendment. While it seems likely that an individual living in Ireland and commuting abroad for work would not have been affected by the change in the definition of residence, since such individuals would have been present in Ireland at midnight on most days in which they were present here at all, it seems likely that Deputy Mansergh's comment that individuals in the converse situation, 'cross-Border workers' employed in the State, would not be affected by the change was not accurate. Such individuals are likely to be present in Ireland but absent at midnight on a large number of days during the year, and it seems likely that many who had previously not been resident in Ireland prior to the amendment would have become resident as a result of it. This would not have changed the liability of such individuals to Irish tax on their employment income, which would have been taxable here anyway, but may have affected their liability to tax on other Irish income (such as dividends from Irish companies), subject to any relief under a double taxation agreement (DTA).[9]

Deputy Yates' motivation for proposing the Cinderella rule in 1994 was to enable individuals to return to Ireland regularly without having their day of arrival and day of departure both taken into account in determining their residency status for tax purposes. While some genuine emigrants may have been affected by the change in 2008, considering that individuals can spend up to 139 days in Ireland per year on an ongoing basis without being resident here, it seems unlikely that this change would have had an effect on most such individuals.

As noted in chapter 5, a series of audits of wealthy non-resident individuals in 2005 by Revenue's High Worth Individual (HWI) unit concluded that 'all the

[9] TCA 1997, s 153(4) provides that an individual who is neither resident nor ordinarily resident in Ireland and who is resident in a country with which Ireland has a DTA, is not liable to Irish income tax, pay related social insurance (PRSI) or the universal social charge (USC) on dividends paid by Irish resident companies. An individual who was commuting to Ireland for work but not resident here would thus have been exempt from Irish tax on Irish dividend income prior to the abolition of the Cinderella rule, but, if he or she was resident following the amendment would lose such exemption. There may also have been other tax consequences for such an individual.

taxpayers under audit had taken particular care to document their movements in and out of the State and to ensure that the rules were not breached', and that in some cases 'a specific member of the taxpayer's staff had responsibility for monitoring that taxpayer's travels to ensure that the taxpayer did not breach the residence rules'.[10] Considering that these individuals were controlling the extent of their physical presence in Ireland to ensure that they did not become resident here, and that at least some of these individuals are likely to be wealthy enough to own private jets or helicopters, or to at least be able to afford to fly in and out of Ireland regularly, it seems likely that the abolition of the Cinderella rule will have had an effect on some individuals who are considered to be tax exiles. There does not appear to be any evidence of individuals who have been publicly described as tax exiles returning to live in Ireland since 2008, so it is not unreasonable to assume that these individuals have simply adjusted the extent of their physical presence in Ireland in order to continue to remain non-resident. The economic effect of any such reduction in physical presence in Ireland by these individuals is impossible to estimate,[11] though it has been reported that the 2015 JP McManus Invitational Pro-Am will not take place as Mr McManus has stated that he is unable to spend a sufficient amount in Ireland because 'an overnight at his home in Martinstown now counts for two days in this country'. It has been estimated that the cancelling of the event will result in a loss of approximately €60 million to Irish charities.[12] Whether the abolition of the Cinderella rule has dissuaded individuals who might otherwise have considered going into tax exile from leaving Ireland is impossible to tell, though it seems unlikely.

The argument has already been advanced in chapter 4 that Ireland's statutory definition of residence does not provide an effective measure of membership of Irish society for tax purposes, and it is further criticised for facilitating the tax exile problem as a result of being manipulable and permitting an individual to maintain significant personal and economic connections to Ireland, and significant physical presence here,

[10] Letter from Frank M Daly, chairman of the Revenue Commissioners to Brian Cowan, Minister for Finance, dated 15 February 2005 in appendix A.2(f)(i). See also the comments of Revenue chairman Frank Daly in Committee of Public Accounts Deb 20 October 2005 and Simon Carswell, 'Large Cases Division – HWIs and audits of non-residents' *Sunday Business Post* (Dublin, 28 May 2006).

[11] No estimates of any resulting increase in exchequer revenues were provided by the government, or requested by the opposition, during the debate of the measure in the Oireachtas.

[12] Jimmy Woulfe, 'Cancelled golf event means "€60m loss"' *Irish Examiner* (Cork, 17 January 2014). See also Editorial, 'Former mayor bids to help JP McManus stay in Ireland a bit longer' *Irish Examiner* (Cork, 13 March 2014).

while remaining non-resident. The abolition of the Cinderella rule does not improve Ireland's definition of residence as a measure of membership of Irish society, as it remains based solely on physical presence here for a relatively high number of days in a particular year. It has, however, made it less easy to manipulate and has effectively reduced the level of physical presence possible for tax exiles, which does represent some improvement in this regard.

6.2(b) Temporary non-residence for capital gains tax (CGT) purposes

In 2003 a provision was introduced to address a method of avoidance of Irish capital gains tax (CGT) that had been identified by Revenue. This involved an individual becoming resident *in*, and a resident *of*, a country with which Ireland had a double taxation agreement (DTA), disposing of assets subject to a minimal CGT liability under the regime in the country in question and no liability to Irish CGT as a result of the provisions of the DTA, and then returning to become resident in and resident of Ireland in a subsequent year. The FOI materials make reference to this method of avoidance having received publicity and a specific example of the operation of the method is demonstrated in relation to an individual moving to Portugal.[13] This is presumably a reference to the sale in December 2000 by telecoms entrepreneur Denis O'Brien of his shares in Esat Telecom to British Telecom for approximately €286 million at a time when he was resident in Portugal and the discussion which this received in the media and from politicians in the following three years.[14] The FOI requests also show that it was felt that there should be a 'deemed disposal of assets on emigration' as this would ensure that a 'charge would be established while the individual concerned was still Irish resident', that is, at a time when the individual was not entitled to relief under a DTA. A tax on significant shareholdings was recommended rather than a 'general exit tax' as the stated objective was to 'to deter or defeat significant tax avoidance trough [sic] temporary emigration without imposing a tax on genuine migration'.[15]

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[13] See the annex to the letter from Joe Stone to Liam Murphy dated 12 November 2002 contained in appendices A.2(b)(iv) to (vii).

[14] See *O'Brien v Quigley* [2013] IEHC 398 for the details of the case in question, and see chapter 5 for a discussion of the media controversy surrounding Mr O'Brien's move to Portugal and the fact the he was not liable to Irish CGT on the sale of his shares. As outlined in chapter 5, there was also some media publicity regarding the sale of shares in Unicare by Martin Bates, Paddy Halligan and David O'Farrell in 2002, who were also said to have moved temporarily to Portugal.

[15] See appendices A.2(b)(iv) and (v).

It was also proposed that the exit charge would be restricted to 'long term residents', as it was felt that it would 'seem inappropriate that it should apply to those who are temporarily resident in Ireland'. Two suggestions for differentiating between long-term and temporary residents were advanced: either 'those who are not domiciled in the State' were to be excluded from the charge, or alternatively one should exclude individuals who were 'resident in the State for, say, at least 10 of the 15 years ending with "emigration"'.[16] This suggests a very broad conception of temporary residence. The proposal appears to have been based on the equivalent United Kingdom legislation which was introduced in 1998 and which applied to individuals who had been resident for four of the seven years prior to 'temporary non-residence'.[17] The legislation uses what is arguably the longer of two proposed long-term connecting factors: domicile.[18]

The legislation provides that where an individual who is resident and domiciled in Ireland and owns more than 5 per cent of the issued share capital of a company, or owns shares in a company with a market value of in excess of €500,000, ceases to be resident in Ireland and disposes of those shares, and then becomes resident again in Ireland, having been non-resident for five years or fewer, then he or she is deemed to have disposed of and reacquired the shares on the last day of the year in which he or she had last been resident. As outlined in chapter 4, an individual will be resident in Ireland if he or she is physically present here for more than 280 days in the current year and previous year combined, unless the individual is present for fewer than 30 days in the current year. As a result, if an individual has been physically present for a significant portion of the previous year, he or she will probably need to depart from Ireland and not return before the end of January in the current year (ie before he or she has been physically present for more than 30 days) in order to avoid being resident in the current year. Since section 29A of TCA 1997 provides that the exit charge will apply where there are not more than five years falling between the

[16] See appendix A.2(b)(vi).

[17] Taxation of Chargeable Gains Act 1992 (UK), s 10A(1)(d) as inserted by Finance Act 1998 (UK), s 127.

[18] TCA 1997, s 29A(2)(c) as inserted by Finance Act 2003, s 69. Domicile is discussed in section 6.2(c) below. As outlined there, it would be possible for an individual to be resident in Ireland for ten years, or for a much longer period, without becoming domiciled here provided that individual had not formed an intention to live here permanently or indefinitely.

year of his or her departure and the year of his or her return, an individual leaving Ireland in February of a particular year may need to be abroad for seven years to avoid the charge.[19]

The provision was barely mentioned during the passage of the 2003 Finance Bill through the Oireachtas, but the FOI material shows that the intention in 'requiring a 5-year period abroad in order to successfully avoid capital gains tax' was that this period was sufficient to 'distinguish between those who genuinely change their centre of personal and commercial interests by emigrating, from those who might temporarily emigrate mainly to avoid tax'.[20] Of course, since Ireland's statutory definition of residence depends solely on physical presence in Ireland, there would be no need for an individual to change his or her centre of personal or commercial interests at all; all that is required is that the individual be physically absent from Ireland for a sufficient number of days each year for a sufficient number of years. However, it does indicate the belief that an individual should be abroad for at least five (in fact six, possibly seven) years before he or she can be said to have left for more than temporarily.

The FOI material reveals that it was recognised that it was 'difficult to estimate the Exchequer gain' from the measure, but it seems that it was viewed as having political merit as it was observed that it 'could be readily presented as closing a tax loophole that has received some considerable publicity recently'. It was also stated that it would 'prevent future Exchequer losses from such arrangements'.[21] The latter hope proved to be in vain, as the provision was easily circumvented. By November 2005 Revenue had become aware of 'two instances (5 individuals involved)' where individuals had transferred shares to their spouses who had ceased to resident in Ireland and become resident *in*, and residents *of*, a country with which Ireland had a DTA.[22] This transfer was exempt from Irish CGT because the individuals in question were married.[23] The non-resident spouses then disposed of the shares to unrelated third

[19] For example, if an individual left Ireland on 1 February 2014 he or she may still be resident in 2014. That individual would need to be non-resident for more than five years – 2015, 2016, 2017, 2018, 2019, 2020, and so could not return to live in Ireland until 2021 (though of course he or she could spend an average of 139 days per year on an ongoing basis and remain non-resident during the intervening period).
[20] See appendix A.2(b)(vi).
[21] See appendix A.2(b)(xii).
[22] See appendices A.2(b)(xxi) and (xxii).
[23] TCA 1997, s 1028(5).

parties and were not liable to Irish CGT on the sale by virtue of the provisions of the DTA. The non-resident spouses then returned to Ireland the following year, but were not subject to tax under section 29A of TCA 1997, as they did not own the shares in question in the last year in which they had been resident in Ireland. The instances in question almost certainly included the *Kinsella* case[24] and may have included the sale of shares in Century Homes by Gerry McCaughey, Gary McCaughey and Jim McBride, which are discussed in chapter 5; in both cases, the spouses in question became resident in Italy.

In response to these cases of circumvention of the legislation, the Finance Act 2006 amended TCA 1997 by providing that the exemption for transfers between spouses would no longer apply where the spouse receiving the asset in question could not be taxed in Ireland on a subsequent disposal of the asset in the same year.[25] A similar provision was introduced for transfers between separate spouses on foot of a deed or court-ordered separation and on foot of a decree of divorce.[26] FOI material reveals that it was felt that there was 'no good reason why capital gains tax should be foregone in a situation where an individual transfers assets to a separate spouse (of [sic] in the case of divorce, a former spouse) who is living in and liable to tax in another jurisdiction'.[27] Presumably it was also felt that where an individual was resident in Ireland but his or her spouse was not, for example where a married person was seconded to work in Ireland, that the exemption for from CGT should not apply.

FOI requests reveal that there are no documents held by Revenue or the Department of Finance relating to section 29A of TCA 1997 being applied or any audits or investigations into the possible application of the provision. However, problems with the legislation remain, and it may well be that it continues to be circumvented in a manner similar to that outlined above. Section 1028(4A) denies an exemption from CGT on a transfer to an individual's spouse if he or she 'could not be

[24] *Kinsella v The Revenue Commissioners* [2007] IEHC 250, [2008] 1 ILRM 337.
[25] TCA 1997, s 1028(6A). A similar provision was introduced for transfers between separate spouses on foot of a deed or court-ordered separation (TCA 1997, s 1030(2A)) and on foot of a decree of divorce (TCA 1997, s 1031(2A). FOI material reveals that it was felt that there was 'no good reason why capital gains tax should be foregone in a situation where an individual transfers assets to a separate spouse (of [sic] in the case of divorce, a former spouse) who is living in and liable to tax in another jurisdiction'.
[26] TCA 1997, s 1030(2A) and TCA 1997, s 1031(2A) respectively.
[27] See appendix A.2(b)(xxii).

taxed in the State for the year in which the acquisition took place' on a subsequent disposal of the asset in question in that year. If an individual were to cease to be resident in Ireland but were to continue to be ordinarily resident here, and to be a resident *of* Ireland under any relevant DTA, then that individual would continue to be entitled to the exemption from CGT on a transfer of shares from his or her spouse.[28] If that individual were to dispose of the shares the following year, when he or she was a resident *of* a country with which Ireland has a DTA, no charge to Irish CGT would arise by virtue of the provisions of that DTA. If that individual were then to return to Ireland and again become resident here in the year following the sale of the shares, section 29A of TCA 1997 would not apply to that individual, as he or she would not have owned those shares in the last year in which he or she was resident before departure.[29]

Although the amendment to section 1028 of TCA 1997 may deny an exemption from Irish CGT on a disposal between an individual who is resident temporarily in Ireland and his or her non-resident spouse, assuming the individual is question is not domiciled in Ireland and the asset in question is not located in Ireland, there would be no liability to Irish CGT unless the proceeds of the disposal were remitted to Ireland.[30] Also, assuming that the individual in question is a resident *of* a country with which Ireland has a DTA, any charge to Irish CGT would most likely be relieved under the provisions of that DTA. As a result, this amendment is not likely to have had any impact on Ireland's ability to attract FDI. Genuine emigrants who left Ireland for non-tax purposes may be subject to the provisions of section 29A of TCA 1997, though the requirement that the individual own 5 per cent of the issued share capital of a company or shares at worth at least €500,000 would exclude many such individuals. The fact that the legislation does not appear to have been implemented

[28] As he or she would still be liable to Irish CGT on a disposal of those shares in that year by virtue of his or her ordinary residence pursuant to TCA 1997, s 29(2).

[29] TCA 1997, s 29A(1)(a) defines 'relevant assets' as shares which 'he or she beneficially owned on the last day of the year of his or departure', that is the last year of assessment before the individuals return in which the individual was resident in Ireland. There is also a minor difficulty with the charging provision, TCA 1997, s 29(2), which provides that the section applies where 'the individual *has* relevant assets' (emphasis added) and 'is resident in the State for a year of assessment (in this section referred to as the "year of return") ...' The difficulty is that in the year of return it is highly likely that the individual will no longer *have* any relevant assets, having sold them all during the period of non-residence. Clearly, the legislation is not intended to only apply to individuals who only sell part of their shareholdings when temporarily living abroad.

[30] TCA 1997, s 29(4).

suggests that it has had little, if any, impact on genuine emigrants. The effect of the legislation on tax exiles is again impossible to estimate. It may be that some individuals have been deterred from becoming temporarily non-resident to avoid CGT, but is may be equally likely that some individuals have continued to circumvent the legislation.

From a theoretical perspective, it seems that membership of Irish society is measured in two ways according to the section. First, an individual will only be subject to the legislation is he or she is, or was, domiciled in Ireland; a very long-term measure of connection to Irish society. Secondly, an individual will remain a member of Irish society, and within the scope of Irish CGT on the disposal of shares, if he or she is not resident in Ireland for fewer than six years. Again, this is quite a long-term measure of connection, twice as long, in fact, as ordinary residence. These measures are in stark contrast to the normal measure of membership, which is determined by physical presence only over one or three years. The use of domicile as a connecting factor is discussed in section 6.2(c) below.

6.2(c) The domicile levy

Section 150 of the Finance Act 2010 introduced an entirely new and novel charge in Irish taxation known as the domicile levy.[31] On introducing the measure in his budget speech, Minister for Finance Brian Lenihan said:

> Our tax treatment of non-resident individuals is broadly in line with that of most other OECD countries. But, we must ensure that every wealthy Irish domiciliary who pays little or no income tax makes a contribution to the State, especially during times of economic and fiscal difficulty.[32]

Although it was not expressly stated, it seems clear that the levy was aimed at tax exiles, and at addressing the tax exile problem, and it was widely interpreted as such, and given a guarded welcome, though concern was expressed that the charge might be

[31] The legislation is contained in TCA 1997, ss 531AA to 531AK.
[32] Dáil Deb 9 December 2009, vol 697, col 636.

easily avoided.[33] The levy was originally imposed on any individual who was domiciled in and a citizen of Ireland, 'whose world-wide income for the tax year' exceeded €1,000,000, whose Irish property had a market value of in excess of €5,000,000 and whose liability to Irish income tax the tax year was less than €200,000, though the citizenship requirement was later removed.[34] Irish property encompasses 'all property, situate in the State, to which the individual is beneficially entitled in possession' other than shares in a company which 'exists wholly or mainly for the purpose of carrying on a trade' or in a holding company deriving its value from shares in such trading companies. The levy is a fixed charge of €200,000, though there is a credit for Irish income tax paid in the relevant year.[35]

The connecting factors used in the provision were citizenship and domicile (now domicile only), and there was no provision as to the residence or ordinary residence of those on whom it was levied. FOI material reveals that the charge was imposed on Irish residents in order to comply with EU law, as it was felt that '[t]axing an EU/EEA resident on their Irish-located assets while not taxing an Irish resident in the same circumstances would most likely fall foul of the free movement of persons and capital and non-discrimination EU treaty articles',[36] however it was considered that 'tax-resident individuals with capital in excess of €5m' would in many cases already be paying income tax in excess of €200,000 per annum, and that 'by including an income test as well, we ensure we exclude Irish residents from the charge since they should have exceeded the tax figure required by virtue of the horizontal proposals'.[37] The 'horizontal proposals' referred to were contained in section 23 of Finance Act 2010 and amended a restriction on the use of a wide variety of tax reliefs

[33] It is clear from the context of the debate on the provision in Dáil Deb 9 February 2010, vol 701, cols 602, 609 and 611; Dáil Deb 10 February 2010, vol 701, cols 947 and 957 and Select Committee on Finance and the Public Service Deb 23 February 2010 that it was aimed at tax exiles. See also John Ward and Dara Burke, 'The Domicile Levy' (2010) 42 Accountancy Ireland 65. See also Stephen O'Brien and John Burns, 'Blitz on rich tax exiles "to flop"' *The Sunday Times* (Dublin, 13 December 2009); Cliff Taylor, 'High earners in the line of fire' *Sunday Business Post* (Dublin, 13 December 2009); Fionnan Sheahan, 'Tax exiles to calculate own liability for €200,000 levy' *Irish Independent* (Dublin, 18 March 2010); Niall Brady, 'Tax exiles silent on domicile levy' *The Sunday Times* (Dublin, 13 June 2010); Stephen O'Brien, 'Child benefit cut dropped to suit Labour' *The Sunday Times* (Dublin, 3 December 2011); Sarah McInerney, 'Government gears up for clampdown on tax exiles' *The Sunday Times* (Dublin, 11 March 2012).

[34] TCA 1997, s 531AA(1) sets out the definition of a 'relevant individual'. Finance Act 2012, s 136(1) removed the citizenship requirement for the year 2012 and subsequent years.

[35] TCA 1997, ss 531AB and 531AC.

[36] See appendix A.2(d)(viii).

[37] See appendix A.2(d)(xii).

by individuals who were considered 'high earners'. These proposals had been introduced in 2006[38] and were originally intended to ensure that such individuals earning more than €250,000 could only shelter half of their income with these reliefs and should therefore pay an effective rate of income tax of at least 20 per cent.[39] The Finance Act 2010 had amended these provisions so that they now applied to all individuals earning more than €150,000 and further restricted the operation of the reliefs with the intention of ensuring that high earners now paid an effective rate of income tax of at least 30 per cent.[40] Thus, it was assumed that individuals who were resident in Ireland and whose 'world-wide income' exceeded €1 million, would already pay at least €200,000 in Irish income tax and would not be subject to the domicile levy. This proved not to be the case.

The FOI material reveals that in 2010 and 2011, more than half of those paying the domicile levy were resident in Ireland, while in 2012 it was just over a third.[41] The reason lies in the definition of 'world-wide income' for the purposes of the domicile levy which encompasses an 'individual's income from all sources as estimated in accordance with the Tax Acts' but without 'regard to any amount deductible from or deductible in computing total income'. There are several ways in which an individual's taxable income might be significantly less than his or her total income from all sources, other than through the use of the restricted reliefs described as 'horizontal provisions' in the paragraph above. For example, where the individual has losses, either from the current year or carried forward from a previous year,[42] he or she might have world-wide income in excess of €1 million but have a liability to Irish income of less than €200,000, but be subject to the domicile levy.[43] Equally, if much of an individual's income was derived from sources in a country with which Ireland has a DTA and on

[38] Finance Act 2006, s 17 inserting TCA 1997, ss 485C to 485G.

[39] See the budget statement of the Minister for Finance Brian Cowan introducing the measuring in Dáil Deb 7 December 2005, vol 611, col 1528.

[40] See the budget statement of the Minister for Finance Brian Lenihan introducing the amendment in Dáil Deb 9 December 2009, vol 697, col 636.

[41] See appendix A.2(d)(i). In 2010, 24 domicile levy returns were filed and 15 of those filing were resident in Ireland. In 2011, 21 domicile levy returns were filed and 12 of those filing were resident in Ireland. In 2012, 14 domicile levy returns were filed and 5 of those filing were resident in Ireland.

[42] Such losses might give rise to a deduction or a claim for repayment of tax. See for example TCA 1997, ss 381 to 389.

[43] See Kieran Twomey, 'Private Client Taxation' (Irish Taxation Institute Annual Conference, April 2011); Jane Florides, 'New Capital Taxes Landscape' (Irish Taxation Institute Annual Conference, April 2012).

which foreign income tax had already been paid, the credit for those foreign taxes might well reduce the individuals Irish income tax liability below €200,000 even if his or her world-wide income exceeded €1 million.[44] In an extreme case, an individual might have no liability to Irish income tax but be subject to the domicile levy in full. Surprisingly, although the low numbers of individuals paying the domicile levy has been a source of both political and media criticism, the fact that for its first two years it was predominantly paid by residents and not tax exiles has attracted virtually no comment.[45] Nor has this been the subject of academic comment, as the levy has been subject to virtually no academic scrutiny at all.[46]

The FOI material also reveals that Revenue and Department of Finance officials were concerned that an individual who is a resident *of* a country with which Ireland has a DTA might seek to claim a credit for the domicile levy paid in Ireland against his or her income tax in that country.[47] This, it was suggested, could lead to

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[44] Such a credit is available pursuant to TCA 1997, s 826(2) and sch 24.

[45] See for example Sarah McInerney, 'Tax exiles levy "derisory"' *The Sunday Times* (Dublin, 20 November 2011); Sarah McInerney, 'Exiles move funds to dodge levy' *The Sunday Times* (Dublin, 15 April 2012); Sarah McInerney, 'Government gears up for clampdown on tax exiles' *The Sunday Times* (Dublin, 11 March 2012); Steven Carroll, '10 wealthy non-resident Irish citizens paid €200,000 domicile levy in 2011' *Irish Times* (Dublin, 23 November 2012); Carl O'Brien, 'Revenue targets 60 wealthy individuals over non-payment of domicile levy' *Irish Times* (Dublin 25 November 2013); Harry McGee, 'Sharp fall in number of tax exiles paying domicile levy' *Irish Times* (Dublin, 22 April 2014). One recent article does avert to the fact that the domicile levy is paid mostly by residents: Harry McGee, 'Levy aimed at tax exiles paid mostly by Irish residents' *Irish Times* (Dublin, 16 August 2014).

[46] With the exception of a brief article by Ward and Burke (John Ward and Dara Burke, 'The Domicile Levy' (2010) 42 Accountancy Ireland 65) and references in the Institute of Taxation's annual conference (Kieran Twomey, 'Private Client Taxation' (Irish Taxation Institute Annual Conference, April 2011); Jane Florides, 'New Capital Taxes Landscape' (Irish Taxation Institute Annual Conference, April 2012)), all of which focused on practical aspects of the charge.

[47] The domicile levy is not one of the taxes listed in Ireland's DTAs. However, all of those DTAs provide that the scope of the agreement will extend to any 'identical or substantially similar taxes' imposed after the signing of the agreement. Klaus Vogel, *Klaus Vogel on Double Taxation Conventions* (3rd edn, Kluwer Law International 1997) 157 says that to determine if a tax is substantially similar, one must carry out a 'a comprehensive comparison of the tax laws' constituent elements' with reference to 'all types of taxes historically developed within the State in question – and of States with related legal systems – in order to determine which of such traditional taxes comes closest to the new tax' (see also Michael Lang, '"Taxes Covered" – What is a "Tax" according to Article 2 of the OECD Model?' (2005) 59 Bulletin for International Taxation 216). In *Kinsella v The Revenue Commissioners* [2007] IEHC 250, [2011] 2 IR 417, 432-33 Kelly J held that 'capital gains tax is a substantially similar tax to the Irish taxes which are mentioned in article 2.3' of the Ireland/Italy DTA (Double Taxation Relief (Taxes on Income) (Italy) Order 1973, SI 64/1973), that is income tax, because the income tax and CGT legislation were 'very closely related' and both income tax and CGT were levied on gains even though they were calculated in a different way. Since the domicile levy is subject to many of the same legislative rules as income tax, and is contained in the same act, and since the levy is computed according to an individual's world-wide income and is dependent on the amount of Irish income paid by the individual, and since there is a credit for the Irish income tax paid against the levy, there must be a distinct possibility that the levy would be considered to be substantially similar to income tax for the purposes of Ireland's DTAs concluded prior to 2010 (ie, prior to the introduction of the levy).

'potential litigation by such individuals and protracted discussions between Revenue and other Tax Authorities about the precise meaning of the Levy which could, in time, damage our DTA relations',[48] and could be 'potentially embarrassing'.[49] There is nothing in the FOI materials, or any publicly available materials, that suggests that this situation has (yet) come to pass. It seems that the reason the tax was named the 'domicile levy' was to provide some 'cover' in case of a challenge regarding the application of the provisions of a DTA,[50] though as Vogel notes that '[f]or the purpose of establishing similarity, the name and rate of a tax is of just as little significance as the group of taxpayers liable to it'.[51]

6.2(c)(i) Citizenship as a connecting factor in Irish taxation

As mentioned above, the domicile levy as originally introduced only applied to individuals who were both domiciled in Ireland and citizens of Ireland. It is not clear why the citizenship requirement was included. The FOI material reveals that one of the Revenue Commissioners, at an early stage in discussing the form of the levy, expressed the view that having a tax based on both citizenship and domicile was unusual, and that domicile would probably be sufficient unless there was 'a desire to present this partly as a price wealthy Irish nationals living abroad have to pay for the privilege of holding on to their Irish passport'.[52] A speaking note prepared for the Minister for Finance for the committee stage of the Finance Bill 2010 states that the levy was 'aimed at those who have a significant and on-going connection with Ireland represented by significant Irish located capital', though it is not stated why that connection needed to also be represented by both citizenship and domicile as well as having significant capital in Ireland.[53] A note to the Minister of Finance from his Department set out that 'Irish citizenship is not normally used as a determinant of tax liability' and that 'if the levy was intended to apply to individuals who are both Irish citizens and Irish-domiciled' domicile was 'by far the stronger provision because an individual cannot easily revoke domicile'. It was further stated that the 'domicile test'

[48] See appendix A.2(d)(xliv).
[49] See appendix A.2(d)(lxxv).
[50] See appendix A.2(d)(lviii)
[51] Vogel (n 47) 157.
[52] See appendix A.2(d)(xiv).
[53] See appendix A.2(d)(liii).

was sufficient to ensure that 'foreign investors in Ireland' were not subject to the levy, as they were unlikely to have acquired an Irish domicile of choice and were unlikely to be Irish citizens, as the 'tendency for investors to take out citizenship' had declined in recent years.[54] Since domicile was seen as a sufficiently adhesive connecting factor to catch the intended 'Irish' targets and to exclude the 'foreign' ones, it is again unclear what purpose was served by using citizenship as an additional criterion, except perhaps that citizenship was intended to distinguish between 'Irish' and 'foreign' in this regard.

Concern was expressed at an early stage in developing the form of the levy that if it were 'necessary to be both an Irish National (i.e. passport holder) and an Irish domicile [sic] in order to be caught by the new levy' there would be an 'inbuilt incentive to side step the levy by dropping Irish nationality even though Irish domicile is retained.[55] Surprisingly, it seems that this is the reason that citizenship was later dropped as a connecting factor for the levy. A submission to the Minister for Finance of November 2011 refers to 'reports of individuals renouncing Irish citizenship to avoid the Domicile Levy', and the reason given for removing the citizenship requirement by the Minister for Finance was 'to ensure tax exiles cannot avoid it by renouncing their citizenship',[56] however a newspaper report later questioned this motive stating that 'both the Revenue and Department of Finance admitted they had "no information about individuals giving up their passports"', and that the 'Department of Justice said that it did not retain detailed statistics on people who renounced their Irish citizenship, but that numbers "are believed to be low"'.[57] Considering that the numbers paying the levy have decreased since the citizenship condition was removed, and the number of non-residents paying it has remained steady, it is not unreasonable to assume that large numbers of individuals had not been renouncing their citizenship in order to avoid paying the levy.

It is clear from the FOI material that imposing tax on individuals on the basis of their citizenship was considered during the process of formulating the domicile

[54] See appendix A.2(d)(xlvi).
[55] See appendix A.2(d)(x). See also Colin Coyle, 'Tax exiles 'would hand back passports' to avoid levy' *The Sunday Times* (Dublin 4 September 2011).
[56] Budget speech of Minister for Finance Michael Noonan (Dáil Deb 6 December 2011, vol 748, col 863).
[57] Sarah McInerney, 'Exile claim lacks proof' *The Sunday Times* (Dublin, 10 December 2011).

levy.[58] This is something that has been suggested on a number of occasions by politicians[59] and by media commentators,[60] with Joan Burton TD on three separate occasions proposing amendments to the Finance Bill that would have required Irish citizens who spent more than ten days in Ireland to file a return of their annual profits and gains from outside Ireland,[61] and Pat Rabbitte TD saying that tax exiles should lose their passports noting that in the United States all citizens are subject to income tax and that the 'ultimate instrument the state has in enforcing that is the passport'.[62] Citizenship-based taxation was further considered as a possible measure by the Department of Finance in 2009, 2010 and 2012[63], ultimately leading to views being sought on the 'appropriateness of citizenship as a basis for taxation' in the 2012 public consultation on residence carried out by the Department of Finance.[64] The views of those who made submissions to the Department of Finance in response to the consultation that expressed a view on the question were strongly, and unanimously, against such a move, as had two previous Ministers of Finance been when questioned on the issue in Dáil.[65] FOI materials reveal that Department of Finance officials were

[58] See appendix A.2(d)(xvii), which sets out some of the difficulties in doing this, and is discussed in the coming paragraphs.

[59] See for example Dáil Deb 3 May 2001, vol 535, col 888 (Michael D Higgins TD); Dáil Deb 11 July 2002, vol 553, col 1928 (Ruari Quinn TD); Select Committee on Finance and the Public Service Deb 24 February 2004 (Richard Bruton TD); Dáil Deb 2 November 2004, vol 591, col 763 (Seymour Crawford TD); Dáil Deb 18 February 2009, vol 674, col 441 (Joan Burton TD); Dáil Deb 8 April 2009, vol 679, col 90 (Róisín Shorthall TD); Dáil Deb 27 May 2009, vol 683 col 717 (Joan Burton TD); Select Committee on Finance and the Public Service Deb 24 February 2010 (Richard Bruton TD).

[60] See for example Matt Cooper, 'General McCreevy, lead us into battle' *The Sunday Times* (Dublin, 12 October 2008); Mark Hennessy, 'Gilmore urges ending of tax exile system and breaks for landlords' *Irish Times* (Dublin, 6 February 2009); Editorial, 'Tax-exile perks for the gilded few must end' *The Sunday Times* (Dublin, 28 March 2009).

[61] Select Committee on Finance and the Public Service Deb 24 February 2004 (amendment 82); Select Committee on Finance and the Public Service Deb 22 February 2006 (amendment 50); Select Committee on Finance and the Public Service Deb 19 February 2008 (amendment 39).

[62] See Justine McCarthy, 'Pay tax or lose your passport' *The Sunday Times* (Dublin, 25 July 2010). In October 2010 a Red C opinion poll found that 'more than half of all adults in Ireland believe tax exiles should not be entitled to hold Irish passports' (Newstalk.ie <http://www.newstalk.ie/2010/news/308taxpassportscopyjol-news142> accessed 10 October 2010.

[63] See appendices A.2(c)(xi) and (xii) and A.2(c)(xxxii).

[64] Department of Finance, Public Consultation on Tax Residence Rules' (Department of Finance, 1 May 2012) <http://www.finance.gov.ie/sites/default/files/Public-consultation-on-tax-residence-rules.pdf> accessed 19 May 2014.

[65] See Submission of the Consultative Committee of Accountancy Bodies Ireland to the Department of Finance Public Consultation on Tax Residence Rules (July 2012) <http://www.finance.gov.ie/sites/default/files/CCAB-I-Submission-on-Residency-Rules-2012.pdf> accessed 19 May 2014; Submission of the Irish Taxation Institute to the Department of Finance Public Consultation on Tax Residence Rules (1 August 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Mary-Healy-Irish-Tax-Institute.pdf> accessed 19 May 2014; Submission of Matheson Ormsby Prentice (now Matheson) solicitors to the Department of Finance Public Consultation on Tax Residence Rules (1 August 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Turlough-Galvin-Matheson-Ormbsy-Prentice.pdf > accessed 19 May 2014; Submission of Mazars to the

cautious about such a move and highlighted several difficulties with imposing tax on such a basis.

Many reasons have been advanced as to why Ireland should not impose income tax on the non-Irish income of Irish citizens who would not, apart from their citizenship, be considered resident in Ireland and subject to tax on a worldwide basis, and these will now be summarised. First, taxation of non-residents based on citizenship is contrary to international tax norms.[66] Minister for Finance Brian Lenihan stated that '[t]here are two countries which employ citizenship as a basis for taxation, namely, the United States and Eritrea'.[67] This is not strictly speaking true. Several countries use citizenship as a connecting factor (Ireland did so when it first introduced the domicile levy), and some impose tax on their citizens living abroad in limited circumstances. For example, under Article 7 of the France-Monaco treaty, French citizens who move their residence to Monaco are taxed as if they were resident in France.[68] Hungarian citizens are deemed to be resident for tax purposes and thus are subject to tax even if they are resident abroad, and so their tax system is similar to that of the United States in this regard.[69] Of course, if compliance with international or OECD norms were of such fundamental necessity, then our statutory definition of residence would not be based solely on physical presence for a set number of days

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Department of Finance Public Consultation on Tax Residence Rules (30 July 2012) <http://www.finance.gov.ie/sites/default/files/Submission-Mr-Frank-Greene-Mazars.pdf> accessed 19 May 2014; Submission of the Society of Trust and Estate Practitioners to the Department of Finance Public Consultation on Tax Residence Rules (July 2012). See also A.2(c)(lii). <http://www.finance.gov.ie/sites/default/files/Submission-Nora-Lillis-STEP-Ireland.pdf> accessed 19 May 2014. See also the comments of Minister for Finance Brian Cowan TD (Select Committee on Finance and the Public Service Deb 22 February 2006; Select Committee on Finance and the Public Service Deb 19 February 2008) and Minister for Finance Brian Lenihan (Dáil Deb 27 May 2009, vol 683 col 751; Select Committee on Finance and the Public Service Deb 24 February 2010).

[66] See for example the statement of Minister for Finance Brian Cowan in Select Committee on Finance and the Public Service Deb 22 February 2006, 'The amendment which seeks to link tax liability with citizenship is out of line with normal practice in OECD countries in which tax liability is based on residence, not citizenship'; Ian Kehoe, 'Tax exiles feel the heat' *Sunday Business Post* (Dublin, 29 March 2009); Irish Taxation Institute (n 65). See also appendices A.2(c)(xi) and A.2(c)(xxxii).

[67] Dáil Deb 27 May 2009, vol 683 col 751.

[68] Convention Fiscale Entre La France Et La Principaute De Monaco signée à Paris le 18 mai 1963 ('Les personnes physiques de nationalité française qui transporteront à Monaco leur domicile ou leur résidence - ou qui ne peuvent pas justifier de cinq ans de résidence habituelle à Monaco à la date du 13 octobre 1962 - seront assujetties en France à l'impôt sur le revenu des personnes physiques et à la taxe complémentaire dans les mêmes conditions que si elles avaient leur domicile ou leur résidence en France').

[69] Personal Income Tax Act 1995 (*a személyi jövedelemadóról*) (Act CXVII of 1995), art 3 § 2. See Mark Nestmann, 'Hungary Now Imposes Tax on non-Resident Citizens' (Nestmann.com, 2 October 2012) <http://www.nestmann.com/hungary-now-imposes-tax-on-non-resident-citizens/> accessed 22 January 2013.

during the year.[70] Secondly, the taxation of citizens who are resident abroad leads to considerable administrative difficulties.[71] A report of the interdepartmental Tax Strategy Group of 2012 pointed out that 'there could be difficulties ensuring that Irish citizens resident abroad were filing returns, collecting any tax due, and auditing the returns filed', noting that the United States' Internal Revenue Service (IRS) encountered such difficulties and that it probably has 'greater resources to enforce a citizenship-based system than would the Irish Revenue Commissioners'.[72] Schneider notes that the IRS experiences significant problems in administering the taxation of non-resident citizens noting that there is a 'high degree of nonfiling', '[d]etecting overseas income is very difficult for the Service' and '[e]nforcement is also an issue'.[73] The annual report to Congress of the Taxpayer Advocate Service for 2011 states that 'the IRS has no way to accurately identify international taxpayers and assess their filing compliance rate. It also lacks a reliable and accurate estimate of the international tax gap'.[74]

Thirdly, it is suggested that very little additional revenue would be generated for the Exchequer by imposing tax on non-resident citizens.[75] The lobby group American Citizens Abroad notes that 'close to 90% of Americans residing overseas

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[70] See chapter 4.

[71] See for example Ian Kehoe, 'Tax exiles feel the heat' *Sunday Business Post* (Dublin, 29 March 2009) saying that 'such a system has been shunned internationally by virtue of the logistical difficulties in policing it' and quoting Brian Keegan, director of taxation with the Institute of Chartered Accountants in Ireland as saying, 'How do you tie Revenue records to citizenship records? And would you have to give all citizens the vote, worldwide?'; Irish Taxation Institute (n 65); Matheson (n 65).

[72] Tax Strategy Group, 'Residence Issues' (Department of Finance, 18 September 2012) <http://www.finance.gov.ie/sites/default/files/12-02-Residence-issues.pdf> accessed 19 May 2014. See also appendices A.2(c)(xi) and A.2(c)(xxxii).

[73] Bernard Schneider, 'The End Of Taxation Without End: A New Tax Regime For U.S. Expatriates' (2013) 32 Virginia Law Review 1, 55-57. See also Cynthia Blum and Paula N Singer, 'A Coherent Policy Proposal for U.S. Residence-Based Taxation Of Individuals' (2008) 41 Vanderbilt Journal of Transnational Law Volume 705, 713-15; American Citizens Abroad, 'ACA recommendation for fundamental reform of U.S. tax law affecting bona fide overseas residents' (American Citizens Abroad February 2012) <http://americansabroad.org/files/5313/3589/7840/coverpage.pdf> accessed 13 October 2013.

[74] Nina E Olsen (ed), '2011 Annual Report to Congress' (Taxpayer Advocate Service 11 January 2012) <http://www.taxpayeradvocate.irs.gov/Annual-Reports-To-Congress/FY-2011-Annual-Report-To-Congress> accessed 19 May 2014, 131. See also Staff of the Joint Committee on Taxation, 'Review of the Present-Law Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency' (Report to Congress JCS-2-03, 28 February 2003) <https://www.jct.gov/publications.html?func=startdown&id=1694> accessed 19 May 2014, 96-98; Kirsch (n **Error! Bookmark not defined.**) 496; Cynthia Blum and Paula N Singer, 'A Coherent Policy Proposal for U.S. Residence-Based Taxation of Individuals' (2008) 41 Vanderbilt Journal of Transnational Law Volume 705, 713.

[75] See for example Consultative Committee of Accountancy Bodies Ireland (n 65); Mazars (n 65); Tax Strategy Group (n 72). See also appendices A.2(c)(xii) and A.2(c)(xxxii).

live in countries with tax rates higher than those of the United States' and that in 2009 'close to a million Form 1040 filings had foreign addresses; only 9% of those reporting had U.S. tax liabilities'.[76] Fourthly, there is a very large number of Irish citizens who are resident abroad who may have 'limited physical and economic contact' with the country,[77] though there are many who visit Ireland on holidays, generating significant revenue for the country.[78] Minister for Finance Brian Lenihan noted that 'there is a very extensive access to citizenship in this country' through 'birth or descent or through marriage or naturalisation' and that this was 'part of our history of migration to other parts of the world'. Also, since 'we have always attributed citizenship throughout the territory of the island of Ireland on an equal basis', if Ireland were to impose tax based on citizenship, Revenue would 'be obliged to send tax return forms to virtually every resident of Northern Ireland'.[79] Up-to-date, accurate data on the number of Irish citizens resident abroad do not exist, with the most authoritative estimate being one compiled in 2002, which put the figure at three million.[80] Although there was a period of net inward migration of Irish nationals since 2002, in recent years this pattern has reversed,[81] so it is not unreasonable to suggest that the figure of three million remains a reliable estimate. The population of Ireland in 2011 was just over

[76] American Citizens Abroad (n 72).

[77] Society of Trust and Estate Practitioners (n 65). See also Matheson (n 65).

[78] In 2008 Minister for Finance Brian Cowan pointed out that 'in 2006 more than 1,034,000 visitors to Ireland from the United States generated revenues of approximately €815 million and that almost 4 million visitors from the United Kingdom generated revenues of €1,400 million. The number of visitors from the North was approximately 585,000, generating revenues of approximately €200 million. The data also show that almost 60% of US visitors and up to 40% of UK visitors claim to be Irish born or of Irish ancestry'. He went on to note that although it was clearly not the case that 'all or most of these visitors are Irish citizens', he was 'confident that those who are would abandon that citizenship if they were required to file with the Revenue Commissioners each time they took a holiday in Ireland a return of their profits or gains earned in their country of residence' (Select Committee on Finance and the Public Service Deb 19 February 2008). This argument is even more compelling if the individuals were required not just to file a return but to pay Irish income tax. See also Select Committee on Finance and the Public Service Deb 22 February 2006, where the same minister for Finance made similar points.

[79] Dáil Deb 27 May 2009, vol 683 col 751. The same Minister for Finance made a similar point in Select Committee on Finance and the Public Service Deb 24 February 2010. See also appendices A.2(c)(xii) and A.2(c)(xxxii).

[80] Bronwen Walter and others, 'A Study of the Existing Sources of Information and Analysis About Irish Emigrants and Irish Communities Abroad' (Task Force Study August 2002) 22 <http://www.dfa.ie/uploads/documents/taskforcestudy.pdf> accessed 30 September 2013, 'The status and entitlements of emigrants who hold Irish citizenship received little attention until recent years. Approximately 3 million Irish citizens live abroad and over 1.2 million of these were born in Ireland'. I am indebted to Dr Piaras MacEinri of the geography department of University College Cork for his assistance in locating this information.

[81] Central Statistics Office, 'Estimated Migration classified by Sex and Nationality, 2008 – 2013' (CSO, 29 August 2013) <http://www.cso.ie/en/releasesandpublications/er/pme/populationandmigrationestimatesapril2013/#.U9g_T7EXvSj> accessed 28 July 2014.

4.5 million,[82] of whom just over 500,000 were non-nationals,[83] suggesting that 43 per cent of Irish citizens live outside Ireland. This compares to an estimate of approximately 6 million non-resident US citizens[84] out of a total population of over 318 million.[85] The difficulties of administration and enforcement experienced by the IRS would therefore be greatly magnified in Ireland's case.

Fifthly, imposing tax on non-resident citizens would be contrary to government initiatives to 'encourage individuals within the Irish diaspora to re-engage with Ireland, in cultural and economic terms' and might 'deter expatriates from returning to or investing in Ireland'.[86] Sixthly, such a policy would affect a large number of genuine emigrants who were not the intended target of the measure, and create 'unintended and undesirable complexities for the Irish Diaspora'.[87] As the Tax Strategy Group observed in 2012, '[a]t a time when individuals are emigrating from Ireland to find work, it would not be well received if the Irish Government continued to seek tax from their income'.[88] Seventhly, it is relatively straightforward for an individual to relinquish his or her citizenship by application to the Minister for Justice, Equality and Law Reform.[89] As outlined in chapter 5, the experience in the United States has been that individuals are willing to relinquish their citizenship for tax purposes and sever their remaining connections with the country if necessary.

Finally, the most compelling reason not to impose income tax on the non-Irish income of non-resident citizens is that it simply will not work. Most of Ireland's DTAs provide that an individual will be a resident *of* Ireland for the purpose the agreement

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[82] The population was 4,588,252. See Central Statistics Office, 'This is Ireland, Highlights from Census 2011: Part 1 (Formerly Principal Demographic Results)' (CSO, 29 March 2012) <http://www.cso.ie/en/media/csoie/census/documents/census2011pdr/Tables,and,Appendices.pdf> accessed 28 July 2014.

[83] There were 544,357 non-nationals. See Central Statistics Office, 'Profile 6: Migration & Diversity in Ireland - A profile of diversity in Ireland' (CSO, 4 October 2012) <http://www.cso.ie/en/media/csoie/census/documents/census2011profile6/Profile,6,Migration,and,Diversity,Tables,and,Appendices.pdf> accessed 28 July 2014.

[84] Schneider (n 73) 16.

[85] United States Census Bureau, 'Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2014' (US Census Bureau, June 2014) <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> accessed 28 July 2014.

[86] Society of Trust and Estate Practitioners (n 65) and Tax Strategy Group (n 72) respectively. See also Matheson (n 65).

[87] Irish Taxation Institute (n 65).

[88] Tax Strategy Group (n 72).

[89] See the comments of Minister for Finance Brian Lenihan in Dáil Deb 27 May 2009, vol 683 col 751. See also Mazars (n 65); Matheson (n 65); Society of Trust and Estate Practitioners (n 65).

if that individual is liable to tax *in* Ireland by reason of his or her 'domicile, residence or any other criterion of a similar nature'.[90] Citizenship is not a similar criterion, and so an Irish citizen who is resident *in* a country with which Ireland has a DTA and who is not resident or ordinarily resident *in* Ireland, would be a resident *of* the other country. This would significantly limit the amount of tax that Ireland would be able to impose on such an individual.[91] The Tax Strategy group has noted that if Ireland were to impose tax on the basis of citizenship, this would require that 'all our DTAs (other than the Ireland-USA DTA) would have to be re-negotiated to allow us to tax individuals on the basis of citizenship regardless of their residence'.[92] In a note on the domicile levy it was noted that '[s]ome countries may resist renegotiation or refuse to renegotiate or seek different terms for other areas of taxation',[93] and the Tax Strategy Group painted an even gloomier picture, stating that it might 'lead to the cancelling of some DTAs and would affect our competitiveness' pointing out that 'the US has fewer DTAs than, for example, the UK'.[94] A former International Tax Counsel and Chief Spokesman for International Tax Policy with the US Treasury Department, speaking of the fact that the United States seek to include a provision in their DTAs that states that 'notwithstanding anything else in this Convention, the United States reserves the right to tax its citizens as if this Convention were not in force.', wrote that

> When we put this provision in, when you are dealing with a country that has not negotiated with the United States before, they just cannot believe it. They first think the provision must be a joke. And then when they begin to realize that we are serious, they try to figure out what they have got to give us to make us retreat to a "sensible" position. They soon discover that we just are

[90] The one exception is the Ireland/United States DTA (United States Double Taxation Relief (Taxes on Income and Capital Gains) (United States of America) Order 1997, SI 477/1997), which provides that 'A United States citizen or an alien lawfully admitted for permanent residence in the United States is a resident of the United States, but only if such person has a substantial presence, permanent home or habitual abode in the United States' (art 4(1)) and which also provides 'Notwithstanding any provision of the Convention, a Contracting State may tax its residents (as determined under Article 4 (Residence)), and by reason of citizenship may tax its citizens, as if the Convention had not come into effect. For this purpose, the term "citizen" shall include a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax, but only for a period of 10 years following such loss' (art 1(4)).

[91] Even if Ireland were to amend TCA 1997, s 819 to provide that all Irish citizens were to be deemed to be resident in Ireland, for the purposes of a DTA such an individual would not be subject to tax in Ireland by reason of his or her residence, but by reason of his or her citizenship.

[92] Tax Strategy Group (n 72). See also appendices A.2(c)(xii) and A.2(c)(xxxii).

[93] See appendix A.2(d)(xvii).

[94] Tax Strategy Group (n 72).

completely non-negotiable from our standpoint, and they finally either accept it or they go away.[95]

As outlined in chapter 2, there is an ongoing debate in the United States about whether taxation of non-resident citizens is theoretically justified or administratively practical. However good a measure it might be of membership of US society, with such a large number of citizens living overseas, it is an extremely poor measure of membership of Irish society. On that basis, as much as on the basis of its impracticality, it is not a connecting factor which should be used in direct taxation in Ireland.

6.2(c)(ii) Domicile as a connecting factor in Irish taxation

Domicile is a common law concept that dates back to at least the early nineteenth century and connotes an individual's permanent home. An individual takes the domicile of his or her father at birth if his or her parents are married and his father is living, otherwise the individual takes the domicile of his or her mother.[96] This is the individuals *domicile of origin*, which is invariable. An individual may acquire a *domicile of choice* in a country if he or she takes up physical residence in the country with the intention of residing there permanently or indefinitely.[97] However, if the individual has an intention to return to his or her country of origin 'upon a clearly foreseen and reasonably anticipated contingency', as opposed to a 'vague possibility' the individual will not acquire a domicile of choice.[98] To acquire a domicile of choice, it is necessary to show 'by unequivocal intention and act' that the domicile of origin has been abandoned,[99] though the length of time spent in a country is not necessarily relevant and an individual may live in a country for almost forty years without acquiring a domicile of choice,[100] though equally 'domicile can be established

[95] David S Foster, 'Exporting United States Tax Policy' (1978) 12 The International Lawyer 600, 602.
[96] *Udny v Udny* (1869) LR 1 HL Sc & Div 441, 457 (Westbury LJ), 'It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile the mother if illegitimate. This has been called the domicile of origin and is involuntary'.
[97] See *Revenue Commissioners v Shaw* [1982] ILRM 433, 435 (McWilliam J), 'In order to acquire another domicile a person must have the intention of doing so together with actual residence in the country for an unlimited time'.
[98] *Re Fuld (deceased) (No 3)* [1968] P 675, 684-85 (Scarman LJ).
[99] *Re Lloyd-Evans* [1947] Ch 695, 707 (Wynn-Parry J).
[100] *IRC v Bullock* [1976] 3 All ER 353. See also the discussion of Hans Rausing, who is reported to have lived in the UK since 1982 without acquiring a domicile of choice in chapter 4.

immediately if there be clear proof of intention'.[101] The question of domicile is primarily one of fact to be decided in relation to the tax affairs of an individual by the Appeal Commissioners,[102] and the burden of proof rests on the 'person who asserts a change of domicil to establish it'.[103] Where an individual abandons a domicile of choice, his or her domicile of origin is revived.[104] This will occur when an individual ceases to reside in the country in which he or she acquired the domicile of choice, and does not retain a clear or definite intention of returning to reside there.[105] During a child's minority he or she may acquire a *domicile of dependency* if the child's father acquires a domicile of choise, or the child's mother does, if the child's domicile of origin is derived from his or her mother, or if the child's parents are living apart and the child has his or her home with the mother and no home with the father.[106] On reaching majority, the child may then acquire a domicile of choice in the country in question, or, if he or she does not do so, for example if the child moves to another country without the intention of residing permanently or indefinitely there, the child's domicile of origin is revived.[107]

The main advantage for Revenue using domicile as the main, and now only, connecting factor for the domicile levy is clearly that 'domicile of birth is difficult to shake off so that Irish people residing temporarily abroad can more easily be brought within the scope of a domicile-based charge'.[108] Although the FOI materials show that Revenue and Department of Finance officials were cognisant of the fact that '[e]stablishing domicile can require an in-depth examination of a person's background, lifestyle and intention over the course of the person's lifetime' and that this 'examination will extend to areas of the person's own life and also that of his/her family',[109] since the burden of proving a change of domicile rests with the party alleging it, if an individual with an Irish domicile of origin leaves Ireland to reside abroad, the onus is on him or her to show that he or she has a acquired a domicile of choice in that other country, and so Revenue would not be required to carry out what

[101] *Lambert v An tArd Chlaraitheoir* [1995] 2 IR 372, 389 (Kinlen J).
[102] *Iveagh v Revenue Commissioners* [1930] IR 386 (SC).
[103] *Winans v AG* [1904] AC 287, 288 (Halsbury LC).
[104] *Sproule v Hopkins* [1903] 2 IR 386.
[105] *Re Rowan, Rowan v Rowan* [1988] ILRM 65 (HC).
[106] Domicile and Recognition of Foreign Divorces Act 1986, s 4.
[107] *Gulbenkian v Gulbenkian* [1937] 4 All ER 618.
[108] See appendix A.2(d)(xx)-(xxi).
[109] See appendix A.2(d)(xvi).

might otherwise be a very complicated and difficult investigation into the affairs of an individual now located overseas. Using domicile as a connecting factor generally also eliminates the most significant drawback for taxation based on citizenship: the incompatibility with the provisions of Ireland's DTAs. As outlined earlier in this section, most of Ireland's DTAs provide that an individual will be a resident *of* Ireland for the purpose the agreement if that individual is liable to tax *in* Ireland by reason of his or her 'domicile, residence or any other criterion of a similar nature'.[110]

The use of domicile as a connecting factor for direct taxation does suffer from some of the drawbacks outlined in relation to citizenship in the preceding paragraphs, in particular that a large number of non-residents with relatively little ongoing connection to Ireland may be domiciled here by virtue of having an Irish domicile of origin and not having acquired, or retained, a domicile of choice elsewhere. Further, many such individuals might be unaware whether they are domiciled in Ireland or not, as it is a concept that is much less clear cut than nationality. For example, an individual with an Irish domicile of origin who left Ireland many years, or even decades ago, with no intention of returning to live here, but who never settled in one particular place, or never settled anywhere with a definite intention of saying there permanently would still be domiciled in Ireland. Even an individual who left Ireland as an infant and whose father acquired a domicile of choice abroad, giving the child a foreign domicile of dependence, could find his or her domicile of origin revived if that individual moved to another country and didn't acquire a domicile of choice there. When one considers that approximately 16 per cent of Ireland's population emigrated in the 1950s,[111] such examples are not fanciful. It is impossible to say how many individuals with an Irish domicile of origin are resident abroad, let alone how many are still domiciled in

[110] Of course this may not be an issue if Revenue are correct in their assertion that the provisions of Ireland's DTAs do not apply to the domicile levy. See the minutes of the meeting of the Taxes Administration Liaison Committee (TALC) (a liaison committee between the Revenue Commissioners, the Irish Taxation Institute, the Consultative Committee of Accountancy Bodies of Ireland and the Law Society of Ireland) of 9 February 2010, where it is stated that 'Practitioners highlighted the distinction between Irish income tax, which is allowed as a credit against the domicile levy, as opposed to income tax paid in another jurisdiction, which is not. Revenue acknowledged the distinction; they stated their view that the domicile levy is not an income tax, wealth tax or property tax for treaty purposes' (Irish Taxation Institute Website: TALC section: <http://www.taxinstitute.ie/Portals/0/Tax%20Policy/TALC/Minutes/Minutes%20and%20Summary%20Notes%20TALC%202010.pdf> accessed 20 July 2014). See also appendix A.2(d)(lxxxv), 'The current double taxation provisions would not cover the Domicile Levy'.

[111] Enda Delaney, *The Irish in Post-War Britain* (Oxford University Press 2007) 12-13.

Ireland. Domicile is an extremely poor measure of whether an individual is a member of a society or not. An intention to return to live in Ireland 'upon a clearly foreseen and reasonably anticipated contingency' at some point in the future, or a failure to form, or to demonstrate that one has formed, 'by unequivocal intention and act' the intention to live permanently or indefinitely elsewhere, is not a measure that most people would recognise as signifying a close connection to a country that could or should form the basis of an obligation to pay tax. On the other hand, the location of an individual's permanent home, or where he or she intends to reside permanently or indefinitely is. Thus, perhaps a domicile of choice is a good measure of membership of a society, but the unabandoned domicile of origin of someone who is not otherwise connected to a country is not.

6.2(c)(iii) Assessment of the domicile levy

From the perspective of FDI, the use of domicile as a connecting factor in taxation is not necessarily positive or negative. As the UK Treasury Department noted in its summary of the responses to the 2007 public consultation on residence and domicile, the majority of respondents felt that 'domicile is an important and useful concept and both domicile and the remittance basis should be retained' and the paper went on to say that the 'Government recognises that this system makes an important contribution to the UK's global competitiveness' and that the 'remittance basis plays a key role in ensuring the UK remains a highly attractive destination for skilled people to work, do business and invest in our economy'.[112] It has been suggested that the domicile levy has had precisely the opposite effect.

The effect of domicile as a connecting factor for the domicile levy depends on whether an individual has an Irish domicile of origin or a foreign one. If the individual's domicile of origin is abroad, then it is unlikely that such an individual will

[112] United Kingdom, 'A Summary of Responses to Paying a Fairer Share: A Consultation on Residence and Domicile' (HMSO, March 2008) paras 2.4, 2.7 and 2.8 respectively. See also Matheson (n 65) making a similar point in relation to Ireland, and saying that it is 'essential in the context of foreign direct investment, that individuals are viewed legally as fully connected with Ireland only when they are both resident and domiciled in the State. In practice, this places non-domiciled individuals outside the charge to Irish tax on foreign income and gains (other than employment income), unless remitted to Ireland. This is justifiable, under jurisprudential theory, on the basis that individuals who are non-domiciled in Ireland do not have a full social contract with the State, but instead maintain a connection with another jurisdiction as well'.

be subject to the levy, as, in order to impose it, Revenue would have to demonstrate that the individual has acquired a domicile of choice in Ireland. On the other hand, if an individual has an Irish domicile of origin, that individual may be subject to the levy unless or she can prove the acquisition of a domicile of choice elsewhere; subject of course to meeting the other conditions for the levy. The FOI material shows that in June 2011 an official from the Department of Finance received a call from an unidentified individual[113] in relation to the domicile levy and indicated that 'he had been contacted by a Big 4 firm who had two clients who might be liable for the levy. He indicated that these individuals were considering moving assets outside Ireland so they would not be liable for the levy'.[114] The FOI material also contains an extract from a draft report by Forfás, the enterprise and trade policy advisory board, which said that the domicile levy has the potential to 'discourage investment in Ireland by non-resident Irish domiciliaries'.[115] The report said that the 'definition of Irish property within the domicile levy provisions has influenced decisions which have a detrimental impact on continued investment in Irish assets' and went on to observe that the 'levy could benefit from a cost/benefit review (assuming such a review has not already been undertaken)'. In April 2012 a spokesman for the Consultative Committee of Accountancy Bodies in Ireland said in a newspaper interview that 'it had anecdotal evidence of wealthy clients deliberately moving capital to avoid the levy' and that many of the firms it represented had reported 'that clients of theirs moved funds out of the country to ensure they weren't caught by the levy', noting that it had made submissions to the Minister for Finance calling for the abolition of the levy.[116] Submissions to the Department of Finance's 2012 public consultation on tax residence rules also criticised the domicile levy for the effect it had on FDI in Ireland.[117]

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[113] See appendix A.2(d)(lxxxv). The caller may have been a representative of Chartered Accountants Ireland, as the memo finished with the comment that 'CAI might make a submission on this matter'.
[114] ibid. The 'Big 4' accounting firms are Deloitte, PwC, Ernst & Young and KPMG.
[115] See appendix A.2(d)(lxxxviii).
[116] Sarah McInerney, 'Exiles move funds to dodge levy' *The Sunday Times* (Dublin, 14 April 2012). See also Colin Coyle, 'O'Brien signs deeds over to wife' *The Sunday Times* (Dublin, 9 September 2012.
[117] See Consultative Committee of Accountancy Bodies Ireland (n 65), 'We are of the view that the Domicile Levy as currently drafted acts as an impediment to investment in Ireland, targeting as it does those successful people abroad who have the greatest affinity towards Ireland and are most likely to invest in some way in Ireland'; Society of Trust and Estate Practitioners (n 65), 'If the Domicile Levy were altered such that income or asset thresholds were reduced, it is our view that this could have an adverse impact and act as a disincentive to foreign investment in Ireland'. Mazars (n 65), on the other hand said 'We would be inclined to leave the Domicile levy as currently enacted as it does ensure that a certain amount of tax is paid by non-resident domiciled individuals'.

The specific issue referred to in the Forfás report was regarding a non-resident but Irish domiciled individual who has €5 million on deposit with an Irish bank. Although any interest received is exempt from tax,[118] the individual would be subject to the domicile levy and may as a result decide to move the deposit to a bank outside Ireland. A similar issue might also arise regarding government bonds a securities. The interest on such securities are exempt from Irish tax,[119] but the securities do constitute Irish assets, and the interest is part of world-wide income, for the purpose of the domicile levy. An Irish domiciled individual resident abroad may well be deterred from investing in such securities as a result. The levy, and in particular its regressive nature, may also act as a disincentive to non-resident Irish domiciliaries investing in Irish property, at least at a certain level of investment. For example, suppose such an individual had non-Irish income of in excess of €1 million and purchased an office building in Ireland for €5 million, financed by an 80 per cent loan at a rate of interest of 3.5 per cent annually, and the building was leased at an annual rent of €250,000. The individual would be entitled to deduct the interest on the loan in computing his or her taxable profit and would be subject to Irish income tax and the USC on the profit of €110,000[120] at a maximum rate of 51%.[121] However, the individual will be subject to the domicile levy of €200,000,[122] and so will pay tax of almost double his or her profit from the investment. If the individual purchased an office building worth €4.9 million, this issue would not arise. Nor would it arise if he purchased a building worth €25 million or more, as his Irish income tax liability would then exceed amount of the domicile levy, and it would not be payable.[123]

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[118] TCA 1997, s 256(1)(g) provides for the exemption from DIRT. TCA 1997, 261(c)(i)(II) provides that deposit interest should be 'chargeable to tax at the rate at which tax was deducted from' the interest. Where the exemption under s 256(1)(g) applies, this should be zero per cent. The USC will not apply pursuant to TCA 1997, s 531AM(1)(b)(iii)(I).

[119] TCA 1997, s 43.

[120] The profit is €250,000 minus the interest (€5 million x 80 per cent x 3.5 per cent) of €140,000.

[121] The individual would be liable to income tax at a maximum rate of 41 per cent, the USC at a maximum rate of 10 per cent, but would not be subject to PRSI (unless he or she carries on a trade or profession in Ireland). Of course, some profit will be taxed at the lower income tax and USC rates, and the individual may be entitled to tax credits (depending on whether he or she is a citizen of Ireland, an EU member state or a country with which Ireland has a DTA and which contains a non-discrimination provision that applies to tax credits).

[122] There is no deduction for the loan on the Irish property for the purposes of the levy, it is the (unencumbered) market value of the assets that is relevant (TCA 1997, s 531AA(1)).

[123] It is only the liability to income tax, and not liability to the USC, that can be credited against the charge to the domicile levy.

Most genuine emigrants are unlikely to be affected by the domicile levy because of the wealth and income requirements. The small numbers paying the levy can probably be explained by the fact that first, as outlined in chapter 5, there aren't very many extremely wealthy tax exiles; secondly, since there is an exemption for shares in trading companies, an individual will only be subject to the levy if he or she has certain types of assets in Ireland, such as land, non-income producing assets such as art, antiques etc, or assets exempt from income tax such as government bonds; and thirdly, depending on the individual's level of economic investment in Ireland and his or her asset profile, the individual's income tax liability may already exceed €200,000.[124] This is of course more likely the wealthier the individual is and the larger the scale of his or her investment in Ireland. Given the stated purpose of the domicile levy, and considering the small numbers who pay it, and the relatively small amount of revenue generated, and the high proportion of those who could not be described as tax exiles or intended targets of the levy (ie Irish residents), one would have to say that the levy has not been a success. Given the structure of the levy and its regressive nature, this is hardly surprising.

6.3 Summary and conclusions

Ireland's three legislative measures to date do not appear to have had any measurable effect on the tax exile problem. While the abolition of the Cinderella rule has no doubt reduced the number of days that a tax exile might be able to be physically present in Ireland, especially if the individual owns a private jet, there is no evidence that this has prompted any tax exiles to resume residence in Ireland or dissuaded others from leaving. The effects on Irish exchequer revenues are also impossible to gauge, though it is easy to conceive of situations in which the effect might have been negative in that regard (eg individuals spending and investing less in Ireland as a result of a reduced physical presence here), and more difficult to enumerate scenarios in which the effect was positive in revenue terms. From a theoretical perspective, the measure has not changed the fact that the definition of residence continues to rely on just one, it is suggested short-term, connecting factor, though because it has effectively limited

[124] Both Consultative Committee of Accountancy Bodies Ireland (n 65) and Society of Trust and Estate Practitioners (n 65) suggest this as a reason.

the number of days an individual can be present in Ireland before being deemed resident, it may have shortened the breadth of that one factor.

The other two measures do not appear to have been successful. The CGT charge on temporary non-residents has not been imposed, and, considering the defects in the legislation, it seems unlikely that this is because of its effectiveness in dissuading individuals from moving abroad temporarily to avoid Irish CGT on the sale of shares. The domicile levy has been applied, though the numbers paying it are small and falling, and most have been residents and therefore not in any sense tax exiles. Of the nine non-residents who have paid the levy, it is not clear whether they were formerly resident in Ireland, or if they moved abroad for tax or other reasons, or whether they have any ongoing connection to Ireland other than their €5 million of Irish property and, otherwise, low Irish tax exposure. This is because the connecting factors used, domicile and, previously, citizenship, do not discern between these situations, nor are they an effective measure of them. This is especially true for a country like Ireland, which has a long history of net outward migration, and where over 40 per cent of citizens live abroad and where it is likely that there is a similar proportion of non-resident domiciliaries.

An examination of the FOI material and of the parliamentary debates on these measures suggests that there was little, if any, consideration of whether the connecting factors being used were theoretically appropriate by the politicians and officials concerned in their drafting. Rather, the concern was with whether the connecting factors would be practically effective. Some concern was expressed to ensure that the measures did not affect groups at which they were not aimed, for instance individuals resident in Ireland in the case of the domicile levy, but there appears to have been less discussion about how to identify and define the groups which were being targeted. It is clear that the intention was to impose tax on individuals with a long-term connection to Ireland, and since the current definition of residence in Ireland provides no real mechanism for this, since it is a measure of short-term connection only, other types of connecting factor were considered and utilised. There appears to have been no recognition of the short-comings of the definition of residence in this regard though.

Of the connecting factors chosen, neither citizenship nor domicile is an effective measure of membership of Irish society for tax purposes. This is particularly true when these factors are used in isolation, rather than in conjunction with other indicia of continued and ongoing connection to Ireland, as there is a very large number of Irish citizens and domiciliaries who do not normally live in Ireland, who may have departed many years ago, and who are fully integrated members of other societies. The use of the six-year connection for the CGT charge on temporary non-residents is a better measure of continued membership of Irish society, though an imperfect one, as it is still based on the statutory definition of residence, and therefore on physical presence alone. Thus, it remains possible for an individual to be physically present in Ireland for relatively long periods each year, and to in every other way remain fully connected to Irish society during the necessary period ostensibly spent abroad.

CONCLUSION

Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes!

Letter from Benjamin Franklin to Jean-Baptiste Leroy (13 November 1789) in William Temple Franklin, *The Works of Dr Benjamin Franklin in Philosophy, Politics and Morals, Volume VI* (William Duane 1817) 232

The tax exile problem is not going to go away. One very recent, at the time of writing, resurfacing of it concerns the singer Rod Stewart, who is said to be returning to live in England after almost forty years in tax exile, leading to criticisms that he wants to avail of all the benefits that British society has to offer, including the provision of education for his children, without contributing towards their cost.[1] This neatly summarises some of the core issues that are outlined in this work: that tax exiles are perceived as being members of society and availing of its benefits, but not contributing towards its costs. As yet, there have been no reports of Irish tax exiles returning to their native land. The tax exile problem is also set to remain firmly on the Irish legislative agenda. Proposals were put to cabinet in 2013 following the 2012 consultation on residence, suggesting that a place of abode test and a centre of vital interests test be added to the current test of residence based on physical presence.[2] This in essence follows the recommendation of the Commission on Taxation of 2009.[3] These factors appear to have been chosen not because of any deep consideration of their merit as a measure of the connection of an individual to Ireland, or because of their practicality or administrability, so much as the fact that the other suggestions, taxation based on citizenship or reducing the number of days a person can spend in Ireland before being deemed resident, have been rejected. There are considerable

[1] Hanna Hope, 'Tax exile Rod Stewart moving back after 40 years so kids can have British education' *The Mirror* (London, 18 July 2014).

[2] See Tax Strategy Group, 'Residence Issues' (Department of Finance, 18 September 2012) <http://www.finance.gov.ie/sites/default/files/12-02-Residence-issues.pdf> accessed 19 May 2014.

[3] Commission on Taxation, *Commission on Taxation Report 2009* (Stationary Office 2009) 7 'Residence rules are important as regards equity and protecting Ireland's taxing rights. The present rules–which are based solely on time spent in the country – need to be strengthened. We are recommending that the existing 183/280 days test for determining the tax residence of an individual be supplemented by additional criteria, which should include tests relating to a permanent home and an individual's centre of vital interests'.

differences between the two tests, both theoretically and practically. A place of abode is an objective test that requires little inquiry from Revenue and is easily ascertained by all parties, whereas a centre of vital interests is a nebulous concept that depends on a number of (unenumerated) factors. A place of abode is a personal connection whereas a centre of vital interest might also be an economic one. An Irish place of abode is likely to be acquired by a foreign individual posted by his or her employer to work in Ireland, a centre of vital interests may not be. A genuine emigrant may retain a place of abode in the same way that a tax exile might. Nothing in the Tax Strategy Group report, or in the FOI material, suggests that any attempt has been made to define the relationship to Ireland of the group that it is intended to tax with such an amendment, or that the group's relationship to Ireland has been compared to that of other groups that are not to be targeted by the measure, or that the question of whether the proposed connecting factors are a useful measure of membership of Irish society. It is not clear whether the targeted group has been identified, or if it has been determined whether they currently have a place of abode or their centre of vital interests in Ireland. It is a haphazard response to a serious problem. The problem is serious because the ramifications of its solution might be far reaching, both in terms of a loss of investment and other benefits currently provided by tax exiles, or of a loss of FDI from individuals otherwise unconnected to Ireland, or from imposing tax on genuine emigrants or Irish workers posted abroad whom it was not intended target.

If it is truly intended to amend the statutory definition of residence in an attempt to impose tax on Ireland's tax exiles, or to dissuade others from going into exile, then several things ought to be done. First, a comprehensive investigation should be carried out by Revenue or the Department of Finance, or both, to establish the identity and number of tax exiles, their net worth and their level of economic investment and current tax liability in Ireland, and their citizenship and domicile status. Secondly, an estimate of the economic value of these individuals to Ireland should be made, including direct and indirect employment, capital investment, spending, contributions to charity etc. Thirdly, an estimate should be made of the amount of revenue generated if these tax exiles were to become resident in Ireland as a result of a legislative amendment. Fourthly, an estimate should be made of the cost to the Irish economy of these tax exiles further severing their connection to Ireland in response to any legislative amendment. As suggested in chapter 5, this is no simple

task, though it is an impossible one using only publicly available materials. Even if the purpose behind a targeting of tax exiles is political or it is motivated by equity concerns, the potential cost of a solution to the problem should at least be computed. If nothing else, such an investigation would bring some clarity to an issue that has been consistently distorted and overstated in the public discourse. A solution to the tax exile problem may not be possible, or it may prove prohibitively costly in economic terms, and the lesson from the US experience is that some individuals will go to considerable lengths to reduce or avoid tax, including severing almost all ties with their 'home' country. This is of course not necessarily a reason not to attempt a solution, or a partial solution, and it may be that a higher price is put on the principle of fairness than on the overall gain or loss to the exchequer. These are matters that should be debated based on complete and accurate information, rather than left to misinformed speculation.

Even if it is decided not pursue a solution to the tax exile problem at this time, a re-examination of Ireland's statutory definition of residence is nonetheless required. This definition, while not unique internationally is unlike that of other OECD member countries. The abandonment of any long-term connecting factor when the statutory definition was introduced has left Ireland with a measure of connection to Ireland for tax purposes which is appropriate only for 'foreigners': those with no other substantial or continuing connection to Ireland other than their presence in the tax year in question. The issue of a lack of a long-term connecting factor is clear when one considers the attempts to address the tax exile problem through the domicile levy and the CGT exit tax for temporary non-residents. Unfortunately, the choice of connecting factors was less than ideal, partly, it is suggested because the decisions were made in a theoretical vacuum. A re-examination of Ireland's residence rules for individuals should be based on a sound consideration of the a theory of *justification* or of *identification*, rather than purely on practical or political considerations. The way that a society defines who are its members matters, especially to those members themselves when they are considering the fairness of the tax system.

Even if steps are not taken to address the tax exile problem through a redefinition of residence for tax purposes, other aspects of the legislation should be reviewed. Section 29A of TCA 1997 is easily avoided and in need of amendment. The

domicile levy is being paid by residents who have, presumably, been denied reliefs or deductions which would otherwise, validly, have reduced their Irish income tax liability below €200,000.

This work has argued that central to the tax exile problem is the way in which one defines how an individual is connected to a country for the purposes of direct taxation, and this has been categorised as a question of *identification* of taxpayers. It has further been argued that existing theories of taxation, the benefit theory, the ability to pay theory and the theory of economic allegiance, are not effective theories of identification. They benefit theory has developed little since the eighteenth century, and the principal development, the focus on the benefits provided by the state to the individual, are, it is submitted, regressive as regards the use of the theory as a theory of identification. The ability to pay theory cannot function in this regard, as it does not address the universe of individuals whose ability is being compared, and the theory of economic allegiance is primarily a theory of allocation of taxing rights between countries, and, further, it is suggested, is merely version of the benefit theory in which economic benefits are substituted for the benefit of protection.

This work has offered the *membership theory of taxation* as an alternative theory of identification of taxpayers. This theory states that the obligation to bear direct taxation is an incident of membership of the society upon which that tax is levied, and to which the benefits of the public spending financed by that taxation accrue, and that the connecting factors used in taxation are in effect measures of membership of society for this purpose. It is argued that this theory has a number of advantages over the benefit theory as a theory of identification, including an avoidance of the need to quantify or impute to individuals the benefits that arise to them from general public services, an avoidance of the issue of connection for tax purposes being based on benefits the availability of which is based on a different set of connecting factors, and avoidance of the problem of 'collective benefits' crossing international borders and being received by individuals who are not expected to contributed towards their cost. It is also suggested that the notion of taxation being an incident of membership of a society is in greater harmony with the theories of equity and fairness between taxpayers, which are based to some extent on a conception of individuals sacrificing personal rights for collective benefits.

It is argued that an assessment Ireland's statutory definition of residence for individuals for direct taxation according to the membership theory of taxation suggests that this definition does not provide a good measure of membership of Ireland for tax purposes, based as it is solely on physical presence in the country. This further bolsters the argument that a re-examination of this definition is warranted, whether in the context of the tax exile problem or more generally.

The membership theory of taxation may have further implications beyond the scope of those examined in this work. For example, it may operate as a theory of both *justification* and *identification* and provide a different method of analysing topical questions such as the taxation by the United States of its non-resident citizens. It may also provide valuable insights into questions of the *allocation* of taxing rights between countries, which is currently discussed in terms of the theory of economic allegiance, a theory which takes a narrow focus of the benefits provided by countries, and one which may be more, or only, appropriate to the taxation of corporations, which are not members of society and which do not benefit directly from public spending on matters such as health, education or social welfare. The question of the taxation of mobile individuals is an increasingly important one internationally, and it is submitted that a separate theory of allocation, or at least a variation of the one currently used in this regard is needed. A re-examination of theories of *justification*, *identification* and *allocation* is overdue given the time span since the first formulation of the theories currently espoused and the lack of development of those theories during the intervening period of significant change in international mobility, communication and globalisation. It is hoped that the *membership theory* advanced in this work will make some modest contribution in that regard.