



[2022] UKFTT 00112 (TC)

TC 08443/V

INCOME TAX – whether resident in UK or RSA – Article 4 of the Republic of South Africa/UK Double Tax Treaty 2002 as amended by the 2010 protocol – interpretation of Double Tax Treaty in accordance with the Vienna Convention on the Law of Treaties – Article 4 – tiebreaker – centre of vital interests – habitual abode – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04075

BETWEEN

JONATHAN OPPENHEIMER

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ANNE SCOTT
MEMBER HELEN MYERSCOUGH**

The hearing took place on 7 to 9 June and 14 to 15 June 2021. With the consent of the parties, the form of the hearing was video conference on the Tribunal video platform.

David Goldberg QC and Sam Brodsky of Counsel, instructed by Macfarlanes LLP, for the Appellant

Christopher Stone and Sebastian Purnell of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent

DECISION

INTRODUCTION

1. Having first opened an enquiry on 24 January 2013, on 20 March 2019, the respondents (“HMRC”) issued final closure notices (“the Closure Notices”) to Mr Oppenheimer under Section 28A(1B) and (2) Taxes Management Act 1970 (“TMA”) in relation to the tax years 2010/11, 2011/12, 2014/15, 2015/16 and 2016/17. In consequence therefore HMRC made amendments to Mr Oppenheimer’s self-assessment returns for those years.
2. We note that HMRC confirmed on 20 July 2016 that, although HMRC had wished to raise a Discovery Assessment for 2009/10, having opened an enquiry on 29 August 2013, HMRC had not raised a protective assessment within the permitted time limits so were out of time to do so.
3. On 28 March 2017, HMRC had issued discovery assessments to Mr Oppenheimer under Section 29 TMA in relation to the tax years 2012/13 and 2013/14 (“the Discovery Assessments”). In the statement accompanying the Closure Notices, HMRC intimated that the Discovery Assessments were “currently suspended on appeal”.
4. Mr Oppenheimer appealed the Closure Notices to the Tribunal on 31 May 2019. Those Grounds of Appeal indicate that although the appeal to HMRC in relation to the Discovery Assessments was on the same basis as this appeal, this appeal is not intended to encompass an appeal against the Discovery Assessments. Therefore those Discovery Assessments do not currently fall to be considered by the Tribunal, albeit both parties were agreed that those years fall within the period to be considered by the Tribunal, namely 2 April 2010 to 5 April 2017 (the “Relevant Period”).
5. The enquiry, Closure Notices and Discovery Assessments were predicated on remittances made to Mr Oppenheimer by the Harry Oppenheimer Family Continuity Trust (“HOFCT”) in the period 2010/11 to 2016/17. We set those out in this table, including for these purposes the Discovery Assessments (in italics) in order to give the full picture.

Year	Remittance	Assessment
2010/11	£6,961,912	£3,537,075.60
2011/12	£12,368,322	£6,238,414.50
<i>2012/13</i>	<i>£9,534,779</i>	<i>£4,825,230</i>
<i>2013/14</i>	<i>£577,311</i>	<i>£1,184,965</i>
2014/15	£270,747	£117,750.18
2015/16	£285,337	£123,089.14
2016/17	£272,821	£103,256.63

6. The total of the remittances in the Relevant Period is £20,159,139 and the additional tax is £10,119,586.05.
7. The amendments and assessments in terms of the Closure Notices were made on the basis that Mr Oppenheimer was Treaty resident in the United Kingdom (“UK”) in the Relevant Period. He does not dispute that he was resident and ordinarily resident in the UK for the years

2010/11 and 2011/12 under the common law and under the statutory residence test for the years from 2014/15 onwards.

8. The basis for this appeal is his contention that on a proper application of Article 4(2) of the UK/Republic of South Africa Double Taxation Convention 2002 as amended by the 2010 protocol (“the DTC”), he was Treaty resident in South Africa (“the RSA”) for each tax year in the Relevant Period.

The issues

9. The Tribunal must determine in respect of each tax year during the Relevant Period:

(a) Whether the State with which Mr Oppenheimer’s personal and economic relations (centre of vital interests) are closer is the UK or the RSA. If it is the UK, then he would be deemed to be Treaty resident solely in the UK and the appeal fails. If it was the RSA, then the appeal succeeds as he would be deemed to be Treaty resident in the RSA.

(b) If he was Treaty resident in the UK are the assessments excessive? However, the parties have agreed that if Mr Oppenheimer is found to be Treaty resident in the UK then the issue of quantum should be remitted to the parties to negotiate in the first instance.

(c) If the centre of his vital interests cannot be determined, the issue is whether Mr Oppenheimer had an habitual abode in the RSA. It is not disputed that he had an habitual abode in the UK in the Relevant Period. If he had an habitual abode in the UK only, he was Treaty resident in the UK and the appeal fails. If he also had an habitual abode in the RSA, the appeal succeeds because he is a national only of the RSA.

10. The burden of proof is upon Mr Oppenheimer and, in summary, he must establish that his centre of vital interests was in the RSA, or, if that cannot be determined that he had an habitual abode in the RSA and in both cases in each year in the Relevant Period.

The Hearing

11. We had Skeleton Arguments for both parties, an electronic Bundle extending to 2,804 pages, and a Bundle of Authorities extending to 743 pages. Substantial further information and documentation was produced during and after the Hearing. We had the benefit of transcripts. We had both written and oral Closing Submissions from both parties. We also had further submissions.

12. We heard oral evidence from Mr Oppenheimer, his father Mr Nicky Oppenheimer, Julie Burgon, and Polly Carr. The witness statements of Dr Greg Mills and Moira Moses were unchallenged.

13. Dr Mills lives in the RSA and has visited Folly Farm (Mr Oppenheimer’s home in the UK) four times in 14 years. The three ladies all lived in the RSA during the Relevant Period. Julie Burgon, Mr Oppenheimer’s South African executive assistant, has never visited Folly Farm. Mrs Carr is a senior executive in the Oppenheimer Family Office in Johannesburg and married to one of Mr Oppenheimer’s university friends and they were close friends of Mr and Mrs Oppenheimer. Mrs Moses and her husband were also close friends and she has spent a few nights at Folly Farm in the Relevant Period, usually before and/or after shooting in Scotland.

The case law

14. We have annexed at Appendix 1 a list of the cases to which we have been referred or which we cite, their full citations and the name by which we reference them in the body of the decision.

Overview of Mr Oppenheimer's arguments

15. He argues that, on the facts of his case, the taxing right belongs most naturally to the RSA because:-

(1) The State with which his personal and economic relations are closer is the RSA and not the UK so that he is deemed by Article 4(2)(a) of the DTC to be a resident solely of the RSA for the purposes of the Convention, and

(2) If it is not possible to determine the State with which his personal and economic relations are closer:

(a) He has habitual abodes both in the RSA and the UK;

(b) In accordance with Article 4(2)(c) of the DTC he is deemed, for the purposes of the DTC, to be a resident solely of the State of which he is a national and that is the RSA.

16. His personal and economic links, are, and always have been, closer to the RSA than anywhere else. He has had an habitual abode in the RSA since before the Relevant Period.

Overview of HMRC's arguments

17. HMRC argue that the appellant is a South African national with historic links both to the UK and the RSA who voluntarily decided to move to the UK in 2007 with his wife and three children. They lived in the UK thereafter as a family and throughout the Relevant Period. Although he retained property and interests in the RSA he spent more time in the UK where he lived and his centre of vital interests was in the UK. HMRC do not challenge his South African citizenship or residence; purely his Treaty residence for tax purposes.

18. If his centre of vital interests cannot be determined as between the UK and the RSA, his sole habitual abode since his arrival in the UK in 2007, prior to the start of the 2010/11 tax year, and thereafter, was in the UK.

Article 4 of the DTC

19. The relevant provisions of Article 4 read:-

“1. For the purposes of this Convention, the term ‘resident of a Contracting State’ means any person who, under the laws of that State, is liable to tax therein by reason of that person’s domicile, residence, place of management, place of incorporation or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof.

2. Where by reason of the provisions of paragraph 1 of this Article an individual is a resident of both Contracting States, then that individual’s status shall be determined in accordance with the following rules:

(a) the individual shall be deemed to be a resident solely of the Contracting State in which a permanent home is available to the individual; if a permanent home is available to the individual in both States, the individual shall be deemed to be a resident solely of the State with which the individual’s personal and economic relations are closer (centre of vital interests);

(b) if the sole residence cannot be determined under the provisions of subparagraph (a), the individual shall be deemed to be a resident solely of the State in which the individual has an habitual abode;

(c) if the individual has an habitual abode in both Contracting States or in neither of them, the individual shall be deemed to be a resident solely of the State of which the individual is a national;...”.

20. The Treaty must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (“the Vienna Convention”): see *Anson*.

21. Guidance as to how the DTC is to be interpreted is to be found in the Vienna Convention, in OECD commentaries on the OECD Model Tax Convention (the “MTC”) on which the Treaty is based, and in some UK authorities. Beginning with the Vienna Convention, Article 31 provides, so far as is relevant, that:

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

...

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

22. The correct approach to interpretation was most recently set out in *Anson* by the Supreme Court (and recently referred to with approval by the Supreme Court in *Fowler*) where Lord Reed, delivering the judgment of the Court, stated at [56]:

“Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.”

23. In *Fowler* at paragraphs 18 and 19, Lord Briggs pointed out that the OECD Commentaries are updated from time to time, so that they may, and do in this case, post-date the DTC but they should be given such persuasive force as they deserve. He referenced Patten LJ, in *Smallwood* at paragraphs 26 to 29. We quote the following passages:

“26. The correct approach to the construction of the [DTC] is not, I think, controversial. The Special Commissioners adopted the summary by Mummery J (as he then was) in *IRC v Commerzbank* [1990] STC 285 at page 297 of the principles of interpretation laid down by the House of Lords in *Fothergill v Monarch Airlines* [1981] AC 251. This summary has subsequently been approved by the Court of Appeal in *Memec v IRC* [1998] STC 754 as a correct statement of the law. In his judgment, Mummery J said that:-

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

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

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

‘The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament which deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd v. Babco Forwarding & Shipping (UK) Limited*, [1987] AC 141 at 152, "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance": per Lord Diplock (at 281–282) and Lord Scarman (at 293).’...”.

and

“29. [In relation to the DTC] Its purpose is to set out rules for resolving issues of double taxation which arise from the tax treatment adopted by each country's domestic legislation by reference to a series of tests agreed by the Contracting States under the DTA. The criteria adopted in these tests are not necessarily related to the test of liability under the relevant national laws and are certainly not intended to resolve these domestic issues.”

The OECD Commentary (“the Commentary”)

Matters on which the parties are agreed

24. The RSA is not a member of the OECD but the parties are agreed that both the RSA and the UK were aware of the Commentary on the Model Tax Convention on Income and Capital Gains (“MTC”) and:

- (1) Article 4 is the same as that in the MTC.
- (2) The Commentary on the MTC adopts the Commentary.
- (3) The RSA has not commented on the Commentary as other non OECD members have done.

25. The test in regard to Article 4(2)(a) is comparative whereas it is not for Article 4(2)(b).

26. There is no dispute that Mr Oppenheimer owned and was habitually resident at Folly Farm in the UK but also that he was resident in the RSA and maintained a permanent home at Isibindi.

27. The parties relied on the following paragraphs of the Commentary namely:-

“9. This paragraph relates to the case where, under the provisions of paragraph 1, an individual is a resident of both Contracting States.

10. To solve this conflict special rules must be established which give the attachment to one State a preference over the attachment to the other State. As far as possible, the preference criterion must be of such a nature that there can be no question but that the person concerned will satisfy it in one State only, and at the same time it must reflect such an attachment that it is felt to be natural that the right to tax devolves upon that particular State. The facts to which the special rules will apply are those existing during the period when the residence of the taxpayer affects tax liability, which may be less than an entire taxable period.....

15. If the individual has a permanent home in both Contracting States, it is necessary to look at the facts in order to ascertain with which of the two States his personal and economic relations are closer. Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State...

17. In the first situation, the case where the individual has a permanent home available to him in both States, the fact of having an habitual abode in one State but not in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently. For this purpose regard must be had to stays made by the individual not only at the permanent home in the State in question but also at any other place in the same State.....

19. The application of the criterion provided for in subparagraph b) requires a determination of whether the individual lived habitually, in the sense of being customarily or usually present, in one of the two States but not in the other during a given period; the test will not be satisfied by simply determining in which of the two Contracting States the individual has spent more days during that period. The phrase 'séjourne de façon habituelle', which is used in the French version of subparagraph b), provides a useful insight as to the meaning of 'habitual abode', a notion that refers to the frequency, duration and regularity of stays that are part of the settled routine of an individual's life and are therefore more than transient. As recognised in subparagraph c), it is possible for an individual to have an habitual abode in the two States, which would be the case if the individual was customarily or usually present in each State during the relevant period, regardless of the fact that he spent more days in one State than in the other. Assume, for instance, that over a period of five years, an individual owns a house in both States A and B but the facts do not allow the determination of the State in which the individual's centre of vital interests is situated. The individual works in State A where he habitually lives but returns to State B two days a month and once a year for a three-week holiday. In that case, the individual will have an habitual abode in State A but not in State B. Assume, however, that over the same period of five years, the individual works short periods of time in State A, where he returns 15 times a year for stays of two weeks each time, but is present in State B the rest of the time (assume also that the facts of the case do not allow the determination of the State in which the individual's centre of

vital interests is situated). In that case the individual will have a habitual abode in both State A and State B.

19.1 Subparagraph b) does not specify over what length of time the determination of whether an individual has an habitual abode in one or both States must be made. The determination must cover a sufficient length of time for it to be possible to ascertain the frequency, duration and regularity of stays that are part of the settled routine of the individual's life. Care should be taken, however, to consider a period of time during which there were no major changes of personal circumstances that would clearly affect the determination (such as a separation or divorce). The relevant period for purposes of the determination of whether an individual has an habitual abode in one or both States will not always correspond to the period of dual-residence, especially where the period of dual-residence is very short.

28. Technically, resort should be had to the commentary as in force at the date that the DTC was agreed and then more recent versions only to the extent that they are cogent and assist the determination by the Tribunal. The most relevant change is in paragraph 19, which was only introduced in 2017, but both parties were agreed that the Commentary is helpful in understanding the tiebreaker tests. We agree.

29. HMRC also rely on paragraph 62 of the United Nations Commentary because the RSA is a signatory to the UN Model Double Taxation Convention which adopted Article 4(2) of the DTC. That reads:-

“Concepts such as ‘centre of vital interest’ and ‘place of effective management’ which was the tiebreaker rule for legal entities before the 2017 update of the Convention, require a strong relationship between a taxpayer and a country. The fact that a taxpayer has a home available to him in a country where he sojourns frequently, is not enough to claim that that country is his centre of vital interests; likewise the mere fact that meetings of a board of directors of a company take place in a country is not sufficient to conclude that this is where the company is effectively managed.”

The approach to the issues

30. Both parties invited the Tribunal to determine the case on centre of vital interests but there was not unanimity on the approach to be adopted. The principal point of difference was Mr Goldberg's focus on the permanent immutable links that Mr Oppenheimer had, and has, with the RSA. He advanced five principles in that regard and we have referenced the cases on which he relies for that, namely:-

- (a) Deep roots such as a permanent home, nationality, domicile, place of birth are important (*Hertel*).
- (b) The centre of vital interests is not easily moved (*Hertel, Gaudreau, Hankinson and Yates*).
- (c) A move of State for a limited purpose is unlikely to shift the centre of vital interests (*Gaudreau, Hankinson and Yates*).
- (d) The phrase “personal and economic relations” is conjoined and poses a composite test and that is a matter of fact and degree (*Pike*).
- (e) “Vital” means permanent links to the State (*Pike and the Commentary*).

31. Mr Stone argued that, with the exception of point (d) that cannot be correct since Treaty residence is an annual test determined by the objective facts of the taxpayer's life at the relevant time. Treaty residence can be changed from one year to the next depending on the

circumstances. Mr Stone relied on *Yoon, Shah* and *Mackay*. In his oral Closing Submissions Mr Goldberg conceded that the centre of vital interests could change from year to year in certain “unusual” circumstances but it did not change as easily as residence.

32. As far as habitual abode is concerned, and that is only reached if the centre of vital interests cannot be established, there was less disagreement as to the correct legal approach and it was concerned only with whether Mr Oppenheimer had an habitual abode in the RSA.

33. Both parties are agreed that we must look at each of the tax years in the Relevant Period since Treaty residence, like income tax, is annual. However, Mr Goldberg argued that that must be in the context of the overall position.

34. It was accepted by Mr Stone that Treaty residence is not determined by either day count or actual residence.

35. Both parties lodged with the Tribunal extensive notes of facts that we were invited to find. In the case of Mr Oppenheimer that extended to more than 70 and for HMRC it was of the order of 100.

The Agreed Facts

36. Mr Oppenheimer was, at all material times, by reason of the provisions of paragraph 1 of Article 4 of the DTC, a resident of both Contracting States.

37. Mr Oppenheimer had a permanent home available to him in both States for the purposes of paragraph 2(a) of Article 4.

38. Mr Oppenheimer (while arguing that he also had an habitual abode in the RSA) accepts that he had an habitual abode in the UK for the purposes of paragraph 2(b) of Article 4.

39. Mr Stone accepts that Mr Oppenheimer’s loyalty to, and love for, the RSA is undoubted.

The Facts

The Family

40. Mr Oppenheimer is a fourth generation South African having been born in Johannesburg. He is the son of Mr Nicky Oppenheimer, and the great grandson of the founder, in 1917, of Anglo American Corporation of South Africa, a famous mining company. It is now Anglo American plc (“Anglo”), a British listed multinational mining company. Since 1999 it has been headquartered in London.

41. Since 1929, Mr Oppenheimer’s great grandfather had chaired the De Beers mining company (we use the term De Beers because it is an extensive group of companies and we explain some of that, insofar as we can, below) until his death when Mr Oppenheimer’s grandfather took over as Chairman of both Anglo and De Beers.

42. At an early stage, De Beers owned 32% of Anglo and Anglo owned 30% of De Beers although we understand that by the time of the sale it was 45% of De Beers. At that stage the Oppenheimer interest in De Beers was 40%.

43. Mr Nicky Oppenheimer was a non-executive director of Anglo until 2012 when De Beers was sold to Anglo.

44. Mr Nicky Oppenheimer, having been Deputy Chairman of De Beers since 1984, became Executive Chairman in 1998 and then Chairman in 2000 when his father died. He was Chairman until De Beers was sold to Anglo in 2012.

45. He, and his wife, were both resident in the RSA and the UK from 1984 until, in 2013/14, his day count in the UK fell below the 90 day threshold.

46. He told us that until 2013/14 he spent a total of approximately six months in each country travelling between them on a very regular basis to the extent that, although he considered the RSA to be his primary base, he tended to spend approximately a week at a time in each country. We accept that and find it as fact, not least since it is corroborated by Mr Oppenheimer, but we observe that his witness statement, which was explicitly described as being in support of his son, stated at 10.2: “I might be in the UK perhaps one week in six”. Clearly not in the period until 2013/14. That must have been an error.

47. He had acquired indefinite leave to remain in the UK in 1983, so as a minor child Mr Jonathan Oppenheimer had also acquired indefinite leave to remain in the UK as, in due course, did his wife and children as his dependents.

48. In the early 1970s, for a short period, Mr Oppenheimer attended the Montessori Training College in London as his father had come to London in connection with his work with De Beers. On returning to South Africa, he lived at Little Brenthurst on his family’s Brenthurst Estate (“Brenthurst”) in Johannesburg and attended preparatory school in Johannesburg.

49. In 1982, his father moved to London to work for The Diamond Trading Company Limited (“Diamond”) a subsidiary of De Beers. (On 1 August 2008, Diamond changed its name to De Beers UK Limited).

50. From the age of 13, Mr Oppenheimer went to boarding school in the UK. From 1988 until June 1991 he attended university in Oxford. His father and grandfather had also attended boarding school and university in the UK. During his time at school and university he would usually spend his holidays in Johannesburg at Brenthurst (save for holidays elsewhere, for example, at his parents’ cattle farm in Zimbabwe or shooting in Scotland or skiing).

51. Since 1984 his parents have owned a home known as Waltham Place (“Waltham”) on a 220 acre estate in Berkshire. Waltham has been in the Oppenheimer family for more than 100 years. They also owned a flat in London but Mr Oppenheimer did not spend much time in either property. He would occasionally go to Waltham for a term-time exeat which was simply during the day on a Sunday.

52. His parents bought him a flat in London near their flat in Chelsea for his 18th birthday and occasionally he would stay there for a few nights whilst at university. That flat was held in a trust structure.

53. In or around June or July 1991 he returned to the RSA and stayed at Brenthurst. Between January and June or July of 1992 he travelled in the United States where he met his future wife, Jennifer.

54. In the summer of 1992 he returned to the RSA to undertake his one year period of National Service. It was a conscious choice to do National Service because as the country was in the middle of a transition from apartheid to democracy it was clear that conscription would not last much longer. In fact conscription ended at the end of 1993.

55. In May or June 1993, he returned to London for a 12 month internship at N. M. Rothschild & Sons in London. He travelled to the USA at least once a month to visit his future wife until she joined him in London in February 1994. In the year before that she had spent only one weekend with him in London.

56. He married his wife in June 1994 and the wedding was held in the village church next to Waltham and the reception at Waltham, not least because that was roughly equidistant between the South African family and his wife’s American family.

57. He then completed an internship for a year as a management trainee at De Beers and was based at Diamond’s offices in London. They lived in his London flat. During that period he

travelled extensively and spent long periods elsewhere, including periods of three or four weeks at a time in Belgium, India, and Israel, possibly Botswana, and in Kimberley in the RSA. When abroad, other than the period spent in Kimberley, where he lived in one of his grandparents' homes, he stayed in a company flat or hotel for each trip.

58. When that internship finished, at the suggestion of his father, he and his wife relocated to Zimbabwe in May 1995 for an extended internship with Anglo American Corporation of Zimbabwe which was a subsidiary of Anglo. The focus was on Zimbabwe.

59. Whilst in Zimbabwe, since he had a helicopter and fixed wing licence, he flew himself and his family to Johannesburg on a regular basis making Zimbabwe almost within commuting distance from all of his interests in Johannesburg. We had no evidence as to whether, or to what extent, he commuted. He was certainly resident in Zimbabwe. His father, who is also a very keen pilot visited them frequently in Zimbabwe.

60. Their first child was born in January 1996 and the second in April 1997. Although the family lived in Harare, Mrs Oppenheimer lived at Brenthurst in the last few weeks of each pregnancy and for the first few weeks thereafter. Mr Oppenheimer and their children have South African nationality, whilst Mrs Oppenheimer retained her American nationality.

61. Whilst living in Zimbabwe, Mr Oppenheimer visited the UK for occasional business meetings and for his father's annual shoot in Scotland every August.

62. After they left Harare on 31 December 1998 they lived at Brenthurst for about two or three months and then moved to a home on another family estate in Inanda, Johannesburg which was later renamed Isibindi. Mr Nicky Oppenheimer had previously lived on the Inanda estate before moving to his estate at Brenthurst.

63. Their third child was born in March 2001 and they decided that their home was too small. Mr Oppenheimer drew up a set of plans which was the genesis of what became their home at Isibindi. Construction commenced in 2003 and finished in 2004.

64. All three children attended a pre-prep school in Johannesburg and the two boys went on to the same preparatory school in the RSA as their father and grandfather.

65. When their first child was born, Mr Oppenheimer had put his name down for a number of secondary schools in both the RSA and the UK. They did not consider the United States because it was too far from the RSA. They did the same for the other two children.

66. After much discussion in 2006, the eldest child having been accepted for a school in the UK which had recommended a period of primary education in the UK, it was agreed that all three children should be moved into the UK education system at the same time in 2007.

67. The family moved to the UK in August 2007 and purchased Folly Farm. Mr Oppenheimer's UK tax return for 2010/11 stated that he had arrived in the UK on 6 April 2010. He argued that prior to that he had simply been visiting the UK and had remained non-resident. Baker Tilly, who were then acting for Mr Oppenheimer, argued that it was only in 2010 that his visits to the UK acquired a degree of regularity. We had no evidence in that regard beyond the Baker Tilly letter. Before, during and after the Relevant Period he has remained a resident of the RSA and submitted tax returns there.

68. The intention was that the children would board when they were old enough. In the case of the youngest child that would have been in 2014. Had they boarded, which only the eldest did for any length of time (the youngest boarded for only one term), the intention had been that at that stage Mr Oppenheimer and his wife would have spent less time in the UK and more time in the RSA.

69. The preparatory school attended by the children offered weekly boarding but the children attended as day pupils.
70. During the Relevant Period Mrs Oppenheimer and two, and sometimes three, of the children were in the UK during school term times and, in his words, Mr Oppenheimer watched the children's sporting events "pretty much every single Saturday".
71. Mr Oppenheimer tried to avoid spending more than a few nights away on business whilst the children were at school.
72. The middle child was educated in the US between September 2011 and January 2013. Mr Oppenheimer and his wife tried to ensure that one of them would be present in the USA whenever possible in order to support that child. Accordingly, the UK was an easier base for both of them from which to fly to the US.
73. In that period because the US and UK term dates were largely incompatible, holidays were spent by the family in the US, the RSA, the UK or elsewhere. For example, Christmas 2011 was spent in the UK because the middle child had no time to go to the RSA where the previous Christmas had been spent.
74. In the period from 2013 to 2016 the middle child's education was split almost equally between the US and the UK.
75. Tertiary education for the eldest child was university in the UK and for the middle child was in France and she split her time between the US and France.
76. The youngest child, who boarded for less than a term, finished secondary education in the UK in the summer of 2020.
77. Mr Oppenheimer ensured that his diary was kept clear for his children's annual school meetings with teachers, other important school events and half terms.
78. As we have indicated above, De Beers was sold to Anglo at the end of 2012 and therefore Mr Nicky Oppenheimer demitted office as Chairman and Mr Oppenheimer's employment in London terminated. After that sale, approximately 70% of the Oppenheimer family capital was managed in the USA and a significant amount of that capital was invested in Asia.
79. Mr Nicky Oppenheimer and his wife became non-resident in the UK in 2013/14 when the day count fell below 90 days.
80. Tragically, Mrs Oppenheimer died after a short illness in June 2017. She had treatment in the United States in early 2017 but returned to the UK in March or April 2017. Her funeral took place in the gardens at Folly Farm. Her memorial services were held in the RSA, the UK and America and were attended by approximately 1000, 330 and 200 people respectively.
81. Mr Oppenheimer celebrated his birthdays in 2010 and 2011 in the UK and his wife did so in 2011 and 2012.
82. Mr Oppenheimer celebrated his 40th birthday in the RSA at Tswalu and Isibindi. They booked the whole of Tswalu for their friends and their children (18 families with 12 based in the RSA, three from the UK and three from elsewhere and spent a week there) and he also had a party at Isibindi for approximately 300 people. He did celebrate in London with a party for approximately 55 people. However, that birthday was in November 2009 which is before the Relevant Period.
83. For his 50th birthday, which was sadly after his wife died, he again celebrated at Tswalu with a large party in Johannesburg for over 600 people and a smaller party in the UK for approximately 200 people.

The property portfolio and matters directly associated therewith

Folly Farm

84. The family moved to the UK on 1 August 2007 and on 15 August 2007, Mr Oppenheimer purchased Folly Farm at a cost of approximately £8 million. They moved into the main house in 2007 but on realising that it required significant renovation they converted what was described as a cottage in the grounds. In fact, it was two semi-detached properties (North Cottages) which they converted into one property and they moved into it in April 2009.

85. Folly Farm itself is Grade 1 listed and the gardens Grade 2 listed. The house and gardens had been primarily designed and developed by Edwin Lutyens and Gertrude Jekyll. It is approximately 25 miles away from Waltham.

86. The process of restoring Folly Farm commenced in 2007 with the assembly of a design team including Lutyens experts later described by the Lutyens trust as “a ‘dream team’ of design and executive architects, contractors and specialists”. During the Relevant Period a number of planning permission applications were made. HMRC argue that there were 30 applications, but Mr Oppenheimer’s then agents, RSM, argued that there were only 10 substantive applications.

87. It became apparent that considerable investment was required in both the main house and the gardens and, over a period some £34 million was expended. The majority of the original works were completed by 2012 and the family moved into the main house in January 2013. (Mr Oppenheimer’s first witness statement dated 2020 said they moved into the main house in 2012 but a letter from RSM, to HMRC dated 16 December 2016 confirmed that it was January 2013 and we find that that is likely to be more accurate given the elapse of time.)

88. The main house has five bedrooms. In the course of renovations, in addition, Mews Cottage and Mews Flat were converted and incorporated into the main house. A squash court was built underground beneath the conversion which now incorporates a gym, a sports complex and other rooms.

89. There are also two further semi-detached houses called South Cottages which are occupied by the estate manager and the head gardener. In addition, another employee lives in a property called Bothy Cottage which is adjacent, and attached, to North Cottage. In the relevant period there would have been between five and eight staff accommodated on the estate.

90. Mr Oppenheimer had also purchased a further two properties which now form part of the estate, namely, Wisteria at a cost of £900,000 on 15 May 2009 and the Old Post Cottage on 20 July 2012 at a cost of £725,000. Both are used for staff accommodation.

91. In the grounds there are also extensive outbuildings which include a workshop, store rooms, a changing room for staff, a canteen area and garaged parking. There is a miniature tennis court for an American sport called paddle tennis, a tennis court, a cricket net, a walled garden and three glass houses.

92. Mrs Oppenheimer is quoted as saying of Lutyens “...it is our hope that the great man himself would approve of our loving restoration of the house and garden which for our family have now become a home.” She described the project as a “lifetime privilege”. In 2017 she returned from treatment in the USA, in Mr Oppenheimer’s words “so that she could enjoy the time in the house and gardens that she had invested such time and effort in...”.

93. Video conferencing facilities were installed at Folly Farm to enable Mr Oppenheimer to continue his work in the RSA and elsewhere without having to go into the office.

94. Mr Oppenheimer incorporated Landseer Management Services Limited (“Landseer”) on 21 July 2008 as an entity within his Family Office structure through which the renovation and staffing costs of Folly Farm were managed. He was not a director of that company. 1 Charterhouse Street Limited held the shares in Landseer as nominee for Mr Oppenheimer. He had one £1 share in Landseer until, on 3 June 2015, he was allotted a further £1 share at a premium of £491,992. Landseer was dissolved on 11 May 2021. We know nothing of that.

95. During the Relevant Period, Landseer’s turnover comprised solely of a management fee paid to it by Mr Oppenheimer and that was marginally more than the project costs of the redevelopment of Folly Farm and the staff costs.

96. To summarise, the accounts disclose that in the accounting periods ending 31 December 2009 to 31 December 2017 the total turnover was £35,065,124, the administrative expenses were £34,363,690, the staff and estate costs were £4,020,964 and the project costs (being the difference between the latter two) were £30,342,526.

97. Folly Farm is, and always has been, fully staffed and the number of staff has varied over the years rising from eight in 2010 to 17 in 2017 and currently it is 19 or 20. Of those two thirds are employed in the gardens. The gardens require constant attention and they are opened to the public through the National Garden Scheme and through direct invitation.

98. In 2013, the first full year in which the family lived in the main house, there were 15 staff and in 2014 there were 16 staff rising to 18 staff in the next two years and falling to 17 in 2017. The cost for staff in 2017 was £660,919. The majority of those staff worked in the grounds. Mrs Oppenheimer’s personal assistant may have been included in those numbers. Mr Oppenheimer could not be sure.

99. Mr Oppenheimer’s executive assistant in the UK and his chief of staff in the UK were not included in that staff count and they worked in the London office, albeit they travelled extensively with and for Mr Oppenheimer.

Funding for Folly Farm

100. The main source of the funding of the £34 million that has been spent on the renovations and the running costs of Folly Farm is the HOFCT. It is a discretionary trust and is resident in Bermuda. HOFCT was settled by a South African resident and requests for distributions are managed by the Family Office in Johannesburg, so when Mr Oppenheimer required funding from the HOFCT he would contact the Family Office.

101. The trustee was EOSon Trustees Bermuda Limited which itself was a trust company under the laws of Bermuda. The principal asset of the Trust is the share capital of HOFCT Investments Limited which is a company incorporated in the British Virgin Islands.

102. That company owns the benefit of debts owed by other trusts for the benefit of the Oppenheimer family.

103. The Oppenheimer wealth, including that of Mr Oppenheimer, is held offshore in terms of ownership. The income fed into it is derived as to 50% from the RSA and most of the balance from other parts of Africa.

104. The trustee of the HOFCT, during the 2010/11 and 2011/12 UK tax years, awarded the following amounts to Mr Oppenheimer which he remitted to the UK during the same period:

DATE OF AWARD	AMOUNT OF DISTRIBUTION
1 April 2011	\$19,087,920
13 December 2011	\$1,531,185
30 December 2011	£1,375,000 or \$2,129,462.50
15 February 2012	£9,400,000 or \$14,861,400

In addition, prior to the Relevant Period, on 18 December 2009, the trustee awarded £5 million and \$2.6 million which were also remitted to the UK. Those distributions were disclosed in Mr Oppenheimer's South African tax returns but were not taxed in the RSA.

The London Flat

105. As we indicate above Mr Oppenheimer was given a flat in London for his 18th birthday. However, it is held in a trust. It was acquired with the freehold. Two other flats in that building were also acquired by that trust over a period of time, apparently to protect the view from his parents' property across the road. The basement flat in Mr Oppenheimer's building was utilised by his parents until they purchased another property in London and moved away. None of the four flats at that address have ever been let out.

106. During the Relevant Period Mr Oppenheimer spent very little time in his flat which was, in his view, not habitable.

107. Mr Nicky Oppenheimer explained that they had moved out of their original flat and Mr Oppenheimer "...came to occupy it". Mr Oppenheimer stayed in London in that flat occasionally during the Relevant Period. We have no detail but we find that it was intermittent.

Isibindi

108. As we indicate at paragraph 62 above, Mr Oppenheimer had constructed a home called Isibindi. All of the witness statements suggested that Mr Oppenheimer had owned Isibindi throughout the Relevant Period.

109. We were not persuaded by the limited information provided and in the course of the hearing asked for evidence. We were provided with an aerial picture of Isibindi and an explanation stating that the ground had been owned by a South African Trust, the Harry Oppenheimer Family Trust.

110. We were wholly unpersuaded by that since the only relevant reference in the Bundle to the Harry Oppenheimer Family Trust was in the accounts of a company, Cypher Holdings (Proprietary Limited ("Cypher") which had an unsecured loan from that Trust. It seemed apparent to us that Cypher owned the property, or, as it transpired, only in part. We note that Mr Oppenheimer was a director of Cypher with his close South African friend James Teeger and an American friend Thomas Claiborne (they were also all directors in a number of other companies). His father was Chairman.

111. We issued Directions during the hearing seeking clarification on that and other matters on which there was a lack of clarity.

112. Having reviewed the evidence subsequently provided, we find that on 14 December 2012, Mr Oppenheimer entered into a Sale of Properties Agreement with four

different companies that owned the ground upon which Isibindi was constructed and some of the grounds for 122 million Rand. The relevant accounts for Cypher disclose that the property owned by them had been valued independently at an open market value of 100 million Rand on 1 August 2012 and Mr Oppenheimer had signed an agreement on 12 December 2012 to acquire the land at that value. As at 28 February 2013 the transaction had not been completed. He acquired further property in 2015 for 15 million Rand.

113. The balance of the grounds, which include substantial guest and staff accommodation, are owned by the Nicky Oppenheimer South Africa Trust (“NOSAT”). The entire grounds extend to just under 11 hectares, which is approximately 27 acres.

114. Mr Oppenheimer designed Isibindi and his wife the interior décor. It has individual bedrooms for each of the children and a guestroom, in addition to the master bedroom complex. There is also a squash court, yoga studio, gym, cricket net, swimming pool and tennis court. In other words the same sporting facilities as at Folly Farm with the exception of the paddle court. Over a period Mr Oppenheimer has also created a gate or guard house and a community garden.

115. The house is fully staffed and in 2010 there were 33 staff, 30 in 2011 and 30 in 2012. We do not know the actual cost of the staff or indeed what they do.

Tswalu

116. Mr Oppenheimer refers to Tswalu as “my family’s nature reserve in the Kalahari”. It was purchased in 1999 and is owned by Tswalu Kalahari Reserve (Proprietary) Limited, a South African company. Mr Oppenheimer became a director of that company in that year. Its holding company is Tswalu Holdings Limited, a company incorporated in the British Virgin Islands.

117. Tswalu is both a tourism business and a conservation project. It is not far from the border with Botswana. The tourism business provides accommodation that is open to the public and primarily caters for international guests. A conservation research centre was completed in 2018.

118. Since 2007, the Oppenheimer family have invested significantly in Tswalu, increasing the total area from 93,000 hectares to 114,000 hectares at a cost of around 120 million Rand.

119. A new home in the reserve was developed for Mr Oppenheimer and his family known as Motlhopi. It was a £10.7 million development project carried out between 2014 and 2017 but we do not know how that was financed or by whom. Since it was finished in 2017, Mr Oppenheimer and his children have spent their Christmas holidays there. During the Relevant Period, when visiting Tswalu, the family stayed in a lodge called Tarkuni in the reserve. When the family are staying in Tswalu, although there are resident staff, a number of Isibindi staff travel there to provide extra support.

120. Tswalu is the home of the Tswalu Dialogue conferences which Mr Oppenheimer has hosted annually since 2002. It was established in conjunction with the South African Institute of International Affairs. The Tswalu Dialogue is an independent public policy think tank and is a unique African forum bringing together prominent African and international, political and business figures. In the words of former President F W De Klerk, it had “... come to play an influential role shaping international policy towards Africa and African policy debates ...”.

121. The Brenthurst Foundation, which was established in 2004 by Mr Oppenheimer and his father, has also been involved in organising the Tswalu Dialogues.

122. As we indicate above, Mr Oppenheimer had celebrated both his 40th and 50th birthdays at Tswalu. His 40th birthday coincided with the fifth anniversary of the Brenthurst Foundation so it was a joint celebration.

Leopard Creek

123. Mr Oppenheimer owns a house on the Leopard Creek golf estate in the north of the RSA although he does not play there regularly.

Other property

124. Mr Oppenheimer said that they:

“...have a number of homes in the US: an apartment in New York ..., an apartment in Boston ...and two properties in Maine plus a piece of land in Maine which is owned by Jennifer's estate and her siblings. The Boston property was acquired in February 2016 as a base for Jennifer and me to support [their middle child] (we also leased a flat for [that child] in Paris when [at] university). I stayed at the Boston property with [that child] when I was with her in the US and spent a considerable amount of time there as a result. The [New York] property was purchased in October 2014 and we used it from time to time when we were in New York. The Maine properties were acquired in 1999 and 2010. We spent and continue to spend time in August there as Jennifer's parents and siblings have houses there as well.”

Renovation work was carried out at a number of the US properties between 2010 and 2016. We have no detail.

125. We have limited detail but Mr Oppenheimer confirmed that he had a “trust ownership structure in America”.

Non work related activities

Flying

126. Both Mr Oppenheimer and his father enjoy flying and Mr Oppenheimer holds South African licences for helicopter and fixed wing flying. He only holds a helicopter licence in the UK as a fixed wing licence relates to the registration of the aircraft so he did not need a UK licence. On average throughout the Relevant Period, approximately 75 or 80% of his flying was in aircraft registered in South Africa. Since 2012, the majority of his flights between the RSA and the UK have been in the private jet that he charters from Fireblade Aviation Proprietary Limited (“Fireblade”). When in the RSA he charters four planes and two helicopters from Fireblade. As we explain below, he was CEO of Fireblade.

127. Throughout the Relevant Period when in the UK, Mr Oppenheimer chartered a helicopter which was owned by family interests but reserved exclusively for his own use and that of his father (chartered by him on a commercial basis). He piloted this helicopter when commuting between Folly Farm and the De Beers office, which, during the earlier part of the Relevant Period, had a helipad on its roof. When his father was in the UK, Mr Oppenheimer would “quite often” stop off at Waltham Place *en route* to De Beers to pick up his father and fly to work together, which Mr Oppenheimer described not only as a “joy” but also an “extremely convenient way to travel”.

128. Following the decommissioning of the De Beers helipad at some point after 2012, Mr Oppenheimer instead commuted from Folly Farm to the Battersea helipad, *en route* to his office in London. When commuting to and from work, he would land the helicopter in the curtilage of the Folly Farm grounds just west of the main house and a colleague would then fly it back to its base at the Denham Aerodrome. That colleague would have brought it to Folly Farm in the morning.

129. In addition to their regular daily helicopter commutes, Mr Oppenheimer confirmed that during the Relevant Period, he occasionally flew recreationally with his father in the UK, most

often around Scotland, and he would fly the helicopter up to Scotland for the annual shooting week near Invermark.

Shooting

130. Mr Oppenheimer confirmed that he personally owned five licensed shotguns in the UK, which are registered to Folly Farm, but additionally he has on his own shotgun licence all of his father's guns, and those of his son so that they can share the use of the guns between them. His guns would also be on their licences.

131. The Oppenheimer family have an annual shoot every August near Invermark in Scotland which typically lasts a week. Historically Mr Oppenheimer and his father had shared the hosting of the shooting week although his recollection was that it may be that throughout the Relevant Period he was "host". Around 13 attendees would participate in the shoot each year, for varying number of days, although some attended with partners and children resulting in an overall party of around 20 people during the week. Most would attend every year, including a number of friends from his time at university and friends from the RSA. Those from the RSA tended to attend for more days than those from the UK.

132. In relation to the four or five other occasions on which Mr Oppenheimer shot in the UK during the year, these would typically happen in or around the Home Counties, either with UK-resident South African friends, or work or university friends based in the UK. They tended to take place during the week rather than at the weekend.

133. He also shoots regularly in South Africa, Spain and Zimbabwe.

Golf

134. Mr Oppenheimer is a member of three golf clubs in South Africa and three golf clubs in the UK plus one, or possibly two (there is conflicting evidence) in the United States and one in Zimbabwe.

135. Of the three golf clubs of which Mr Oppenheimer is a member in the UK, Temple Golf Club, which is only a few miles away from Waltham, has a long Oppenheimer family connection. Raymond Oppenheimer (Mr Nicky Oppenheimer's cousin, from whom he inherited Waltham) was President of the club and the Oppenheimer family have historically supported the club financially. Mr Oppenheimer has been a member since he arrived in the UK to attend school at the age of 13, his father is a member and two of Mr Oppenheimer's children have recently become members. Mr Oppenheimer confirmed that whenever he played there, it would most often have been with either his children or his father.

136. Mr Oppenheimer said that at he played "very, very occasionally" with friends at one of the other clubs but the "vast majority of the time with family members" (ie his father and his sons). He estimated that he played only 10 rounds of golf in total each year in the UK

137. In addition to the three clubs in the UK of which he is a member, Mr Oppenheimer confirmed that he occasionally played at other courses in the UK, including on corporate golf days.

138. He played more golf in the RSA, where he is a member of three clubs but even then he estimated that he only played a total of 10 to 15 games each year. He explained that the reason he "...played much more golf in South Africa is, we are there without the distraction of school and other activities".

Cricket

139. Mr Oppenheimer primarily plays cricket when in the RSA but practises in the nets both in the RSA and at Folly Farm. He brought his cricket team to tour the UK in 2012 and attended the South Africa v England Test Match at the Oval.

140. He funds his cricket team, the JMEO XI, which he has run since 2005, sponsors matches and plays matches each year at the Oppenheimer cricket pavilion in Randjesfontein. He is involved in team selection, plans and finances tours and pays for the running costs of Randjesfontein. In the day count schedule covering 6 April 2010 to 5 April 2012 there are 14 entries for cricket of which two relate to matches and the others to calls or meetings, some of which were participated in whilst Mr Oppenheimer was in the UK.

141. Mr Oppenheimer sponsors the Oppenheimer Michaelmas Cricket Week in the RSA which is an annual cricket event for the top South African school cricket teams.

142. Since 2014, he has been patron of the Guateng Cricket Umpires Association in the RSA.

Squash

143. Mr Oppenheimer had squash courts at his homes in both the RSA and the UK. In both countries he had people who came and played with him as he used it as a means of keeping fit. In the UK he had a squash coach. He played “a little bit of social squash” and played with the children.

Clubs

144. He was a member of two London private members’ clubs during the Relevant Period: Harry’s Bar (26 South Audley St) and George (87-88 Mount St), which he estimated he frequented up to three to four times a year. We do not accept Mr Goldberg’s assertion that to describe them as private members’ clubs was too grandiose. Harry’s Bar describes itself as “One of the most elegant and sophisticated private members’ clubs in London”.

145. He is a member of the Wanderers Club in Johannesburg which offers a great deal more than purely sporting facilities. He does not play tennis there.

Politics

146. Mr Oppenheimer has never voted in the UK, albeit he was on the electoral roll at Folly Farm from 2008 to 2012. He does vote in the RSA. He has significant contact with politicians in the RSA but minimal contact in the UK and then, only in relation to issues impacting on the RSA or Africa.

Health

147. Mr Oppenheimer’s principal doctor and dentist are in the RSA but he has used UK based services when it was impractical to travel to the RSA. The family were registered with a GP close to Folly Farm and also with a doctor in the RSA.

Mr Oppenheimer’s paid and unpaid employment history

148. Mr Oppenheimer has never received a salary from a UK company but in the Relevant Period he declared UK earnings on the basis of the day count that he was working in the UK. That was a proportion of his total salaried income declared in the UK worked out according to the split of dates spent in the UK.

149. Whilst in the UK, until 2012, he would either work remotely from Folly Farm or from the De Beers office in London. After 2012 he created an office for himself at Oppenheimer & Son, now Oppenheimer Generations. Folly Farm had had video conferencing facilities since shortly after it was bought.

150. We have narrated the detail of Mr Oppenheimer's employment history until December 1998 under the heading "The Family".

151. With the exception of his time at R. M. Rothschild in 1993/94, Mr Oppenheimer was employed by "family" companies. He returned to Johannesburg in 1999 and although he was initially employed by Anglo, at his father's instigation, he was employed by the De Beers group of companies in South Africa and elsewhere between 2000 and September 2012 when the Oppenheimer family interest in De Beers Société Anonyme ("De Beers SA"), the ultimate holding company of the De Beers Group of companies, was sold for £5.1 billion.

152. After the leveraged buy-out of De Beers by Anglo, the Oppenheimer family and the Botswana Government was concluded in 2001, Mr Oppenheimer was employed by De Beers as head of De Beers Producer Relations for Africa. His role for two and a half years was in developing relations with the governments of the RSA, Botswana, Namibia, Angola and the Democratic Republic of the Congo which were the producer and exploration partners.

153. Throughout his career in the industry his primary focus has been on the production side. His evidence was that the real value generators for De Beers were the South African mining operations and the operations in Botswana, Namibia and Canada. That was where he was heavily involved.

154. He was Chairman of Element Six between 2001 and 2012. It was incorporated in Luxembourg but managed on a day to day basis from London. The CEO was based in London and there were meetings approximately every six weeks. It made artificial diamonds for industrial use and those were manufactured around the world, including in Ireland, Sweden, China, the RSA and with smaller production units in the UK and Isle of Man.

155. Between 2001 and 2017 Mr Oppenheimer had been a non-executive director of Umicore which is a Belgian company and, whether directly or not, held shares in that company. Mr Oppenheimer has never been resident in Belgium or spent significant amounts of time there.

156. Between 2001/02 and 2012 Mr Oppenheimer sat on the Executive Committee and the Board of De Beers SA. That company was headquartered in Luxembourg. Meetings were held in Luxembourg and, on one occasion, in Botswana. Mr Oppenheimer was very involved in the recruitment of a new CEO in 2011 and spent a lot of time with him when he was first appointed. The control of finance and sales was based in London. "Technical" which Mr Oppenheimer described as a "critical" position was based in the RSA and production matters were devolved to the various countries involved such as the RSA, Namibia, Botswana and Canada.

157. E Oppenheimer & Son (Proprietary) Limited ("EOS Pty"), a company incorporated in the RSA, was the Oppenheimer Family Office in the RSA. (There are a number of Family Offices including offices in the UK and Isle of Man). It provided advisory and support services to a number of family entities. It was company secretary to numerous companies including, for example, Cypher and Fireblade. From 15 November 2001 until 27 November 2019, Mr Oppenheimer was on the board of EOS Pty. He played an active role attending meetings both in person and remotely. He was also involved in the hiring of new employees.

158. It employed Julie Burgon and his close friends Polly Carr, James Teeger and Thomas Claiborne were directors. Its parent company is E Oppenheimer & Sons Services Limited which was incorporated in the BVI and then the Isle of Man.

159. He ceased to be an employee on 30 June 2018. Although it is not in the relevant period, we note that since 2018 it had been replaced by Oppenheimer Generations Custodian SA (Proprietary) Limited ("OGCSA") and Mr Oppenheimer became an employee on 1 February 2019.

160. Mr Oppenheimer received a salary from both EOS Pty and OGCSA.

161. E Oppenheimer & Son International Limited (“EOSIL”) was the principal holding company for investments owned by the Oppenheimer family interests and Mr Oppenheimer was a non-executive director between 2002 and 2013. It was incorporated in the BVI and subsequently the Isle of Man.

162. EOSIL held a portfolio, latterly known as the South African Private Equity Portfolio (“SAPE”), which invested in direct equity stakes in business in South Africa and Southern Africa. Mr Oppenheimer and his father were consulted on the purchase and sale of investments on a regular basis and Mr Oppenheimer was in ongoing contact with the investment advisory team and senior management who were all based in the RSA. He also liaised with companies in the portfolio. In an average working day, anywhere in the world, Mr Oppenheimer would be involved in working on something concerning SAPE. That had been the case since the portfolio was established in 2003.

163. In 2004 Mr Oppenheimer had become Chief Executive of De Beers Consolidated Mines Limited, a South African entity. Although he was by then no longer the CEO during the Relevant Period he attended seven board meetings and 10 other meetings in person in the RSA between 15 April 2010 and 28 March 2012.

164. He was Chairman of De Beers Tanzania between 2003 and 2008 and Chairman of De Beers Canada between 2006 and 2012. He was a director of Diamond (later De Beers UK Limited) from 2006 until 2008.

165. For an unknown period he was an employee of both De Beers Consultancy Services Limited (a BVI company) and De Beers Group Services (Pty) Limited (a South African company). The former terminated on 31 December 2010 and the latter on 16 August 2012. Neither company was registered in the UK and neither operated PAYE.

166. His primary role from 2006 until 2012 was as Head of the Chairman’s Office of De Beers, so he worked with his father who was the Chairman. He did not have specific responsibility for any particular division within the De Beers group of companies but had an executive role focussing on strategic issues and involving ambassadorial and trouble-shooting aspects.

167. Although Mr Oppenheimer’s primary focus was on the production side of the business, he did have some involvement with the sales side of the business. An example would be his attendance at the sightholder meetings held in London every five weeks. Sightholders were the companies which held the coveted licences which authorised the bulk purchase of rough diamonds from De Beers.

168. In 2011, a company owned by EOSIL called Africa Holdings (created in 2007 by EOSIL) partnered with Temasek, which is what the Singaporeans call a special circumstance fund, to form a joint venture called Tana Africa Capital Managers (Proprietary) Limited (“Tana”). It is registered in Mauritius. It is an Africa focussed investment company looking at pan-African investments. Mr Oppenheimer was very involved not only in the creation of Tana but also its subsequent progress. The advisory team is based in the RSA and Mr Oppenheimer liaises frequently with the team.

169. His first chief of staff was appointed in the UK in 2011 and the second in 2013 and they both also had offices in the RSA; their role involved extensive travel with Mr Oppenheimer and liaison with Julie Burgon in the RSA. They were at a more senior level than her and Mr Oppenheimer said that he viewed them as “being an extension of me so they worked on whatever project he worked on”.

170. After De Beers was sold in 2012, the focus of Mr Oppenheimer's activities changed significantly.

171. Mr Oppenheimer frequently visited Makena Capital Management LLC ("Makena"), the US management entity which managed some of EOSIL's funds and in which EOSIL has a direct stake. Mr Oppenheimer said that of the portfolio of the family's assets that was managed by third parties, approximately 70% was managed by Makena in the US and that a significant amount of the capital that represents is deployed in Asia.

172. His first executive assistant was appointed in August 2016 and his primary focus was to foster relationships with third party managers of capital, and in particular Makena, so working out of London was appropriate.

173. Finally, after years of planning by Mr Oppenheimer, in 2013, Fireblade, which is an aircraft management vehicle, was established. The company itself had been incorporated with a different name on 30 January 2012 but Mr Oppenheimer and others were appointed to the board on 27 November 2013. It trades as a going concern supported by a very significant loan from a family trust which had been secured by Mr Oppenheimer. It acquired independent facilities at O R Tambo International Airport in Johannesburg for the provision of a separate business and tourism terminal. It provides charter services. That opened on 1 July 2014 and Mr Oppenheimer has been CEO of the business since its establishment, having been heavily involved from the first genesis of the venture some years earlier. All board meetings have been held in the RSA and Mr Oppenheimer has attended all but one and usually in person. It employs approximately 60 people. It has absorbed a great deal of his time and energy. Between 2014 and 2017 there was legal dispute with the Government of the RSA regarding Fireblade which was ultimately resolved in its favour. In those years, that too was time consuming for Mr Oppenheimer and, quite apart from issues arising on an almost daily basis, involved him attending a hearing in the Parliament to explain matters to the MPs.

174. In 2016, Oppenheimer Partners was founded at the instigation of Mr Oppenheimer. He requested funding from the family trusts in 2016. It is a direct investment vehicle and its geographic focus is on Africa including South Africa. The investment advisory team are all based in South Africa. Mr Oppenheimer oversaw renovation of the Oppenheimer Partners' office in Johannesburg. The team moved into the new office in March 2017 but prior to that the team had worked for a time from Isibindi. Mr Oppenheimer works with the team in the RSA analysing the investment targets and negotiating terms for the transactions and preparing investment recommendations.

175. Oppenheimer Partners UK Limited was incorporated in the UK on 7 July 2016 with its registered office at the Oppenheimer family office in London. Mr Oppenheimer and Polly Carr are directors. It has no employees. It is the investment manager for Oppenheimer Partners and the board meetings take place in the UK. It reviews the recommendations from the team in the RSA. Its mandate is global and its investments have been pan-African and include Ghana, Nigeria, Uganda and the RSA. All were made in 2018, ie after the Relevant Period, albeit research had been conducted earlier.

176. The immediate controlling party is Oppenheimer Partners Limited (formerly known as EOSon N Company Limited) an Isle of Man registered company. Oppenheimer Partners Limited is controlled by Nakshatra Reserves Limited, a company previously incorporated in the British Virgin Islands, which migrated to the Isle of Man on 28 November 2016.

177. Nakshatra Reserves Limited in turn is owned 70% by EOSon NFO PTC Limited as trustee of The Nicky Oppenheimer 2006 Discretionary Trust and 30% by EOSon NFO PTC Limited as trustee of The Nicky Oppenheimer 2006 Sole Benefit Trust. EOSon NFO PTC

Limited, a company incorporated in Bermuda, is therefore considered the ultimate controlling party.

178. Although we were not referred to it, we observe that Mr Oppenheimer was appointed as a director of Oppenheimer Partners Africa Advisors Proprietary Limited on 15 July 2016. That company carries on the business of financial business advisor. It is owned by Oppenheimer Partners Limited.

179. During the Relevant Period, Mr Oppenheimer was at some point a director of a number of other companies based in the RSA but with the exception of Cypher, they have no immediate relevance other than their geographical location. In summary, during the Relevant Period, Mr Oppenheimer held at least 18 directorships in South African companies and two in UK companies; he drew no salary from the UK companies.

The Brenthurst Foundation and associated matters

180. We have briefly referred to the Brenthurst Foundation and the Tswalu Dialogues under the heading “Tswalu” above. It was, and is, a significant philanthropic interest for Mr Oppenheimer and his father. In her lifetime, Mrs Oppenheimer was also very involved.

181. In 2003, Mr Oppenheimer and his father wrote a thought piece called the Brenthurst Initiative about how the RSA could deal with economic transformation. That generated a great deal of public debate, having been welcomed by the President of the RSA, so they established the Brenthurst Foundation (“the Foundation”) in Johannesburg in 2004. The methodology behind the Foundation was to identify development best practice from around the world and then share the findings with African heads of government with the aim of promoting and strengthening economic performance.

182. In 2005, Mr Oppenheimer recruited Dr Greg Mills, as a Director, to help with the Foundation which is run by a South African company, the Brenthurst Foundation Pty Limited, based in Johannesburg with a staff of seven. The Foundation works directly with African governments to create prosperity in the RSA and Africa more generally.

183. The Foundation is independent of the Oppenheimer family and the focus is deliberately pan-African and that is reflected in the composition of the Board which has three members from the RSA of the 15. The remainder come from Nigeria, Liberia, Kenya, Mozambique, Rwanda, Morocco, the USA and the UK. Dr Mills explained that that was a conscious decision which was taken “partly because of the challenges of the family’s legacy in South Africa. The family are closely associated with South Africa but their involvement in Anglo-American and De Beers meant they had a complicated relationship with South Africa”.

184. It operates as an interface between governments, society and business. The methodology is to identify development best practice from around the world and share the findings with African heads of government with the aim of promoting and strengthening economic performance. That allows for continuous and sustained policy engagement across Africa driven by a comprehensive research agenda.

185. Mr Oppenheimer is a Board member of the Foundation and its Patron, a member of the advisory board of the Foundation and worked very closely with Dr Mills in setting the strategic direction. That involved daily electronic contact at a minimum and perhaps several times in a day. He chairs the monthly management committee meetings whether remotely or in person. He hosts study tours and book launches and attends the annual board meetings. He co-authored papers for publication on a variety of subjects.

186. From the information made available, Mr Oppenheimer attended formal Foundation events as follows:

- (i) 2010: five from the RSA and five from the UK
- (ii) 2011: seven from the RSA and six from the UK
- (iii) 2012: three from the RSA and two from the UK

187. The Foundation's meetings and activities are not confined to the RSA and there is evidence of meetings in Botswana, Eritrea, Djibouti, Mozambique, Somaliland, Liberia, Zambia, Tanzania, Kenya, Rwanda, Ethiopia, Zimbabwe and Morocco, quite apart from Italy, Israel, India, Dubai, Afghanistan, Turkey, Singapore, the UK and the USA.

188. The Foundation publishes discussion papers on the issues that it is addressing.

189. Because the Foundation works directly with African governments, Mr Oppenheimer sat on the Presidential International Advisory Board to President Guebeza of Mozambique between 2006 and 2012 and on the Presidential Advisory Committee on the Economy to President Banda of Malawi between May 2012 and August 2014.

190. Since 2017, the focus has been more on the RSA but that is after the Relevant Period.

191. Since its establishment the Foundation has also been involved in organising the Tswalu Dialogue conferences which were hosted by Mr Oppenheimer and his wife. The Tswalu Dialogue is a premier international forum bringing together prominent African and international political and business figures. The conferences last for approximately three days and take place at least annually.

192. The Foundation describes itself as having been "established in 2002 as a premier African forum to discuss issues of concern to continental development and security". The conference programmes cover a wide range of topics.

UK interests

193. Mr Oppenheimer was a member of the Business Advisory Council of the Said Business School of Oxford University between 2010 and 2013, the International Advisory Board of INSEAD between 2009 and 2012 and the Advisory Board of the Olusegun Obasanjo Foundation from 2014. The last of those is a charity registered in the UK founded by the former President of Nigeria and its remit is to "tackle some key issues of human lives in Africa". Mr Oppenheimer has never attended a meeting of that charity in the UK.

Records and Day Counts

194. Mr Oppenheimer has produced day count schedules for 2009/10 to 2012/13 and the first and last years are not in the Relevant Period. No supporting documentation has been produced.

195. Julie Burgon, his PA based in Johannesburg, with whom he was in touch at least daily regardless of his physical location, maintained a detailed and accurate diary throughout the Relevant Period which showed all of Mr Oppenheimer's travel movements between countries and details of his day-to-day engagements, whether personal or work. She assisted his accountants in preparing his tax returns in both the RSA and UK by calculating his day counts in each country.

196. The day counts that we have for 2010/11 and 2011/12, being the only ones, unfortunately do not include social events, dinners with friends or anything similar although the information is available but has not been produced. It also exists for subsequent years in the Relevant Period.

197. Mr Oppenheimer travelled to the RSA overnight, whether by commercial jet until 2012 or thereafter piloting himself, so the day before travel would be recorded as a UK day.

198. Until 2015 South African tax returns recorded the number of days spent outside the RSA in the year of assessment and the previous year.

199. The tax year in South Africa runs from 1 March to 28 or 29 February in each year so the figures are calculated on a slightly different basis to the UK figures. Mr Oppenheimer's returns show that:

Tax years	Not in the RSA	In the RSA	% of year in RSA
2010	263	102	28
2011	245	120	33
2012	278	88	24
2013	287	78	21
2014	296	69	19
2015	278	87	24
Total	1647	544	25

200. As we have indicated, Mr Oppenheimer has chosen not to provide the Tribunal with details of his movements for all of the years with which we are concerned, although those records do exist. The limited information that he has furnished, based on the OECD methodology used by his advisers (which of course is a different method of calculation), show that the days he was present in the RSA, UK and elsewhere in the UK tax years were:

Tax years	RSA	Other	UK	Non UK
<i>2009/10</i>	<i>121</i>	<i>70</i>	<i>191</i>	<i>191</i>
2010/11	126	68	188	194
2011/12	74	116	185	190
<i>2012/13</i>	<i>67</i>	<i>132</i>	<i>197</i>	<i>199</i>
Totals	388	386	761	774

We have put 2009/10 and 2012/13 in italics as they are not in the Relevant Period but they give a slightly bigger picture. Of course, as we indicate at paragraph 2 above, HMRC argue that Mr Oppenheimer was in fact resident in the UK in 2009/10. As can be seen, in every year, Mr Oppenheimer spent more OECD days outside the UK than in the UK.

201. HMRC have calculated that in the 2010/11 tax year, Mr Oppenheimer's wife and children were in South Africa for approximately seven weeks in total. The family were in the UK for the May 2010 and February 2011 half terms but there is no detail about the October 2010 half term. From the information that we do have we can see that from 24 February 2011 when he left the UK to fly to the RSA until 25 April 2011, Mr Oppenheimer was not in the UK other

than for three brief flight connections whilst travelling from the RSA to destinations in Europe and on each occasion returned to the RSA. In that tax year the longest consecutive period he spent in either country was 20 days. He made 21 trips to the RSA and the shortest was for one day. There were six other occasions where he spent at least seven consecutive days in the RSA being 14, 13, 11, 10 and two of seven days. He spent part or all of a weekend in the RSA on 19 occasions and in the UK on 27 occasions. His schedule was hectic and on a number of occasions he would travel long distances for a visit of only between one and three days. It is not a representative year, in that it is the year that he spent the most time in the RSA, so we set out below the figures that we have for the non UK or RSA countries visited in that and the two subsequent years. The inflight days are in brackets for each.

Year	Number of countries	HMRC days	OECD days
2010/11	14	59 (42)	59 (9)
2011/12	20	103 (42)	96 (20)
2012/13	15	108 (41)	122 (10)

202. It is not in dispute that in 2011/12 Mrs Oppenheimer and the children spent only four weeks in the RSA and that was split between their properties at Isibindi and Tswalu. The family had holidayed in Switzerland twice, the USA and in Sweden and, of course they were in the UK. They spent Christmas 2011 in the UK followed by skiing in Switzerland. The February 2012 half term was spent skiing in Switzerland.

203. In his second witness statement, Mr Oppenheimer said that he did not deny that he spent large parts of the tax years 2010/11 to 2012/13 outside the RSA but that was “a reflection of the fact that I needed to spend time in the UK... [and the US] to support my children in their education at that time”.

204. Mr Oppenheimer confirmed that in the 2015/16 UK tax year he spent 93 days in the US much of which was supporting his middle child.

205. In 2016/17, after his wife’s diagnosis in January 2017, he spent time with her in the US where she was being treated, and of course thereafter in the UK until she died.

Earnings

206. Mr Oppenheimer asserts that he “earned no employment income from a UK entity during the relevant tax years”. However, he declared UK source income in his UK tax returns in each of the years in the Relevant Period, calculated on the basis of the days he had spent working in the UK in each year, as follows:

Year	Employer	UK employment income declared on UK return	Foreign earnings declared on HS302	Total earnings declared (UK & Non-UK)	Total employment income before tax (UK & Non-UK)	% split of employment income source (UK vs Non-UK)	
						UK	Non-UK
10/11	De Beers Consultancy Services Ltd	£22,214	£31,470	£53,684	£212,611	41%	59%
	De Beers Group Services (PTY) Ltd	£65,762	£93,164	£158,927			
11/12	De Beers Group Services (PTY) Ltd	£101,173	£112,414	£213,587	£213,587	47%	53%
12/13	De Beers Group Services (PTY) Ltd	£42,803	£35,395	£78,197	£214,149	49%	51%
	EOS Pty	£61,546	£74,406	£135,952			
13/14	EOS Pty	£93,959	£49,619	£143,578	£143,578	65%	35%
14/15	EOS Pty	£68,293	£59,552	£127,845	£127,845	53%	47%
15/16	EOS Pty	£46,031	£73,650	£119,681	£119,681	38%	62%
16/17	EOS Pty	£55,996	£82,451	£138,447	£138,447	40%	60%

207. This table demonstrates that 48% of Mr Oppenheimer’s overall employment income was declared on his UK tax returns as having a UK source, as compared to 52% of non-UK “foreign earnings” over the same period. The foreign earnings were not all earnings in the RSA (where Mr Oppenheimer spent less than 25% of his time for the years he has provided information). The relative drop in UK sourced earnings in 2015/16 and 2016/17 is consistent with Mr Oppenheimer spending more time in the USA.

208. Until 2012, Mr Oppenheimer had his own office in De Beers’ office in London and from 2012 in the UK Oppenheimer Family Office in London. He also had offices in the RSA. Mr Oppenheimer confirmed that whenever he was in the UK on a weekday during 2010-2012 he would typically have attended the De Beers office. However, on those days when he flew from the UK to the RSA in the evening he would typically have worked from home at Folly Farm.

209. Mr Oppenheimer confirmed that on the days in the UK in which there was no entry in the diarised whereabouts schedules, he would nevertheless typically have been talking to colleagues and engaged in general work, either in the De Beers office or at Folly Farm, albeit he would not necessarily have had any scheduled meetings on those days.

Pension

210. Because Mr Oppenheimer's role within the De Beers Group had primarily been focussed on the South African side of the business, and that was where he had always been resident, he participated in a De Beers pension plan administered in the RSA relating to his employment within the De Beers group.

211. On the cessation of his employment with De Beers, following the sale by the Oppenheimer interests of their stake in De Beers, there was a requirement for him to transfer his interests in the De Beers pension plan into another South African pension plan which he duly did on 1 October 2012. That transfer was reported on his South African tax return. He has never had any rights under, or in respect of a UK pension plan.

Personally owned assets declared in South African tax returns

212. Although we have the detail from his South African tax returns for the years 2005, 2006, 2008 and 2010 to 2017, it is not necessary or appropriate to put that in the public domain. It suffices to say that in the early years of the Relevant Period his personally owned net foreign assets were almost nine times the value of those in the RSA. By 2013, they were 40 times higher (completion of the purchase of Isibindi occurred in the 2014 tax year). It appears that even after the purchase in 2012 of Isibindi and the further acquisition in 2015 (both of which were at market value), his personally owned UK assets still dwarfed the value of the assets in the RSA by a ratio of 4:1.

Personal Philanthropy

213. Mr Oppenheimer has followed in the footsteps of his family and has deep roots in the RSA with a strong history of philanthropic activities in the country; often driven by his deep interest and involvement with politics, not just in the RSA but also Africa more widely.

214. In the early years of the 21st century a team was created to research and recommend philanthropic giving and although now based in the Family Office it was originally based at Isibindi. Mr Oppenheimer has worked closely with that team at all times.

215. He was a patron of the Bishop Bavin church school in the RSA.

216. In the UK he has endowed a Professorial Chair in Cambridge; the Jennifer Ward Oppenheimer Professorship of the Deep History and Archaeology of Africa.

217. In her lifetime, Mrs Oppenheimer was a trustee of the Oppenheimer Memorial Trust, a South African charity which pursued education-focussed projects in the RSA. At that time, Mr Oppenheimer also had an involvement with the charity, albeit he was not a trustee. On 29 September 2017 he joined the Board and is now chairman, but those are both after the Relevant Period.

218. In the US, in the Relevant Period, the Harvard University Committee on African Studies recognised not only what they described as "generous financial contributions" but also considered and thoughtful feedback from both Mr Oppenheimer and his late wife.

Discussion

219. As long ago as 29 September 2017, at a meeting between Mr Oppenheimer's advisers, the HMRC officer who was conducting the enquiry and a Mr Thomas of the UK Competent Authority Treaty Claims unit of HMRC, Mr Thomas, whose field of expertise it is, confirmed that in his view the issues were finally balanced. HMRC confirmed that again on a number of occasions in subsequent correspondence.

220. We agree, but it would have been very difficult to have discerned that from the Skeleton Arguments, Notes on Evidence and Closing Submissions since, on the face of it, the parties were diametrically opposed on almost every issue and on the approach to those issues.

221. In summary, Mr Stone focussed on the UK, fine detail such as day counts and the absence thereof, Mr Oppenheimer's immediate family (being his wife, children and father) and the years up until 2017. As he put it, there should be a focus on Mr Oppenheimer's personal acts and deeds in the Relevant Period and how that translated into what he described as the daily grind; the daily life that was conducted in the UK because of the strength of the family relationships which caused him to live in the UK.

222. Mr Goldberg focussed on the RSA and adopted a more broad brush approach. He looked at the Oppenheimer family in the wider sense starting with Mr Oppenheimer's great grandfather, Mr Oppenheimer's entrenched roots in the RSA, the RSA's place in Africa, Mr Oppenheimer's past and present commitment to, and involvement in, the RSA and Africa, generally arguing that Mr Oppenheimer's attachment is to the RSA and has been all his life. Living in the UK changed nothing. He was in the UK for the time limited purpose of educating his children. He retained all of his interests in the RSA whilst in the UK and indeed expanded them.

223. Mr Goldberg had not lodged day counts since he did not consider them to be relevant (those that had been lodged had been lodged many years ago). Mr Stone asked us to draw adverse inferences from the absence of day counts after 2012/13. Mr Goldberg asked us to find facts about Mr Oppenheimer's donations and work in relation to Covid in the RSA and Mr Stone viewed that as being irrelevant. There are many other examples of no meeting of minds.

The approach to Treaty residence

224. As we have indicated at paragraph 30 *et seq* above, in most respects, certainly at the outset of the hearing, the parties did not agree on the approach to determining the centre of vital interests. Albeit they addressed the issue, both argued that the Tribunal would not require to consider habitual abode since it should be possible to make a determination on the centre of vital interests. In the event, we have determined the centre of vital interests but we have also addressed habitual abode.

225. Ultimately the parties did agree that the approach to ascertaining the centre of vital interests was comparative, unlike the test for habitual abode since Article 4.2(c) of the DTC makes it clear that a taxpayer can have an habitual abode in both States. They also eventually agreed that the question of the personal and economic relations with the UK and the RSA is a composite test.

226. In Closing Submissions, Mr Stone moved away from his stance in his Skeleton Argument where he had placed emphasis on personal relationships "trumping" economic relations. He then emphasised, and we agree, that the correct approach is to consider both ties together and then determine with which State both economic and personal ties are closer.

227. Although, as we point out at paragraph 31, Mr Stone had argued that the facts should be looked at objectively and Mr Oppenheimer's intentions were not relevant, in his Closing Submissions he said that "vital" meant "necessary or essential". He went on to define that as being "...the things, in other words, that are of greatest importance..." to Mr Oppenheimer. We agree with that analysis and we also agree with Mr Goldberg that that means that we need to find facts about Mr Oppenheimer's thinking and, of course, that introduces a subjective element.

228. We agree that Article 4.2(a) of the DTC is a composite test and, although the terms of the tiebreaker test in that case are different, we adopt the wording at paragraph 39 in *Pike 2*:-

“...in each case it will be a matter of fact and degree as to whether a taxpayer’s personal and economic relations, viewed as a whole, support ties closer to one contracting state than the other.” (emphasis added)

That is the approach that we have adopted in regard to centre of vital interests.

229. We have emphasised the word “whole” because although we are acutely aware that we must look at each tax year in the Relevant Period, nevertheless, because of the possibly unique factual matrix, as we explain later, we must also look at a broader perspective.

230. In oral argument, both parties referred us to an Article in the British Tax Review, in 1981, by Dr John Avery Jones and Others entitled “Dual residence of individuals: The meaning of the expressions in the OECD Model Convention” which comprised two parts. HMRC relied on Part II for the proposition that the centre of vital interests is considered on an annual basis. Mr Goldberg relied on it for the proposition that intention alone is not sufficient to establish a movement in the centre of vital interests but it is relevant in assessing the level of attachment to a State, and indeed Mr Stone agreed that it could tip the balance.

231. We agree with both propositions.

232. We observed that Part II also indicated that when considering habitual abode, one should look at whether living in each State is normal and it was suggested that the test should not merely be made for one year but a broad view should be taken over a number of years as to whether living in each State is habitual.

233. We have set out at paragraphs 30 and 31 above a number of the cases upon which the parties rely. We have certainly read all of the cases to which we were referred but we do not intend to analyse and distinguish them because they are not of particular assistance to us. Each turns on its own specific facts and for example in *Hankinson*, the discussion on the application of that double taxation treaty is *obiter* because the taxpayer was found to be non-resident. Most of the cases dealt with a taxpayer who was not with the family for periods of time and, as Mr Stone argued, the taxpayer had split their interests. None of the cases deal with the type of facts with which we are here concerned, they are all fact specific and a number are decisions by courts at first instance.

234. Both parties relied on the Commentary, as did we.

235. As can be seen, we have found the facts at considerable length, not because we were exhorted to do so by both parties, as we were at length, but because they are crucial to our decision. It is therefore appropriate to comment first on the witness evidence.

Witness evidence

236. We agree with Mr Stone when he stated in Closing Submissions that Mr Oppenheimer, albeit lapsing occasionally into argument, was a straightforward witness, as indeed we find that his father was also. In fact, although there were some discrepancies in their evidence, we found that both father and son were very straightforward, credible and clear witnesses.

237. One of the issues which was obvious was that the witness statements were, perhaps understandably, unbalanced. Indeed Mr Stone accurately argued that Mr Oppenheimer had produced witnesses, pictures and details speaking of life in the RSA but only limited information about the UK.

238. Mr Oppenheimer conceded as much in cross-examination. For example, he had focussed on the facilities at Isibindi but it was only in cross-examination that the extent of not only the

facilities but also the physical ambit of Folly Farm were disclosed. He agreed in cross-examination that the relaxation/sports facilities in both were “absolutely equivalent” other than the addition of the paddle court at Folly Farm.

239. However, we accept Mr Goldberg’s argument that the focus was on Isibindi and the RSA because it had never been disputed that Folly Farm was an habitual abode for Mr Oppenheimer. The onus of proof lay with him to establish that he had an habitual abode in the RSA; hence the focus on the RSA.

240. In their Skeleton Argument HMRC correctly argue that, in assessing the probative value of the witness evidence, the Tribunal should be informed by the guidance of the High Court in *Kimathi* in which the importance of the “Gestmin” principles was re-emphasised. The first of those principles was to base factual findings on inferences drawn from documentary evidence. For that reason we have reviewed the extensive correspondence and notes of phone calls and meetings which go back to 2013 and therefore cast a more contemporaneous light on the factual matrix.

241. A minor example is that item 70 in the Schedule entitled “Facts the Appellant asks the Tribunal to Find” was that:

“The appellant’s GP, dentist, optometrist and dermatologist and his barber are based in South Africa. He has no recollection of any visits to the GP surgery in the UK where he is registered”.

242. That was based on Mr Oppenheimer’s witness statement where he stated that he could not recall ever having been for an appointment at a GP surgery in the UK and his oral evidence was to similar effect. However, correspondence dated 30 September 2014 from Baker Tilly to HMRC confirms that “Mr Oppenheimer very rarely seeks treatment in the UK – only when unable to seek treatment in South Africa from his usual doctor/dentist” and “Mr Oppenheimer’s principal doctor and dentist are based in Johannesburg”.

243. We find that this is not an adverse reflection on Mr Oppenheimer’s evidence, rather it reflects the principles outlined in *Kimathi* at paragraphs 96 and 98. In particular, we have found the extensive documentary evidence a very useful prism through which to assess the witness statements.

244. In the various witness statements we had been told that Mr Oppenheimer’s wife and their children would spend their time outside school time “most typically in South Africa”, that they would “often” spend half-terms in Johannesburg, that Mrs Oppenheimer returned to the RSA regularly, that Mr Oppenheimer was in the RSA “a lot” and that they socialised regularly in the RSA.

245. As we have pointed out in our findings in fact the evidence of the day counts does not support that. It is clear that outside school time the family did not spend much time in the UK although Christmas 2011 was in the UK. The family were not typically in the RSA if not in the UK.

246. Apart from his father, the other witnesses were almost entirely focussed on life in the RSA. Much of the witness evidence strayed into opinion evidence as opposed to evidence of matters of fact. Of course the weight to be attached to the former is variable and depends on context.

247. A particular example is Mrs Moses’ unchallenged witness statement which stated:

“4.5 If I had to say which of the family’s properties was closest to Jonathan’s heart, however, I would say Tswalu was the property where both Jonathan and Jennifer felt

most at home and where I understood from conversations with them, they planned to spend much of their time once the children had grown up....

4.6 I remember going to Tswalu with Jonathan and Jennifer on one occasion and Jennifer said something along the lines of:- ‘one day I am going to land here and never take off again,’”.

However, Mrs Moses went on to say at 4.9 that “....to my mind Isibindi is his main home.”.

248. That did not assist us but, at least, she had been to Folly Farm on a number of occasions. The only clear fact that her evidence pointed to was a very close connection with the RSA but she knew little, or disclosed little, about the Oppenheimer family’s life in the UK.

249. Polly Carr, who is a senior executive in the Family Office (and held other roles in family companies and trusts) says that she was, and is, in weekly, if not, daily contact with Mr Oppenheimer. The key personnel in the Family Office were not only based in the RSA but, like Mrs Carr were also close personal friends of Mr Oppenheimer and his wife.

250. However, some of her evidence was another problem for us. In her witness statement she said that when the Oppenheimer family were “not around in South Africa” they would still socialise regularly in the RSA. However, when it was put to her in cross-examination that in 2011/12 Mrs Oppenheimer had only been in the RSA for a total of four weeks, she had to concede that she only “caught up” when Mrs Oppenheimer was in the RSA. That cannot be described as regular.

251. We were underwhelmed by her evidence that, as a close friend, colleague and employee and knowing the family’s movements in great detail, she sent Christmas cards to Isibindi in the knowledge that Mr Oppenheimer might not be there for months but apparently did so on the basis that she considered Isibindi to be his home. In the modern age that is surprising.

252. She said that once the children finished school the staff complement at Folly Farm had been downsized because it was not “needed as much”. We prefer Mr Oppenheimer’s evidence which flatly contradicts that.

253. In her witness statement she had opined that the “cost of employing staff at Isibindi was 1.6 times the costs at Folly Farm (compared on a purchasing power parity basis)” in the period 2010-2013. However, in cross-examination she said that the data was provided by accountants and if done on an exchange rate basis the Isibindi costs would be just above the Folly Farm costs. She did not know what the comparative costs were in the period 2013/14 to 2016/17 when the restoration of Folly Farm was completed and it became fully staffed.

254. We observe that when writing to HMRC on 13 July 2018, RSM stated that the Family Office estimated that during the years in question “...the annual spending on the family’s South African homes exceeds that on the UK properties...by a factor of 1:1 (adjusted for purchasing power parity)”. The letter defines the years in question as being 2010/11 and 2011/12.

255. Although we were invited to make findings in fact about the comparative costs we have not done so as we have no reliable evidence on that issue and, in any event, in our view it is not a material fact. Both properties were fully staffed at all times.

256. Mrs Carr, like Ms Burgon, agreed in cross-examination that if they had visited Folly Farm in the Relevant Period they would have found a home with a full complement of staff, food on the table, pets running around etc just as at Isibindi.

257. What is relevant is that, although no doubt meaning well, Mrs Carr’s evidence was partisan and did not materially assist us.

258. Julie Burgon, Mr Oppenheimer's executive assistant since 2001 and based in the RSA at all times, also said in her witness statement that the staff at Folly Farm had been down-sized and, as with Mrs Carr, we place no reliance on that.

259. Her evidence was interesting more for what she did not say rather than what she did say. She, with the Family Office, had prepared the day count schedules that were in the Bundle. She has diaries including personal appointments. Neither the supporting documentation nor details for the later years were produced or spoken to. She did confirm that in the 2016/17 year, Mr Oppenheimer spent very little time in the RSA. Mr Oppenheimer's own evidence was that she and he managed his diary latterly so that, because of family commitments, he was only in the RSA for the "most important meetings that I felt I needed to be present at".

Centre of Vital Interests

260. The arguments for both parties were seductive in their simplicity and well-crafted but we did not entirely agree with either and, as can be seen, both changed somewhat in the course of the proceedings. There was some force in the arguments for each party but, unfortunately, the issues are not capable of straightforward resolution given the complexity of Mr Oppenheimer and his family's lifestyle. Before we comment on that, we set out the parties' core arguments and some of our comments thereon.

261. Mr Stone argued that Mr Oppenheimer had spent many years in the UK for his own education so, taken with the period from 2007, almost half of his life had been spent in the UK. He had deep roots in the UK as he had in the RSA.

262. The majority of the assets that he owned outright, even after the purchase of Isibindi in 2012, were in the UK and in the Relevant Period he worked in, and from, the UK and not the RSA. The settled routine of his life was in the UK and he went abroad from the UK for holidays, business trips and to support his daughter in the US and France and his wife in the US in 2017.

263. Mr Stone, whilst accepting that day count did not determine Treaty residence, argued that day count reflects the choices that are made about where and how a life is lived and that those are the matters that determine Treaty residence. It is the clearest evidence of the State with which the personal and economic relations are stronger in the Relevant Period. In the absence of such detail he argued that there was a "remarkable lack of evidence" and that that was compounded by the opacity of the evidence in relation to Mr Oppenheimer's personal wealth. Therefore he argued that the burden of proof had not been discharged.

264. As we have indicated he does not accept that a centre of vital interests has a significant degree of permanence.

265. By contrast, Mr Goldberg argued that evidence as to day count had not been produced because it was not relevant to the case put before the Tribunal, not least, because the day count for the earlier periods shows that Mr Oppenheimer spent more days outside the UK in that period than in the UK (see paragraph 200 above) and that would not be consistent with a centre of vital interests in the UK.

266. Mr Goldberg eloquently explained that he had seen no reason to produce evidence in the form of banking or credit cards or phone bills because what had to be considered was the relationship between Mr Oppenheimer and the RSA. Mr Oppenheimer's presence in the UK had to be looked at in the context of the whole picture including periods before and after his residence in the UK. Mr Oppenheimer's connections with the RSA are exceptional and his personal and economic relations and habits are all rooted in the RSA, wherever he may be at any given time.

267. His argument was that the question of where a person's personal and economic relations might be, does not respond to a detailed account of daily doings but rather to the relationships

which exist at large. He stated that the evidence is “broad truths about the ...personal and economic allegiances of the appellant” and “The evidence needs to be about relations, not about deeds”.

268. However, in his written Closing Submissions he departed from that position, quoting from paragraph 15 of the Commentary, which bears repetition here:

“Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property etc. The circumstances must be examined as a whole, but it is nevertheless obvious considerations based on the personal acts of the individual must receive special attention”.

269. We have underlined the word “will” because we find that that means that it is mandatory that we consider all of these aspects when deciding to which State Mr Oppenheimer is closer. The other word that is important is “Thus” because it must be read with the immediately preceding sentence which concludes with the words “...it is necessary to look at the facts in order to ascertain with which of the two States his personal and economic relations are closer”. By using the word “Thus” in that context, it gives a very wide meaning to “personal and economic”.

270. We must indeed look at the actions of Mr Oppenheimer and not just at where he was present at any given point or just at his family and his work, however work is defined. It is for that reason that we said at paragraph 229 that we look at Mr Oppenheimer’s lifestyle and work from a broader perspective.

271. As Mr Goldberg pointed out, the tiebreaker only comes into play where a taxpayer is already resident in two States so the level of attachment goes beyond mere residence. We agree.

272. We also comment on the choice of the word “will” because the last sentence of paragraph 15 of the Commentary goes on to say that where a taxpayer retains his home in the first State when he sets up home in second State:

“...the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State”.

We have underlined the word “can” because, by contrast that is simply a possibility.

273. Mr Goldberg argues that the caveat expressed in that last sentence is relevant to Mr Oppenheimer because although he physically stayed at Folly Farm for large parts of the Relevant Period he arranged his life so that, by working remotely, he could in effect continue his life and work in the RSA. Of course, Mr Stone disagrees pointing out that in some years, Mr Oppenheimer spent less than 20% of the year in the RSA.

274. In any event, we have a problem with reliance on that sentence because it is predicated on the family remaining in the first State which was the situation in many of the cases cited to us but is not the position for the Oppenheimer family. It does not assist Mr Oppenheimer.

275. To be fair to Mr Oppenheimer we know that the family spent comparatively little time in the RSA in the Relevant Period and he frankly admits that. For that reason alone we do not draw adverse inferences about the lack of production of diary entries etc.

276. We take the view that we have sufficient evidence to find, as we do, that in any year in the Relevant period Mr Oppenheimer spent less time in the RSA than in the UK and in the

years where we have no evidence, being the last two, given the presence of his middle child in the US and his wife's illness the time in the RSA would have been even less.

277. For the avoidance of doubt, we find that they certainly retained their possessions including pets, in the RSA, and Isibindi was always available to them and fully staffed for their arrival. Tswalu was also available.

278. We find that, prior to August 2007, Mr Oppenheimer's centre of vital interests was the RSA and, notwithstanding his education and internships based in the UK and the internship in Zimbabwe, we find that at all relevant points until 2007 that had remained the case. We observe that the internships in the UK, although notionally based in London, involved a very significant amount of travel including to the RSA.

279. We reject Mr Stone's argument that Mr Oppenheimer had deep roots in the UK having spent almost half of his life here. We know that children at boarding school and young people at University have very long holidays by comparison with other sectors. For example, an average student at a typical Oxbridge College would have two and a half months holiday in summer and a month at both Easter and Christmas. Boarding school terms are not dissimilar. Simply counting the "years" spent in education in the UK does not give an accurate reflection of time spent in the UK. Like many young people Mr Oppenheimer did not "hang around" once term finished and he had the ability and money to go wherever he wanted. He could and he did.

280. Mr Goldberg argued that nothing had changed to alter the centre of vital interests in 2010/11 and we agree since, as can be seen from paragraph 200, there was very little difference between 2009/10 and 2010/11. We have no tangible evidence other than the letter from Baker Tilly (see paragraph 67 above) about the residence situation in terms of presence in either the UK or the RSA from August 2007 until April 2009. As can be seen from paragraph 2 above, HMRC certainly thought that Mr Oppenheimer was resident in the UK in 2009/10 and we would agree.

281. Both parties are agreed that Mr Oppenheimer has permanent homes in both the UK and the RSA. Mr Goldberg argued in Opening Submissions that the use of the word "permanent" permeated the whole of Article 4 of the DTC. We do not agree. Quite apart from the wording of paragraph 13 of the Commentary which indicates that a permanent home, whether rented (which connotes a degree of impermanence) or not, has to be available continuously, we observe that in Part I of the British Tax Review article, Dr Avery Jones explained that "permanent" in that context is used objectively in contrast to "temporary". It is not subjectively in the sense of a place where the taxpayer intends to spend the rest of his life. That is not a high threshold and that is reflected in the case law (see for example *Cooper*).

282. We therefore agree that the use of the word "permanent" in Article 4.2(a) of the DTC does not colour the assessment of the taxpayer's personal and economic relations and indeed those can change in the course of a year. That is made explicit in the last sentence that we have quoted from paragraph 10 of the Commentary. We do not accept Mr Goldberg's unsupported assertion that that can only be in unusual circumstances. It depends entirely on the facts at the time.

283. Although in Opening Submissions Mr Goldberg relied on "permanent immutable links" with the RSA, in Closing Submissions he tempered that by agreeing that by permanent he meant "not temporary" and that "relations" in the DTC sense had to be construed in that context. We agree with that.

284. Article 4 of the DTC refers only to personal and economic relations. Neither it nor the Commentary refer to either "employment" or "ownership of assets". "Relations" is a

straightforward and important word. Simply put it is widely understood to mean the way people and/or things are connected. That is its ordinary everyday meaning. It is a very wide and flexible concept. As Dr Avery Jones pointed out “economic relations” is not a term of art.

285. Paragraph 15 of the Commentary does refer to consideration of “place of business” and “occupations” when looking at economic and personal relations and we will revert to that.

The Family, work and wealth

286. To a limited extent, we were surprised that all of the focus was on Mr Oppenheimer’s centre of vital interests. The Commentary is clear that we should look at matters in the “whole”. We find that Mrs Oppenheimer’s centre of vital interests is a relevant consideration given that HMRC’s primary focus was on arguing that Mr Oppenheimer was in the UK because his wife was there and she and the children were the most important factor in his life.

287. HMRC relied on Philip Baker QC, commenting on *Yates* in Tax Treaty Case Law around the Globe 2013. He had concluded, and of course it is only commentary, that:

“One point which is very clear is this: if the relationship with your spouse is the key relationship in your life, then it is going to be very hard to have a centre of vital interest separate from where your spouse has their home”.

On the facts in *Yates*, where the taxpayer lived in Spain separately from her husband in the UK and most of her economic and other interest relations were also in the UK, that is hardly surprising.

288. The problem with that for HMRC is that we find that Mrs Oppenheimer undoubtedly not only shared the various homes owned by the family but played a large part in making all of them homes. Julie Burgon was clear that Mrs Oppenheimer had had considerable involvement in Isibindi and Motlhopi, although Mr Oppenheimer took the lead on both just as she had for Folly Farm. She was able to participate in the planning of Motlhopi from 2014 onwards whilst spending little time physically in the RSA. Just as she had had a team working for her on Folly Farm, and Julie Burgon would coordinate meetings before Mrs Oppenheimer got an executive assistant in the UK in April 2013, they had people working on Motlhopi in the RSA. As far as Motlhopi was concerned she was particularly heavily involved in 2015 which is in the Relevant Period.

289. She had a very keen interest in conservation and environmental issues in the RSA and after her death Mr Oppenheimer ensured that her plans for the renovation of the conservation centre at Tswalu were completed.

290. She remained a trustee of the Oppenheimer Memorial Trust until her death and at all times she was deeply invested in the Tswalu Dialogue. Her parents had a home in Cape Town where they usually spent December to March each year and the family spent Christmas 2010 there. We do not accept HMRC’s argument in correspondence that that did not constitute a tie to the RSA since it was not a stay at Isibindi (see the second sentence in paragraph 17 of the Commentary).

291. We find it telling that in the Summer 2017 Lutyens Trust Newsletter, which carried a tribute to Mrs Oppenheimer, although of course, there was a focus on Folly Farm, the tribute also had a strong focus on her connections with the RSA. It pointed out that she had been the long term chairman of the De Beers Fund, she had dedicated much of her professional life to issues in Africa, she was a founding member of the Foundation and was involved in the Tswalu Dialogue. It pointed out that she and Mr Oppenheimer were generous donors to Africa related matters such as conservation, education, entrepreneurship, social development and ground breaking research.

292. The evidence was clear that Mrs Oppenheimer had “adopted” the RSA as her home. We quote from Dr Mills’ comments about her memorial service in the RSA, which was attended by people from all walks of life, where he said “It was said with some pride by all present that Jennifer considered herself a South African, despite being born an American.”

293. In his eulogy, Prince Magosuthu Buthelezi described her as “an outstanding young South African”.

294. Of course, Folly Farm was very important to Mrs Oppenheimer and the very large amount of money invested in it was, and is, a strong link with the UK. However, we find that it should be looked at in context. Mr Nicky Oppenheimer spoke with enormous pride of Waltham which has been in the Oppenheimer family for more than one 100 years and is far larger than Folly Farm. Folly Farm remains fully staffed long after its function as a home for the children whilst they were being educated had ceased. Just as his father has Brentwood and Waltham and other properties, Mr Oppenheimer has Isibindi and Folly Farm and other properties.

295. We have no doubt that Mr Oppenheimer’s reason for coming to the UK in 2007 was entirely predicated on the temporary, in the whole scheme of things, purpose of educating the children in the UK. That became more complicated when the middle child was educated for a time in the US and when his wife was ill in the US as it was easier to commute from the UK to the US rather than from the RSA. Again, however, both were temporary measures. We say temporary because there was no cutting of ties with the RSA. What there was was a physical move to the UK where in the period 2009/10 to 2012/13 the OECD days outside the UK were greater than those in the UK.

296. We accepted Mr Oppenheimer’s evidence to the effect that, when in the UK, he usually spent Saturday evenings *en famille*, having watched the children’s sport during the day, because he travelled such a lot. They had a quiet social life meeting friends or going to events certainly less than twice a month and possibly only once. We do not accept Mr Stone’s argument that Mr Oppenheimer carried on regular relationships with friends in the UK but only had intermittent relationships with those in the RSA.

297. Both Mr Oppenheimer and his wife had a large number of close friends in the RSA. They also had an extended family in the RSA including Mr Oppenheimer’s grandmother until she died in 2013. From 2013/14 his father to whom he was, and is, very close no longer resided in the UK although he did visit.

298. Of course they also had a number of friends in the UK but as can be seen from the memorial services and birthday parties it was on a much smaller scale.

299. Mr Stone argued that from 2010/11 to 2013/14 Mr Oppenheimer could enjoy a closer relationship with his father in the UK because of the travel to and from work, working together in London and having occasional golf games and occasionally lunch at Folly Farm. However, we refer to paragraph 46 above where we find as fact that Mr Nicky Oppenheimer spent half of those years in the RSA. Mr Oppenheimer was still in contact with him daily and saw him when they were both in the RSA and elsewhere.

300. We do not know how often Mr Oppenheimer was in the RSA in the later years of the Relevant Period, although as he freely concedes it was not frequent, but he maintained constant contact with his father and they had shared interests in regards to not only Fireblade, the Foundation, the investment team in the Family Office in Johannesburg and numerous family companies and trusts but also cricket, shooting, golf, flying etc.

301. He was also in regular contact with close friends in the RSA, a number of whom were also employed in the Family Office in Johannesburg and Mr Oppenheimer was in very regular

contact with the Family Office. Some such as Polly Carr, James Teeger and Bruce Tillim were employed by family companies as directors. They saw a number of their friends from the RSA in the UK such as when shooting in Scotland.

302. Quite apart from having friends who worked with and for him, Mr Oppenheimer and his wife also had friends from the political and cultural worlds in the RSA and further afield in Africa. Mr Oppenheimer had no material involvement with politics in the UK and although Mrs Oppenheimer had some interest in cultural matters in the UK, he did not. He described himself as being “unlucky” if he went to the theatre two or three times in a year. By contrast even in planning the décor, layout and food for the Family Office he tried to promote South African culture and food. He has an interest in South African musicians and brought Johnny Clegg, a very well-known anti-apartheid activist, to the UK for tours in 2014. He also supported Robin Auld, a Cape Town musician who has played at Foundation events in Africa, Europe and North America.

303. Mr Stone correctly states that we are looking at ties with the RSA and not Africa more widely. However, that is to oversimplify matters and we will revert to that in the context of work and wealth.

304. Mr Oppenheimer did want to spend as much time as he could with his wife and children and was clear about that. In response to Mr Stone arguing that Mr Oppenheimer had made a conscious choice to spend as much time with the family as he could, he responded that “I made a conscious choice to balance my ability to remote work with time with the family”.

305. We find that Mrs Oppenheimer and the children were certainly a key relationship for Mr Oppenheimer but that there were also other key relationships. We understood and agreed with Mr Oppenheimer when he articulated it as follows:

“I think I am a family man who sees his obligations to both his family and to his commercial endeavours in a balance. This is not some sort of linear relationship which you can say this particular thing is ahead of something else...”.

For him, work was essential and working remotely was the key and he and she worked together as a team with both of them having continuing and expanding interests and strong ties to the RSA before and during the Relevant Period.

306. In his Closing Submissions, Mr Stone stressed that not only did Element Six have some production facilities in the UK but Mr Oppenheimer’s evidence had been that it was run out of the UK, its management was in the UK and, of course, Mr Oppenheimer had been Chairman. Mr Oppenheimer’s witness statement made it clear that having been appointed Chairman of Element Six in 2001, he and his late wife had thought about moving to the UK but decided against that. He was therefore Chairman for approximately six years whilst he was living and working in the RSA. All that changed in 2007 was his physical location. Although it is for a shorter period, after his appointment as Head of the Chairman’s Office in 2006, he managed that role from the RSA until he moved to the UK in August 2007.

307. Unlike most of the cases to which we were referred, Mr Oppenheimer did not come to the UK to work. In the years from 2007 to 2012, he worked in, and from, the UK doing what he had previously done in, and from, the RSA simply because of his children’s education and his wife’s presence in the UK supporting that (other than her visits to the US to support the middle child).

308. A key question is what was Mr Oppenheimer’s work? Prior to 2012, it was not just De Beers. As can be seen from our findings in fact from 2005 he expended a lot of time and energy on the Foundation and was involved with those working for it on at least a daily basis.

309. Dr Mills described the Foundation as being Mr Oppenheimer's "baby" and we find that the same could be said of Fireblade and it is not disputed that from 2012 onwards, Mr Oppenheimer has devoted a great deal of time and energy to working on and for Fireblade. He was, and is, passionate about both.

310. Although prior to the sale of De Beers in 2012, he had had involvement in managing the family wealth, after the sale, apart from Fireblade and the Foundation, the greater part of his working life was managing the family capital and liaising with third party managers.

311. Mr Stone argues that because 70% of that capital was managed in the US, and a significant proportion of that was deployed in Asia, there is only the very loosest of ties with the RSA and the greater part of Mr Oppenheimer's personal wealth, being Folly Farm, was based in the UK.

312. Mr Stone argues that we must look at Mr Oppenheimer's personal acts (which he accepts are not his personal relationships) and his personal wealth and not at the Oppenheimer family wealth and economic ties. Indeed that is at the heart of his argument and it is not straightforward.

313. Can we take account of the family wealth? Mr Goldberg argues yes and Mr Stone not.

314. In his witness statement at paragraph 2, Mr Oppenheimer stated:

"I refer below to property, investments and other assets as mine or that I'm involved with. In some instances, they may not be held by me but through other structures, but in each case, I use them or I'm actively involved with them."

315. We find it significant that Mr Oppenheimer built Isibindi on land that was not owned by him and indeed part of the land is still not owned by him outright. As we have pointed out at paragraph 110 above, Cypher, who owned part of it, was a family company. Almost certainly he does not own Motlhopi outright. The properties in the US are owned in trust structures. Most of the companies are ultimately owned in trust structures. There are numerous trusts and there is a clear theme that, with the exception of Folly Farm and Isibindi, a deliberate decision was made to distance ownership. That has been the case going back more than one generation.

316. Mr Oppenheimer accepted that in terms of assets that he owned outright Folly Farm was significantly greater than the assets owned outright by him elsewhere. However, his unchallenged evidence was that if he required money for any purpose, whether it be for a personal investment such as Folly Farm or for a commercial investment, not owned by him, such as Fireblade, he put a business case to the Family Office in Johannesburg who passed it to the relevant trust. We can see that that is indeed the case.

317. He offered the entirely credible explanation that with an expectation that the rand would weaken, and it is within our knowledge that over the years it has done so significantly, he tried to manage his expenditure in the RSA to minimise the gross amount that he would have to repatriate to the RSA to cover that. Trust structures can, and do work for that.

318. He used the word repatriate, and we repeat it, because the historical origin of the family wealth was largely what is now the RSA. The money released from the sale of De Beers is only a part of the family wealth which Mr Oppenheimer is involved in managing. We accept that like with the Foundation, by no means all of it is focussed on the RSA.

319. Mr Stone argued that the family having deliberately chosen to put the family wealth into offshore structures that wealth cannot constitute an economic relation with the RSA. Whilst we understand that argument, for the reasons that we set out below having due regard to paragraph 15 of the Commentary in particular, we find that Mr Oppenheimer's engagement in

managing the family wealth is an occupation that is part of a strong political, social and economic link with the RSA.

320. Although he paid tax on employment income in the UK because of his residence, he was not paid a salary in the UK. Mr Oppenheimer's income from employment was very modest in the context of other wealth to which he had, and has, ready access.

321. Mr Stone argues that when the DTC comes to allocate taxing rights on income from employment, it allocates that to the State where the employee is physically present. That is correct (Article 14). Where we do not agree with him is the extrapolation from that that when looking at the tiebreaker in Article 4 one should look not at where the work took effect or had impact, but rather to where the work was done, ie physical presence. That does not fit easily with paragraph 62 of the United Nations Commentary (see paragraph 29 above) which says that the place where board meetings are held does not mean that the company is managed from that country.

322. In summary we agree with Mr Goldberg that Article 4 of the DTC is about relations, and as we have said that means connections, so he is correct to say that the questions that we have had to ask are more about "who?" and "what?" rather than "when?" or "where?".

323. If we look at Fireblade, where the board meetings are all held in the RSA, it is clear that it is managed and operates in the RSA. Mr Oppenheimer has been very clearly closely connected with Fireblade since 2012 and he is its largest customer. As can be seen from the accounts, not only is he a director but since the accounting period ended 28 February 2015 he has had economic ties with Fireblade. His father and his close friends Bruce Tillim and Poly Carr are also directors. EOS Pty are the secretaries and, of course, Mr Oppenheimer was on the board of that. We find Fireblade to be a personal, social and economic tie to the RSA. The fact that he may interact with the other directors from the UK, or indeed the US, does not sever that link.

324. In a similar vein Mr Oppenheimer was a director of Olympic Park Trading 123 (Pty) Ltd from 19 January 2016. He personally derived no income from it but it was an investment vehicle for property used by family interests in Johannesburg. His fellow directors included his close friends Poly Carr and James Teeger who were both based in the RSA. He may very well have communicated with them remotely from the US or UK but his occupation as a director was also linked to his social relations with those friends and the economic interests of the family. Latterly that company owned the Family Office where Mr Oppenheimer had his own office in the RSA. We find that it is a close tie to the RSA.

325. A large part of what both Mr Oppenheimer, and his wife did, in relation to philanthropic activities, such as the Foundation, transcended mere philanthropic interest. It patently also constituted not only a political relationship but also a social relationship. Of course, since the Oppenheimer wealth funded it, it is family wealth and a family relationship and it is clear that Mr Oppenheimer had and has a very close connection with it. Mr Oppenheimer was in the RSA every Easter to host the Tswalu Dialogue and, as we have found, part of Mr Oppenheimer's daily life, wherever he might have been, was to be in daily, and often more frequently, contact with Dr Mills throughout the Relevant Period.

326. It is argued for HMRC that the Foundation should be discounted because of the family wealth and connections and because it had a pan-African focus. HMRC argue that on that basis alone it is not a tie with the RSA. We do not agree.

327. The latter point is to ignore the importance for the RSA itself, given its history, to be perceived as being "African" and to be seen to have influence for good in Africa having been a pariah nation for many years during the apartheid era. As far as the former point is concerned,

Mr Oppenheimer, and his father and the family trusts have invested significant amounts of time and money, in the case of the Oppenheimers, and money in the case of the trusts, in the Foundation. Its place of business is firmly in the RSA at the Family Office.

328. Whilst we accept that Mr Oppenheimer worked in and from the UK more than any other country we are not persuaded that what Mr Stone described as the “duties of his employment” were UK based after 2012. In no sense could Mr Oppenheimer really be described as having “duties of employment”. After 2012, much of what he described as work was unpaid and self-directed. He could choose what and how he did anything. He travelled a great deal.

329. In any event, we are not considering “employment”. What we have to consider is the nature of Mr Oppenheimer’s various occupations and that is different.

330. He did employ his executive assistant in the UK in 2016 but we accepted that that was because it was convenient to base him in the Family Office in London so that he could liaise with Makena. That is an economic tie to the UK but predicated on easier access to the US from the UK rather than from the RSA. We accept that his two chiefs of staff were an economic tie to the UK because they were based in the UK. For all three, the “place of business” when not travelling was the UK.

331. By contrast, Julie Burgon was at all times based in the RSA and until April 2013 also managed Mrs Oppenheimer’s diary in the UK.

332. During the Relevant Period, Mr Oppenheimer’s place of business was undoubtedly more often in the UK than anywhere else.

333. The fact that the board meetings for Oppenheimer Partners UK Limited were held in London does not reflect the fact that all of the investment research and recommendations was done by the team in Johannesburg in consultation with Mr Oppenheimer. Mr Stone makes the same argument as he did for the Foundation stating that because its mandate is global and its investments pan-African it cannot be a link with the RSA. As with the Foundation, we find that Oppenheimer UK Limited employs people in the RSA and it approves recommendations for investments which include investment in the RSA but not the UK. It does not employ people in the UK. Mr Oppenheimer’s occupation with regard to it was directed at and linked with the RSA.

334. Mr Oppenheimer and his wife had homes on three continents, and they were all homes. They had friends and family on all three continents but the very clear evidence was that they had many more personal links to friends, and indeed family in the RSA. They were close to the maternal grandparents who had homes in the US and the RSA.

335. Mr Oppenheimer’s various occupations in terms of managing the family wealth, whether before or after the sale of De Beers, involved extensive communication with the Family Office and others in the RSA. The same applies to the Foundation. As we have pointed out above, those occupations are intertwined with his social and personal relations with friends and colleagues based in the RSA.

336. Until the middle child started school in the US in September 2011 both parents and the children lived at Folly Farm during term time. Thereafter, both parents spent some time in the US supporting that child for periods, usually separately. In all of the Relevant Period, as he had done at other times in his life, Mr Oppenheimer travelled extensively so although his base was at Folly Farm in term time he was often away from there.

337. In that regard, we find that his description of his substantial property interests in both the UK and the US as being practical acquisitions providing bases in each country for him and the family is apt.

338. What was important to Mr Oppenheimer in the Relevant Period? Undoubtedly his wife and children but, just as they would rarely have been out of his thoughts, we find that the RSA, its people, its culture, its politics, its place in Africa and the world would rarely have been out of his thoughts. The same could not be said of the UK. Although, of course he has friends in the UK his closer links with his friendship base was with the RSA and it was interlinked with his various occupations. His political interests were closer to the RSA.

339. As we have indicated his occupations as Head of the Chairman's Office and chairman of Element Six were originally undertaken from the RSA, it was not those that brought him to the UK and he was remunerated for neither so they are not, as such, a strong economic link.

340. Undoubtedly, Mr Oppenheimer has a longstanding and ongoing commitment to the RSA and an investment both in terms of his time, money (whether directly or not) and his emotions in its future as a nation and as an integral part of Africa.

341. For all these reasons we find that throughout the Relevant Period Mr Oppenheimer's personal and economic relations were closer to the RSA rather than the UK. Therefore his appeal succeeds.

Habitual abode

342. As we indicated, we did consider the issue of habitual abode in case we were wrong on the centre of vital interests.

343. We found that rather more difficult. The Commentary, at paragraph 19, talks about the "frequency, duration and regularity of stays that are part of the settled routine of an individual's life and are therefore more than transient".

344. It also makes it explicit that the test will not be satisfied by determining in which State the taxpayer spent more days.

345. Mr Stone's stance was that given the amount of time that Mr Oppenheimer had spent in the RSA in the Relevant Period he could not be described as regularly, customarily, usually or even normally living in RSA but that that could be said of Folly Farm.

346. Being in the UK in each tax year of the Relevant Period was, in the words of paragraph 19 of the Commentary, part of his settled routine. Saturdays during school terms demonstrated that vividly (see paragraph 296 above). There was no such settled routine in the RSA.

347. Mr Goldberg's starting point was that an habitual abode cannot suddenly cease to be habitual without some act of abandonment and Mr Oppenheimer had certainly never ceased to have an habitual abode in the RSA. He continued to have, and to use as a matter of habit, his substantial homes in the RSA which were constantly kept ready for his arrival.

348. In essence, he argued that because the staffed homes were available, Mr Oppenheimer was ordinarily resident in the RSA. He relied on Lord Scarman in *Shah* at page 342 for the proposition that "ordinary" in the context of residence means the same thing as "habitually" and that therefore since Mr Oppenheimer was resident in the RSA then he must have had an habitual abode there.

349. We do not think that it is that straightforward. Lord Scarman did say:

"I agree with Lord Denning MR that in their natural and ordinary meaning the words [ordinarily resident] mean 'that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration.' The significance of the adverb 'habitually' is that it recalls two necessary features mentioned by Viscount Sumner in *Lysaght's* case, namely residence adopted voluntarily and for settled purposes."

However, as Mr Stone pointed out he went on to say that he did not think that one should import into ordinary residence an intention to live in a place permanently or indefinitely. The issue would be to determine whether absences from a home destroyed the degree of continuity needed to establish ordinary residence. He then said:-

“I unhesitatingly subscribe to the view that ‘ordinarily resident’ refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration”.

350. In line with those quotations, clearly, as the parties agree, Folly Farm was certainly an habitual abode.

351. The problem with the RSA was whether Mr Oppenheimer’s stays in the RSA were part of the regular order of his life in each tax year. Mr Goldberg argued that at all times it remained his home regardless of how long he spent there; he only had to be there for some part of every year in issue.

352. However, and we were not referred to it, we observe that Lord Scarman made it explicit at pages 345 and 348 of *Shah* that it is wrong to conduct a search for the place where a person has his permanent base or in other words to look for his “real home”.

353. The onus of proof lies with Mr Oppenheimer and we have no information about how long any stay might have been in 2015/16 or 2016/17. We only know that he was not very often there. A further issue with 2016/17 is that paragraph 19.1 of the Commentary makes it explicit that periods where there are major changes of personal circumstances should be excluded and of course Mrs Oppenheimer had to be in the US from January 2017.

354. One of the issues that we have with the case law to which we were referred, is that, in general, those cases deal with binary issues. In this case Mr Oppenheimer effectively had homes in the US as well as the UK and the RSA in every year in the Relevant Period. The substantial use of Folly Farm during term time is undoubted.

355. We have set out at paragraph 201 a limited analysis of Mr Oppenheimer’s presence in the RSA in 2010/11 and we accept that it cannot be taken as being representative of each year, not least because we know that he spent more time in the RSA in that year than others for which we have information. It is for that reason that we have included the HMRC and OECD days for countries other than the RSA and the UK and for flights for that year and the other years for which we have details.

356. What that does demonstrate was that he led a very peripatetic life travelling frequently and all over the globe. Even as far as the weekends are concerned, there are weekends in both countries where he either worked part of the time or he travelled to or from that country. We know that in later years he spent more time in the US because of his wife and child.

357. It is evident to us that the one thing that Mr Oppenheimer did not have was a particularly settled routine in a conventional sense or in the sense described in the cases. For example, Canada was one of the countries included in the table at paragraph 201 and the HMRC and OECD days were the same for each year and were one, five and forty respectively; a big difference. However, some other countries such as Nigeria were consistent year on year. A number of countries were only visited in one year.

358. The examples given in the Commentary and in the cases do not assist us greatly since those were concerned with individuals whose lifestyles are infinitely less complex than that of Mr Oppenheimer and his family. He lived and worked not only in the RSA, USA and UK but also worked elsewhere in countries such as Luxembourg, Ireland and other countries.

359. We certainly do find that, as and when Mr Oppenheimer visited the RSA, it would have been part of the regular order of his life to stay at Isibindi or Tswalu. Is that enough? His stays in the RSA could not be described as transient, in the context of his life where he was permanently on the move, as the number of days spent outside the UK demonstrate.

360. Of course, he did spend much greater time in the UK because of schooling, and in the US because of his wife and child but he could, and did, return to the RSA for important meetings and other matters including family, business, philanthropic, political and social activities. It was a normal, regular and important part of his life throughout the Relevant Period.

361. In the unusual facts of his life in the Relevant Period, his stays in both the RSA and the UK were both part of the settled routine of his life and were of sufficient frequency, duration and regularity to constitute habitual abodes in both countries.

362. We find that he did have an habitual abode in the RSA and as he is a national of that country the answer to the tiebreaker is that he is Treaty Resident in the RSA.

Decision

363. For all these reasons the appeal succeeds.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

364. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE SCOTT
TRIBUNAL JUDGE**

Release date: 24 March 2022

Appendix

1	<i>Cooper v Cadwalader</i> (1904) 7F, 146 (“Cooper”)
2	<i>R v Barnet LBC ex p Shah</i> [1983] 2 AC 309 (“Shah”)
3	<i>Hertel v The Minister of National Revenue</i> (1993) 93 DTC 721 (“Hertel”)
4	<i>Gaudreau v Canada</i> (2004) 7 ITLR 640 (“Gaudreau”)
5	<i>Gaudreau v Canada</i> 2005 FCA 388 (“Gaudreau 2”)
6	<i>Yoon v The Queen</i> [2005] TCC 366, 8 ITLR 129 (“Yoon”)
7	<i>Hankinson v HMRC</i> [2009] UKFTT 384 (TC) (“Hankinson”)
8	<i>Yates v Commissioners v Revenue and Customs Comrs</i> [2012] UKFTT 568 (TC), 15 ITLR 205 (“Yates”)
9	<i>Mackay v HMRC</i> [2008] UKUT 378 (TCC), [2019] STC 83 (“Mackay”)
10	<i>Pike v Commissioner of Taxation</i> [2019] FCA 2185, 22 ITLR 474 (“Pike”)
10	<i>Pike v Commissioner of Taxation</i> [2020] FCAFC 158, 23 ITLR 293 (“Pike 2”)
11	<i>Fowler v HMRC</i> [2020] UKSC 22, [2020] 1 WLR 2227 (“Fowler”)
12	<i>Anson v Commissioners for HMRC Revenue & Customs</i> [2015] UKSC 44 (“Anson”)
13	<i>HMRC v Smallwood</i> [2010] EWCA Civ 778 (“Smallwood”)
14	<i>Kimathi & Others v The Foreign & Commonwealth Office</i> [2018] EWHC 2066 (QB) (“Kimathi”)