



30TACD2019

APPELLANT

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Introduction and Grounds of Appeal

1. This is an appeal against amended assessments to income tax for the years 2011, 2012 and 2013 raised by the Respondent on the 20th of August 2014 in relation to the Appellant and the Appellant's spouse. The Appellant and his spouse are jointly assessed to tax pursuant to section 1017 of the Taxes Consolidation Act 1997, as amended.
2. The Appellant is a person entitled to a contributory pension pursuant to section 108 of the Social Welfare Consolidation Act 2005, as amended (hereinafter referred to as "**the 2005 Act**"), having made the contributions and satisfied the conditions set forth in section 109 of that Act.
3. The Appellant has claimed and been granted that pension for the years under appeal. The amount of the pension has been increased pursuant to section 112(1) of the 2005 Act because the Appellant's spouse is a "*qualified adult*" within the meaning of the Act.
4. The Appellant received pension payments amounting to €22,703 for each of the three years under appeal and he has been assessed to income tax on same. The Appellant submits that some €10,727 of the €22,703 received in each year is attributable to his spouse. The Appellant states that both he and his spouse have always understood and believed that the portion of the pension received attributable to his spouse is received by the Appellant on trust for her. Since 2006, the said sum has been, by written agreement between the Appellant, his spouse and the Department of Social Protection, paid directly into the Appellant's wife's bank account



5. The Appellant submits that the portion of the contributory pension received by him but attributable to his spouse should not be taxed as his income but should instead be taxed as his wife's income. He argues that the portion of the pension attributable to his spouse is payable to him as a bare trustee or, alternatively, as an agent for his wife. He therefore submits that the said sum of €10,725 should be taxed as his wife's income, with the benefit of the Schedule E tax credit and the transferable amount taxed at 20%.

B. The Respondent's Submissions

6. In response to the points advanced by the Appellant, the Respondent submits that section 126 of the Taxes Consolidation Act 1997, as amended, sets out the tax treatment of various payments made under the Social Welfare code, including payments which, subject to certain conditions, can attract an increase in respect of a qualified adult. The State pension (contributory) paid by the Department of Social Protection is a taxable source of income pursuant to the legislation.
7. The Respondent further submits that any increase in that pension in respect of a qualified adult is, for tax purposes, part of the pension, and the increase does not represent a separate source of income for the qualified adult. It was argued that the State pension (contributory) received by the Appellant is a unitary pension, which includes an increase by reference to the existence of an adult dependant. Any increase pursuant to section 112 of the 2005 Act is contingent on there being a prior entitlement to the pension under section 108, and therefore the adult dependant increase cannot in any way be said to be a 'stand-alone' payment.
8. The Respondent cited in support of this submission the provisions of section 112(1B) of the 2005 Act, which provides that:-

"Where a beneficiary ceases to be entitled to State pension (contributory), the payment to a qualified adult of the increase of pension referred to in subsection (1) shall also cease."
9. While the Respondent fully acknowledged that there was a facility for the Department of Social Protection to pay the increase directly to the adult dependant, they submitted that this did not alter the legal nature of the payment being made.



10. Accordingly, the Respondent contends that the PAYE employee tax credit and the extended rate band are not available to a qualified adult dependant in respect of that increase.
11. In further support of their submissions, the Respondent cited the provisions of section 126(2B) of the Taxes Consolidation Act, 1997 (to which reference had also been made by the Appellant, both in his written submissions and at the hearing before me), and the decision of the Supreme Court in **Ó Síocháin (Inspector of Taxes) -v- Neenan [1999] 1 IR 533**.
12. That case concerned a widow whose pension had been increased by reference to a number of dependant children pursuant to the Social Welfare (Consolidation) Act 1981. Section 95(1) of that Act provided that *“The weekly rate of widow’s (contributory) pension shall be increased by the amount...”* The widow claimed that the element of her pension represented by the increase payable in respect of her dependant children was not her income, but was instead the income of her children. Her argument succeeded before the Appeal Commissioners and, on appeal, in the High Court, but was rejected by the Supreme Court
13. The Respondent relied in particular on the following passages from the judgment of Murphy J, who delivered the unanimous decision of the Supreme Court:-
“It seems to me to be clear beyond debate that the scheme of the legislation was to “increase”, and that is the word used, the pension of the widow to meet those particular circumstances. No doubt a widow or any other parent would be expected to make provision for his or her children and the Oireachtas was satisfied in enacting the Act of 1981 to rely on the moral obligations which that relationship imposes.
...
[T]he express provisions entitling the widow to the pension and the failure to draw any distinction between the entitlement to the pension and the increases thereon are coercive evidence of an intention that the beneficial entitlement to the entire of the social welfare payment should vest in the widow.

Whilst my judgment results in a liability to tax which would be avoided if it were the children who were entitled to all or part of the widow’s pension this is not relevant to the proper construction of the Act of 1981.”



C. Relevant legislation

14. Section 2(2) of the 2005 Act defines a “*qualified adult*” for the purposes of that Act. It was not contended by the Respondent that the Appellant’s spouse was not a qualified adult, and so it is unnecessary to consider this definition in the instant appeal.

15. Section 108(1) provides that:-

“Subject to this Act, a person shall be entitled to State pension (contributory) where he or she has attained pensionable age and satisfies the contribution conditions in section 109.”

16. Section 109(1) then details the main conditions for eligibility, providing that:-

“The contribution conditions for old age (contributory) pension State pension (contributory) are—

(a) subject to subsection (3), that the claimant has entered into insurance before attaining the age of 56 years,

(b) that the claimant—

(i) has qualifying contributions in respect of at least 520 contribution weeks, or

(ii) in the case of a person who on or before 6 April 1997, is a voluntary contributor paying contributions under Chapter 4 of Part 2, has an aggregate of qualifying contributions and voluntary contributions in respect of 520 contribution weeks, of which not less than 156 are qualifying contributions, or

(iii) in any other case, has an aggregate of qualifying contributions and voluntary contributions in respect of 520 contribution weeks of which not less than 260 are qualifying contributions,

since his or her entry into insurance,

(c) that the claimant has a yearly average or, in the case of a person who attains pensionable age on or after 6 April 1992, an alternative yearly average of not less than 48.”



- 17.** The key statutory provision in the context of this appeal is section 112(1), which provides as follows:-

“Subject to this Part, the weekly rate of old age (contributory) pension State pension (contributory) shall be increased by the amount set out in column (3) of Part 1 of Schedule 2 for any period during which the beneficiary has a qualified adult, subject to the restriction that a beneficiary shall not be entitled for the same period to an increase of pension under this subsection in respect of more than one person.”

- 18.** Section 112(1A) of the 2005 Act was inserted by the Social Welfare and Pensions Act 2007 to put on a statutory footing the former extra-statutory practice of the Department of Social Protection of making arrangements with the beneficiary and the “qualified adult” to pay the amount by which a contributory pension had increased directly to the qualified adult. The new subsection now provides as follows:-

“The amount of the increase of pension referred to in subsection (1), in respect of any claim for State pension (contributory) made after 24 September 2007, shall be paid –

- (a) directly to the qualified adult concerned, or*
- (b) to such other person as may be nominated by the qualified adult for the purpose of receiving the increase of pension referred to in subsection (1) on behalf of the qualified adult.”*

- 19.** Section 126(2) of the Taxes Consolidation Act 1997, as amended, provides for the taxation of certain benefits payable under the Social Welfare Acts, and states:-

“(a) This section shall apply to the following benefits payable under the Acts-

- (i) widow’s (contributory) pension,*
- (ii) orphan’s (contributory) pension*
- (iii) retirement pension, and*
- (iv) old age (contributory) pension.*

(b) Payment of benefits to which this subsection applies shall be deemed to be emoluments to which Chapter 4 of Part 42 applies.”

- 20.** A new subsection 126(2B) was inserted by the Finance (No. 2) Act 2013 and took effect from 1 January 2014, providing that:-

“Notwithstanding the provisions of section 112(1), where an increase in the amount of a pension to which section 112, 113, 117 or 157, as the case may be, of the Social Welfare Consolidation Act 2005 applies is paid in respect of a qualified adult (within the meaning of the Acts), that increase shall be



treated for all the purposes of the Income Tax Acts as if it arises to and is payable to the beneficiary referred to in those sections of that Act.”

21. Finally, section 472(4) of the 1997 Act provides that:-

“Where, for any year of assessment, a claimant proves that his or her total income for the year consists in whole or in part of emoluments (including, in a case where the claimant is a married person assessed to tax in accordance with section 1017, or a civil partner assessed to tax in accordance with section 1031C, any emoluments of the claimant’s spouse or civil partner deemed to be income of the claimant by that section for the purposes referred to in that section) the claimant shall be entitled to a tax credit (to be known as “the employee tax credit”) of –

(a) Where the emoluments (but not including, in the case where the claimant is a married person or a civil partner so assessed, the emoluments, if any, of the claimant’s spouse or civil partner) arise to the claimant, the lesser of an amount equal to the appropriate percentage of the emoluments and €1,650, and

(b) Where, in a case where the claimant is a married person or a civil partner so assessed, the emoluments arise to the claimant’s spouse or civil partner, the lesser of an amount equal to the appropriate percentage of the emoluments and €1,650.”

D. Analysis and Findings

22.At the outset of my analysis, I should record that I have not had regard to the provisions of section 126(2B) in reaching the conclusions outlined hereunder. Notwithstanding that reference was made to, and reliance placed upon, this subsection by both the Appellant and the Respondent, the subsection was inserted by the Finance (No. 2) Act 2013, and only took effect after the years under consideration in the instant appeal.

23.The decision in *Cronin (Inspector of Taxes) -v- Cork and County Property Company Ltd. [1986] IR 559*, which has frequently been cited with approval and applied in more recent cases, makes it clear that a subsequent legislative amendment can at best be neutral in the context of the interpretation of the relevant legislation in its pre-amendment form, and cannot be used to construe the statute as it was before the amendment in question.



24. It would therefore be inappropriate for me to consider the issues which fall for determination in this appeal in the light of the 2013 amendment, and I have not done so.
25. The core of the Respondent's argument is that the State pension (contributory) is a single or unitary pension, and that the additional monies payable in respect of a qualified adult dependant are, in law, an increase in that single pension. They emphasise in particular in this regard the clear wording of section 112(1) ("*...shall be increased...*") and the provisions of section 112(1B), which provides that payments to a qualified adult dependant are contingent upon the primary beneficiary remaining entitled to the contributory pension.
26. The Respondent understandably relies heavily upon the decision in **Ó Síocháin (Inspector of Taxes) -v- Neenan**, and I accept that the wording under consideration in that decision is effectively identical to that contained in section 112(1). However, certain important aspects of the legislation under consideration in this appeal are materially different to those considered by the Supreme Court, to the extent that I believe that the decision of that Court is distinguishable.
27. It is apparent from the decision of the Supreme Court that it was agreed between the parties and accepted by the Court that "*...the burden [of taxation] , irrespective of the person on whom the assessment might be made, is on the person or persons beneficially entitled to the increased amounts.*" I am satisfied that the same test applies in the instant appeal. It is therefore necessary for me to determine who is beneficially entitled to the increased amount payable in respect of the qualified adult dependant in this appeal; this is either the Appellant or his spouse.
28. In the Supreme Court decision, Murphy J noted that "*The legislation contains no words of trust in favour of all or any of the children nor is here any specific indication that any part of the increase should be applied for their benefit.*"
29. Murphy J considered at some length the decision of Lynch J in **Ó Coindealbháin (Inspector of Taxes) -v- O'Carroll [1989] I.R. 229**, which he described as "*deceptively similar*" to the case before him. In **Ó Coindealbháin (Inspector of Taxes) -v- O'Carroll**, the High Court was asked to determine whether a pension or any part of a pension paid to a widow for the benefit of her children under the Garda Síochána Pensions Order 1981 was assessable to tax in the hands of the widow.



30. Murphy J noted that Article 8(1) of the relevant Order provided that a children's contributory pension would be paid to a member's widow if the eligible children were in her care, and further provided that the pension could be paid directly to the children in certain circumstances. Article 8(1) further provided that *"In all cases, the pension is to be applied for the benefit of the children for whom it is granted."* Article 8(6) provided that no children's contributory pension would be paid unless a widow's contributory pension was payable to their mother.
31. Having analysed the 1981 Order and the judgment of Lynch J, Murphy J concluded that the Garda pension scheme provided what was described as a contributory pension for the children, whereas the Social Welfare scheme merely increased the widow's pension. Murphy J held that Lynch J was entitled to conclude that the children's contributory pension, though paid in most cases to the mother, was the property of the children, and that there was ample evidence of an intention to create a trust in favour of the children.
32. Murphy J concluded that:-
"The absence of any comparable terminology in the social welfare code and the express provisions entitling the widow to the pension and the failure to draw any distinction between the entitlement to the pension and the increases thereon are coercive evidence of an intention that the beneficial entitlement to the entire of the social welfare payment should vest in the widow."
33. I believe that the statutory scheme under consideration in the instant case is rendered materially different from that considered by Murphy J by reason of section 112(1A), which provides that the amount of any increase in a State pension (contributory) in respect of a qualified adult dependant is to be paid directly to the qualified person concerned, or to such other person as the qualified adult may direct. There is nothing in the legislation to impose or even suggest an obligation on the part of the qualified adult to apply any monies received for the benefit of the primary beneficiary of the pension. The statutory entitlement to receive the monies, or direct how they are to be paid, and the unqualified right to apply the monies as the qualified adult thinks fit, is in my view, to adopt the words of Murphy J, coercive evidence of an intention on the part of the Oireachtas to vest the beneficial ownership of the increased amounts in the recipient qualified adult dependants.



34. I am therefore satisfied that the beneficial entitlement to, and the beneficial ownership of, any increased amounts payable pursuant to section 112(1) of the 2005 Act lies with the qualified adult dependant. In the instant case, I find as a material fact that the Appellant's spouse was the beneficial owner of the €10,725 paid by the Department of Social Protection into the bank account of the Appellant's spouse during each of the three years under appeal.

35. The amount by which the State pension (contributory) pension is increased by virtue of section 112(1) constitutes an emolument by virtue of the provisions of section 126(2)(b) of the Taxes Consolidation Act 1997, as amended. Because the Appellant's spouse is the beneficial owner of and beneficially entitled to receive payment of the increased amount, it follows that the increased pension payments "*arise to the claimant's spouse*" within the meaning of section 472(4)(b) of the 1997 Act, and accordingly the Appellant is entitled to the employee tax credit with reference to that income.

E. Determination

36. For the reasons outlined above, I find that:-

- (a) the Appellant's spouse was the beneficial owner of the €10,725 paid by the Department of Social Protection into the bank account of the Appellant's spouse during each of the three years under appeal; and,
- (b) the Appellant is entitled pursuant to section 472(4)(b) of the Taxes Consolidation Act 1997, as amended, to the employee tax credit with reference to that income.

37. I therefore find that the Appellant has, by reason of the Amended Assessments dated the 20th of August 2014, been overcharged to income tax for the years 2011, 2012 and 2013 and determine, in accordance with section 949AK(1), that those Amended Assessments should be reduced accordingly.

MARK O'MAHONY
Appeal Commissioner
Dated the 14th day of June 2019

