



13TACD2020

BETWEEN/

APPELLANT

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Appeal

1. This is an appeal against a Notice of Amended Assessment to Income Tax for the year 2012 dated 28 April 2016. The appeal relates to an amount included in the amended assessment under Schedule E – Emoluments. The balance payable on the amended assessment is €15,591.99.
2. On agreement of the parties, the appeal is adjudicated without a hearing in accordance with section 949U of the Taxes Consolidation Act, 1997.

Facts

3. The Appellant was an employee of [REDACTED] (hereinafter ‘the employer’). The Appellant instituted High Court proceedings against the employer on [REDACTED] 2012. A Settlement Agreement was agreed between the Appellant, the employer and a third company, [REDACTED], in [REDACTED] 2014, prior to the hearing of the High Court proceedings scheduled for [REDACTED] 2014.



4. The Settlement Agreement states at Recital E *‘This Agreement sets out the terms on which the parties have agreed to settle all matters arising out of the Proceedings, the Employment and its termination.’*

5. The Settlement Agreement provides at Clause 1:

‘1. PAYMENT AND ARRANGEMENTS

1.1 Without admission of liability the Employer agrees to pay to the Employee a total of €340,000 (three hundred and forty thousand euro) gross, subject to statutory deductions as are required in respect of the following:

1.1.1 Damages for personal injury €45,000;

1.1.2 Special damages of €95,000

1.1.3 Ex gratia termination payment of €60,000

together referred to as the “Settlement Payment”; and

1.1.4 Contribution to legal costs of €140,000 inclusive of VAT (referred to as the “Legal Costs”).

...

1.6 The Employee represents that she has not prior to the date hereof been in receipt of any tax relieved termination payment in relation to this or any other employment. In the event that this representation is untrue and the Company or Employer is subject to a tax liability including for income tax, PRSI contributions, USC, levies, charges, interest and/or penalties (“Excess Tax”) on foot of such a representation, the Employee undertakes, at the written request of the Employer to immediately pay it an amount equal to the Excess Tax.

...

1.9 Within 30 days of the Employer’s receipt of the aforesaid written Revenue approval, the Settlement Payment shall be paid to the Employee subject to the required statutory deductions.

6. It is the charge to tax by the Revenue Commissioners of the payment described as ‘*Special damages of €95,000*’ that has been appealed by the Appellant.

Legislation

7. Section 192A of the Taxes Consolidation Act, 1997 provides:

“192A Exemption in respect of certain payments under employment law

- (1) *In this section*

“relevant Act” means an enactment which contains provisions for the protection of employees’ rights and entitlements or for the obligations of employers towards their employees;

“relevant authority” means any of the following –

- (a) *a rights commissioner,*
 - (b) *the Director of the Equality Tribunal,*
 - (ba) *an adjudication officer of the Workplace Relations Commission,*
 - (bb) *the Workplace Relations Commission,*
 - (bc) *the District Court,*
 - (c) *the Employment Appeals Tribunal,*
 - (d) *the Labour Court,*
 - (e) *the Circuit Court, or*
 - (f) *the High Court.*
- (2) *Subject to subsections (3) and (5), this section applies to a payment under a relevant Act, to an employee or former employee by his or her employer or former employer, as the case may be, which is made, on or after 4 February 2004, in accordance with a recommendation, decision or a determination by a relevant authority in accordance with the provisions of that Act.*

- (3) *A payment made in accordance with a settlement arrived at under a mediation process provided for in a relevant Act shall be treated as if it had been made in accordance with a recommendation, decision or determination under that Act of a relevant authority.*
- (4) (a) *Subject to subsection (5) and without prejudice to any of the terms or conditions of an agreement referred to in this subsection, this section shall apply to a payment –*
- (i) *made, on or after 4 February 2004, under an agreement evidenced in writing, being an agreement between persons who are not connected with each other (within the meaning of section 10), in settlement of a claim which–*
- (I) *had it been made to a relevant authority, would have been a bona fide claim made under the provisions of a relevant Act,*
- (II) *is evidenced in writing, and*
- (III) *had the claim not been settled by agreement, is likely to have been the subject of a recommendation, decision or determination under that Act by a relevant authority that a payment be made to the person making the claim,*
- (ii) *the amount of which does not exceed the maximum payment which, in accordance with a decision or determination by a relevant authority (other than the Circuit Court or the High Court) under the relevant Act, could have been made under that Act in relation to the claim, had the claim not been settled by agreement, and*
- (iii) *where –*
- (I) *copies of the agreement and the statement of claim are kept and retained by the employer, by or on behalf of whom the payment was made, for a period*



of six years from the day on which the payment was made, and

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

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

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

(II) the statements of claim related to those agreements kept and retained by the employer in accordance with subparagraph (iii) of that paragraph.

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

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

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

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

(5A) This section shall not apply to payments made pursuant to an order under section 2B of the Employment Permits Act 2003.

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

8. Section 123 of the Taxes Consolidation Act, 1997 provides:

“123 General tax treatment of payments on retirements or removal from office or employment

- (1) This section shall apply to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions or emoluments, including any payment in commutation of annual or periodic payments (whether chargeable to tax or not) which would otherwise have been so made.*
- (2) Subject to section 201, income tax shall be charged under Schedule E in respect of any payment to which this section applies made to the holder or past holder of any office or employment, or to his or her executors or administrators, whether made by the person under whom he or she holds or held the office or employment or by any other person.*
- (3) For the purposes of this section and section 201, any payment made to the spouse, civil partner, or any relative or dependant of a person who holds or has held an office or employment, or made on behalf of or to the order of that person, shall be treated as made to that person, and any valuable consideration other than money shall be treated as a payment of money equal to the value of that consideration at the date when it is given.*
- (4) Any payment chargeable to tax by virtue of this section shall be treated as income received on the following date –*
 - (a) in the case of a payment in commutation of annual or other periodical payments, the date on which the commutation is effected, and*
 - (b) in the case of any other payment, the date of the termination or change in respect of which the payment is made,*



and shall be treated as emoluments of the holder or past holder of the office or employment assessable to income tax under Schedule E.

- (5) *In the case of the death of any person who if he or she had not died would have been chargeable to tax in respect of any such payment, the tax which would have been so chargeable shall be assessed and charged on his or her executors or administrators, and shall be a debt due from and payable out of his or her estate.*
- (6) *Where any payment chargeable to tax under this section is made to any person in any year of assessment, it shall be the duty of the person by whom that payment is made to deliver particulars of the payment in writing to the inspector not later than 14 days after the end of that year.”*

Submissions on behalf of the Appellant

9. The Appellant submits that the payment described as ‘Special Damages of €95,000’ in the Settlement Agreement is not a payment in respect of remuneration but that the payment represents a payment coming within section 192A(4) and, consequently, the exemption in section 192A(6) applies. The Appellant submits that the payment was a compensation payment quantified by reference to salary rather than a payment in respect of remuneration. In a letter to the Revenue Commissioners dated [REDACTED] 2014, it was explained that proceedings were issued by the Appellant in the High Court for breach of contract and a claim for personal injury arising from workplace induced stress, bullying and harassment. The letter further explains that the special damages of €95,000 represented the impact on the Appellant of not being able to work full-time as a result of the personal injuries sustained which was made up of medical costs and future net loss of earnings.
10. In a further letter to the Revenue Commissioners dated [REDACTED] 2014, it was explained that the reference to earnings in relation to the €95,000 was for the



purposes of quantifying the value of the personal damages by virtue of not being able to work due to the injuries and the payment was not a substitute for employment income due and payable by the former employer. In an e-mail to the Revenue Commissioners dated [REDACTED] 2015, it was submitted that the payment related to an out of court compensation payment for personal damages resulting in the Appellant not being able to work on a full-time basis.

11. In support of the appeal, the Appellant refers to an extract from a Revenue Operational Manual titled '[7.1.27] *Exemption from income tax in respect of certain payments made under employment law – Section 192A of the Taxes Consolidation Act 1997*' with the following description at paragraph 6 thereof – '*In general, a distinction can be made between salary/wages – including arrears of same – (which are taxable) and compensation for a wrong done which is quantified by reference to salary/wages*'.

Submissions on behalf of the Revenue Commissioners

12. The Revenue Commissioners submit that the payment described as 'Special Damages of €95,000' is a payment in respect of remuneration, and, consequently, section 192A(5) applies to exclude the payment from exemption under section 192A(6). The Revenue Commissioners submit that the payment is taxable under section 123 of the Taxes Consolidation Act, 1997.

Analysis and Findings

13. Section 192A(6) provides that, if the section applies, payments shall be exempt from income tax and shall not be reckoned in computing total income for the purposes of the Income Tax Acts. Section 192A(4) describes the requirements that must be satisfied for a payment made under an agreement to come within the section. Section 194A(4) is subject to section 192A(5). Section 192A(5) provides



that the section shall not apply to so much of a payment, however described, in respect of remuneration including arrears of remuneration or a payment referred to in section 123(1) or section 480(2)(a).

14. In considering if a payment made under an agreement has tax consequences, and as the terms agreed by the parties are embodied in the agreement, the agreement is considered as a whole with due regard for the words expressed in the agreement, which are words chosen by the parties.
15. The description of the payment in the Settlement Agreement is ‘Special Damages’ and the amount quantified separately to ‘Damages for Personal Injury’. The Schedule of Special Damages prepared for the High Court proceedings describes the following:

“1. LOSS OF EARNINGS

The Plaintiff is currently working on a part time basis. She has been offered a full time position but was unable to accept same in light of the injuries she sustained arising out of the bullying and harassment she experienced while employed with the Defendants.

Loss of earnings due to injuries:

Period 1: - [REDACTED]:

<i>€4,200.00 net x 5 months</i>	<i>€21,000.00</i>
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Period 2: - [REDACTED] partial loss:

<i>Full time income net</i>	<i>€4,200.00</i>	
<i>Part time income</i>	<i>€2,200.00</i>	
<i>Ongoing partial loss</i>	<i>€2,000.00 net x 18 months</i>	<i>€36,000.00</i>

2. MEDICAL EXPENSES

<i>G.P. visits</i>	<i>€240.00</i>	
<i>Dr. [REDACTED] – 2 visit</i>	<i>€190.00</i>	
<i>Cognitive behaviour therapy treatment course</i>		
<i>(12 sessions @ €80.00)</i>	<u><i>€960.00</i></u>	
<i>...</i>		<i>€1,390.00</i>

3. MISCELLANEOUS EXPENSES

<i>Attending Solicitors, G.P. & medical in Dublin</i>	<u><i>€450.00</i></u>	
 <i>Sub-TOTAL</i>		 <i>€58,840.00</i>

FUTURE LOSSES

*Based on the medical evidence of Dr. [REDACTED] –
there shall be a further 1/2 years before the Plaintiff returns to
full time employment*

<i>The future loss of earnings anticipated say €2,000.00 net x 18 months</i>	<u><i>€36,000.00</i></u>
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GRAND TOTAL	<u>€94,840.00</u>
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16. The purpose of an award of damages is to place the injured party in a position as close as is practicable to that which the party would have enjoyed but for the injury caused by the other party. The categorisation observed in court actions for damages is typically ‘general damages’ and ‘special damages’. General damages are broadly viewed as being for pain and suffering (non-pecuniary loss) and special damages as pecuniary loss. The Settlement Agreement accords with this categorisation with separate descriptions of ‘Damages for Personal Injury’ and ‘Special Damages’. It is significant, in my opinion, that the Settlement Agreement provided separate descriptions and amounts for these categories of damages.
17. In the Schedule of Special Damages, the Appellant describes the damages in terms of loss of earnings and expenses. Again, this is the type of categorisation observed in court actions in awards of special damages. Therefore, in my view, the Schedule of Special Damages seeks to quantify the pecuniary loss to the Appellant arising from the action the subject matter of the High Court proceedings. The inclusion of the medical expenses and miscellaneous expenses supports this view.
18. The Schedule of Special Damages describes that, in line with the medical advice, the Appellant had the capacity to only engage in part-time employment but that the Appellant anticipated returning to full-time employment in the future. The quantum of special damages sought by the Appellant from her employer was on the basis that the earning capacity of the Appellant, and consequently, her income, was reduced as the Appellant was not in full-time employment. In essence, the pecuniary loss was being measured on the basis that the Appellant was prevented from earning an income from full-time employment and she was seeking to recover that income from her employer.
19. The documentary evidence does not support the submission by the Appellant that the payment of €95,000 was a compensation payment quantified by reference to



salary only. The Settlement Agreement describes the payment as ‘Special Damages’ and the Schedule of Special Damages refers to ‘loss of earnings’ for past and future losses. It is noteworthy that the Schedule of Special Damages takes a deduction for the income earned by the Appellant from her part-time employment in the quantification of the loss of earnings. In my opinion, the Schedule of Special Damage was a calculation to place the Appellant as close as was practicable to that which the Appellant would have enjoyed had the Appellant had the earning capacity of full-time employment.

20. The statutory language in section 192A(5)(a) has been broadly drawn. That can be seen from the use of the words ‘however described’ and ‘in respect of’. The payment was described by the parties in the Settlement Agreement as ‘Special Damages’ and identified separately from the ‘Damages for Personal Injury’. The payment was described by the Appellant in the Schedule of Special Damages as ‘loss of earnings’ and was calculated by reference to the income that the Appellant would have earned in full-time employment. If the Appellant had been able to earn that income in the course of employment, that income would have been taxable. In the circumstances, I am satisfied that so much of the payment described as ‘Special Damages’ and calculated as loss of earnings was a payment in respect of remuneration.

Determination

21. For the reasons outlined above, I determine that a sum of €93,000 was a payment in respect of remuneration to be taxed accordingly and the exemption in section 192A of the Taxes Consolidation Act, 1997 does not apply to that payment. The appeal is hereby determined in accordance with section 949AK of the Taxes Consolidation Act, 1997.

FIONA McLAFFERTY
APPEAL COMMISSIONER

18th DECEMBER 2019