AC Ref: 06TACD2016

Between/

NAME REDACTED

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Background

1. On or about the 7th of November 2012, the Appellant and his then wife obtained by consent a decree of judicial separation pursuant to section 2(1)(f) of the Judicial Separation and Family Law Reform Act, 1989.

2. The Order of the Circuit Family Court also granted a number of ancillary reliefs, including at paragraph F thereof the following:-

> *"The Applicant* [being the Appellant in the instant appeal] *will pay €38,000 by way of lump sum maintenance payment pursuant of Section 8(3) of the 1995 Act. €17,500 to be paid within 6 weeks of today's date and the balance of €20,500 within 6 months (6th May 2013)"*

3. The Appellant gave evidence to the effect that he had contacted the Respondent prior to obtaining the decree of judicial separation and had been advised at that time that any maintenance payments he made to his former wife on foot of a court Order would be deductible for income tax purposes.

4. In compliance with the said Order (albeit not in compliance with the time limits specified therein), the Appellant paid his former wife the sum of €17,500 on the 8th of May 2013 and a further sum of €20,500 on the 16th of June 2014.

5. The Appellant claimed a deduction in respect of the aforesaid payment of €17,500 in computing his total income for the 2013 tax year, and claimed a further deduction of €20,500 when computing his total income for the 2014 tax year. Returns were duly submitted to the Respondent on this basis. It appears that the Appellant's return for 2013 was not questioned by the Respondent but his 2014 return was examined. This led to a review of his return for 2013.

6. In or about August of 2015, the Appellant was advised by the Respondent that he was not entitled to deduct the payments of €17,500 and €20,500 from his income for 2013 and 2014 respectively. A Notice of Amended Assessment for 2013 and a Notice of Assessment for 2014 were issued by the Respondent on the 19th of August 2015.

Matters under appeal

7. By letter to the Respondent dated the 26th of August 2015, the Appellant sought to appeal the Amended Assessment for 2013 and the Assessment for 2014. The grounds of appeal advanced by the Appellant can be summarised as follows:-

(a) The two payments were made exclusively for the benefit of the Appellant's spouse pursuant to a court Order;

(b) The two payments constituted two annual payments, in that the Order effectively required the Appellant to make a maintenance payment of €17,500 in 2013 and a further maintenance payment of €20,500 in 2014;

(c) The Respondent had advised the Appellant prior to the making of the Court's Order that any maintenance payment to the Appellant's ex-wife would be tax deductible; and,

(d) The Respondent had accepted that a deduction of €17,500 was permissible for the 2013 tax year, and so the Respondent was not entitled to revisit that decision, and was obliged to treat the payment of €20,500 in a consistent manner for the 2014 tax year.

8. By letter dated the 28th of August 2015, the Respondent replied in a substantive manner to the grounds of appeal put forward by the Appellant. The letter from the Respondent recited the provisions of section 1025(2)(a) of the Taxes Consolidation Act, 1997, as amended, and went on to state:-

> *"If the payment of the €38,000 is in respect of one or both of your children it is not an allowable deduction and the notices as issued on the 19th August 2015 are correct.*
>
> *If, alternatively, the payment is a payment to your spouse it is equally not allowable as it is, and is described as such in the consent order, a lump sum payment and only payments which are annual or periodical are allowable under the provisions of the section. The fact that the consent order allowed for the payment to be made in two instalments does not negate the fact that it is not an annual or periodic payment to be made to your spouse. Again, the notices of the 19th August 2015 are therefore correct."*

9. The letter from the Respondent then went on to state:-

> *"I am therefore giving notice that I am not allowing your appeal as you have not provided any valid grounds for the appeal as required by section 959AJ Taxes Consolidation Act 1997, as amended."*

10. The letter from the Respondent concluded by advising the Appellant of his right of appeal against the refusal afforded by section 933(1)(c) of the Taxes Consolidation Act, 1997, as amended.

11. By notice of appeal dated the 9th of September 2015, the Appellant exercised that right of appeal, and that appeal was heard by me on the 30th of March 2016.

Relevant legislation (refusal of appeal)

12. The relevant provisions of section 959AJ, as amended, provide as follows:-

> *"(1) Where an appeal is brought against an assessment or an amended assessment made on a person for any chargeable period, the person shall specify in the notice of appeal—*
>
> *(a) each amount or matter in the assessment or amended assessment with which the person is aggrieved, and*
>
> *(b) the grounds in detail of the person's appeal as respects each such amount or matter.*
>
> *(2) Where, as respects an amount or matter to which a notice of appeal relates, the notice does not comply with subsection (1), the notice is, in so far as it relates to that amount or matter, invalid and the appeal concerned shall, in so far as it relates to that amount or matter, be deemed not to have been brought."*

Analysis and finding (refusal of appeal)

13. Having reviewed the grounds of appeal advanced by the Appellant in his letter of appeal dated the 26th of August 2015, and having heard and carefully considered the submissions made by the parties at the hearing, I was satisfied that the Appellant did specify with sufficient particularity the amounts and matters in the Notice of Amended Assessment and Notice of Assessment issued by the Respondent on the 19th of August 2015 with which he was aggrieved.

14. I was further satisfied that the said letter of appeal identified with sufficient particularity the grounds of the Appellant's appeal in relation to the amounts and matters with which he was aggrieved.

15. It appears to me that the refusal by the Respondent on the 28th of August 2015 to allow the Appellant's appeal came about, in reality, because the Respondent did not accept as valid or meritorious the grounds of appeal advanced by the Appellant, and not because the letter of appeal submitted by the Appellant did not comply with section 959AJ, or was otherwise deficient.

16. I therefore determined, pursuant to section 933(1)(d), that the Appellant's application for an appeal should be allowed.

17. Having so advised the parties of my determination of the preliminary appeal pursuant to section 933(1)(c), I then proceeded, with the consent of the parties, to immediately hear the evidence and submissions in relation to the substantive appeal.

Relevant legislation (substantive appeal)

18. The legislative provisions governing the income tax treatment of payments made to a separated spouse on foot of a maintenance arrangement are contained in sections 1025 and 1026 of the Taxes Consolidation Act, 1997, as amended. The application of section 1025 is governed by section 1025(2)(a), the portion of which relevant to this appeal provides as follows:-

> *"This section shall apply to payments made directly or indirectly by a party to a marriage under or pursuant to a maintenance arrangement relating to the marriage for the benefit of his or her child, or for the benefit of the other party to the marriage, being payments –*
>
> > *(i) which are made at a time when the wife is not living with the husband,*
> > *(ii) the making of which is legally enforceable, and*
> > *(iii) which are annual or periodical…"*

19. Section 1025(3) goes on to provide:-

"Notwithstanding anything in the Income Tax Acts but subject to section 1026, as respects any payment to which this section applies made directly or indirectly by one party to the marriage to which the maintenance arrangement concerned relates ***for the benefit of the other party to the marriage*** *–*

(a) the person making the payment shall not be entitled on making the payment to deduct and retain out of the payment any sum representing any amount of income tax on the payment,

(b) the payment shall be deemed for the purposes of the Income Tax Acts to be profits or gains arising to the other party to the marriage, and income tax shall be charged on that other party under Case IV of Schedule D in respect of those profits or gains, and

(c) the party to the marriage by whom the payment is made, having made a claim in that behalf in the manner prescribed by the Income Tax Acts, shall be entitled for the purposes of the Income Tax Acts to deduct the payment in computing his or her total income for the year of assessment in which the payment is made." [emphasis added]

20. It is also relevant to have regard to section 8(3) of the Family Law Act, 1995, which was expressly referenced in paragraph F of the Order of the Circuit Family Court, pursuant to which the Appellant made the payments giving rise to this appeal. Section 8(1) of the 1995 Act provides that, on granting a decree of judicial separation, a court may make **(a)** a periodical payments order, **(b)** a secured periodical payments order, or **(c)** an order directing a lump sum payment or lump sum payments. Section 8(3) goes on to provide:-

"An order under this section for the payment of a lump sum may provide for the payment of the lump sum by instalments of such amounts as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court."

Analysis and findings (substantive issue)

21. It is clear that in order to succeed in his substantive appeal, the Appellant must establish that the payments made in May 2013 and June 2014 were, in accordance with section 1025(3), made for the benefit of the Appellant's former spouse, and not for the benefit of his children.

22. Although the Respondent initially queried whether the payments were made for the benefit of the Appellant's children, and not his former spouse, it was conceded by the Respondent at the hearing of the appeal that the payments were made for the benefit of the Appellant's former spouse. Having had regard to the evidence offered by the Appellant on this issue, and in particular a letter dated the 1st of September 2015 from the solicitors who represented the Appellant in the family law proceedings, I am satisfied that this concession was properly made and I find as a material fact that the two payments were made for the benefit of the Appellant's former spouse.

23. The Appellant must further satisfy me that the payments were made at a time when the Appellant was not living with his former spouse. This was not disputed by the Respondent and again, having heard the evidence of the Appellant on this issue, I am so satisfied and find as a material fact that the payments were "*made at a time when the wife is not living with the husband*", as required by section 1025(2)(a).

24. Section 1025(2)(a) further requires the making of the payments to have been legally enforceable. Having regard to the fact that the making of the payments was directed by an Order of the Circuit Family Court, I am satisfied that this requirement has been met.

25. The final requirement of section 1025(2)(a), and the key point at issue in this appeal, is that the payments must be "*annual or periodical*".

26. The Respondent submitted that the decision of the English Court of Appeal in ***IRC –v- Personal Representatives of Mallaby-Deeley*** **23 TC 153** was authority for the proposition

that the fact that a payment was to be made by a number of quarterly instalments over a period of years did not prevent that payment from being considered a lump sum payment. While the Court of Appeal did reach that conclusion, I believe, having carefully considered the judgment delivered by the Master of the Rolls, that the decision focussed primarily on determining whether or not the payments in issue in that case were of a capital nature as distinct from being in the nature of income. Accordingly, I believe that the decision is not of material assistance in deciding how I should construe the words "*annual*" and "*periodical*" for the purposes of this appeal and I have not had regard to same in reaching my determination.

27. I believe that the principles which I ought instead to apply in construing those words are those enunciated by Henchy J, giving the judgment of the Supreme Court in ***Inspector of Taxes –v- Kiernan*** **[1981] IR 117**, where he stated:-

> *"Leaving aside any judicial decision on the point, I would approach the matter by the application of three basic rules of statutory interpretation. First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or an extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning…*
>
> *Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed."*

28. The 1997 Act is one which is directed to the public at large, and so I must give the words "*annual*" and "*periodic*" their ordinary and colloquial meaning. The words are in

widespread and everyday use, and I do not believe that there are any alternative meanings, regional usages, obliquities or reasons for believing that the meaning of the words might have changed since the enactment of the legislation which would require me to have regard to dictionaries or other sources in construing the words.

29. Applying the aforesaid principles to the facts before me, I believe that it is clear from the wording of paragraph F of the Order of the Circuit Family Court that the Appellant was required to make a single lump sum maintenance payment of €38,000. This was to be paid by means of two instalments, the first within 6 weeks of the date of the Order and the second within 6 months of the date of the Order. The Appellant was not required to pay the two instalments on dates determined by reference to the passage of years or other set periods; the fact that one instalment was ordered to be paid in one calendar year and the second instalment was to be paid in the following calendar year does not mean that the instalments were annual payments. Equally, the fact that the two instalments were to be paid on two separate dates does not render them periodical within the ordinary and natural meaning of that word.

30. In reaching this conclusion, I am fortified in my reasoning by the fact that section 8 of the Family Law Act, 1995, pursuant to which the payment of the monies was ordered by the Circuit Family Court **(a)** clearly draws a distinction in subsection (1) between periodical payments (whether secured or otherwise) and lump sum payments, and **(b)** expressly provides in subsection (3) that a lump sum payment may be payable by a series of instalments.

31. Accordingly, I find that the payments made by the Appellant on the 8th of May 2013 and the 16th of June 2014 were not annual or periodic payments within the meaning of section 1025(2)(a).

32. The next ground of appeal advanced by the Appellant was that the Respondent ought not to be permitted to deny him relief pursuant to section 1025 in circumstances where a Revenue

official had advised him prior to the making of the Circuit Family Court Order that any maintenance payment to the Appellant's ex-wife would be tax deductible.

33. While it is conceivable that such a statement or representation by a Revenue official could possibly, if proven, give the Appellant a cause of action founded on the doctrine of legitimate expectation and/or estoppel, or grounds for judicial review, such matters do not fall within the statutory jurisdiction of the Tax Appeals Commission.

34. The nature of the statutory jurisdiction of the Appeal Commissioners is established by a long line of judicial authorities. In ***IRC –v- Sneath*** **[1932] KB 362**, Greer LJ stated:

> *"I think the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question."*

35. In the same case, Romer LJ stated that:

> *"The appeal is merely another step taken by the Commissioners at the instance of the taxpayer in the course of the discharge of their administrative duty of collecting surtax. In estimating the total income of the taxpayer, the Commissioners must necessarily form, and perhaps express, opinions upon various incidental questions of fact and law. But the only thing the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the taxpayer's income for the year in question."*

36. Similarly, in ***Elmhurst –v- IRC*** **21 TC 381**, Lord Wright observed that:

> *"I may note here at once than in making the assessment and in dealing with the appeals, the Commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. They are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgement on such material as comes before them and to obtain any*

material which they think is necessary and which they ought to have on that material to make an assessment or the estimate which the law requires them to make. They are not deciding a case inter partes, they are assessing or estimating the amount on which, in the interests of the country at large, the taxpayer ought to be taxed."

37. The foregoing passages were cited with approval by Hanna J in ***The State (Whelan) –v- Smidic*** **[1938] 1 I.R. 626**, who then concluded:

"Though these cases dealt with a different subject-matter, I agree with the underlying principle indicated and hold that the Special Commissioner is an administrative official acting judicially, his curial jurisdiction on an appeal being confined to making a final determination as to the assessment to be put on the taxpayer."

38. More recently, the dicta of Lord Wright in ***Elmhurst –v- IRC*** was cited with approval by Charlton J in ***Menolly Homes Ltd –v- The Appeal Commissioners*** **[2010] IEHC 49**.

39. In ***The State (Calcul International Ltd) –v- The Appeal Commissioners*** **III ITR 577**, Barron J stated as follows:

"Turning to the powers of the Appeal Commissioners it seems to me that their essential function is to decide whether the assessment raised by the Tax Inspector should be reduced or increased. They do not have power to enforce their decision nor to impose liabilities. Essentially, their decisions are enforced by the institution of legal proceedings to recover the amount of tax determined by them as being payable. Equally in those cases where penalties may become payable proceedings must be instituted before they can be recovered. Nor do the Appeal commissioners determine the amount of or impose such penalties. It is the statute which does so.

The essence of a tax assessment is the determination of the amount of tax to be paid by the taxpayer. It is the particular proportion of his taxable income which is required by the tax code to be paid by way of tax. Undoubtedly, questions of fact and law require to be decided to determine taxable income. I am sure that a spectator at a hearing before the Appeal Commissioners will see no material difference between the conduct

of the hearing and the conduct of many hearings in the courts. In each case, there will be an adversarial procedure with each side seeking to establish the law and the facts to suit its own case.

This however is not the test. This lies in the orders which the Appeal Commissioners are empowered to make. Such orders obviously impose liabilities upon the taxpayer concerned but they do not deprive him of anything nor impose penalties nor limit his freedom of action. They declare his liability for tax upon the basis of the facts as found by them."

40. While those decisions obviously predate the establishment of the Tax Appeals Commission by the Finance (Tax Appeals) Act, 2015, I believe that the statements made therein regarding the nature and the extent of the statutory jurisdiction of the Appeal Commissioners and, by extension, the Tax Appeals Commission remain valid and applicable today.

41. Having regard to the foregoing authorities, I find that I do not have the jurisdiction to consider or determine whether the representation allegedly made to the Appellant by a Revenue official prior to his agreeing to the terms of the Order made by the Circuit Family Court could in law or in equity prevent the Respondent from permitting the Appellant to claim relief pursuant to section 1025. Accordingly, I have not considered this ground of appeal in reaching my determination.

42. The final ground of appeal put forward by the Appellant is his contention that the Respondent accepted that he was entitled to a deduction of €17,500 for the 2013 tax year, and so the

Respondent is not entitled to revisit that decision, and is obliged to treat the payment of €20,500 in a consistent manner for the 2014 tax year.

43. In relation to this ground of appeal, I accept the evidence and submissions advanced on behalf of the Respondent and find as a material fact that the Appellant's 2013 tax return was processed on the normal, self-assessment basis and was not the subject of any scrutiny or detailed consideration by the Respondent.

44. I find that the fact that the Appellant's 2013 return was processed without his entitlement to claim a deduction pursuant to section 1025 being questioned by the Respondent, and/or the fact that the Appellant received a repayment of tax on foot of his claim for such a deduction, does not mean that the Respondent is now precluded from amending the 2013 assessment; section 959Y(1) expressly permits such an amendment. Equally, I find that the fact that the Appellant's claim for a deduction pursuant to section 1025 in his 2013 return was initially accepted by the Respondent does not mean that the Respondent is required by law to allow such a deduction for the 2014 tax year.

Determination

45. Having carefully considered all of the evidence before me and the submissions made by the parties, I find, for the reasons detailed above, that the payments made by the Appellant on the 8th of May 2013 and the 16th of June 2014 were not annual or periodic payments within the meaning of section 1025(2)(a), and accordingly the Appellant is not entitled to claim a deduction in respect of those payments pursuant to section 1025(3)(c). I therefore determine, pursuant to section 949AK(1)(c), that the Notice of Amended Assessment for 2013 and the Notice of Assessment for 2014 issued by the Respondent on the 19th of August 2015 stand.

APPEAL COMMISSIONER

April 2016