130TACD2020

BETWEEN/

[NAME REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

This is an appeal against an amended assessment to income tax in the sum of €25,633 dated 9 December 2016, in respect of the tax year of assessment 2012.

On 1 September 2003, the Appellant and his spouse jointly purchased an apartment, [address redacted] (hereafter 'the property'). The property was located in a tax incentive area and qualified for rented residential relief first introduced by section 23 of the Finance Act 1981, commonly known as *section 23 relief*.

This appeal relates to a claim for relief in accordance with Part 10 Chapter 11 of the Taxes Consolidation Act 1997 as amended ('TCA 1997'). In addition, the appeal involves a claim for travel expenses claimed as a rental income deduction pursuant to section 97(2) TCA 1997.

The Respondent in raising the assessment, operated a partial clawback of the relief as the property, having been acquired jointly by the Appellant and his spouse, was transferred to the full ownership of the Appellant within the ten-year relevant period.

In addition, the Respondent, in allowing a deduction based on actual expenses incurred, disallowed a further deduction for travel expenses based on the civil service kilometric rates.

Further, the Respondent disallowed a deduction in respect of the cost of insurance, road tax, NCT, repairs and maintenance in relation to the Appellant's motor vehicle. The Appellant duly appealed.

Background

The Appellant and his spouse jointly purchased the property. The property acquisition was by way of 999-year lease commencing 1 September 2003. The property was located in a tax incentive area and qualified for rented residential relief first introduced by section 23 of the Finance Act 1981, commonly known as *section 23 relief*. The property qualified for 87.5% relief which amounted to an eligible deduction of €199,500. The property must be let under a qualifying lease(s) for a period of ten years in order for the relief to be claimed.

By deed of transfer dated 2 February 2012, the ownership of the leasehold interest in the property was transferred into the sole name of the Appellant. A written agreement between the Appellant and his spouse provided that in the event of sale of the property, the Appellant was required to notify his spouse and to obtain her consent. The Land Registry property folio [redacted] provides that from 7 August 2012, the Appellant's interest is '*full owner'* and that there is '*absolute title'*.

In raising the amended assessment, the Respondent operated a partial clawback of the relief in accordance with section 372AP(7) TCA 1997 which provides for a clawback of the relief where, during the ten year relevant period '*the ownership of the lessor's interest in the house passes to any other person…'.*

The Appellant and his spouse own a number of rental properties within the State. Section 97(2) TCA 1997 sets out the expenses which are allowed as deductions in the computation of Case V profits and losses. The Appellant claimed a deduction for mileage undertaken for the purposes of the rental business. The trips were undertaken to meet prospective tenants, to tidy and redecorate properties between lettings, to collect rents and to carry out maintenance and repairs on the properties. The Respondent allowed the deduction based on the actual amount incurred however, the Appellant contended that the deduction should be permitted based on civil service kilometric rates. The Appellant also claimed a deduction in

respect of the cost of insurance, road tax, NCT, repairs and maintenance in relation to the Appellant's motor vehicle.

Submissions

Section 23 relief

The Appellant claimed that there was no basis for a clawback of section 23 relief as his spouse retained her beneficial interest in the property notwithstanding the deed of transfer dated 7 August 2012. In the alternative, in the event that the Appellant's spouse no longer held a beneficial interest, the Appellant submitted that the Respondent should allow a concession and refrain from operating a clawback of the relief.

The Respondent submitted that the facts of this appeal invoked the clawback provisions of section 372AP(7) TCA 1997 and there was no basis upon which to refrain from operating the clawback.

Travel expenses

The Appellant claimed a deduction pursuant to section 97(2) TCA 1997 against his Case V rental income in relation to motor expenses incurred when travelling between properties. While the Respondent allowed a partial deduction for motor expenses, the Respondent disallowed a deduction based on civil service kilometric rates. Separately, the Respondent disallowed a deduction in relation to the cost of insurance, road tax, NCT, repairs and maintenance in relation to the Appellant's motor vehicle.

Legislation

<u>The relevant legislation in this appeal is:</u>

- Part 10, Chapter 11 TCA 1997 (sections 372AK – 372AV TCA 1997)
- Section 384 TCA 1997
- Section 81 TCA 1997
- Section 97 TCA 1997

Section 372AP(7) TCA 1997 provides as follows;

(7) Where a house is a qualifying premises or a special qualifying premises and at any time during the relevant period in relation to the premises either of the following events occurs –

(a) the house ceases to be a qualifying premises or a special qualifying premises, as the case may be, or

(b) the ownership of the lessor's interest in the house passes to any other person but the house does not cease to be a qualifying premises or a special qualifying premises, as the case may be,

then, the person who before the occurrence of the event received or was entitled to receive a deduction or, as the case may be, deductions under subsection (2) in respect of eligible expenditure incurred on or in relation to that premises shall be deemed to have received on the day before the day of the occurrence of the event [an amount as rent from that premises equal to the amount determined by the formula—

A – B

where—

A is the amount of the deduction or, as the case may be, the aggregate amount of the deductions under subsection (2) in respect of eligible expenditure incurred on or in relation to the premises, and

B is that part of the amount of any excess (within the meaning of section 384) that is attributable to the deduction or, as the case may be, the aggregate amount of the deductions under subsection (2) in respect of eligible expenditure incurred on or in relation to the premises and which has been carried forward under section 384 to the year of assessment in which either of the events, referred to in paragraphs (a) and (b), occurs.]

EVIDENCE

There were no witnesses called to give evidence in this appeal.

Documentary evidence included *inter alia*, the deed of transfer dated 2 February 2012, a written agreement between the Appellant and his spouse dated 2 February 2012, the land

registry folio [redacted] and a manuscript log of the dates of travel to each rental property including the purpose of each visit.

ANALYSIS

In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments are incorrect. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated: *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*

As the statutory provisions in issue in this appeal, being section 97(2) and sections 372AK – 372AV TCA 1997, provide for relief from taxation, the Appellant in order to succeed in his claim must demonstrate that he falls squarely within the respective relieving provisions.

This principle is set out clearly in the well quoted dicta of Kennedy C.J. in the Supreme Court case of *Revenue Commissioners v Doorley* (1995) ITR 19, at page 548 of the judgment as follows;

> *'I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable.'*

Section 372AP(7) TCA 1997 provides that where the ownership of the lessor's interest in a qualifying premises passes to any other person within ten years of first letting, the relief granted to that person will be clawed back. The relief already granted will be withdrawn by

treating the amount of the relief granted to date as if it were rent received in the year in which the ownership of the property changes.

The Appellant's claim for section 23 relief turned on the submission that his spouse retained her beneficial interest in the property. The Appellant contended that dealings in respect of the property required the consent of the Appellant's spouse and that this amounted to evidence that the beneficial interest of the Appellant's spouse remained unchanged. No authority was opened in support of this proposition. Further, the land registry folio, the contractual documentation and the title documentation furnished did not support the submission that the beneficial interest was retained by the Appellant's spouse. In short, the Appellant did not succeed in proving that his spouse retained her beneficial interest in the property.

The Appellant, noting concessions set out in Tax Briefing issue 23 of September 1996 and issue 8 of June 2010, submitted that even if the Appellant's spouse did not retain the requisite beneficial interest, the Respondent should allow a concession and refrain from operating a clawback pursuant to section 372AP(7) TCA 1997.

A similar submission was made in relation the deductibility of fuel costs based on civil service kilometric rates insofar as the Appellant claimed that the Respondent should allow a concession that would entitle the Appellant to a deduction on this basis.

It is well established based on a number of prior authorities including *inter alia*; *IRC –v- Sneath* [1932] KB 362, *Elmhurst –v- IRC* 21 TC 381, *The State (Whelan) –v- Smidic* [1938] 1 I.R. 626, *The State (Calcul International Ltd) –v- The Appeal Commissioners* III ITR 577 and *Menolly Homes Ltd –v- The Appeal Commissioners* [2010] IEHC 49, that the jurisdiction of an Appeal Commissioner is confined to making a final determination as to the amount of tax due and owing on the assessment and that such jurisdiction does not extend to the provision of equitable remedies nor to the kind of remedies available in judicial review proceedings.

In relation to the availability of section 23 relief, the Appellant has been unable to identify a statutory basis or a stateable legal basis in support of his submission that the clawback does not apply. I determine therefore that the clawback applies.

The Respondent allowed a partial deduction for fuel costs in relation to the Appellant's motor vehicle in accordance with section 97(2) TCA 1997. However, as the Appellant was unable to

identify a statutory basis or a stateable legal basis for an additional deduction, I determine that no additional deduction arises.

The Appellant claimed a deduction for the costs of insurance, road tax, NCT, repairs and maintenance in relation to the Appellant's motor vehicle however, he did not furnish receipts or other documentation evidencing these expenses. The Appellant bears the onus of proof in this appeal and must adduce evidence in support of a deduction claim. Having failed to do so, I am satisfied that the Respondent correctly refused this deduction.

Determination

For the reasons set out above, I determine that the notice of amended assessment to income tax dated 9 December 2016, in respect of the tax year of assessment 2012 shall stand.

This appeal is hereby determined in accordance with section 949AK TCA 1997.

COMMISSIONER LORNA GALLAGHER

7th day of April 2020