



153TACD2020

BETWEEN/

[NAME REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against a determination of the Revenue Commissioners dated 9 July 2015 which refused a repayment request by the Appellant in relation to repayment of PAYE, PRSI and USC. The tax was deducted by the Appellant's former employer, from a payment of €180,000 made to him by his employer pursuant to the terms of a 'Compromise Agreement' which resulted in the cessation of the Appellant's employment.
2. The Respondent took the view that the payment was taxable in accordance with section 123 of the Taxes Consolidation Act 1997, as amended ('TCA 1997') on the basis that it was was '*made 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*'.
3. The Appellant accepted that part of the payment represented remuneration and was subject to income tax however, he contended that the payment included approximately €80,000 to €150,000 representing damages for defamation,

victimisation and injury to his professional reputation (referred to herein as 'damages for defamation') and that this amount was exempt from income tax in accordance with the provisions of section 192A. The Appellant also placed reliance on section 613 TCA 1997.

Background

4. The Appellant commenced employment with a Solicitors' firm in 2012. On [date redacted] 2015, following a period of dispute and disagreement with his employer, an agreement titled 'Compromise Agreement' was drawn up and executed as between the employer and the Appellant which provided that the Appellant would accept a sum of €180,000 in full and final settlement of all claims and entitlements against his employer and that the Appellant's employment would terminate on that date.
5. While the notice of appeal quantified the damages at €80,000, the Appellant's tax advisor in correspondence with the Respondent dated 31 May 2015, quantified the damages to be in the region of €125,000, while at hearing, the Appellant stated that the sum representing damages was approximately €150,000.
6. The relevant clauses of the Compromise Agreement are as follows;

WHEREAS

- 1.2 *A number of disputes have arisen between the Employer and the Employee and the Employee has alleged, inter alia, that he has been defamed, victimised and that the Employer proposes to subject him to an unlawful disciplinary process. The Employer denies those claims in their entirety; and*
- 1.3 *The Parties have agreed to settle all disputes between them on the following terms;*
- 2 *RESIGNATION*
- 2.1 *The Employee will resign from his employment with the Employer with effect from [date redacted] 2015 ('the Termination Date')*



3 *CONSIDERATION, RELEASE AND DISCHARGE*

- 3.1 *The Employer agrees to pay and the Employee agrees to accept the sum of €180,000 gross in full and final settlement of all or any claims or entitlements (including the Employee's claims that he has been defamed and victimised) that the Employee may have howsoever arising out of or in connection with his employment with the Employer or the termination thereof against the Employer its partners, employees, servants or agents, whether at common law, in equity or under statute....*
- 3.2 *The Employer will pay the sum at 3.1 above in the most tax efficient manner permissible by law, The sum at 3.1 above is a gross sum, i.e. the Employer will deduct from the sum of €180,000 any necessary deductions in respect of income tax, PRSI and universal social charge before making any payment to the Employee. The Employer's liability to the Employee under this Agreement will in any event not exceed €180,000.*
- 3.7 *The payment at 3.1 above is made strictly without admission of liability on the part of the Employer.*

4 *INDEPENDENT LEGAL ADVICE*

- 4.1 *The Employee acknowledges that he has taken independent legal advice prior to signing this Agreement and that he understand the full meaning and effect of entering into this Agreement.*

WITHDRAWAL OF ALLEGATIONS

- 5 *The Employee withdraws and agrees not to repeat each of the allegations made by him against the Employer. The Employer withdraws and agrees not to repeat the allegations made by it against the Employee.*

Submissions

7. The Appellant submitted that the payment of €180,000 contained an amount of between €80,000-€150,000 representing damages for defamation which was not subject to income tax. The Appellant accepted that the balance represented remuneration entitlements and was subject to income tax. The Appellant claimed that



the sum representing damages was exempt from income tax in accordance with section 192A. The Appellant also placed reliance on section 613 TCA 1997.

8. The Appellant submitted that on the basis of the background to the claims, the written evidence tracing the evolution of the claims and the negotiations of settlement between the employer and the Appellant, the payment in large part represented damages for defamation and was not a payment *'made 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'* in accordance with section 123(1) TCA 1997. The Appellant submitted that the claim for defamation predated any claim in relation to termination of employment and would have been pursued by the Appellant irrespective of the matter of termination of his employment.
9. The Respondent submitted that the monies received on foot of the Compromise Agreement constituted a payment *'made 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'* in accordance with section 123(1) TCA 1997.
10. The Respondent submitted that the payment did not meet the statutory requirements of section 192A and was not exempt from income tax in accordance with that provision. The Respondent submitted that it was clear from the terms of the Compromise Agreement that the payment did not represent damages for defamation or injuries suffered by the Appellant but related to a payment in connection with the termination of his employment. The Respondent submitted that section 613 TCA 1997 was not relevant to the within appeal.

Legislation

Section 192A TCA 1997 - 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 from the purposes of the Income Tax Acts.”

Section 123 TCA 1997 - 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)
- (4) ...
- (5) ...
- (6) ...

Section 201 of the Taxes Consolidation Act, 1997 - Exemption and reliefs in respect of tax under section 123

(2)(a) Income tax shall not be charged by virtue of section 123 in respect of the following payments:

(i) an amount not exceeding €200,000 of any payment made –

(I) in connection with the termination of the holding of an office or employment by the death of the holder, or

(II) on account of injury to or disability of the holder of an office or employment;

(ii)



ANALYSIS

11. Section 192A provides for an exemption from income tax for payments made to an employee or former employee by his or her employer or former employer where the payment is made under a 'Relevant Act' in accordance with a recommendation, decision or determination under that Act of a 'Relevant Authority' as defined.
12. The Appellant stated that he had intended to institute proceedings against his employer for defamation, victimisation and injury to reputation but that the necessity of instituting proceedings was obviated by the execution of the Compromise Agreement on [date redacted] 2015.
13. To assess the nature of the payment, it is necessary to examine the terms of the Compromise Agreement on foot of which the payment was made. Pursuant to clause 3.1 of the agreement, the Appellant agreed to accept the payment '*in full and final agreement of all or any claims or entitlements*' against his employer. He accepted the sum on the basis that it was made '*strictly without admission of liability*' on the part of the Employer (clause 3.7). He also agreed to withdraw each of the allegations made by him against his employer and his employer agreed to withdraw allegations made by the employer against the Appellant (clause 5.1). The Appellant, pursuant to the Compromise Agreement, agreed to resign from his employment of and from [date redacted] 2015 (Clause 2.1).
14. The Appellant was legally represented at the time he executed the Compromise agreement and he acknowledged pursuant to clause 4.1 that he took independent legal advice prior to signing the agreement and that he understood the full meaning and effect of entering into the agreement.
15. Section 192A(4) provides for an exemption from tax in respect of a payment made under a written agreement in circumstances where, had the claim not been settled by agreement, it is likely to have been the subject of a recommendation, decision or determination by a relevant authority. The High Court is a 'relevant authority' for the purposes of section 192A. The section refers to the retention of the statement of claim in subsection 4(a)(iii) and while there was a written agreement in this case, no statement of claim issued as, per the submissions of the Appellant, the necessity of instituting proceedings was obviated by the execution of the Compromise Agreement.



As proceedings did not issue, no claim was made to a relevant authority pursuant to section 192A TCA 1997.

16. The Compromise Agreement provided for the payment of a sum of €180,000 to the Appellant *'in full and final settlement of all or any claims or entitlements' arising 'in connection with his employment with the Employer or the termination thereof against the Employer whether at common law, in equity or under statute.'* in circumstances where he agreed in accordance with clause 2 to resign from his employment with effect from *'the Termination date'* being [date redacted] 2015.
17. The sum of €180,000 was agreed and received by the Appellant in circumstances where the payment was made *'strictly without admission of liability on the part of the Employer'* per clause 3.7 and in circumstances where the Appellant, as employee, agreed to withdraw the allegations against his employer and where his employer agreed to withdraw allegations against the Appellant (clause 5).
18. Thus, pursuant to the express terms of the Compromise Agreement, the payment was not made in relation to a series of allegations nor does it seek to apportion the payment between different heads of claim. In accordance with clause 5, all allegations by both employer and employee (the Appellant) are withdrawn. Further, pursuant to clause 3.7, the Compromise Agreement provides for the making of the payment *'strictly without admission of liability'* in respect of the Appellant's claims.
19. Based on the terms of the Compromise Agreement, it is not possible to conclude that the payment or part thereof comprised damages for defamation or injury to reputation as alleged by the Appellant. It follows that it is not possible nor is it necessary to identify a basis for apportionment of the monies as contended by the Appellant.
20. Section 123 TCA 1997 provides that: *'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,'*



21. Section 192A(5) excludes *'so much of a payment under a relevant Act or an agreement referred to in subsection (4) as is a payment referred to in section 123(1)'*

22. Based on the express terms of the Compromise Agreement including in particular clauses 1.2, 1.3, 2, 2.1, 3, 3.1, 3.2, 3.7, 4, 4.1 and 5, I am satisfied that the payment of €180,000 cannot be characterised as damages for defamation or injury to reputation. In circumstances where the Compromise Agreement provided for the resignation of the Appellant (by agreement of the Appellant) and where the Appellant agreed to withdraw his allegations and to accept the payment without admission of liability on the part of his employer, I am satisfied that the correct legal characterisation of the payment is that the payment was made directly or indirectly in connection with the termination of the Appellant's employment.

23. The Appellant contended that if the sum came within section 123, then it came within the exemption in section 201(2)(a) which provides:

'(2)(a) Income tax shall not be charged by virtue of section 123 in respect of the following payments:

- (i) an amount not exceeding €200,000 of any payment made –*
 - (I) in connection with the termination of the holding of an office or employment by the death of the holder, or*
 - (II) on account of injury to or disability of the holder of an office or employment;*
- (ii) '*

24. The Respondent submitted that section 201(2)(a)(i)(II) applied to physical injury or disability and did not apply to damages for defamation or injury to reputation. It is not necessary to address that particular submission in circumstances where I have determined that the payment of €180,000 on examination of the express terms of the Compromise Agreement, does not represent damages for defamation but was made directly or indirectly in connection with the termination of the Appellant's employment and as a result, I find that the provisions of section 201(2)(a) TCA 1997 do not apply.



25. The Appellant also cited and relied upon section 613 TCA 1997 which provides that damages in respect of *'any wrong or injury suffered by an individual in his or her person or in his or her profession'* shall not constitute a chargeable gain. However, the Appellant has not been assessed to chargeable gains tax and this provision is not relevant to the question under consideration in this appeal which is whether the payment falls within section 123 TCA 1997.

Determination

26. For the reasons set out above, I determine that the nature and character of the payment made pursuant to the Compromise Agreement is that the payment was *'made 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'* in accordance with section 123(1) TCA 1997 and on this basis I determine that the Appellant is unable to succeed in his claim for repayment of tax on the basis of s.192A TCA 1997. This appeal is hereby determined in accordance with section 949AL TCA 1997.

COMMISSIONER LORNA GALLAGHER

5th day of June 2020

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.

