166TACD2020

BETWEEN/

APPELLANT

Appellant

AND

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments to additional income tax for the tax years 2014, 2015, 2016 and 2017 as follows:

2014	€3,655.14
2015	€3,079.39
2016	€2,137.04
2017	€1,649.41

2. This appeal is adjudicated without a hearing in accordance with the provisions of Section 949U Taxes Consolidation Act (TCA) 1997 by agreement with the parties.

Background

3. The Appellant was married in August 2006 and income tax returns were submitted for 2007 and 2013 inclusive under joint assessment.

4. The appeal concerns whether the Appellant and his wife should be separately or jointly assessed for the years 2014 to 2017.

5. The Appellant believes that he had correctly elected to be assessed separately from 2014 and contends that Revenue have not been able to find the original election request in their records.

6. The Respondent reviewed the Appellant's tax returns for 2014 to 2017 in August 2019 and made amended assessments on the joint income of the Appellant and his wife. These assessments included late filing surcharges of €729.58 for 2014 and €814.89 for 2015.

7. The Appellant duly appealed the amended assessments and the Tax Appeals Commission (TAC) accepted the appeal on 26 September 2019.

Legislation

S1017 TCA 1997 Assessment of husband in respect of income of both spouses

(1)Where in the case of a husband and wife an election under section 1018 to be assessed to tax in accordance with this section has effect for a year of assessment –

(a)the husband shall be assessed and charged to income tax, not only in respect of his total income (if any) for that year, but also in respect of his wife's total income (if any) for any part of that year of assessment during which she is living with him, and for this purpose and for the purposes of the Income Tax Acts that last-mentioned income shall be deemed to be his income,

(b)the question whether there is any income of the wife chargeable to tax for any year of assessment and, if so, what is to be taken to be the amount of that income for tax purposes shall not be affected by this section, and

(c)any tax to be assessed in respect of any income which under this section is deemed to be income of a woman's husband shall, instead of being assessed on her, or on her trustees, guardian or committee, or on her executors or administrators, be assessable on him or, in the appropriate cases, on his executors or administrators.

(2)Any relief from income tax authorised by any provision of the Income Tax Acts to be granted to a husband by reference to the income or profits or gains or losses of his wife or by reference to any payment made by her shall be granted to a husband for a year of assessment only if he is assessed to tax for that year in accordance with this section.

S1018 TCA 1997 Election for assessment under section 1017

(1)A husband and his wife, where the wife is living with the husband, may at any time during a year of assessment, by notice in writing given to the inspector, jointly elect to be assessed to income tax for that year of assessment in accordance with section 1017 and, where such election is made, the income of the husband and the income of the wife shall be assessed to tax for that year in accordance with that section.

(2)Where an election is made under subsection (1) in respect of a year of assessment, the election shall have effect for that year and for each subsequent year of assessment.

(3)Notwithstanding subsections (1) and (2), either the husband or the wife may, in relation to a year of assessment, by notice in writing given to the inspector before the end of the year, withdraw the election in respect of that year and, on the giving of that notice, the election shall not have effect for that year or for any subsequent year of assessment.

(4) (a)A husband and his wife, where the wife is living with the husband and where an election under subsection (1) has not been made by them for a year of assessment (or for any prior year of assessment) shall be deemed to have duly elected to be assessed to tax in accordance with section 1017 for that year unless before the end of that year either of them gives notice in writing to the inspector that he or she wishes to be assessed to tax for that year as a single person in accordance with section 1016.

(b)Where a husband or his wife has duly given notice under paragraph (a), that paragraph shall not apply in relation to that husband and wife for the year of assessment for which the notice was given or for any subsequent year of assessment until the year of assessment in which the notice is withdrawn, by the person who gave it, by further notice in writing to the inspector.

Submissions

Appellant

8. The Appellant through his agent, submitted that REDACTED was jointly assessed with his wife up to the year 2013.

14. The agent for the Appellant submitted that as the Appellant is a proprietary director and required to file his income tax returns under self-assessment he advised the Appellant to opt for separate assessment in February 2014.

15. The agent for the Appellant submitted that his firm had submitted a request for separate assessment for 2014 and future years on behalf of the Appellant on 12th February 2014. The Agent provided his file copy of this letter in support of this contention.

16. The agent for the Appellant submitted that the Appellant's employment record was recorded and reported annually by his company in its annual P35 return of employments and he submitted copies of the relevant extracts from the P35's in support of this.

17. The agent for the Appellant acknowledged that the entries on the P35 in respect of the Appellant's tax liability was incorrect insofar as the employee tax credit was incorrectly claimed in reporting the Appellant's income on the company P35.

18. The agent for the Appellant submitted that he was advised by Revenue on 5 March 2019 that despite an extensive search Revenue was unable to locate any record of the application for separate assessment but advised him as follows;

    "I accept that it is not inconceivable that such an application could have been lost, mislaid or misdirected."

19. The agent for the Appellant submitted that the Appellant is not attempting to gain any advantage through separate assessment insofar as achieving duplicate reliefs in any outcome from the appeal. Rather the Appellant's expectation from the appeal would be to have his spouse liable for the tax due in relation to her having his excess reliefs in the years of assessment.

20. The agent for the Appellant submitted that neither his client nor his wife has any degree of familiarity with the tax system and were not aware of their taxes being underpaid overall due to the erroneous duplication of tax credits. This occurred because the Appellant's wife was in receipt of all the available tax credits whilst the Appellant's company operated PAYE on the Appellant's salary after allowing further credits.

21. The agent for the Appellant submitted that he had sought and failed to reach agreement with the local Revenue Inspector and further by internal review with the Respondent.

Respondent

22. The Respondent submitted that income tax returns were submitted for the tax years 2007 to 2013 under joint assessment.

23. The Respondent submitted that in November 2009 the Appellant ceased in employment with REDACTED and the married person's tax credits and standard rate cut off point automatically transferred to the Appellant's spouse who had an active employment at that time.

24. The Respondent submitted that the Appellant commenced a new employment as a director with REDACTED in 2010. The Respondent further submitted that the Appellant failed to notify Revenue of that employment and consequently the married person's tax credits and standard rate cut off point remained with his spouse.

25. The Respondent submitted that the Appellant's employment and directorship was only registered with Revenue on 7th January 2019 even though the Appellant had been an employee and director since 2010.

26. The Respondent submitted that on 21 January 2019 the Appellant requested a transfer of the unused standard rate cut off point from the Appellant to his spouse and also asked to retain his full personal tax credit and earned income credit.

27. The Respondent submitted that it became aware at this time that income tax returns for the Appellant were filed through its online system (ROS). These returns claimed separate assessment for the years 2014 to 2017 inclusive. The Respondent further submitted that returns were not filed for the Appellant's spouse at the same time.

28. The Respondent submitted that as joint assessment applied to the income of the Appellant and his spouse it made assessments to jointly assess all the income of the couple as the income of the Appellant. Those assessments are the subject of the instant appeal.

29. The Respondent noted that the tax agent for the Appellant stated that election for separate assessment was made in February 2014 but submitted that it had no record of receiving this application and further that a copy of the election request had not been provided.

30. The Respondent submitted that it is incorrect of the tax agent for the Appellant to state that separate assessment had been operated by the Appellant as the Appellant was not registered as an employee or director of his employing company until 7 January 2019 and therefore was not in receipt of any tax credits for the operation of PAYE in respect of that employment.

31. The Respondent submitted that the additional liability in the assessments arose because the returns submitted by the Appellant included a claim for single person's tax credit, employee tax credit together using the single standard cut off point. Meanwhile his spouse was in receipt of the credits as outlined at 23 above.

32. The Respondent submitted in summary that the Appellant filed returns as a chargeable person through the self-assessment system that indicated his only source of income as his director's salary. The Respondent pointed out that the Appellant did not obtain a tax credit certificate to allow his employer, of which he is a proprietary director, to operate the PAYE system correctly.

Analysis and Findings

33. This appeal concerns whether or not the Appellant had applied for separate assessment in February 2014.

34. Tax was underpaid on the joint income of the Appellant and his wife because in effect they had been granted (Spouse) and taken (Appellant) both married persons (Spouse) and single persons (Appellant) tax credits and standard rate cut off points in calculating their respective tax liabilities for the years of assessment. In addition the Appellant had claimed an allowance for the employee tax credit to which he is not entitled because he is a proprietary director. The tax due on the joint incomes as assessed was further increased by a surcharge in 2014 and 2015 because these returns were submitted late by the Appellant - a chargeable person.

35. The application of separate assessment to the sole income of the Appellant for those years would effectively transfer most of the burden of the underpaid tax liability to his spouse.

36. The Appellant, through his agent has indicated the willingness of his spouse to account for the tax underpaid in the years of assessment in relation to her income arising because she had additional tax credits allocated to her and hence incurred the underpayment.

37. In effect therefore the benefit to the couple as a unit is limited to the reduction in the surcharge applicable to the joint income as assessed for 2014 and 2015. There was no surcharge applied in the assessments for 2016 and 2017.

38. The PAYE system is designed to correctly deduct tax due on income in a fair and reasoned way by allocating various reliefs and cut off points evenly throughout a tax year. In the instant case the PAYE system could not operate efficiently at all as the Appellant had failed to engage with the system even though in employment as a proprietary director from 2010 to 2019.

39. It seems that the Appellant's employer of which he was a proprietary director arbitrarily allocated tax credits and cut off points to his salary and represented the resultant pay and tax on its annual P35 return.

40. The agent for the Appellant has submitted a copy of a letter dated 12 February 2014 purportedly sent to the Respondent in which he elects for separate assessment for the Appellant. The Respondent in correspondence with the TAC stated that:

    "This office has no record of receiving this letter at or about the time it was dated. The existence of this letter only came to light when the basis of assessment gave rise to additional liability."

41. The agent for the Appellant has submitted that his clients had little familiarity with the tax system and were not aware of their taxes being underpaid overall due to the erroneous duplication of tax credits.

42. In light of this it would seem incumbent on the Appellant's agent to advise the Appellant and perhaps the Appellant's connected company (if acting for it) of the Appellant's obligations to notify the Respondent of his employment and to notify the employing company of its obligations to operate the PAYE system correctly for all its employees.

43. It is acknowledged by both parties that the Appellant first notified the Respondent of his employment status which commenced in 2010 on 7 January 2019.

44. The Appellant's tax returns for 2014 and 2015 were submitted late on the 6th June 2017 and the tax returns for 2016 and 2017 were submitted in time on 29 October 2017 and 13 November 2017 respectively.

45. The existence and the salary of the employment of the Appellant was declared on the P35s submitted annually. The basis of assessment as being separate was identified on the dates above (44) in the Appellant's return of income for each of the years 2014 to 2017.

46. The failure of the Appellant to notify the Respondent of his employment status, the continuing use of the married person's tax credits and standard rate cut off point by his spouse and the failure of his controlled employer company to operate the PAYE system indicate that there was a general failure by the Appellant to manage his tax affairs correctly.

47. The Respondent is unable to identify with certainty that it didn't receive the formal request for separate assessment as claimed by the Appellant.

48. S.1017 TCA 1997, provides for joint assessment of the income of a husband and wife where an election in accordance with s.1018 is made in writing for that year and subsequent years of assessment.

49. It is evident from the submissions that such an election was made by the Appellant for the years up to 2013.

50. S.1018 TCA 1997 confirms that a party may, by giving a notice in writing, withdraw an election for joint assessment for that year and for subsequent years.

51. The question therefore to be answered in this appeal is whether or not the Appellant through his agent's letter of 12 February 2014 cancelled his previous election for separate assessment in accordance with s.1018 (3) TCA 1997.

52. The Appellant has provided evidence in the form of his agent's letter dated 12 February 2014 of his request for separate assessment but the Respondent is unable to locate this letter in its records. The evidence of the returns of income dated 6 June 2017, 29 October 2017 and 13 November 2018 identifying the basis of assessment as separate, point to a belief by the Appellant and his agent that the Appellant had cancelled his election for joint assessment as indicated in the copy letter of 12 February 2014, which could not be located by the Respondent.

53. No tax advantage can be obtained by the separate assessment of a husband and wife: each becomes liable for an amount of tax and the two sums paid by them are the same as would have been payable if they had been taxed on a joint assessment. The agent in the instant appeal has indicated the willingness of the parties to engage with the Respondent to achieve this outcome.

54. Nevertheless the instant appeal concerns whether the Appellant is the chargeable person for the joint income or not as the case may be. Whilst there remains a doubt as to whether or not the crucial letter of 12 February 2014 was received by the Respondent I am

compelled by the evidence to accept that the Appellant had in fact cancelled his election for joint assessment on that date for the years 2014 and subsequent years.

55. Having considered the facts and circumstances of this appeal, together with the documentary evidence and submissions, I determine that the Appellant had made a valid cancellation of his election for joint assessment.

Determination

56. Having considered the facts and circumstances of this appeal, together with the evaluation of the documentary evidence as well as the submissions from both parties, I have concluded that the Appellant has succeeded in discharging the burden of proof in relation to the cancellation of his election to joint assessment for the years 2014 to 2017. As a result, I determine that the assessments for 2014, 2015, 2016 and 2017 should be amended to reflect the correct liability to income tax for these years reflecting the Appellant's income tax liability under separate assessment.

57. This Appeal is determined in accordance with Part 40A TCA 1997 and in particular, s.949AK thereof.

CHARLIE PHELAN

APPEAL COMMISSIONER

1 SEPTEMBER 2020