09TACD2021

BETWEEN/

[NAME REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against amended notices of assessment for the tax years of assessment 2015 and 2016, in the sums of €4,260 and €4,449 respectively. The Respondent raised the amended notices of assessment on 9 January 2018, which had the effect of withdrawing from the Appellant the joint basis of assessment in respect of the tax years of assessment 2015 and 2016.

2. The Appellant submitted that the Respondent was not entitled to withdraw the joint basis of assessment retrospectively. He contended that he was entitled to avail of the joint basis of assessment in accordance with section 1017 of the Taxes Consolidation Act 1997, as amended ('TCA 1997') as he and his spouse remained officially married and because post separation, he supported his spouse by way of voluntary maintenance payments during the relevant tax years of assessment.

Background

3. The Appellant, a proprietary director, registered for income tax on 1 June 2014. The Appellant submitted a return of income for the tax year of assessment 2015, on 27 October 2016 and for the tax year of assessment 2016, on 12 October 2017.

4. It was accepted as a matter of fact that the Appellant and his spouse separated in April 2014 and that the Appellant moved out of the family home at this time. The Appellant did not return to live in the family home on a continuous basis thereafter and the spouses did not reconcile. The Appellant stated that he and his spouse made an informal agreement for the payment of maintenance by him at the time of the separation and that this agreement evolved over the years that followed. In accordance with the agreement, the Appellant supported his spouse financially in 2015 and 2016 when she was caring for the children full-time and was not in paid employment. He stated that he and his former spouse engaged in mediation in 2016 and that an access Order was obtained in March 2017. In April 2019, divorce proceedings had been initiated and were progressing through the Courts. In response to a request for further information post the hearing of the appeal, the Appellant submitted that while he moved out of the family home in April 2014, he stayed over on the sofa approximately two nights per week until September 2016.

5. In his tax returns, the Appellant identified his civil status as '*married*' and identified the basis of assessment as '*joint assessment*'. There was an option to tick the '*married but living apart*' option however, the Appellant did not tick this box. The Appellant queried the matter with his accountant but submitted that he understood that he could continue to avail of the joint basis of assessment in relation to the tax years of assessment 2015 and 2016.

6. The Respondent stated that a certificate of tax credits issued to the Appellant in respect of 2015 and 2016, advising the Appellant that the certificate issued based on the most recent information available to the Respondent. The certificate provided that the Appellant should ensure that the information contained on the certificate was up-to-date and accurate.

7. Notification to the Respondent in respect of the separation occurred on 30 January 2017, when the Appellant's former spouse contacted the PAYE helpline and informed

the Respondent that she separated from her spouse in April 2014. On 17 August 2017 the Appellant's spouse furnished information to the Respondent in relation to the separation.

8. Based on this information the Appellant's tax records were adjusted and amended notices of assessment issued on 9 January 2018, in respect of the tax years of assessment 2015 and 2016. The amended notices of assessment computed the Appellant's tax liability in accordance with the single basis of assessment.

Submissions

9. The Appellant submitted that he was entitled to the joint basis of assessment in respect of the tax years of assessment 2015 and 2016, on the basis that he remained legally married during those years and had not obtained a decree of separation or divorce. He submitted that there was no change to the financial status of the family as a result of the separation as he continued to financially support his former spouse and family after the separation and during the relevant tax years of assessment. He submitted that as his spouse was not in employment in 2015 and 2016, she was unable to avail of her personal tax credits in respect of those tax years of assessment. The Appellant also submitted that the Respondent was not entitled to change the basis of assessment retrospectively.

10. The Respondent's position was that the joint basis of assessment was open to the Appellant only if he and his spouse were living together for the relevant tax years of assessment. The Respondent stated that as the Appellant and his spouse had separated and were living separately in circumstances where the separation was likely to be permanent, the joint basis of assessment was unavailable to the Appellant. The Respondent submitted that the Appellant's former spouse was not treated for income tax purposes as living with the Appellant in accordance with section 1015 TCA 1997, and therefore the Appellant was unable to satisfy the requirements of the joint basis of assessment pursuant to sections 1017 and 1018 TCA 1997. The Respondent placed the Appellant on proof of the requirements of section 461 TCA 1997.

Legislation

11. Relevant legislation is contained in the following provisions;

- section 1015 TCA 1997 – Interpretation
- section 1017 TCA 1997 – Assessment of husband in respect of income of both spouses
- section 1018 TCA 1997 – Election for assessment under section 1017
- section 461 TCA 1997 – Basic personal tax credit

ANALYSIS

12. Section 1015 TCA 1997 provides

(2) A wife shall be treated for income tax purposes as living with her husband unless either –

(a)they are separated under an order of a court of competent jurisdiction or by deed of separation, or

(b)they are in fact separated in such circumstances that the separation is likely to be permanent.

....

13. Section 1017 TCA 1997 provides:

(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.

14. Section 1018 TCA 1997 provides:

(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

15. It is clear from the relevant legislative provisions that in order to avail of the joint assessment basis of taxation, the spouses must be treated as living together for income tax purposes.

16. The Appellant contended that the Respondent had no entitlement to alter the joint basis of assessment retrospectively. However, the matter of electing for joint assessment arises only if a taxpayer has established in the first instance, an entitlement to avail of such tax treatment. Thus before the question of an election arises, the Appellant must demonstrate that he was entitled to avail of the joint basis of assessment in respect of the tax years of assessment 2015 and 2016.

17. It is clear from sections 1017 and 1018 TCA 1997 that to avail of the joint basis of assessment, the spouses must be treated as living together for income tax purposes. Section 1015(2) provides that a wife shall *not* be treated for income tax purposes as living with her husband where they are '*separated in such circumstances that the separation is likely to be permanent*'.

18. It is not in dispute in this appeal that the Appellant and his spouse separated in April 2014 and that the Appellant moved out of the family home at this time. The Appellant and his wife made an agreement in relation to their separation in which the Appellant continued to support his spouse and children financially. The Appellant and his former spouse engaged in mediation in 2016, an access Order was obtained on foot of court proceedings in March 2017 and by April 2019, divorce proceedings had been initiated and were progressing through the courts.

19. In response to a request for further information post the hearing of the appeal, the Appellant in correspondence stated that while he moved out of the family home in April 2014, he stayed over on the sofa approximately two nights per week until

September 2016 and that in 2014 he did not necessarily consider the separation to be permanent. I am satisfied that the spouses were separated in fact for the relevant tax years of assessment as the Appellant continued to live away from the family home, even if he stayed over on the sofa from time to time. The question which arises then is whether, and if so when, the separation became permanent.

20. The onus was on the Appellant in this appeal, to demonstrate that the separation was *not* likely to have become permanent in 2015 and 2016 however, there was little evidence in this regard. There was no evidence of reconciliation of marriage after the separation in 2014 and the Appellant did not resume residence in the family home in 2015 or in 2016. As the Appellant's spouse did not attend or give evidence at the hearing, there was no evidence of her intention as regards the permanency or otherwise of the separation. In 2016 family mediation took place. Shortly thereafter, child access proceedings and divorce proceedings were initiated and progressed through the Courts.

21. I am satisfied that in 2015 and in 2016, the Appellant and his spouse were separated in circumstances where the separation was or had become permanent and that in accordance with section 1015(2) TCA 1997, the spouse of the Appellant cannot be treated for income tax purposes, as living with the Appellant in 2015 and in 2016. I have reached this conclusion taking into consideration, the Appellant's submission that in 2015 and 2016, he stayed over on the sofa approximately two nights per week in the family home.

22. For the reasons set out, I find that in 2015 and 2016, the Appellant did not satisfy the requirements of joint assessment pursuant to sections 1017 and 1018 TCA 1997 and was not entitled to avail of this basis of assessment for the relevant tax years of assessment.

Section 461 TCA 1997

23. Where a separated spouse makes voluntary payments for the maintenance of the other, the paying spouse may be entitled to claim the married persons' basic personal tax credit where certain conditions are met. The paying spouse must show *inter alia*, that his spouse was wholly or mainly maintained by him for the tax year of assessment.

24. The relevant provision is section 461(a)(ii) TCA 1997 which provides as follows;

> *In relation to any year of assessment, an individual shall be entitled to a tax credit (to be known as the "basic personal tax credit") of –*
>
> *(a) [€3,300], in a case in which the claimant is [a married person or a civil partner] who-*
>
> *(i) is assessed to tax for the year of assessment in accordance with [section 1017 or 1031C, as the case may be] , or*
>
> *(ii) proves that his or her spouse or civil partner is not living with him or her but is wholly or mainly maintained by him or her for the year of assessment and that the claimant is not entitled, in computing his or her income for tax purposes for that year, to make any deduction in respect of the sums paid by him or her for the maintenance of his or her spouse or civil partner.*

25. It was not in dispute that the Appellant and his spouse separated in April 2014 and that the Appellant departed the family home at that time. The Appellant submitted that in April 2014, he and his former spouse agreed that his spouse would look after the children on a full-time basis in the home and that the Appellant would financially support his spouse until such time as the spouses formalised the dissolution of their marriage through the Courts. The Appellant submitted that in 2015 and 2016, there was no change to the financial status of the family as a result of the separation because the Appellant continued to financially support his spouse and children. The Appellant furnished a household budget detailing annual expenditure which included mortgage repayments on the family home, car loan repayments, heating, insurance, groceries, broadband and the children's extra-curricular activities. The Appellant submitted an e-mail from his spouse which supported the existence of a maintenance arrangement in respect of 2016.

26. In relation to 2015 and 2016, the Appellant's spouse was not in paid employment and I find as a material fact that the Appellant discharged a substantial amount of household expenses in 2015 and 2016.

27. For the relevant tax years of assessment, the Appellant's spouse was caring for the children in the family home on a full-time basis and was being supported financially

by the Appellant on a voluntarily and not legally enforceable basis. On this basis, I am satisfied that the Appellant was wholly or mainly maintaining his spouse for the tax years of assessment 2015 and 2016, in accordance with section 461(a)(ii) TCA 1997. As the maintenance was not deductible pursuant to section 1025 TCA 1997, and the spouses were not living together for the relevant tax years of assessment, I am satisfied that the Appellant is entitled to claim the married persons' basic personal tax credit for the tax years of assessment 2015 and 2016 in accordance with section 461(a)(ii) TCA 1997.

Onus of proof

28. In appeals before the Tax Appeals Commission, the onus of proof rests on the Appellant who must prove on the balance of probabilities that the assessments to tax are incorrect.

29. 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.'*

30. For the reasons set out above, I am satisfied that the Appellant has not succeeded in demonstrating that his former spouse should be treated as living with him in accordance with section 1015(2) TCA 1997, for tax years of assessment 2015 and 2016.

31. In relation to the Appellant's claim pursuant to section 461 TCA 1997, I am satisfied that the Appellant has established that he was wholly or mainly maintaining his spouse for the tax years of assessment 2015 and 2016.

Determination

32. For the reasons set out above, I determine that the Appellant has not succeeded in demonstrating that his former spouse should be treated as living with him in accordance with section 1015(2) TCA 1997, for the tax years of assessment 2015 and

2016, and accordingly I determine that the Appellant is not entitled to avail of the joint basis of assessment in respect of those tax years of assessment.

33. As regards section 461 TCA 1997, I am satisfied that the Appellant was wholly or mainly maintaining his spouse for the tax years of assessment 2015 and 2016 and that the Appellant has succeeded in demonstrating an entitlement to the married persons basic personal tax credit for the relevant tax years of assessment in accordance with section 461(a)(ii) TCA 1997 and the amended assessments should be adjusted accordingly.

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

COMMISSIONER LORNA GALLAGHER

20th day of November 2020

The Tax Appeals Commission has not been requested to state and sign a case for the opinion of the High Court in respect of this determination.