



110TACD2021

BETWEEN

APPELLANT

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by the Appellant's estate relating to a repayment claim in respect of the tax years 2013, 2014 and 2015 pursuant to section 865 of the Taxes Consolidation Act 1997, as amended, hereinafter referred to as the TCA 1997. The repayment claim relates to Value Added Tax, commonly known as VAT. The Commissioner extends condolences to the Appellant's wife in respect of the Appellant's death, described in the documentation as occurring after a long illness. The payment under appeal is €9984.49.
2. The Appellant's estate submitted the appeal on 14th August 2020. The Commissioner has considered the documentation including the Notice of Appeal, the Statement of Case submitted by both parties and all submitted documentation.
3. By agreement of the parties, this case is adjudicated without a hearing in accordance with the provisions of section 949U TCA 1997.

Background

4. The Appellant's widow sought to harmonise and settle the Appellant's estate including outstanding tax affairs. Some tax returns were in arrears due to the Appellant's long illness. The Appellant's husband had maintained a direct debit to the Revenue Commissioners ("the Respondent") in the sum of €500. The Appellant's widow engaged with accountants to bring the tax returns up-to-date and the tax returns were duly filed. As a result there was a VAT overpayment but as the claim had been made more than 4 years after the filing of the return, the Respondent refused to make the payment and/or offset this overpayment to other tax due. The Appellant's estate appealed under section 865(4) of the TCA 1997. The Appellant's estate has requested in the Notice of Appeal that an exception to the general rule regarding offsets should be allowed.
5. The Appellant's estate have supported their appeal under section 865 TCA 1997 on the grounds that the Appellant would have had an legitimate expectation in relation to the direct debit paid of €500 per month that any shortfall or excess would be made good from

the estate. The Appellant's estate also claim that the Respondent is in breach of its Charter and fair procedures were not applied to the Appellant. The Appellant's estate has also claimed that the Appellant can rely on the doctrine of estoppel. In addition, the Appellant's estate claim that the Respondent was acting ultra vires.

6. The Commissioner has considered these submissions. The Commission's role is to determine if the charge to tax has been correctly applied within the statutory framework. It cannot consider matters relating to the doctrine of estoppel and administrative/public law matters such as legitimate expectation and ultra vires. This clarification has been provided by the Court of Appeal in the case of *Lee v Revenue Commissioners* delivered on 28th January 2021 Court of Appeal Record 2018/223, [2021] IECA 114. The Appellant's estate were correct to appeal on these grounds, as their submission was made prior to the judgment in *Lee v Revenue Commissioners*. The Commissioner notes that no costs were awarded against Mr Lee in this Court of Appeal matter as the legislation was a challenge for all appellants. So, the Appellant's estate were correct in raising these matters. But the Commissioner cannot consider them as part of this appeal. The Commissioner can consider the appeal in relation to section 865 of the TCA 1997 and whether there is any facility to offset the VAT overpayment in respect of other taxes.
7. The facts are not in dispute in this appeal in terms of the dates of the payments of the direct debit monies, the date of submission of the VAT returns.
8. The Commissioner sought further information from the Respondent in relation to the date of previous enforcement action in order to consider section 865B(4) in context. The Respondent confirmed that the only history of enforcement action related to action taken in 1989 and 2002. The Respondent confirmed that there was a judgment mortgage secured by the Respondent against the late Appellant's property at Folio [REDACTED] in 1989 in respect of a debt of IR£ [REDACTED] but that this judgment mortgage had expired after 30 years and that an application could be made for the discharge. The Respondent further confirmed that there was a debt totally € [REDACTED] in respect of PAYE/PRSI for 1998/1999 and 2002 and that was referred to the Sheriff on [REDACTED] 2002.

Legislation

9. The relevant legislation that applies in respect of this appeal is section 865 TCA 1997 - Repayment of Tax. This section states as follows:

'(2) Subject to the provisions of this section, where a person has, in respect of a chargeable period, paid, whether directly or by deduction, an amount of tax which is not due from that person or which, but for an error or mistake in a return or statement made by the person for the purposes of an assessment to tax, would not have been due from the person, the person shall be entitled to repayment of the tax so paid.

[(3) A repayment of tax shall not be due under subsection (2) unless a valid claim has been made to the Revenue Commissioners for that purpose.]

[(3A)(a) Subject to paragraph (b), subsection (3) shall not prevent the Revenue Commissioners from making, to a person other than a chargeable person (within the meaning of [Part 41A]), a repayment in respect of tax deducted, in accordance

with Chapter 4 of Part 42 and the regulations made thereunder, from that person's emoluments for a year of assessment where, on the basis of the information available to them, they are satisfied that the tax so deducted, and in respect of which the person is entitled to a credit, exceeds the person's liability for that year.

(b) A repayment referred to in paragraph (a) shall not be made at a time at which a claim to the repayment would not be allowed under subsection (4).]

(4) Subject to subsection (5), a claim for repayment of tax under the Acts for any chargeable period shall not be allowed unless it is made –

- (a) in the case of claims made on or before 31 December 2004, under any provision of the Acts other than subsection (2), in relation to any chargeable period ending on or before 31 December 2002, within 10 years,*
- (b) in the case of claims made on or after 1 January 2005 in relation to any chargeable period referred to in paragraph (a), within 4 years, and*
- (c) in the case of claims made –*
 - (i) under subsection (2) and not under any other provision of the Acts, or*
 - (ii) in relation to any chargeable period beginning on or after 1 January 2003, within 4 years,*

after the end of the chargeable period to which the claim relates...

(7) Where any person is aggrieved by a decision of the Revenue Commissioners on a claim to repayment by that person, in so far as that decision is made by reference to any provision of this section, [the person may appeal the decision to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of that decision].

10. In addition, the Commissioner has also considered section 865B(4). This section states as follows:-

(4)(a) The amount of tax to which this paragraph applies is the amount, or so much of the amount of tax that is due and payable by the person in respect of the relevant period as does not exceed the amount of the repayment that cannot be made to the person in respect of that relevant period.

(b) The circumstances set out in this paragraph are where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax, at a time that is 4 years or more after the end of the relevant period.

Submissions

Appellant's submissions

11. The Appellant's estate submitted that the deceased passed away on [REDACTED] 2018. His widow contacted the local inspector of taxes to sort out the late Appellant's tax affairs. The Appellant's spouse was aware that there was some arrears due to her late husband's long illness. The late Appellant's wife was advised to submit outstanding tax returns so the tax

affairs and any liabilities could be discharged. The late Appellant's wife duly submitted the tax returns for those years and filed on 8th November 2019. Following the submission of the requisite tax returns, there was an overpayment of VAT in respect of 2013, 2014 and 2015.

12. The Appellant's estate submitted that the late Appellant continued to make monthly payments to the Respondent and there had been a charge on property by the Respondent in the name of the late Appellant which only lapsed in June 2020.
13. The Appellant's estate submitted that Revenue should exercise discretion and refund the VAT overpayment and offset one tax head against another. The Appellant's estate further submitted that not do so is not fair and equitable and would result in the incorrect amount of tax due being collected by the Respondent. They cite the Respondent's Customer Service Charter and consider there has been a breach of this charter. They submitted that allowing the offsets is not a change in legislation but rather the use of discretionary powers afforded to the Respondent in administering the tax code and in applying fair procedures.

Respondent's submissions

14. The Respondent submitted that repayment or offset of VAT cannot be made because of the restrictions imposed on the Respondent by section 865(4) TCA 1997.
15. The Respondent submitted that as the tax return and offset/refund claim for tax years were made more than four years after the end of the tax year to which the claim relates, the Respondent is statute barred from making the repayment.
16. The Respondent submitted that the Commission has no jurisdiction to address issues of legitimate expectation, estoppel, ultra vires or breach of the Customer Charter.
17. The Respondent further submitted that they applied section 865(4) correctly and section 865(B)(4) does not apply in this case as the periods in question for the VAT repayment/offset claim relate to periods after the enforcement action has been taken in 1989 and 2002 and no enforcement action has been taken by the Respondent in respect of the relevant periods.

Analysis and findings

18. The extenuating circumstances in this appeal have been recognised by the Commission. The Commissioner has the utmost sympathy for the position the Appellant's widow found herself in, and her legitimate desire to rationalise the late Appellant's tax affairs. However, there is no discretion afforded to the Respondent and hence no discretion afforded to the Commissioner to consider those circumstances in relation to the four-year rule and any repayment outside that period of time. The Appellant was correct to appeal to seek clarity on the situation.
19. Section 865(2) TCA 1997 provides that a person is entitled to a repayment of tax paid where an amount of the tax paid is not due from that person. Section 865(3) provides that a repayment of tax is not due unless a valid claim has been made to the Respondent.

20. Section 865(1)(b)(i) TCA 1997 provides that where a person furnishes a return which is required to be delivered by the person for a chargeable period, such a return shall be treated as a valid claim in relation to a repayment of tax where all the information which the Revenue Commissioners may reasonably require to enable them determine if and to what extent a repayment of tax is due is contained in the return furnished by the person. Section 865(1)(b)(ii) provides that where all the information which the Respondent may reasonably require to enable them to determine if and to what extent a repayment of tax is due is not contained in the return furnished by the person, a claim for repayment of tax shall be treated as a valid claim when that information has been furnished by the person.
21. As regards a limitation period for a repayment of tax under section 865, subsection (4) provides that '*...a claim for repayment of tax under the Acts for any chargeable period shall not be allowed unless it is made- within 4 years, after the end of the chargeable period to which the claim relates.*' [emphasis added]
22. In addition, section 865B states that "*where a repayment of tax cannot be made to a person because a claim is lodged outside of the relevant time limit, offset against any other tax liabilities of the person is prohibited*".
23. The late Appellant's estate sought a repayment/offset of tax on the basis that an amount of tax paid by the Appellant in respect of VAT for the tax years 2013, 2014 and 2015 was not due. The entitlement to a repayment of tax arises under section 865(2) TCA 1997. Section 865(3) TCA 1997 means that the repayment of tax under section 865(2) TCA 1997 is not due unless a valid claim has been made to the Revenue Commissioners. Therefore, for the repayment of tax to be due, the Appellant's estate must have made a valid claim to the Respondent.
24. The Respondent had all the information which they required to enable them determine if and to what extent a repayment of tax was due to the Appellant's estate, following the delivery of the relevant claim to repayment/offset, only when the 2013, 2014 and 2015 returns were received in 2019.
25. In deciding if the Appellant's estate is entitled to repayment of tax (and/or an offset), and having established that there is a valid claim, the provisions of section 865(4) TCA 1996 are applied. As the claim for repayment of tax by the Appellant's estate was made outside the four-year period specified in section 865(4) TCA 1997, the claim for repayment in the amount for the year 2013, 2014 and 2015 was disallowed.
26. The use of the word 'shall' as set out in section 865(4) TCA 1997, indicates an absence of discretion in the application of this provision. The wording of the provision does not provide for extenuating circumstances in which the four-year rule might be mitigated. The Commissioner has no authority or discretion to direct that repayment be made to the Appellant where the claim for repayment falls outside the four-year period specified in section 865(4) TCA 1997.
27. Previous determinations of the Tax Appeals Commission have addressed the matter of repayment in the context of the four year statutory limitation period. These determinations, may be found on the Commission website.¹

¹ www.taxappeals.ie

28. In addition, the Commissioner has considered section 865B but that also negates any payment under offset as it confirms that if a repayment is not due as the claim is lodged outside the time limit, then offset against any other liability is also prohibited. The Commissioner for completeness has also considered section 865B(4)(a) and 865B(4)(b). But this section only applies if the Respondent has taken action for the recovery of tax at a time that is 4 years or more after the end of the relevant period. In this case, the enforcement action for recovery from the late Appellant related to a period to time many years before the relevant period of 2013 to 2015 inclusive. It related to 1999 and 2002. Hence, section 865B(4) has no relevance in this appeal and does not assist the Appellant's estate.
29. The Commissioner has considered the Appellant's submission in relation to legitimate expectation, estoppel and the Respondent's Charter of Rights. These claims are for another forum and not the Commission. The Appellant's estate did not have the clarity provided by the Court of Appeal decision in *Lee v Revenue Commissioners* and hence was correct to raise the issue. But the Commissioner's jurisdiction is to consider only those issues as to fact and law that are relevant to the statutory charge to tax. In addition, the Commissioner cannot consider in this appeal issues relating to legitimate expectation of the late Appellant and/or his estate, or if the Respondent is estopped from applying the statutory provisions or any issue in relation to the treatment of the late Appellant. The Commissioner in this appeal is charged with determining if the Appellant's estate is entitled to any repayment and/or offset of tax relating to the filing of VAT returns outside the four-year statutory "cut-off" rule.
30. The determinations that can be made by an Appeal Commissioner are those delineated in sections 949AK and 949AL TCA 1997.

Determination

31. Pursuant to the wording of section 865 TCA 1997, and in particular the use of the word "shall" as set out in subsection 865(4) TCA 1997, the Commissioner determines that there is no discretion as regards the application of the four-year statutory limitation period in circumstances where the claim has been made outside of the four-year period. As a result, the Commissioner has no alternative but to determine that the repayment claim and hence any offset on behalf of the late Appellant for the tax years of assessment 2013, 2014 and 2015 are out of time in accordance with the provisions of section 865(4) TCA 1997. There is no exception by virtue of section 865B(4). Hence, the appeal is denied.
32. The Commissioner appreciates that the Appellant's estate will no doubt be disappointed by this determination but the Commissioner has no statutory discretion to take into account extenuating personal circumstances or any other expectation. The Commissioner accepts the extenuating circumstances but there is no statutory provision which allows for consideration of them. The Appellant was correct to appeal to have clarity on the position.
33. This Appeal is hereby determined in accordance with section 949AK TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.



Marie-Claire Maney
Chairperson
Appeal Commissioner
28th June 2021