12TACD2021

BETWEEN/

[NAME REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against the withdrawal of the joint basis of assessment for the tax years of assessment 2014, 2015 and 2016.

2. The Appellant and his wife agreed to separate in 2013 and engaged in mediation. Thereafter, they resided separately in the family home. Judicial separation proceedings were commenced in 2016 and a divorce was obtained in April, 2018.

3. On 19 June 2017 and 3 July 2017, the Respondent raised amended end of year statements in respect of the Appellant for the tax years of assessment 2014, 2015 and 2016. The end of year statements applied the single basis of assessment, resulting in an income tax liability of €9,245.05 in relation to the Appellant, for the relevant tax years of assessment.

4. The Appellant submitted that for the relevant tax years of assessment, the joint basis of assessment should apply in accordance with sections 1017 and 1019 of the Taxes Consolidation Act 1997, as amended ('TCA 1997'), on the basis that he and his spouse

remained officially married, were each residing in the family home and because the Appellant maintained his spouse and children by paying the mortgage and household bills for the relevant tax years of assessment.

Background

5. The Appellant and his spouse agreed to separate in 2013 and engaged in mediation in 2013, but were unable to agree the terms of their separation. Thereafter, the spouses lived in the family home on separated terms. The Appellant stated that while he was residing in the family home, he supported his spouse and family financially in discharging the mortgage and household bills.

6. The Appellant notified the Respondent, by letter dated 13 March 2017, which provided;

> *'Dear Mr. Murphy,*
>
> *In reply to your letter dated 8 March 2017.*
>
> *The separation is not legal yet. A judicial separation has been applied for and is with the courts. The Case Progression Hearing is on the* [**date redacted**] *of May 2017.*
>
> *The agreed date of separation is April 2013.*
>
> *As the 4 year time period will be up by the time the courts get to hear the case, a Divorce will be sought rather than a judicial separation.*
>
> *Yours Gratefully*
>
> [**Appellant's name redacted**].

7. Judicial separation proceedings commenced in 2016. The spouses obtained a court hearing date of **[date redacted]** October, 2017 however, the case was not heard on that date. The proceedings were heard in April, 2018, and an Order for divorce was obtained on that date. Pursuant to the terms of the divorce, the Appellant was

required to vacate the family home within a period of eight weeks. He moved out of the family home in July 2018 and notified the Respondent of his change of address on 7 July 2018.

8. On 19 June 2017 and 3 July 2017, the Respondent adjusted the Appellant's tax records applying the single basis of assessment for the tax years of assessment 2014, 2015 and 2016, resulting in a tax liability of €9,245.05. The Appellant duly appealed.

Submissions

9. The Appellant claimed that he maintained his spouse voluntarily for the relevant tax years of assessment and that he was thereby entitled to the married persons' basic personal tax credit in accordance with section 461 TCA 1997. The Appellant also submitted that the joint basis of assessment should be applied in respect of the joint income of the spouses in accordance with sections 1017 and 1019 TCA 1997, on the basis that for the relevant tax years of assessment, they were each living in the family home and they were not formally separated by Court Order.

10. The Respondent submitted that the Appellant did not meet the conditions necessary to avail of the basic personal tax credit for married persons in accordance with section 461(a)(ii) TCA 1997. Further, the Respondent submitted that the Appellant was not entitled to avail of the joint basis of assessment as the Appellant and his former spouse were, for the relevant tax years of assessment, separated in such circumstances that the separation was likely to be permanent.

Legislation

11. Relevant legislation is as follows;

- section 1015 TCA 1997 – Interpretation
- section 1019 TCA 1997 – Assessment of wife in respect of income of both spouses
- section 1017 TCA 1997 – Assessment of husband in respect of income of both spouses
- section 461 TCA 1997 – Basic personal tax credit

12. Section 1015 TCA 1997 provides as follows;

(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.

….

Section 1019 TCA 1997 provides:

(1)In this section –

"the basis year", in relation to a husband and wife, means the year of marriage or, if earlier, the latest year of assessment preceding that year of marriage for which details of the total incomes of both the husband and the wife are available to the inspector at the time they first elect, or are first deemed to have duly elected, to be assessed to tax in accordance with section 1017;

"year of marriage", in relation to a husband and wife, means the year of assessment in which their marriage took place.

(2)Subsection (3) shall apply for a year of assessment where, in the case of a husband and wife who are living together –

(a)(i)an election (including an election deemed to have been duly made) by the husband and wife to be assessed to income tax in accordance with section 1017 has effect in relation to the year of assessment, and

(ii)the husband and the wife by notice in writing jointly given to the inspector before [1 April] in the year of assessment elect that the wife should be assessed to income tax in accordance with section 1017,

or

(b)(i)the year of marriage is the year 1993-94 or a subsequent year of assessment,

(ii)not having made an election under section 1018(1) to be assessed to income tax in accordance with section 1017, the husband and wife have been deemed for that year of assessment, in accordance with section 1018(4), to have duly made such an election, but have not made an election in accordance with paragraph (a)(ii) for that year, and

(iii)the inspector, to the best of his or her knowledge and belief, considers that the total income of the wife for the basis year exceeded the total income of her husband for that basis year.

(3)Where this subsection applies for a year of assessment, the wife shall be assessed to income tax in accordance with section 1017 for that year, and accordingly references in section 1017 or in any other provision of the Income Tax Acts, however expressed –

(a)to a husband being assessed, assessed and charged or chargeable to income tax for a year of assessment in respect of his own total income (if any) and his wife's total income (if any), and

(b)to income of a wife being deemed for income tax purposes to be that of her husband,

shall, subject to this section and the modifications set out in subsection (6) and any other necessary modifications, be construed respectively for that year of assessment as references –

(i)to a wife being assessed, assessed and charged or chargeable to income tax in respect of her own total income (if any) and her husband's total income (if any), and

(ii)to the income of a husband being deemed for income tax purposes to be that of his wife.

(4)(a)Where in accordance with subsection (3) a wife is by virtue of subsection (2)(b) to be assessed and charged to income tax in respect of her total income (if any) and her husband's total income (if any) for a year of assessment –

> *(i)in the absence of a notice given in accordance with subsection (1) or (4)(a) of section 1018 or an application made under section 1023, the wife shall be so assessed and charged for each subsequent year of assessment, and*
>
> *(ii)any such charge shall apply and continue to apply notwithstanding that her husband's total income for the basis year may have exceeded her total income for that year.*

(b)Where a notice under section 1018(4)(a) or an application under section 1023 is withdrawn and, but for the giving of such a notice or the making of such an application in the first instance, a wife would have been assessed to income tax in respect of her own total income (if any) and the total income (if any) of her husband for the year of assessment in which the notice was given or the application was made, as may be appropriate, then, in the absence of an election made in accordance with section 1018(1) (not being such an election deemed to have been duly made in accordance with section 1018(4)), the wife shall be so assessed to income tax for the year of assessment in which that notice or application is withdrawn and for each subsequent year of assessment.

(5)Where an election is made in accordance with subsection (2)(a)(ii) for a year of assessment, the election shall have effect for that year and each subsequent year of assessment unless it is withdrawn by further notice in writing given jointly by the husband and the wife to the inspector before [1 April] in a year of assessment and the election shall not then have effect for the year for which the further notice is given or for any subsequent year of assessment.

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.

…..

Section 461 TCA 1997 provides:

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.

ANALYSIS

13. Where spouses are living apart and where one 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(s) of assessment.

14. 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 –*
>
> *(b) [€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.*
>
> [emphasis added]

15. The Appellant submitted that he maintained his spouse voluntarily in respect of the relevant tax years of assessment and that he was thereby entitled to the married persons' basic personal tax credit for the relevant tax years of assessment. However, the Appellant and his spouse were not living apart during these tax years but were both living in the family home. In these circumstances, the married persons' tax credit is not available to the Appellant pursuant to section 461(a)(ii) TCA 1997, as the Appellant does not satisfy the conditions necessary to avail of the tax credit.

Basis of assessment

16. The Appellant and his spouse during their marriage, opted for joint assessment in accordance with section 1019 TCA 1997 and the Appellant's spouse was the assessable person in respect of both incomes.

17. The Appellant in this appeal seeks that the joint basis of assessment be reinstated and that his former spouse be treated as the assessable person in respect of both her income and the Appellant's income, as regards the tax years of assessment 2014, 2015 and 2016. In the event the Appellant succeeds, his spouse, as the assessable person, will become liable in respect of tax arising in respect of both of the spouses' incomes.

18. The Appellant submitted that the joint basis of assessment should be applied to the joint income of the spouses on the basis that they were both living in the family home for the relevant tax years of assessment, were not separated by means of a Court Order and were thereby entitled to joint assessment in accordance with sections 1017 and 1019 TCA 1997.

19. However, it is clear from sections 1017 and 1019 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)(b) TCA 1997, provides that a wife shall *not* be treated for income tax purposes as living with her husband where they are '*in fact separated in such circumstances that the separation is likely to be permanent*'. The section provides as follows;

(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.*
>
> *….*

20. The law on the onus of proof in tax cases was clearly articulated by Charleton J. in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, where at para. 22, Judge Charleton 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.'*

21. In this appeal, the Appellant must prove that for the relevant tax years of assessment, the separation of the spouses was such that it was not likely to be permanent in nature.

22. The Appellant stated that a mediated separation was attempted in 2013 but that it was unsuccessful as agreement could not be reached. The Appellant's view of the mediation was that it was a failed attempt at separation as he was unable to depart the family home. Thereafter, the spouses resided separately in the family home. In 2016, judicial separation proceedings were commenced. By letter dated 13 March 2017, the Appellant informed the Respondent that judicial proceedings were underway, that a divorce would be sought at the close of those proceedings and that *'the agreed date of separation is April 2013'.* The proceedings were heard in April 2018, and an Order for divorce was obtained on that date. Pursuant to the terms of the divorce, the Appellant was required to vacate the family home within a period of eight weeks. He departed the family home and notified the Respondent of his change of address on 7 July 2018.

23. The date of the separation in April 2013, is the date which was used to measure the Appellant's entitlement to the divorce obtained in April, 2018. The Respondent submitted that the Appellant would have been required to satisfy the Court that he and his spouse were separated for at least four of the previous five years in order to have succeeded in obtaining the divorce Order in April 2018. The Respondent submitted that at a minimum, that would place the date of the separation as having occurred in April 2014.

24. The Appellant's submission was that for income tax purposes, he was not separated in 2014, 2015 and 2016, in such circumstances that the separation was likely to be permanent. In an e-mail dated 12 March 2018, he stated:

'There is no court order in place and there is no deed of separation and we are not in such circumstances that the separation is likely to be permanent as divorce proceedings have been lodged with the Circuit Family court in July 2017, Record No: 01740/16.
It is our intention to continue to live together until a court hearing which is scheduled to be heard on the [**date redacted**] *April in Dublin Circuit Court. On that date a court order should issue and only from that date should we be considered as being separated. At that date we will then live apart under the terms as directed by the courts.'*

25. The Appellant's view that he was not separated was based in part on the fact that he had not in those years, obtained a judicial separation or divorce order.

26. The Appellant confirmed at hearing that he and his spouse resided in the family home for the relevant tax years of assessment but did so as separated spouses. The Appellant argued that he could not be deprived of the joint basis of assessment in circumstances where he and his wife were residing in the family home and where the separation had not been formalised by the Courts. However, it is possible for a separation to be permanent in nature prior to formalisation of the separation by the Courts. For example, in the UK case of *Holmes v Mitchell* [1991] STC 25, the Chancery Division found that a husband and wife living separately under the same roof were separate households and that the taxpayer's declaration of his intention to seek a divorce after ten years of living separately rendered the separation permanent.

27. In this appeal, the parties agreed to separate in April 2013, mediation took place in 2013, judicial separation proceedings commenced in 2016 and a divorce was obtained in 2018. The test in section 1015(2) TCA 1997, is whether the spouses *'are in fact separated in such circumstances that the separation is likely to be permanent'.* In this regard, the Appellant did not contend nor was evidence adduced, that during the relevant tax years of assessment, the parties reconciled or resumed their marriage or that they decided to suspend or reconsider or not proceed with the separation. The Appellant's spouse was not a party to proceedings and was not called by the Appellant to give evidence in support of his appeal.

28. As clear from the High Court authority of *Menolly Homes,* the onus is on the Appellant to prove that the separation was *not* likely to be permanent during the relevant tax

year(s) of assessment, such that the Appellant's spouse may be treated as living with her husband for income tax purposes, for the relevant tax year(s) of assessment.

29. The Appellant in this appeal submitted that he was not formally or judicially separated in 2014, 2015 and 2016 however, the test in sub-section 1015(2)(b) TCA 1997, is whether the separation of the spouses is '*likely to be permanent*' in a given tax year of assessment. Separations which have been formalised through the Courts are provided for in sub-section 1015(2)(a) TCA 1997, and in accordance therewith, spouses who are formally separated, will not be treated as living together for income tax purposes. As per the case of *Holmes v Mitchell* [1991] STC 25, it is possible for spouses to be living in the same property and to be separated in circumstances where the separation is likely to be permanent, albeit this turns on the facts and circumstances of a given case.

30. In conclusion, I find that the Appellant simply did not adduce sufficient evidence, documentation or information in support of his submission as would allow me to conclude that in 2014, 2015 and/or 2016, the separation of the spouses was *not* likely to be permanent such that his former spouse should be treated as living with the Appellant for income tax purposes for those tax years of assessment and should be treated as the assessable person for the purposes of the joint basis of assessment pursuant to sections 1017 and 1019 TCA 1997.

Determination

31. The Appellant in challenging the end of year statements in this appeal, seeks that the joint basis of assessment be applied and that his former spouse be treated as the assessable person in respect of both her income and the income of the Appellant, for the tax years of assessment 2014, 2015 and 2016.

32. Based on the submissions, evidence and information, I am satisfied that for those tax years of assessment, the Appellant and his spouse were in fact separated in such circumstances that the separation was likely to be permanent in accordance with section 1015(2)(b) TCA 1997. It follows that the spouse of the Appellant cannot be treated for income tax purposes as living with the Appellant during those tax years of assessment and that the Appellant cannot succeed in his claim for the joint basis of

assessment pursuant to sections 1017 and 1019 TCA 1997. As a result, I determine that the end of year statements shall stand.

33. Pursuant to section 461(a)(ii) TCA 1997, one of the conditions for availing of the basic personal tax credit for married persons, is that the spouses be living apart for the relevant tax years of assessment. As this was not the case, the basic personal tax credit for married persons is not available to the Appellant pursuant to section 461(a)(ii) TCA 1997 as the Appellant has not satisfied the conditions necessary to avail of the tax credit.

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

COMMISSIONER LORNA GALLAGHER

1st day of December 2020

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