



57TACD2021

BETWEEN/

APPELLANT

Appellant

AND

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This appeal relates to claims for the repayment of tax in accordance with section 865 of the Taxes Consolidation Act, 1997 (hereinafter 'TCA 1997') in respect of the tax year of assessment 2012.
2. The Appellant filed a PAYE repayment claim for 2012 on 27th February 2017. The repayment claimed for 2012 was €41,561.
3. This Appeal was determined by an oral hearing, which, due to Covid 19 restrictions, took place remotely by electronic means on 5 November 2020 and on 2 March 2021.

Background and Agreed Facts

4. By letter dated 15 May 2017 the Respondent declined to process the repayment on the basis that a valid claim for repayment had not been made within the four-year limitation period in accordance with s. 865(4)¹ TCA 1997. The Respondent incorrectly referred to s. 864 (4) in that letter, when in fact the relevant section is s. 865 (4).

¹ The Respondent incorrectly referred to s. 864 (4) in that letter, when in fact the relevant section is s. 865 (4). Further correspondence and submissions to the TAC referred to the correct section of the TCA 1997

5. The Appellant has sought a repayment of the above amount and duly appealed the Respondent's refusal, to make the repayment, to the Tax Appeals Commission on 1 June 2017.
6. The Appellant is an airline pilot working in Germany but resident in the Netherlands. He is employed by an Irish based airline under a contract of service chargeable to income tax under Schedule E and his employer deducted income tax under PAYE from his salary.
7. He is tax resident in the Netherlands and is entitled to a repayment of Irish income tax suffered in his employment but for the provisions of section 865 TCA 1997.
8. These facts are not in dispute in this appeal.

Legislation

9. Section 865 TCA 1997 provides:

- (1) (a) *In this section and section 865A-
"Acts" means the Tax Acts, the Capital Gains Tax Acts, Part 18A, Part 18C and
Part 18D and instruments made thereunder,
"chargeable period" has the meaning assigned to it by section 321.*
...
*"tax" means any income tax, corporation tax, capital gains tax, income levy,
domicile levy or universal social charge and includes-*
...
"valid claim" shall be construed in accordance with paragraph (b).
- (b) *For the purposes of subsection (3) –*
 - (i) *where a person furnishes a statement or return which is required to be
delivered by the person in accordance with any provision of the Acts for a
chargeable period, such a statement or return shall be treated as a valid
claim in relation to a repayment of tax where-*
 - (I) *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 to the person for that chargeable period is
contained in the statement or return, and*
 - (II) *the repayment treated as claimed, if due –*



- (A) *would arise out of the assessment to tax, made at the time the statement or return was furnished, on foot of the statement or return, or*
 - (B) *would have arisen out of the assessment to tax, that would have been made at the time the statement or return was furnished, on foot of the statement or return if an assessment to tax had been made at that time.*
- (ii) *where all information which the Revenue Commissioners may reasonably require, to enable them determine if and to what extent a repayment of tax is due to a person for a chargeable period, is not contained in such a statement or return as is referred to in subparagraph (i), a claim to repayment of tax by that person for that chargeable period shall be treated as a valid claim when that information has been furnished by the person, and*
- ...
- (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.*
- ...
- (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 provisions 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.*



...

- (6) *Except as provided for by this section, section 865A or by any other provision of the Acts, the Revenue Commissioners shall not –*
- (a) *repay an amount of tax paid to them, or*
 - (b) *pay interest in respect of an amount of tax paid to them.*
- (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.*

...”

Submissions

Appellant

10. The Appellant submitted that he was not aware of the four-year rule contained in section 865 of the TCA 1997. He outlined that his claim for repayment was less than two months late.
11. The Appellant submitted that he lives and is a tax resident in the Netherlands and as such Ireland has no right to claim or keep any taxes paid by his employer.
12. The Appellant submitted that according to the non-discrimination clause in Article 24 of the Double Taxation Treaty (DTA) between Ireland and the Netherlands signed in 1969 he should not be subjected to a more burdensome taxation treatment than the taxation requirements of nationals in other states.
13. The Appellant submitted that the requirement to make similar repayments claims in the Netherlands is five years² and accordingly he should receive similar treatment in Ireland in accordance with Article 24 (1) of the DTA.
14. The Appellant submitted that he had a language barrier in relation to his understanding of the necessity to make a repayment claim within the four-year time limits set out in the Irish TCA.

² The Appellant referred to the Dutch Tax authority website: www.belastingdienst.nl



Respondent

15. The Respondent submitted that in denying the repayment it has relied on the statutory provision provided for, in s. 865(4)(c)(ii) TCA 1997 which states.

“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 – in relation to any chargeable period beginning on or after 1st January 2003, within 4 years after the end of the chargeable period to which the claim relates”.

16. The Respondent further submitted that as the claim was made more than four years after the end of the tax year, it is statute barred by section 865 (4) TCA 1997 as it was submitted after the four year time limit of 31 December 2016.
17. The Respondent submitted that article 2.6 of the DTA indicates that any term should take its meaning from Irish tax law, unless the DTA otherwise requires it.
18. The Respondent submitted that this gives effect to section 865 (4) TCA 1997 and the four-year statutory time limit, as there is no income tax time limit definition or meaning elsewhere in the DTA.
19. The Respondent submitted that as the four-year time limit is applied to Irish resident taxpayers, the Appellant is not treated less favorably. As there is no discrimination in the application of section 865 (4), no case arises under article 24.1 of the DTA.
20. The Respondent advised further that provision i of the Protocol in the DTA allowing a six-year time limit does not help the Appellant in any way. This is so because Protocol i stipulates that it only applies to tax levied contrary to articles 8, 9 and 10 of DTA, which in turn relates to dividends, interest and royalties respectively.
21. The Respondent stated that, as the tax in question is income tax, provision i of the Protocol does not apply. Therefore, the six-year time limit contained in the Protocol does not apply to the instant appeal.

Analysis

22. Article 24 (1) of the DTA between Ireland and the Netherlands provides as follows:



- “The nationals of one of the States shall not be subjected in the other State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected”*
23. This provision in the DTA ensures that a national in the Netherlands will not be treated differently than a national in Ireland in relation to taxation. The Non-Discrimination clause in Article 24 of the DTA does not extend the time limits for the making of repayment claims to the time limits of another State.
24. The provisions in section 865 TCA 1997 apply equally to Irish and non-Irish taxpayers. I cannot therefore, consider the Appellant’s argument that, he should attain a five-year period as provided in the Netherlands in relation to making a repayment claim in Ireland.
25. Section 865(2) 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 Revenue Commissioners.
26. Section 865(1)(b)(i) 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.
27. Section 865(1)(b)(ii) provides that where all the information which the Revenue Commissioners 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.
28. 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].
29. The Appellant sought a repayment of tax on the basis that an amount of tax paid by him for the year 2012 was not due. The entitlement to a repayment of tax arises under section



865(2). Section 865(3) means that the repayment of tax sought by the Appellant under section 865(2) is not due unless a valid claim has been made to the Revenue Commissioners. Therefore, for the repayment of tax for €41,561 to be due, the Appellant must have made a valid claim to the Revenue Commissioners.

30. In deciding if the Appellant is entitled to repayments of tax, and having established that there was a valid claim, the provisions of section 865(4) are applied. As the claim for repayment of tax by the Appellant was made outside the four-year period specified in section 865(4) the claim for repayment for €41,561 for the year 2012 by the Appellant is not allowed.
31. The use of the word '*shall*' in section 865(4) TCA 1997, indicates an absence of discretion in the application of the provision. The wording of the provision does not provide for extenuating circumstances in which the four-year period might be mitigated. In the circumstances, I do not consider that I have the authority to direct that a repayment be made to the Appellant where a valid claim for repayment of tax has not been made within the four-year period specified in section 865(4) TCA 1997.
32. The determinations that can be made by an Appeal Commissioner are those delineated in sections 949AK and 949AL of TCA 1997. Those provisions confine the Appeal Commissioners to making a determination in relation to the assessments, decisions, determinations or other matters which are the subject matter of the appeal actually before the Appeal Commissioners. The jurisdiction of the Appeal Commissioners is confined to interpreting tax legislation and ensuring that the Revenue Commissioners have complied with that legislation. The Appeal Commissioners do not have the jurisdiction to determine whether a legislative provision is discriminatory or unfair or otherwise unlawful; we are not empowered by statute to apply the principles of equity or to grant declaratory reliefs.
33. Accordingly, I am satisfied that it would be *ultra vires* for me to embark upon a consideration of, or to make a finding or determination in relation to, the issue of whether the Irish legislation and Revenue's application of it, concerning an out of time repayment claim, as argued by the Appellant, is discriminatory or unfair or otherwise unlawful. I must therefore decline to consider this argument or to make any finding in relation thereto.





34. Previous determinations of the Tax Appeals Commission³ have addressed the matter of repayment of tax in the context of the four-year statutory limitation period.

Determination

35. I determine that the Appellant made a valid claim in accordance with section 865 TCA 1997 for the year 2012 on 27 February 2017, which is more than four years after the end of the chargeable period to which the claim for repayment of tax relates.

36. Pursuant to the wording of section 865 TCA 1997, and in particular the word '*shall*' in section 865(4) TCA 1997, I determine that I do not have discretion as regards the application of the four-year limitation period in circumstances where a valid claim is made outside the four-year period. As a result, I determine that the claim for repayment of tax for the year of assessment 2012 is not allowed under section 865 TCA 1997.

37. This appeal is determined in accordance with section 949AL TCA 1997.

CHARLIE PHELAN

APPEAL COMMISSIONER

3 March 2021

³ www.taxappeals.ie

