



77TACD2021

BETWEEN/

APPELLANT

Appellant

AND

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against a Revenue assessment to Income Tax in relation to the tax years of assessment 2015 – 2017 inclusive, in accordance with the provisions of Section 1025 Taxes Consolidation Act (TCA) 1997. The tax assessments relate to non-declaration of payments received by the Appellant from her spouse for the years 2015, 2016 and 2017 as follows:
 - a) 01.01.2015 – 31.12.2015 €48,000
 - b) 01.01.2016 – 31.12.2016 €38,000
 - c) 01.01.2017 – 31.12.2017 €18,000
2. By letters dated 22 November 2019 the Respondent issued notices of amended assessments for income tax, PRSI and USC as follows:

2015 - €15,237

2016 - €12,246

2017 - € 3,988



3. The Appellant duly appealed these assessments to the Tax Appeal Commission (TAC) on 19 December 2019.
4. This appeal, with the agreement of the parties, was adjudicated without a hearing, in accordance with Section 949U Taxes Consolidation Act 1997 (TCA 1997).

Background and Agreed Facts

5. The Appellant and her spouse separated some time in 2015. A decree for Judicial Separation was issued to the Appellant and her spouse on 14 November 2017.
6. The Appellant received the following amounts from her spouse for the assessment years

2015 - €48,000
2016 - €38,000
2017 - €24,000
7. The Appellant declared €6,000 as maintenance payments received for 2017. She did not declare any income from maintenance payments for the years 2015 and 2016.

Legislation

8. Section 1025 Taxes Consolidation Act 1997 (TCA),

(1)In this section –

“maintenance arrangement” means an order of a court, rule of court, deed of separation, trust, covenant, agreement, arrangement or any other act giving rise to a legally enforceable obligation and made or done in consideration or in consequence of –

(a)the dissolution or annulment of a marriage, or

(b)such separation of the parties to a marriage as is referred to in section 1015(2),

and a maintenance arrangement relates to the marriage in consideration or in consequence of the dissolution or annulment of which, or of the separation of the parties to which, the maintenance arrangement was made or arises;



“payment” means a payment or part of a payment, as the case may be;

a reference to a child of a person includes a child in respect of whom the person was at any time before the making of the maintenance arrangement concerned entitled to [relief under section 465]1.

(2) (a) This section shall apply to payments made directly or indirectly by a party to a marriage under or pursuant to a maintenance arrangement relating to the marriage for the benefit of his or her child, or for the benefit of the other party to the marriage, being payments –

(i) which are made at a time when the wife is not living with the husband,

(ii) the making of which is legally enforceable, and

(iii) which are annual or periodical;

but this section shall not apply to such payments made under a maintenance arrangement made before the 8th day of June, 1983, unless and until such time as one of the following events occurs, or the earlier of such events occurs where both occur –

(I) the maintenance arrangement is replaced by another maintenance arrangement or is varied, and

(II) both parties to the marriage to which the maintenance arrangement relates, by notice in writing to the inspector, jointly elect that this section shall apply,

and where such an event occurs in either of those circumstances, this section shall apply to all such payments made after the date on which the event occurs.

(b) For the purposes of this section and of section 1026 but subject to paragraph (c), a payment, whether conditional or not, which is made directly or indirectly by a party to a marriage under or pursuant to a maintenance arrangement relating to the marriage (other than a payment of which the amount, or the method of calculating the amount, is specified in the maintenance arrangement and from which, or from the consideration for which, neither a child of the party to the marriage making the payment nor the other party to the marriage derives any benefit) shall be deemed to be made for the benefit of the other party to the marriage.



(c)Where the payment, in accordance with the maintenance arrangement, is made or directed to be made for the use and benefit of a child of the party to the marriage making the payment, or for the maintenance, support, education or other benefit of such a child, or in trust for such a child, and the amount or the method of calculating the amount of such payment so made or directed to be made is specified in the maintenance arrangement, that payment shall be deemed to be made for the benefit of such child, and not for the benefit of any other person.

(3)Notwithstanding anything in the Income Tax Acts but subject to section 1026, as respects any payment to which this section applies made directly or indirectly by one party to the marriage to which the maintenance arrangement concerned relates for the benefit of the other party to the marriage –

(a)the person making the payment shall not be entitled on making the payment to deduct and retain out of the payment any sum representing any amount of income tax on the payment,

(b)the payment shall be deemed for the purposes of the Income Tax Acts to be profits or gains arising to the other party to the marriage, and income tax shall be charged on that other party under Case IV of Schedule D in respect of those profits or gains, and

(c)the party to the marriage by whom the payment is made, having made a claim in that behalf in the manner prescribed by the Income Tax Acts, shall be entitled for the purposes of the Income Tax Acts to deduct the payment in computing his or her total income for the year of assessment in which the payment is made.

(4)Notwithstanding anything in the Income Tax Acts, as respects any payment to which this section applies made directly or indirectly by a party to the marriage to which the maintenance arrangement concerned relates for the benefit of his or her child –

(a)the person making the payment shall not be entitled on making the payment to deduct and retain out of the payment any sum representing any amount of income tax on the payment,

(b)the payment shall be deemed for the purposes of the Income Tax Acts not to be income of the child,



(c)the total income for any year of assessment of the party to the marriage who makes the payment shall be computed for the purposes of the Income Tax Acts as if the payment had not been made, and

(d)for the purposes of [section 465(6)]2, the payment shall be deemed to be an amount expended on the maintenance of the child by the party to the marriage who makes the payment and, notwithstanding that the payment is made to the other party to the marriage to be applied for or towards the maintenance of the child and is so applied, it shall be deemed for the purposes of that section not to be an amount expended by that other party on the maintenance of the child.

(5) (a)Subsections (1) and (2) of section 459 and section 460 shall apply to a deduction under subsection (3)(c) as they apply to any allowance, deduction, relief or reduction under the provisions specified in the Table to section 458.

(b)Subsections (3) and (4) of section 459 and paragraph 8 of Schedule 28 shall, with any necessary modifications, apply in relation to a deduction under subsection (3)(c).

Submissions of the Appellant

9. The Appellant in confirming receipt of the payments on which the amended assessments are based, submitted that the payments received were not legally enforceable.
10. The Appellant submitted that she had received a monthly amount from her spouse throughout their marriage paid at the discretion of her spouse. The Appellant outlined that this was demonstrated by the fact that her spouse reduced the payment from €4,000 to €2,000 per month in August 2016.
11. The Appellant opined that the reduction in the payments made on foot of the agreement could not be challenged, as the agreement was not legally enforceable.
12. The Appellant further submitted that legal separation proceedings commenced in 2015. At that time, she signed an affidavit of means identifying maintenance payments received from her spouse in the amount of €4,000 per month. She asserted that this amount reflected the monthly amount her spouse gave her during their marriage.



13. The Appellant submitted that the first legally enforceable agreement between the parties is the Agreement reflected in the Judicial Separation decree issued on 14 November 2017.
14. The Appellant referred to s. 1025 TCA 1997 and opined that this section requires the recipient, of legally enforceable maintenance amounts, to return such payments for income tax purposes. She quoted from the Respondent's guidance in the matter as follows
- "Voluntary maintenance payments are an arrangement between individuals without any legal agreement in place. These payments are ignored for tax purposes"*
15. She submitted therefore that, as the maintenance payments were not legally enforceable no liability to income tax should arise.
16. She submitted further that the payments could not be construed as a gift and referred to section 70 CAT Act 2003 which confirmed that the CAT spousal exemption applies up until a couple are no longer married – the date of a divorce decree.

Submissions of the Respondent

17. The Respondent submitted that the amounts referred to in paragraph 6 were not declared as income on [REDACTED] tax returns until 2017 when, of the €24,000 received that year, €6,000 was included as maintenance on her income tax return.
18. The Respondent submitted evidence of receipt of the maintenance payments in the form of the Appellant's bank statements and a copy of the Appellant's affidavit dated 25 November 2015 in which she stated:
- "the respondent [her spouse] presently discharges the sum of €4,000 net per month for my support and this money is paid directly into my bank account on foot of an informal agreement made in the early stages of our marriage".*
19. The Respondent provided a copy of a letter from the Appellant's solicitor dated 9 November 2017 concerning her formal separation agreement that advised that once the matter of separation has concluded the *"maintenance figure ceases."*



20. The Respondent provided the wording from section 1025 defining a maintenance agreement and emphasised the words *agreement*, *arrangement* in concluding that the arrangement between the Appellant and her spouse fell into the category of agreement specified in section 1025.
21. The Respondent then provided further text from the legislation that sets out the tax treatment of maintenance payments arising from such a maintenance payment.
22. The Respondent further submitted that it is its position, that the monthly payments from the Appellant's spouse to the Appellant are made on foot of an agreement/arrangement which constitute a maintenance arrangement between the parties and therefore the provisions of section 1025 (3) apply.

Analysis and Findings

23. The question to be answered in this case is whether or not the maintenance arrangement in place for the years 2015, 2016 and 2017 in which the Appellant received the sums of €49,000, €38,000 and €18,000 for the years 2015, 2016 and 2017 respectively amounts to a maintenance agreement as described in section 1025 (1) TCA 1997.
24. The question to be answered specifically is whether or not a legally enforceable obligation on the donor of the monies, existed for the years 2015, 2016 and 2017 to the extent that the arrangement met the requirements for relief and taxation for the parties to that agreement.
25. Under section 1025, if legally enforceable maintenance payments are made from one spouse to another they are allowed as a deduction from the income of the payer for tax purposes. These payments are chargeable to income tax in the hands of the recipient under Case IV of Schedule D.
26. The TAC has not been asked to determine any aspect of the possible relief available to the donor but the Respondent has sought to find the recipient (the Appellant) to be a chargeable person in regard to the payments received under the arrangement.
27. Section 1025 (1) TCA 1997 states:



*In this section – “maintenance arrangement” means an order of a court, rule of court, deed of separation, trust, covenant, agreement, arrangement or any other act giving rise to a **legally enforceable obligation** and made or done in consideration or in consequence of – [emphasis added]*

28. Neither party has adduced any evidence as to the existence of a written contract under which the Appellant received the acknowledged payments.
29. In order to meet the conditions of a legally enforceable contract the arrangements should meet the fundamental principles of contract law requiring that before the contract can be formed there must be
- a. An offer;
 - b. An acceptance of that offer;
 - c. Consideration; and
 - d. An intention to create legal relations.
30. In the instant appeal, there is no dispute between the parties in relation to the consideration received by the Appellant for the years in question. The Appellant has opined that the arrangement is not legally enforceable and therefore does not meet the criteria laid down in section 1025 (1) for a charge to income tax to arise.
31. The Respondent has relied on the fact that the monies were actually paid to the Appellant, on the Appellant’s affidavit acknowledging receipt of the monies and on the Appellant’s solicitor’s advice that the maintenance payments would cease on completion of the judicial separation agreement, in advancing its arguments as to the taxation of the monies.
32. In considering whether or not a charge to income tax arises in accordance with the arrangement in place for the years under appeal, I must consider whether or not the arrangement entered into, fulfils the requirements for taxation, in accordance with section 1025 TCA 1997
33. A contract can only come into existence if the parties intend to enter legal relations.
34. I have considered a number of cases concerning legal relations.
- a) In the decision of *Balfour V Balfour* [1912] 2 KB571, an agreement was reached between a husband and wife. The wife was unable to return to her husband’s place of work in Ceylon due to ill health. The husband agreed to



pay the wife £30 a month while he was away. Sometime later the marriage broke down. When this case came before the court on an application of the wife to require the husband comply with the agreement, the court decided that the agreement was not enforceable as there was a lack of consideration on the part of the wife. In addition, the Court went on to say that there was no intention to create legal relations.

- b) In the Irish High Court case of *Courtney v Courtney* (1923) 57 ILTR 42, the court held that the parties to an agreement made where due to marital difficulties, they were living apart, would have the requisite intention to create legal relations.
- c) This distinction was made in the case of *Merritt v Merritt* [1970] 1 WLR 1211. In this case, following the breakdown of a marriage a couple entered an agreement whereby the husband was to pay the wife £40 a month and she was to agree to pay the mortgage on a house that was in their joint names. The husband agreed that once the mortgage was paid off, the house would be transferred to the wife. The agreement was reduced to writing and was considered by the court to be legally enforceable. Lord Denning, in distinguishing the Balfour decision, set out – *'It is altogether different when the parties are not living in amity but are separated, or about to separate. Then they bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relation.'* However, in the *Merritt* case the wife had insisted that the agreement be put in writing.
- d) Lord Bingham in *Edwards V Lawson* [2000] 1 ELR 1091 set out – *'Whether the parties intended to enter into legally binding relations is an issue to be determined objectively and not by inquiring into their respective states of mind.'*
- e) In the case of *Soulsbury v Soulsbury* [2007] EWCA Civ 969 following the end of a 20-year marriage, the court made a periodical payments order requiring the husband to pay the wife £12,000 a year, less tax. The wife agreed to waive her entitlement to the periodical payments based on the husband's promise to leave her £100,000 in his will. This agreement between husband and wife was not put before the court, and therefore was never approved by the court. However, in accordance with the agreement, the husband changed his will and stopped making the periodical payments, while the wife did not attempt to recover the arrears that began to accrue. The husband had remarried and



upon his death, his second wife refused in her capacity of personal representative of her deceased husband's estate to make any payment to the first wife on the basis that the agreement was unenforceable, applying *Xydhias v Xydhias* [1999] 1 FLR 683. The decision turned on whether the agreement between the deceased husband and his first wife sought to oust the jurisdiction of the court in the matter of ancillary relief. The court held that as the wife had not attempted to pursue any ancillary relief through the courts, the court's jurisdiction had not been usurped. The agreement was therefore upheld. The case did not concern the question of whether or not an agreement had been reached. It turned on whether the agreement reached was legally enforceable.

35. There is no evidence in this appeal to suggest that the Appellant sought to enforce the terms of the arrangement whereby she was entitled to receive €4,000 per month when her spouse reduced the payments to €2,000 per month in August 2016.
36. This indicates to me that neither she nor her legal advisers were confident of the legal enforceability of the arrangement in place since at least 2015. In fact, she continued to accept the lesser amount until both parties agreed terms of settlement in accordance with the decree for Judicial Separation dated 14 November 2017.
37. The decree for Judicial Separation provided sufficient satisfactory financial finality for the parties.
38. In appeals before the Appeal Commissioners, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the relevant tax is not payable. In the High Court judgment of *Menolly Homes Limited -v- The Appeal Commissioners and The Revenue Commissioners* [2010] IEHC 49 (at paragraph 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".

39. The Appellant has provided sufficient evidence to enable me to conclude on the balance of probabilities that the arrangement whereby she received the acknowledged amounts on which the Respondent seeks to impose a burden of



taxation does not amount to a legally enforceable obligation as defined in section 1025 (1) TCA 1997.

40. I have concluded that she has met the burden of proof in relation to proving that she had not entered into a legally enforceable obligation as set out in section 1025 (1) TCA 1997.

*“maintenance arrangement” means an order of a court, rule of court, deed of separation, trust, covenant, agreement, arrangement or any other act giving rise to a **legally enforceable obligation**.....[emphasis added]*

41. I have therefore determined and found as a matter of fact that the arrangement in place is a voluntary arrangement between individuals without any legally enforceable obligation and therefore no income tax liability arises on the receipt of the sums involved.

Determination

42. I have determined that the assessments for 2015, 2016 and 2017 shall not stand.
43. As such, this appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK.

CHARLIE PHELAN
APPEAL COMMISSIONER
19 MARCH 2021

