



109TACD2022

Between

████████████████████

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal by the Appellant to the Tax Appeals Commission (“the Commission”) against the partial clawback of relief granted to the Appellant under section 477C of the Taxes Consolidated Act, 1997 (“TCA 1997”).
2. The total amount of tax at issue is €10,440.
3. The oral hearings took place remotely before the Commissioner on the 10th and 17th June 2020. The Appellant appeared and was represented by his solicitor (hereinafter “the Appellant’s agent”). The Commissioner heard oral evidence on behalf of the Appellant and submissions were made on behalf of the Appellant and the Respondent.

Background

4. The Appellant is a PAYE taxpayer and is assessed to Income Tax as a single person.
5. On the 1st January 2018, the Appellant was party to a joint application provided for under section 477C TCA 1997 – “Help to Buy” (hereinafter “the relief”). The relief is designed to provide income tax relief to assist first-time buyers with obtaining the deposit required to

purchase or build their first home. Broadly, the relief takes the form of a refund of income tax, including DIRT, paid for the four tax years prior to making an application for the refund.

6. The relief was approved in principle on the 21st March 2018 when the Appellant and his partner initiated a claim for the relief. They were approved for the sum of €17,500 which represented 5% of the purchase price of the property that the Appellant and his partner wished to purchase.
7. The relief granted was apportioned €17,400 (or 99.4% of the total relief) to the Appellant and €100 (or .06% of the total relief) to the Appellant's partner.
8. In accordance with the terms of the relief, the builder of the property which the Appellant and his partner wished to purchase was required to verify the claim and this was done on the 18th July 2018. The ST21 (stamp duty return) for the purchase of the property by the Appellant and his partner was filed with the Respondent on 17th September 2018 and payment in the sum of €17,500 was paid shortly thereafter.
9. Tragically, the Appellant's partners' sister passed away in 2019 leaving four young children aged between 6 and 12 years of age. The Appellant's partner and her mother obtained joint custody of their deceased's sister's/daughter's children ("the children") who resided in [REDACTED]. The Commissioner expresses his condolence to the Appellant and the family for their loss.
10. As the Appellant and his partner had no children of their own at that time a decision was taken by them that rather than uproot the children and cause them further distress, they would sell their property which they had purchased in 2018 (and obtained the relief on), and move into the property in [REDACTED] to look after the children with the assistance of the Appellant's partner's mother. The Commissioner notes the commendable actions of the Appellant and his partner.
11. On the 7th November 2020, the Appellant and his partner sold their house and their solicitor wrote to the Respondent on the 10th November 2020 to advise that the Appellant and his partner had sold their property and he was of the view that a refund under the scheme which equated to 60% of the amount claimed was required to be repaid to the Respondent. The solicitor asked the Respondent for confirmation of that position and to confirm the amount due to them.
12. Subsequently on the 11th November 2020, the Appellant and his partner's solicitor wrote to the Respondent requesting that the liability due to them be waived and he outlined the matters of a "personal and sensitive nature" in which the property was sold. These matters

related to the death of the Appellant's sister and the provision of care to the deceased's children.

13. The Respondent replied to this communication and acknowledged the unfortunate circumstances of the case. However, they advised that section 477C TCA 1997 does not provide for discretion in the application of its provisions or any extenuating circumstances in which the clawback of the relief granted could be waived. The Respondent requested confirmation of the dates of occupation of the property and confirmation that the property had been occupied by the Appellant and his partner throughout the period of ownership.
14. On the 7th December 2020, the Appellant and his partner's solicitor confirmed the dates of ownership of the property as from 7th September 2018 to 6th November 2020 and he also advised that his clients resided in the property for the full period of ownership.
15. The Respondent replied to this communication on the 17th December 2020 and confirmed that the review of the scheme was finalised and the sum of €10,440 was required to be discharged by the Appellant which represented the appropriate percentage of the clawback referable to him.
16. On the 5th March 2021, the Respondent issued a Notice of Assessment in accordance with Section 477C (20) TCA 1997 seeking the sum of €10,440 in respect of the tax year 2018 be repaid to them.
17. The Appellant duly appealed that assessment to the Commission.

Legislation and Guidelines

18. The following legislation is relevant to this appeal.

Section 477 C (17) TCA 1997

- (a) *On its completion, a qualifying residence or a self-build qualifying residence shall be occupied by the claimant as his or her only or main residence.*
- (b) (i) *Where an appropriate payment is made on foot of a claim under this section, and the qualifying residence or self-build qualifying residence ceases to be occupied –*
 - (I) *by the claimant, or where more than one individual is a party to the claim, by all of those individuals,*
 - (II) *where more than one individual is a party to the claim, by all of those individuals,*

within 5 years from occupation of the residence, the claimant shall notify the Revenue Commissioners and, in accordance with subparagraph (ii), pay to the Revenue Commissioners an amount equal to the amount of the appropriate payment, or the lesser percentage there specified of the amount of the appropriate payment.

(ii) *Where the residence ceases to be occupied as mentioned in subparagraph (i)*

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(I) *within the first year from occupation, the claimant shall, within 3 months from the residence ceasing to be so occupied, pay to the Revenue Commissioners an amount equal to the amount of the appropriate payment,*

(II) *within the second year from occupation, the claimant shall, within 3 months from the residence ceasing to be so occupied, pay to the Revenue Commissioners an amount equal to 80 per cent of the amount of the appropriate payment,*

(III) *within the third year from occupation, the claimant shall, within 3 months from the residence ceasing to be so occupied, pay to the Revenue Commissioners an amount equal to 60 per cent of the amount of the appropriate payment,*

(IV) *within the fourth year from occupation, the claimant shall, within 3 months from the residence ceasing to be so occupied, pay to the Revenue Commissioners an amount equal to 40 per cent of the amount of the appropriate payment, or*

(V) *within the fifth year from occupation, the claimant shall, within 3 months from the residence ceasing to be so occupied, pay to the Revenue Commissioners an amount equal to 20 per cent of the amount of the appropriate payment.*

Section 477C (18) TCA 1997

(a) *Where –*

(i) *arising from a claim under this section, an appropriate payment is made to, or in respect of, a claimant, and*

- (ii) *any condition that imposes a qualification, as respects the claimant, in relation to the making of an appropriate payment under this section is not satisfied by the claimant,*

the claimant shall, within 3 months from the date on which the appropriate payment is made, pay to the Revenue Commissioners an amount equal to the amount of the appropriate payment, or part of such an amount, as appropriate.

Section 477C (19) TCA 1997

Where more than one individual is a party to a claim under this section and a liability arises under subsection (17) or (18) in respect of payment to the Revenue Commissioners of an amount equal to the amount of the appropriate payment, or part of such an amount, each party to the claim shall be liable jointly and severally.

Section 477C (20) TCA 1997

- (a) *Where a person who is liable to pay to the Revenue Commissioners an amount referred to in subsection (17)(b) or paragraph (a), (b), (c) or (d) of subsection (18) fails to pay that amount, a Revenue officer may, at any time, make an assessment or an amended assessment on that person for a year of assessment or accounting period, as the case may be, in an amount that, according to the best of that officer's judgement, ought to be charged on that person.*
- (b) *A person aggrieved by an assessment or an amended assessment made on that person under this subsection may appeal the assessment or the amended assessment to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of assessment or amended assessment.*
- (c) *Where in accordance with paragraph (a), a Revenue officer makes an assessment or an amended assessment on a person in an amount that, according to the best of that officer's judgement, ought to be charged on that person, the amount so charged shall, for the purposes of paragraph (a) and Part 42, be deemed to be tax due and payable in respect of the tax year in which the person is liable to pay the amount involved and shall carry interest as determined in accordance with subsection (2) of section 1080 as if a reference in that subsection to the date when the tax became due and payable were a reference to the date the amount so charged is, under this section, payable to the Revenue Commissioners.*

(d) Any liability to pay an amount to which paragraph (a) applies, including any interest thereon, which is due and unpaid by a qualifying contractor under this section shall be and remain a charge on the freehold or leasehold estate or interest in the land on which the qualifying residence was to be constructed, where the contractor retains such estate or interest in the land.

(e) Notwithstanding section 36 of the Statute of Limitations 1957, the charge referred to in paragraph (d) shall continue to apply, without limit as to time, until such time as it is paid in full.

Submissions

Appellant

19. The Appellant's agent submitted that under the strict confines of the legislation, he had to concede the clawback amount of €10,440 was due to the Respondent. However, he requested owing to the particular circumstances of this appeal that the Respondent in accordance with their care and management procedures had the ability to waive the liability and he requested that they so do.

20. The Appellant's agent advised that this was possible as the Appellant's partner liability was waived. He advised that he received the following email from the Respondent's on the 4th December 2020:

"... [The Appellant's partner] received €100 as part of the HTB claim... and therefore a 60% clawback would equate to €60. It is the view of the Revenue that this clawback is uneconomical to pursue at this time.

Therefore, the Notice of Assessment is in relation to your client [the Appellant] solely. For this reason I will not be adding the name of [the Appellant's partner] to this letter, notwithstanding she is a joint applicant to the HTB claim..."

The Appellant's agent submitted that this email correspondence was evidence that the Respondent had the ability to waive clawback of the relief as they had done so for the Appellant's partner.

21. The Appellant's agent advised that the Appellant and his partner's property having been purchased for €350,000 was subsequently sold for €385,000 but that the profit on the sale was largely "*eaten up by interest and bank fees*". As a result he advised that the payment of the liability would result in genuine hardship being inflicted not only on the Appellant but also the five children in his care (the Appellant and his partner subsequently had a child of

their own). The Appellant's agent stated that as the Appellant and his partner had "*stepped up to the plate*" in taking care of the deceased's children that some regard ought to be had by the Respondent in considering a waiver of the liability. The Appellant's agent noted that as the Appellant and his partner had decided to take care of the children, this saved the State significant costs in foster care or such like.

22. The Appellant's agent quoted section 477C (20) TCA 1997 which provides that where a person is liable to pay the Respondent a clawback amount but fails to pay that amount a Revenue Officer **may** at any time make an assessment in the amount of that officer's judgment **ought** to be charged by that person which he stated provided an element of discretion. He submitted that the words "may" and "ought" to be charged to that person indicated that it was not mandatory for the Respondent to collect the sum due and he respectfully requested that the Respondent exercise that discretion and waive the liability accordingly.

Respondent

23. The Respondent submitted that while they were fully empathetic to the Appellant's circumstances, as there was no dispute in relation to the quantum owed or that the amount was due and owing, their position was that the liability was payable under Section 477C TCA 1997.
24. The Respondent submitted that as the Appellant's agent had not only agreed in correspondence that the sum was due and owing but calculated the figure to be repaid and that the notice of appeal did not contain any ground stated as to why the liability should be waived, that it should not be and the assessment should be upheld.
25. The Respondent further submitted as the Appellant's property was sold within the five year timeframe detailed in the legislation and as the legislation did not contain any extenuating circumstances in which the liability could be waived, then under the confines of the legislation neither they nor the Commission had any discretion to waive the liability and as such the liability was due and owing.
26. Accordingly, the Respondent requested that the assessment which they issued on the 5th March 2021 in the sum of €10,440 be upheld by the Commission.

Adjournment to the Initial Hearing

27. Following the initial submissions of the parties at the hearing held on the 10th June 2022 and noting the Appellant's agent request that the liability be waived under the "care and management" facility available to the Respondent, the Commissioner agreed with the

consent of both parties, for the hearing to be adjourned for a period of one week. The purpose of this adjournment was to enable the Respondent seek instructions as to whether an agreement could be reached with the Appellant on a waived or reduced liability.

28. The Respondent advised the Commission and the Appellant's agent that such an agreement was not available and the appeal recommenced on the 17th June 2022.

Material Facts

29. The Commissioner finds the following material facts:-

29.1. The Appellant purchased an interest in a property on the 7th September 2018 and received the sum of €17,400 in assistance from the Respondent under the "Help to Buy Scheme". This payment contributed towards the purchase price of the property by the Appellant and his partner.

29.2. The Appellant resided in that property with his partner as their primary residence for the period 7th September 2018 to the 6th November 2020.

29.3. The Appellant and his partner sold that property on the 6th November 2020.

29.4. On the 5th March 2021, the Respondent issued a notice of assessment to the Appellant for the tax year 2018 in accordance with the provisions of section 477C (20) TCA 1997 seeking a reclaim of the relief previously granted in the sum of €10,440.

Analysis

30. In appeals before the Commission, the burden of proof rests with the Appellant who must prove on a balance of probabilities that the assessments or tax deductions are incorrect. In the case of *Menolly Homes v Appeal Commissioner and another* (2010) IEHC 49, at paragraph 22 Charleton J. stated:

'The burden of proof in this appeals 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'

31. The rules for statutory interpretation are set out in the judgment of McDonald J. in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* ([2020] IEHC 552) where he summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

“The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

- (a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
- (b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: “... context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that”;*
- (c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*
- (d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*
- (e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*
- (f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.*
- (g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766: “Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is*

clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible”.

32. The Commissioner is satisfied that there is no inherent ambiguity in the statutory wording used per section 477C (17) TCA 1997 as amended. It is clear from section 477C (17) (b) (I) that the legislature intended that where a payment is made on foot of a claim under that section and the residence ceases to be occupied by the Appellant within five years from the occupation of the residence then the claimant shall pay the Respondent an amount equal to the lesser percentage as specified under section 477C (b) (ii) TCA 1997. The use of the word “shall” in the legislation indicates a lack of discretion and the Commissioner is bound by the statutory wording therein.
33. As the Appellant had occupied the property for the period 7th September 2018 to 6th November 2020, a period of over two years then he was considered to occupy the property within the third year. In this appeal as the Appellant had occupied the property for less than five years, section 477C (b) (II) (iii) TCA 1997 requires that the appropriate amount to be repaid as he had occupied the property for three years is 60% of the sum originally advanced which equates to €10,440.
34. The Commissioner considered the Appellant’s agent’s submission that section 477C (20) (a) TCA 1997 contains an element of discretion but is of the view that the discretion afforded under that section of the legislation has been superseded by the issuance of the notice of assessment to the Appellant on the 5th March 2021 and as such is not applicable.
35. The jurisdiction of the Commission was set out by Murray J. in the case of *Kenny Lee and the Revenue Commissioners* [2021] IECA 18 (“Lee”). Paragraph 76 of that judgment provides:

“The jurisdiction of the Appeal Commissioners and of the Circuit Court under those provisions of the TCA in force at the time of the events giving rise to these proceedings

and relevant to this appeal (ss. 933,934 and 942) is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA. That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and see if the assessment has been properly prepared in accordance with those statutes. They may make findings of fact and law that are incidental to that inquiry. Noting the possibility that other provisions of the TCA may confer a broader jurisdiction and the requirements that may arise under European Law in a particular case, they do not in an appeal of the kind in issue in this case enjoy the jurisdiction to make findings in relation to matters that are not directly relevant to that remit, and do not accordingly have the power to adjudicate upon whether a liability the subject of an assessment has been compromised, or whether Revenue are precluded by legitimate expectation or estoppel from enforcing such a liability by assessment, or whether Revenue have acted in connection with the issuing or formulation of the assessment in a manner that would, if adjudicated upon by the High Court in proceedings seeking Judicial Review of that assessment, render it invalid.”

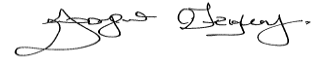
36. The judgment in the *Lee* case makes it clear that that the function of the Commission is to be determined based on the express wording of the Tax Acts and that the Commission does not have an inherent or general jurisdiction beyond these legislative provisions. As such, the Commissioner is charged with implementing the legislation without deviation or expansion to the wording and in so doing finds that the notice of assessment issued by the Respondent on the 5th March 2021 in the sum of €10,440 must stand.

Determination

37. The Commissioner determines that the assessment which issued by the Respondent on the 5th March 2021 was in compliance with the provisions of section 477C (20) TCA 1997. Therefore, the appeal is denied and the assessment is upheld. The Commissioner wishes to express an understanding for the situation the Appellant finds himself in and he was correct to pursue an appeal to have clarity. However, the legislative provisions are clear and cannot be overturned in this appeal. The Commissioner expressed his admiration for the conduct of the Appellant and his partner in looking after the children and wishes them and their recent addition every success in the future.

38. The appeal is 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.



Andrew Feighery
Appeal Commissioner
23 June 2022