AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

119TACD2022

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against assessments to Income Tax raised by the Revenue Commissioners ("the Respondent") on the 16th July 2019 and the 16th December 2020.

2. The assessments cover the tax years 2015 to 2017 inclusive and the Income Tax on those assessments amounts to €5,455.82. The Appellant is also appealing a late filing surcharge in respect of the tax year 2018 which amounts to €4,069.25. As the surcharge is included within the 2018 assessment in accordance with section 956C (6) Taxes Consolidation Act 1997 ("TCA 1997"), the surcharge and the income tax assessments are appealed to the Commission in accordance with the provisions of section 933 (1) (a) TCA 1997.

Background

3. The Appellant and her husband (spouse) were legally separated on the 3rd April 2014.

4. For the tax years 2015 to 2017 inclusive, the Appellant who was a proprietary director (meaning that she was a director of a company who was the beneficial owner of, or is able to control, more than 15% of the ordinary share capital of the company, either directly or

indirectly) filed her Income Tax returns under joint assessment as a married couple. Proprietary directors are required under the TCA to file yearly tax returns.

5. On the 17th April 2019, the Appellant's former spouse contacted the Respondent via their MyEnquiries service (MyEnquiries is essentially an interface provided by the Respondent which facilitates the management of a taxpayer's affairs) with the instruction that he no longer wished to be jointly assessed with the Appellant due to their legal separation in 2014.

6. The Respondent replied to this correspondence and requested that the Appellant's former spouse submit a copy of the separation agreement. The Appellant's former spouse duly complied with this request and provided a copy of the separation agreement to the Respondent on the 16th May 2019.

7. The separation agreement did not contain any provision regarding the payment of maintenance by either spouse and the Appellant's former spouse confirmed that no legally enforceable maintenance payments were being made.

8. As the Appellant and her former spouse had been legally separated since 2014 and as no maintenance was payable between the former spouses, the Respondent issued revised notices of assessment to the Appellant for the years 2015 to 2017. This removed the Appellant her married treatment for tax purposes. The adjustments reflected in the Notices of Assessments were the withdrawal of married person's allowances and tax bands and their substitution with the single person child credit and rate band.

9. Separate and distinct to the above matters, the Appellant lodged her 2018 tax return which had been due for submission on or before the 31st October 2019, on the 2nd December 2020. As the return was submitted late, the Respondent imposed a 10% surcharge on that return which equated to €4,069.25.

10. On the 8th January 2021, the Appellant who was not in agreement with the Notice of Assessments and the imposition of the surcharge in respect of the tax year 2018 lodged an appeal with the Commission. The Appeal hearing was held remotely on the 21st June 2022 with the Appellant and her former spouse in attendance.

Legislation and Guidelines

11. The following legislation is relevant to this appeal.

Section 1015 TCA 1997

(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 1017 TCA 1997

(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.

Section 1018 TCA 1997

(1) A husband and his wife, where the wife is living with the husband, may at any time during a year of assessment, by notice in writing given to the inspector, jointly elect to be assessed to income tax for that year of assessment in accordance with section 1017 and, where such election is made, the income of the husband and the income of the wife shall be assessed to tax for that year in accordance with that section.

Section 1019 TCA 1997

(1) 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.

Section 1025 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 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),

Section 1026 TCA 1997

(1) Where a payment to which section 1025 applies is made in a year of assessment by a party to a marriage (being a marriage which has not been dissolved or annulled) and both parties to the marriage are resident in the State for that year, section 1018 shall apply in relation to the parties to the marriage for that year of assessment as if—

(a) in subsection (1) of that section ", where the wife is living with the husband," were deleted, and

(b) subsection (4) of that section were deleted.

(2)Where by virtue of subsection (1) the parties to a marriage elect as provided for in section 1018(1), then, as respects any year of assessment for which the election has effect—

(a) subject to subsection (1) and paragraphs (b) and (c), the Income Tax Acts shall apply in the case of the parties to the marriage as they apply in the case of a husband and wife who have elected under section 1018(1) and whose election has effect for that year of assessment,

(b) the total income or incomes of the parties to the marriage shall be computed for the purposes of the Income Tax Acts as if any payments to which section 1025 applies made in that year of assessment by one party to the marriage for the benefit of the other party to the marriage had not been made, and

(c) income tax shall be assessed, charged and recovered on the total income or incomes of the parties to the marriage as if an application under section 1023 had been made by one of the parties and that application had effect for that year of assessment.

Section 1084 TCA 1997

(2) (a) Subject to paragraph (b), where in relation to a year of assessment or accounting period a chargeable person fails to deliver a return of income on or before the specified return date for the chargeable period, any amount of tax for that year of assessment or accounting period which apart from this section is or would be contained in an assessment to tax made or to be made on the chargeable person shall be increased by an amount (in this subsection referred to as "the surcharge") equal to—

(i)5 per cent of that amount of tax, subject to a maximum increased amount of €12,695 where the return of income is delivered before the expiry of 2 months from the specified return date for the chargeable period, and

(ii)10 per cent of that amount of tax, subject to a maximum increased amount of €63,845, where the return of income is not delivered before the expiry of 2 months from the specified return date for the chargeable period,

…

Submissions

Appellant

12. The Appellant advised that her former spouse had developed a serious illness shortly after they separated which had a limited survival rate. The Appellant further advised that she

had devoted a significant amount of time and resources to caring for her former husband and assisting him with medical care. She stated that as her former spouse had no other family members living in Ireland, he could only rely on the Appellant and her family for the much needed care he required.

13. The Appellant advised that her bookkeeper at the time did not inform her that she needed to advise the Respondent that she wished to remain jointly assessed with her former spouse for tax purposes for married treatment for tax purposes to be applicable. The Appellant stated that this failure to inform the Respondent was a complete oversight on her behalf and was caused by the fact she had a lot on her mind from running a business and caring for her two young children and former spouse.

14. The Appellant also submitted that this pre-occupation was the cause of her failing to lodge the 2018 tax return on a timely basis which resulted in the surcharge being imposed "unfairly".

15. The Appellant submitted that owing to the extenuating circumstances in the time period involved that the Commission should allow married treatment for tax purposes to be afforded for the years of assessment 2015 to 2017 inclusive. In addition, the Appellant requested that the Commission direct the Respondent to waive the surcharge imposed on the 2018 tax return.

Respondent

16. The Respondent acknowledged the unfortunate circumstances that predicated the handling of the Appellant's tax affairs and hence the lodging of the Appeal. However, they stated that as the Appellant and her former spouse had separated in 2014, and while it was a decency for the Appellant to have taken care of her former spouse while he was ill, that this did not entitle the Appellant to claim married tax treatment for the years 2015 to 2017 inclusive as she did not meet the relevant statutory criteria.

17. The Respondent advised that subject to certain conditions where spouses separate, divorce or dissolve their civil partnership, they can elect to be treated as a married couple or in a civil partnership for tax purposes. The Respondent advised that in order to claim this treatment there are a number of conditions to be met which are as follows:

    - Written notification, signed by both partners, must be sent to the Respondent by the end of the tax year in which the claim is being made;
    - A spouse or civil partner must be paying legally enforceable maintenance payments to the other spouse or civil partner; and

- Neither partner should have remarried or become divorced.

The Respondent advised that when this treatment is granted only separate assessment is available and explained that the implications of this treatment would result in any unused tax credits or bands being transferrable between the former spouses. The Respondent stated that the effect of this treatment is to effectively grant separated couples who meet the qualifying criteria the equivalent of married person's tax treatment.

18. The Respondent submitted that as the Appellant and her former spouse were not paying any legally enforceable maintenance payments, they did not fulfil the requirements to be separately assessed. As a consequence, the Appellant and her former spouse were not entitled to transfer any unused tax credits or band between one another, and hence the Respondent submitted that the amended assessments which they issued should be upheld.

19. The Respondent stated that as the Appellant filed her 2018 tax return on the 2nd December 2020 and as this tax return had been required to be submitted on or before the 31st October 2019, it was late and accordingly subject to a surcharge. They advised that as the legislation does not contain any extenuating circumstances in which the application of a surcharge could be waived, neither they nor the Commission had any discretion to waive the surcharge and it should also be upheld.

20. In summary the Respondents submitted that the Appellant did not fulfil the requirements to qualify for married person's tax treatment and that the application of the surcharge on the 2018 tax return was mandatory. Accordingly, they requested that the Commission uphold the assessments in the sum of €9,525.07.

Evidence Presented to the Commission

21. The Commission was presented with a copy of the Appellant's separation agreement from the Circuit Family Court dated 3rd April 2014 which was signed by the Appellant, her former spouse and witnessed by their respective legal advisors. The agreement contained various orders and ancillary orders none of which contained provision for maintenance payments to be made by either the Appellant or her former spouse.

Material Facts

22. The Commissioner finds the following material facts:-

    22.1. The Appellant submitted her Income Tax returns for the years 2015 to 2017 inclusive and claimed married person's tax treatment on each of those tax returns.

22.2. The Appellant and her former spouse were legally separated on the 3rd April 2014.

22.3. The separation agreement did not contain any provision within it which required the payment of maintenance from one former spouse to the other, or for one former spouse to the children.

22.4. The Appellant lodged her 2018 Income Tax return on the 2nd December 2020.

22.5. The Respondent applied a 10% surcharge to the 2018 Income Tax liability on the basis that the Income Tax return for that year was submitted late.

Analysis

23. 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*'

24. 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:*
>
> > *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;*
> >
> > *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";*

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;

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.

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;

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.

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"

25. The Commissioner determines that the provisions of section 1015 TCA 1997 are clear and unambiguous. They state that a wife shall be deemed to be living with her husband unless they are separated under a court order. As the Appellant and her former spouse became

separated under an order of the Circuit Family Court on the 3rd April 2014, it is evident that the Appellant and her former spouse are deemed not living together since that date.

26. The provisions of section 1019 TCA 1997 which permits spouses to avail of married tax treatment are equally clear and unambiguous. In order for those provisions to be applicable, they require the husband and wife to be living together and as the Appellant and her former spouse were neither husband nor wife since the 3rd April 2014 nor living together, they are deemed ineligible for relief under this section.

27. An exception to persons not living together as husband and wife is contained in section 1026 TCA 1997 which effectively permits separated couples to avail of married tax treatment but in order for this treatment to be afforded one former spouse must be paying legally enforceable maintenance to the other party or their children. As the separation agreement does not contain any provision regarding maintenance payments, it is equally clear that the Appellant is not entitled to avail of the relief afforded under this section.

28. The Commissioner is satisfied that there is no inherent ambiguity in the statutory wording used per sections 1015, 1019 and 1026 TCA 1997. It is clear from those provisions that the legislature intended that persons should not be separated, or if they are, the parties must be paying legally enforceable maintenance payments in order for married person's tax treatment to be afforded to them. As the Appellant did not fulfil these requirements, it is evident that she was not entitled to elect for married person's tax treatment and accordingly the assessments which issued by the Respondent must stand.

29. Turning to the imposition of the surcharge in respect of the tax year 2018, section 1084 TCA 1997 provides in circumstances where the taxpayer fails to submit their tax return within a period of two months from the date that return was due to be submitted a surcharge of 10% **shall** be imposed computed on the tax liability for that year. Leaving aside that the Appellant managed to submit her tax returns in a timely fashion for each of the years 2015, 2016 and 2017, the years in which her former spouse was ill, she did not manage to do so for the tax year 2018, which was the year her husband had recovered from his illness. As the legislation is unambiguous and it provides the use of the word "shall" there is no discretion afforded to the Commissioner in the application of its provisions. Accordingly, the Commissioner determines that the sum of €4,069.25 imposed by means of a surcharge on the 2018 tax liability must stand.

30. The Appellant advised during the course of the hearing that as her former spouse did not have medical insurance she was required to contribute significant funds to assist him in defraying his medical expenses. It may be of benefit to the Appellant that subject to a valid claim being made within a period of four years from the end of the year of assessment in

which the medical expenses were defrayed, and as the Appellant discharged the medical expense payments, she may be entitled to obtain tax relief on the amount of medical expenses defrayed by her under Section 469 TCA 1997. This provision provides that so long as qualifying medical expenses are paid by an individual, even if that medical care is afforded to "any individual", the person paying those medical expenses may be entitled to tax relief on the sums expended. The Commissioner anticipates this relief may be of some financial assistance to the Appellant and her former spouse after his illness. The Commissioner cannot provide the Appellant with any tax advice and the Appellant should seek further information from her advisors and/or the Respondent. The Respondent has a website with information for the general public on their entitlements.

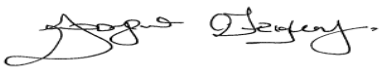
31. The Commissioner determines that the Appellant has not discharged the necessary burden of proof to establish her entitlement to married person's tax treatment for the years of assessment 2015 to 2017. In addition, the Commissioner determines that the surcharge imposed on the 2018 tax return must stand. As a result the Respondent's assessments to income tax in the sum of €9,525.07 are upheld.

Determination

32. The Commissioner determines that the assessments to Income Tax in the sum of €9,525.07 stand as the Appellant has not discharged the necessary burden of proof to establish entitlement to married person's tax treatment nor has succeeded in her argument that the provisions of section 1084 TCA 1997 should be misapplied. Therefore, the appeal is denied and the assessment is upheld.

33. The Commissioner appreciates this decision will be disappointing for the Appellant but the Commissioner has no discretion and must, as stated above apply the provisions of the TCA 1997. The Appellant was correct to check to see whether her legal rights were correctly applied.

34. 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
8 July 2022.