**122TACD2022**

**Between/**

[redacted]

**Appellant**

**-v-**

**THE REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

## *A. Introduction*

**1.** This appeal comes before the Tax Appeals Commission by way of an appeal against PAYE/USC Balancing Statements (P21s) for the tax years 2014, 2015 and 2016 issued by the Respondent to the Appellant on the 10th of May 2017.

**2.** The amount of tax in issue is €3,540.90 in respect of 2014, €3,450.89 in respect of 2015 and €3,450.90 in respect of 2016.

**3.** The Appellant appealed against the Balancing Statements by Notice of Appeal submitted to the Commission on the 18th of May 2017.

## *B. Factual Background*

**4.** The facts material to this appeal are relatively straightforward, and are not in dispute between the parties. The facts which I find material to the determination of this appeal are set forth below.

**5.** The Appellant is married and has two children. In or about 2013, the Appellant and his wife separated and the Appellant moved out of the family home. The Appellant and his wife are not divorced or judicially separated. No formal separation agreement was entered into between the Appellant and his wife but the Appellant agreed informally to make payments to support his wife and children.

**6.** During the three years the subject matter of this appeal, the Appellant paid the mortgage on the former family home and also discharged the Local Property Tax payable in respect of that property. He further paid the gas and electricity bills relating to the property. The Appellant further paid monies in respect of household expenses and petrol costs. The Appellant submitted to the Commission copies of utility bills and bank statements confirming the position in this regard.

**7.** The Appellant and his wife were initially jointly assessed for tax purposes for the years under appeal. Credits during those years were divided between the Appellant and his wife, granting the Appellant the married personal credit, PAYE Credit and maximum married rate bands. The Appellant's wife was allocated the PAYE Credit and the restricted rate band allocated for a spouse.

**8.** In February of 2017, the Appellant's wife wrote to the Respondent, advising that she and the Appellant had been separated since 2013 and were living apart in

circumstances which were likely to be permanent. She further advised that there was no formal separation agreement in place. The Respondent therefore conducted a review of the liabilities of the Appellant and his wife, which resulted in the issue of the Balancing Statements the subject of this appeal. Those Balancing Statements assessed the Appellant's tax liability on the basis of the personal credits and rate bands applicable to a single person.

## *C. Grounds of Appeal*

**9.** The Grounds of Appeal advanced by the Appellant were stated to be as follows:-

> *"My appeal is based on the fact that I have been maintaining my wife and children at the address they are living in throughout these three years. My wife has the use of a credit card that only I fund. It is used for household spend and petrol. I also pay the utilities bills at that address. I am also the sole contributor to our jointly held mortgage and sole contributor to LPT. I have only been in a position to do so based on my means at the time of the costs. To retrospectively reconcile the money that had allowed me to make these contributions is punitive after the fact. I would not have been in a position to cover so many of her outgoings if the tax credit had been moved earlier. Had it been moved earlier I would have been in a position to judge what I could afford to contribute based on the means that would have been known at that time.*
>
> *I am appealing as I don't think it can be right that an underpayment is judged retrospectively when I have been paying all of the above costs based on the means known over those three years. If the spouse wished to have their tax credit moved they were free to do so. When they choose to at a particular point in time*

*it is only then that the other party can judge their means and ability to contribute to the maintenance. The mortgage, LPT & household spend (including utility bills) that is already spent over the three years exceeds the amount Revenue seek to reclaim. Now that the tax credit is moved to my wife's PAYE, I will be down approx. €300 p.m. This decision to seek a retrospective reconciliation on top of that is a further penalty that is not sustainable. I am unable to bear the adjustment now that the tax credit has moved when combined with the additional penalty this retrospective assessment imposes."*

## *D. Relevant Legislation*

**10.** Section 1018(1) of the Taxes Consolidation Act 1997 as amended (hereinafter **"TCA 1997"**) provides that:-

*"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."*

**11.** Section 1015(2) of TCA 1997 provides that:-

*"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."*

**12.** The relevant provisions of section 1025 of TCA 1997 provide as follows:-

*"(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 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;*

*…*

*(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…"*

**13.** Section 1026(1) of TCA 1997 provides that:-

*"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."*

## *E.* ***Submissions of the Appellant***

**14.** The Appellant, having given evidence which I found to be truthful and accurate, and which supported the factual background outlined in Section B above, made submissions which effectively mirrored his grounds of appeal, which are recited in Section C above.

**15.** The Appellant submitted that it was curious that when his wife had applied in 2017 to be singly assessed for the years under appeal, no due diligence appeared to have been carried out by the Respondent in relation to that application. He submitted that he had received no notice of the application and had received no correspondence from the Respondent to warn him that the application had been made.

**16.** The Appellant submitted that the Respondent's decision to allow his wife to be assessed as a single person for the three years under appeal resulted in him being retrospectively penalised. He reiterated that he simply could not have afforded to make the substantial payments which he had made to support his wife and their children if he had known that he was going to be assessed as a single person during the three years in question. He submitted that it amounted to a punitive measure to

impose retrospective tax liability in circumstances where he had already made those payments.

## *F. **Submissions of the Respondent***

**17.** It was submitted on behalf of the Respondent that between 2013, when the Appellant and his wife had separated, and February of 2017, when the Appellant's wife had corresponded with the Respondent to apply for single assessment, the Respondent had received no notification whatsoever that the personal circumstances of the Appellant and his wife had changed. Accordingly, the Respondent could not have ended the joint assessment of the Appellant and his wife, or notify the Appellant of the cessation of such joint assessment, any earlier than it did.

**18.** The Respondent accepted that the decision to end the Appellant's eligibility for joint assessment was made without prior notice to or consultation with the Appellant. The Respondent's representative fairly accepted at the hearing that this lack of communication was difficult to defend.

**19.** Notwithstanding this, the Respondent submitted that various conditions have to be satisfied before a taxpayer is entitled to be jointly assessed, and that those conditions simply were not met in the instant appeal.

**20.** The Respondent therefore submitted that the decision to assess the Appellant as a single person for the three years the subject of the appeal was correct.

## G. ***Analysis and Findings***

**21.** The Appellant effectively seeks in this appeal to set aside the decision made by the Respondent in 2017 that the Appellant and his wife had ceased as and from the 1st of January 2014 to be entitled to be jointly assessed to tax in accordance with section 1017 of TCA 1997.

**22.** The statutory entitlement of the Appellant to be jointly assessed with his wife derives from section 1018, which applies where spouses elect to be jointly assessed. It is clear from the wording of section 1018(1) that the section only applies "*where the wife is living with the husband*". Section 1015(2) provides in this regard that a "*wife shall be treated for income tax purposes as living with her husband unless … they are in fact separated in such circumstances that the separation is likely to be permanent.*"

**23.** Following the 2017 communication from the Appellant's wife, the Respondent formed the view that the Appellant and his wife were in fact separated in such circumstances that the separation was likely to be permanent as and from the 1st of January 2014.

**24.** The Appellant had not sought to argue in his submissions that his separation from his wife was not or was not likely to be permanent during the periods relevant to these appeals. Nonetheless, at the hearing of the appeal I indicated to the Appellant that I would afford him an opportunity to consider whether or not he wished to apply to join his wife as a notice party to the appeal, with a view to arguing that they had not been separated in such circumstances that the separation was likely to be permanent as and from the 1st of January 2014. I allowed a period of two weeks initially, and subsequently extended this to four weeks, but the Appellant did not choose to pursue this avenue.

**25.** It was clear from the evidence before me that the Appellant had left the family home at some time in 2013, and had resided at a separate address ever since that date. I therefore find as a material fact that the Appellant and his wife were in fact separated in such circumstances that the separation was likely to be permanent as and from the 1st of January 2014.

**26.** Accordingly, I find that the Respondent was correct in reaching its view that the Appellant's wife was not living with the Appellant for income tax purposes as and from the beginning of 2014.

**27.** An election under section 1018(1) can only be made where a wife is living with her husband. As the Appellant and his wife were not living together from the beginning of 2014 onwards, they thereupon ceased to be entitled to elect for joint assessment under section 1018, and consequently ceased to be entitled to be jointly assessed pursuant to section 1017. I note in this regard that Maguire's *Irish Income Tax 2017* states at paragraph 3.502 that:-

> *"*[I]*n the event that husband and wife cease to live together in any tax year (ie if they separate before 31 December in a tax year), joint assessment ceases to be available and they must be assessed as single persons from the date of the separation onwards (unless they come to live together again)."*

**28.** Even if section 1018(1) did not contain the requirement that a husband and wife be living together, it is clear that both husband and wife must jointly elect to be jointly assessed; an election cannot be made unilaterally by one of the spouses. In the instant case, it seems apparent from the communication from the Appellant's wife to the Respondent in 2017 that she no longer wished to be jointly assessed with the Appellant from 2014 onwards.

**29.** Section 1026 of TCA 1997 provides that in certain circumstances, separated or divorced persons may still make an election to be jointly assessed under section 1018(1) even if they are not living together. However, section 1026 is only applicable if one spouse has made a payment to which section 1025 applies in the relevant year of assessment.

**30.** Section 1025 only applies to payments made under a maintenance arrangement (as defined in section 1025(1)) "*the making of which is legally enforceable*". On the evidence before me, there was no Court order or deed of separation or formal agreement between the Appellant and his wife which required him to make the payments he made during the years under appeal. The Appellant and his wife were, as he described it, "*informally separated*" and the contributions he made to towards her maintenance and the maintenance of their children were made by him voluntarily and not under compulsion of law.

**31.** Therefore, even if the Appellant's wife had agreed to elect under section 1026 for a joint assessment for the years under appeal (and, as stated above, her application to be assessed as a single person indicates that she did not wish to be jointly assessed for those years), the payments being made by the Appellant were voluntary payments and were not legally enforceable, and accordingly the Appellant and his wife could not avail of the provisions of section 1026.

**32.** I have considerable sympathy for the Appellant, and can fully understand why he feels that he is being treated in an unfair and punitive manner. I accept that he may very well have felt unable to make the same level of payments for the maintenance of his wife and children if he had been aware that his eligibility for joint assessment had ended from the beginning of 2014 onwards, with consequent tax implications for him. I can also understand his disappointment that the Respondent's decision to retrospectively tax him as a single person with effect from the 1st of January 2014

onwards was made without his being notified of or consulted in relation to his wife's application in February 2017.

**33.** However, I also accept that the Respondent could not have taken any steps in relation to the Appellant being jointly assessed with his wife prior to their becoming aware of the change in his personal circumstances, and it was not notified of that change until February of 2017. While the Appellant is aggrieved at the retrospective nature of the tax consequences which flow from the termination of his entitlement to joint assessment, the retrospectivity is an ineluctable consequence of the fact that the Respondent was only informed of the change in the Appellant's personal circumstances more than three years after that change had occurred.

**34.** More fundamentally, the legislation does not afford the Respondent any element of discretion in relation to the Appellant's position. The legislation only permits an election for joint assessment to be made where all the conditions contained in section 1018 (and, where appropriate, section 1026) are met. In the instant appeal, the Appellant ceased to satisfy those conditions as and from the 1st of January 2014.

**35.** Accordingly, I find that the Respondent was correct in deciding that the Appellant is not entitled to be jointly assessed with his wife for the three years the subject matter of this appeal.

**36.** The Appellant has therefore not succeeded in this appeal.

## *H. Conclusion*

**37.** By reason of the foregoing findings, I find that the Appellant has been neither overcharged nor undercharged to income tax and USC by reason of the three P21 Balancing Statements issued by the Respondent on the 10th of May 2017 and determine pursuant to section 949AK(1)(c) that the said Balancing Statements stand.

**Dated the 19th of July 2022**

**MARK O'MAHONY**
**APPEAL COMMISSIONER**