



126TACD2022

BETWEEN/



Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

1. This is an appeal in relation to the Respondent's refusal regarding the Appellant's claim for repayment of employer's PAYE/PRSI pursuant to section 865 of the Taxes Consolidation Act, 1997 as amended ('TCA 1997') in respect of the tax year of assessment 2010.

Background

2. On 7 May, 2017, the Appellant filed amended P35 returns in respect of the accounting periods ended 31 December 2010 and 31 December 2011. The amended P35 showed a reduced liability for the 2010 accounting period in the sum of €9,516, in circumstances where the original liability of €15,267 had been previously discharged, resulting in a tax overpayment on the Appellant's figures, in the sum of €5,751.



3. On foot of the amended P35 return for 2010 and 2011, the Appellant sought a repayment of tax in the sum of €8,028 (as opposed to €5,751) in respect of 2010. At hearing, the Appellant in addition, sought a repayment of €1,817 in respect of 2011. The Respondent did not take issue with the Appellant amending the returns and the date of the filing of the amended returns namely 7 May, 2017, was accepted by both parties as the date of notification of the said amendment and was not in dispute.
4. By notice titled '*Late claim for repayment of tax*' dated 20 September, 2017, the Respondent refused the Appellant's claim for repayment of tax in respect of 2010 on the basis that a valid claim for repayment had not been made within four years after the end of the chargeable period to which the claim related, in accordance with the provisions of section 865(4) TCA 1997.
5. The Appellant's position was that an overpayment of tax arose in respect of 2010 and in 2011 while the Respondent's position was that an overpayment arose in respect of 2010 only.
6. The Appellant filed a notice of appeal in respect of 2010 only. That notice of appeal claimed a repayment of tax in the sum of €8,028. The Appellant's statement of case however, describes the appeal as relating to '*PAYE/PRSI of 2010 and PAYE/PRSI of 2011*' and describes the overpayment amount as €9,844. A schedule containing a breakdown of the calculation of the sum €9,844 was furnished by the Appellant in support of its appeal ('Annex D' of papers furnished).
7. The Respondent's position was that even if there had been an overpayment in respect of both 2010 and 2011, each claim for repayment of tax was out of time having not been made within the four year statutory limitation period in accordance with the provisions of section 965(4) TCA 1997.
8. The Appellant submitted that the Respondent's refusal to process the repayment claim was fundamentally unfair and that the four year limitation period should run, not from the end of the chargeable period to which the claim related as per section 865(4) but from the date of the filing of the amended returns on 7 May, 2022. In the alternative, the Appellant sought an offset of the overpayment in accordance with the provisions of section 865B TCA 1997.

9. Legislation

Section 865 TCA 1997 - Repayment of Tax

...

(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.]

[(3A) (a) Subject to paragraph (b), subsection (3) shall not prevent the Revenue Commissioners from making, to a person other than a chargeable person (within the meaning of [Part 41A]), a repayment in respect of tax deducted, in accordance with Chapter 4 of Part 42 and the regulations made thereunder, from that person's emoluments for a year of assessment where, on the basis of the information available to them, they are satisfied that the tax so deducted, and in respect of which the person is entitled to a credit, exceeds the person's liability for that year.

(b) A repayment referred to in paragraph (a) shall not be made at a time at which a claim to the repayment would not be allowed under subsection (4).]

(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 provision 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.

....

...

(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].

Section 865B TCA 1997 - No offset where repayment prohibited

(2) Subject to subsection (3) and (4), where a repayment of any tax cannot be made to a person by virtue of the operation of –

(a) Section 865,

(b)

(c)

then, notwithstanding any other enactment or rule of law, that repayment shall not be set against any other amount of tax due and payable by, or from, that person.

(3) Where a repayment of tax cannot be made to a person in respect of a relevant period, it may be set against the amount of tax to which paragraph (a) of subsection (4) applies which is due and payable by the person in the circumstances set out in paragraph (b) of that subsection.

4(a) The amount of tax to which this paragraph applies is the amount or so much of the amount, of tax that is due and payable by the person in respect of the relevant period as does not exceed the amount of the repayment that cannot be made to the person in respect of that relevant period.

(b) The circumstances set out in this paragraph are where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax, at a time that is 4 years or more after the end of the relevant period.

(5) No tax shall be set against any other amount of tax except as is provided for by the Acts.

Submissions

10. While the Appellant's notice of appeal sought a repayment in the sum of €8,028, the Appellant at hearing sought a repayment of tax in the sum of €9,844.58 calculated as follows;

	2010	2011	Total
Paid	17,544	10,964	28,508
Liability per the amended P35 returns filed on 17 May 2017	9,516	9,147	18,663
Overpaid	8,028	1,817	9,845

11. The Appellant submitted that the Respondent's refusal to process the repayment claim was fundamentally unfair and that the four year limitation period should run, not from the end of the chargeable period to which the claim related as per section 865(4) but from the date of the filing of the amended returns on 7 May, 2017. In the alternative, the Appellant sought an offset of the overpayment in accordance with the provisions of section 865B TCA 1997.
12. The Respondent's position in relation to the figures differed to that of the Appellant. The Respondent submitted that based on the filing of the amended returns on 7 May, 2017, an overpayment arose in respect of 2010 in the sum of €5,751. The Respondent submitted that an underpayment arose in respect of 2011 in the sum of €3,107, as follows;

	2010	2011	Total
Paid	15,267	6,040	21,307
Liability per the amended P35 returns filed on 17 May 2017	9,516	9,147	18,663
Overpaid	5,751	(3,107)	5,751

13. The Respondent's position was that there was no overpayment of tax in respect of 2011. However, even if there had been an overpayment of tax arising in respect of 2011, the Respondent's position was that a claim for repayment in respect thereof, having not been made until 7 May, 2017, was made outside the four year statutory limitation period pursuant to section 865(4) and was thereby out of time.
14. The Respondent submitted that the Respondent was statutorily obliged to comply with the provisions of section 865 TCA 1997 and was thus unable to process the repayment claim in favour of the Appellant in accordance with the provisions thereof. The basis of the

refusal of the claim as stated in the Respondents' notice dated 20 September, 2017, was that: *'As your claim for the repayment of the overpayment of tax ... was not made within the relevant 4 year period, I am precluded from repaying that tax.'*

15. The Respondent stated that the parties did not dispute that the claims were made when the returns were filed on 7 May, 2017. On this basis, the Respondents submitted that while the returns constituted a *'valid claim'* for the purposes of subsection 865(1)(b) TCA 1997, the claim had not been made within the four year limitation period as per section 865(4) and that the Respondent was statutorily obliged to comply with the provisions of section 865 TCA 1997, and to refuse the claim for repayment of tax on behalf of the Appellant. The Respondent submitted that the Appellant had not identified a basis for offset in accordance with the provisions of section 865B TCA 1997.

Analysis

16. The liability per the amended P35 returns for 2010 and 2011 totalled 18,663 and this figure was not in dispute.
17. The Appellant's original P35 in respect of 2010 contained a liability of €15,267 in circumstances where the Appellant paid €16,405, resulting in an overpayment of €1,138 which was credited to the Appellant's P30 for January 2011.
18. In respect of 2010, a revised return was filed on 2 August, 2011, which did not materially affect the figures. A second revised return was filed on 7 May, 2017. This return calculated the payable amount as €9,516. In circumstances where the original liability was €15,267 and was fully discharged, an overpayment (based on the Appellant's revised P35 return) arose in the sum of €5,751 in respect of 2010. It seems that confusion arose on foot of a demand notice dated 10 May, 2017, which initially added the revised sum of €9,516 to the original liability, instead of amending the 2010 liability so that it equalled €9,516. The Appellant submitted that it was not adequately notified that this correction had been made and that the demand notice had been cancelled. The Respondent submitted that the matter was addressed in their submissions dated July 2020.
19. In relation to 2011, the original P35 showed a liability of €6,040. The sum of €10,963.58 was paid by the Appellant, resulting in an overpayment of €4,923.58. This overpayment was credited to the Appellant at the relevant time namely; €906.88 to VAT for September/October 2008, €524 to VAT for July/August 2009 and a cheque refund in the sum of €3,492.70. On 7 May, 2017, the Appellant filed an amended P35 showing a liability

of €9,147 in circumstances where the original liability of €6,040 had been paid and the overpayment of €4,923.58 had been offset and refunded. The Respondent submitted that this created a liability of €3,107. The Respondent submitted that as there was a liability due and owing in respect of 2011, the liability did not form part of the Appellant's claim for repayment in this appeal as there was an overpayment in respect of 2010 only.

20. Based on the evidence of the returns and amended returns filed by the Appellant and accepted by the Respondent, the payments made by the Appellant and the offsets and refunds credited by the Respondent to the Appellant, I am satisfied and find as a material fact that the Appellant overpaid tax in the sum of €5,751 in respect of 2010. I am satisfied, based on the documentary evidence, that there is no overpayment of tax arising in respect of the tax year 2011.
21. The Respondent submitted that the Appellant's claim for repayment was out of time in accordance with s.865(4) TCA 1997 which provides; '*... 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*'. I accept this submission on behalf of the Respondent. It was not in dispute that the date of filing of the amended returns was 7 May, 2017, thus it follows that the Appellant's repayment claim was not made within four years after the end of the chargeable period to which the claim related.
22. The scope of the jurisdiction of the Appeal Commissioners and of the Tax Appeals Commission, has been the subject of judicial consideration in very recent times, in a number of important Irish cases, namely; *Lee v Revenue Commissioners* [2021] IECA 18, *Stanley v The Revenue Commissioners* [2017] IECA 279 and *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49. See also *The State (Calcul International Ltd.) v The Appeal Commissioners III ITR 577* and *The State (Whelan) v Smidic* [1938] 1 I.R. 626. While the Appellant submitted that the denial of the repayment claim would lead to unfairness, it is clear from the authorities that the jurisdiction of the Tax Appeals Commission does not extend to the provision of equitable or declaratory relief nor to the provision of remedies available in High Court judicial review proceedings.
23. In considering whether the Appellant in this appeal is entitled to a repayment of tax in respect of 2010, the appropriate approach is to examine the meaning of the words contained in the relevant statutory provisions in accordance with the relevant jurisprudence in relation to the interpretation of tax statutes.
24. In the recent Supreme Court case of *Bookfinders Ltd. v The Revenue Commissioners* [2020] IESC 60, the principles governing statutory interpretation were comprehensively

reviewed. Leading the judgment of the Court, O'Donnell J. as he then was, stated at paragraph 39: *'It is worth emphasising that the starting point of any exercise in statutory interpretation is, and must be, the language of the particular statute rather than any pre-determined theory of statutory interpretation.'*

25. The Court at paragraph 53 of the judgment quoted and approved the judgment of McKechnie J. in the Supreme Court case of *Dunnes Stores v the Revenue Commissioners* [2019] IESC 50 including *inter alia*, the following paragraphs:

'63. As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (Craies on Statutory Interpretation (7th Ed.) Sweet & Maxwell, 1971 at pg. 71). In conducting this approach "...it is natural to inquire what is the subject matter with respect to which they are used and the object in view" Direct United States Cable Company v. Anglo – American Telegraph Company [1877] 2 App. Cas 394. Such will inform the meaning of the words, phrases or provisions in question. McCann Limited v. O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.

64. Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case one particular rule rather than another has been applied, and why in a similar case the opposite has also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

65. When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker.'

26. On the authority of *Bookfinders*, I am satisfied that the approach to be taken in relation to the interpretation of the meaning of the words contained in sections 865 and 865B TCA 1997, is one which affords the words their ordinary, basic and natural meaning.
27. Having considered the submissions of the parties, I do not accept the Appellant's submission that section 865 TCA 1997 may be either disregarded in the first instance or alternatively, that it may be interpreted so that the four year limitation period would run from the date of the filing of the amended returns. An interpretation in these terms would be at odds with the express statutory language contained in the provision, specifically, the stipulation in section 865(4) that the claim be made '*within 4 years after the end of the chargeable period to which the claim relates*'.
28. Section 865(4) TCA 1997 provides [emphasis added] 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*'.
29. In this appeal, the applicable provision is section 865 TCA 1997, and I am satisfied that the use of the word '*shall*' per s.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 rule might be mitigated. In short, I do not consider that I have the authority or jurisdiction to determine that a repayment be made to the Appellant where the claim for repayment is outside the four-year period specified in s.865(4) TCA 1997.
30. Further, I am satisfied that the provisions of section 865B TCA 1997 are not applicable on the basis that sub-section (2) provides that: '*... where a repayment of any tax cannot be made to a person by virtue of the operation of - (a) section 865, then, notwithstanding any other enactment or rule of law, that repayment shall not be set against any other amount of tax due and payable by, or from that person.*'
31. Section 865B(2) is subject to subsections (3) and (4) which provide for an exception to the general rule in sub-section (2). Section 856B(3) provides:
- (3) Where a repayment of tax cannot be made to a person in respect of a relevant period, it may be set against the amount of tax to which paragraph (a) of subsection (4) applies which is due and payable by the person in the circumstances set out in paragraph (b) of that subsection.*
32. Section 865B(4) provides: -



4(a) The amount of tax to which this paragraph applies is the amount or so much of the amount, of tax that is due and payable by the person in respect of the relevant period as does not exceed the amount of the repayment that cannot be made to the person in respect of that relevant period.

(b) The circumstances set out in this paragraph are where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax, at a time that is 4 years or more after the end of the relevant period.

33. This exception permits an offset where tax is due and payable for the same relevant period (i.e. 2010) and where that tax has arisen on foot of an action taken by the Respondent to assess or recover tax at a time that is four years or more after the end of the applicable relevant period. In this appeal there is no tax due and payable in respect of 2010 in the circumstances set out in section 865B(4)(b) and thus there is no offset available in accordance with the provisions of that subsection.

34. Previous determinations of the Tax Appeals Commission have considered and addressed the matter of repayment in the context of the four-year statutory limitation period. These determinations may be found on the Commission website at www.taxappeals.ie.

Determination

35. Pursuant to the wording of s.865 TCA 1997, and in particular the use of the word “*shall*” per subsection 865(4) TCA 1997, I determine that I do not have discretion as regards the application of the four-year statutory limitation period in circumstances where the claim has been made outside the four-year period. As a result, I have no option but to determine that the repayment claim on behalf of the Appellant in respect of the tax year of assessment 2010 is out of time in accordance with the provisions of section 865(4) TCA 1997. This appeal is hereby determined in accordance with s.949AL TCA 1997.

A handwritten signature in black ink, appearing to read "Lorna Gallagher".

COMMISSIONER LORNA GALLAGHER

13th day of July 2022

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.