AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

155TACD2022

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter "the Commission") as an appeal against the refusal of the Revenue Commissioners (hereinafter "the Respondent") to grant tax relief in respect of a Deed of Covenant entered into between the Appellant and his wife. Deeds of Covenant qualify for tax relief subject to certain conditions being fulfilled in accordance with section 792 of the Taxes Consolidation Act, 1997 (hereinafter the "TCA 1997"). The amount of tax at issue is €2,444.

   The appeal proceeded by way of oral hearing held in person in the offices of the Commission on 29th August 2022. In addition to receiving oral submissions, the Commissioner had the benefit of written arguments supplied by both parties.

Background

2. The Appellant is a retired engineer/scientist and civil servant. The Appellant's income consists of an occupational pension scheme and a contributory State pension. The Appellant's wife only source of income for the periods under appeal (aside from the disputed covenant payment) was the "qualified adult" contributory State pension. This

is a pension payment made by the Department of Family Protection to one spouse who does not fulfil the requirements to receive a State pension in their own right but qualifies for payment by virtue of their spouse's qualification for payment of the contributory State pension.

3. The Appellant's wife did not pay tax on the pension payments she received as those earnings were below her tax exemption threshold. At all material times, the Appellant and his wife were jointly assessed for tax purposes. Under joint assessment spouses are charged to tax on their combined taxable income and can benefit from the transfer of unused tax credits and/or rate bands between the lower earning and higher earning spouse.

4. On 23rd February 2018, the Appellant submitted a claim for a refund of income tax in the amount of €1,040. The basis of the claim was that the Appellant had entered into a Deed of Covenant dated 30th November 2017, with a payment date of 12th December 2017 in the amount of €5,200. The Appellant submitted Form 185 confirming deduction of income tax on the payment made and a Form 54 containing a formal claim for relief.

5. Section 792 (1)(b) TCA 1997 provides the legislative basis for tax relief on qualifying Deeds of Covenant. A qualifying Deed of Covenant provides a tax benefit to the person making the payment ("the covenantor"), assuming he or she is a top rate taxpayer, consisting of a net tax deduction of the difference between the higher and lower rate of tax. In addition, the person receiving the payment ("the covenantee") may be eligible for a refund of the tax withheld where their income is below their taxable threshold or subject to the lower rate of tax where their tax credits are utilised against other income but where they have unutilised lower rate ("standard rate") band available.

6. While, the Appellant's wife did not qualify for a refund of the tax on the payment of the covenant as her pension payment utilised her tax credits (and any balance thereof would have been utilised by the Appellant under the joint assessment regime) by virtue of section 15(3) TCA 1997, if she and the Appellant were granted relief for the covenant payment, they would gain a tax advantage. This tax advantage would arise as the amount of the covenant paid would be treated as income of the Appellant's wife and taxable at the standard rate rather than the higher rate of income tax.

7. Where a married couple have two incomes, the provisions of section 15 (3) TCA 1997 apply. It provides that a married couple with two incomes are entitled to an increased standard rate band (in excess of what a married couple with one income are permitted) of the lesser of €26,300 and the amount of the lower income spouse's taxable income. Hence, as the Appellant's income was taxed at the higher rate of tax, the benefit of

making the covenant payment to his wife, if granted, would provide that the amount of the covenant payment would be treated as his wife's income. Therefore, by virtue of section 15 (3) TCA 1997, it would be taxable at the standard rather than the higher rate of tax which would apply if the covenant payment was not made.

8. On 15th May 2018, the Respondent informed the Appellant in writing that it did not consider the Deed of Covenant to be a qualifying covenant for the purpose of the relief claimed. They advised:

> "*I note that the deed has been made in respect of an adult over the age of 65 years of age, as you are jointly assessed with your wife,* [redacted]*, the tax relief cannot be granted in respect of this deed.*
>
> *Section 792 (1) (b) of the Taxes Consolidation Act 1997 has a provision providing that where a covenant is made which is not for "valuable or sufficient consideration" then that income is deemed to be income of the person making the covenant. This [sic] is no indication that this covenant meets these criteria given that your income as the assessable wife is also already available to your wife. The effect of the covenant does not provide for any other valuable consideration, other than the benefits derived from the tax relief arising. In order for this covenant to be effective for tax purposes you (the disponer) would have to have divested yourself absolutely of the income involved under the terms of the irrevocable arrangement. In the circumstances pertaining to this deed, the monies involved may have passed to your wife, but on review of your joint liability for the years in question or once more assessable on you, the disponer.*
>
> *Therefore, this deed of covenant does not meet the criteria to be a qualifying covenant*".

9. The Appellant had between the date of first applying for the relief, and the date of the response received from the Respondent on 15th May 2018, also contacted the Respondent's Chairman's office which issued a letter on 1st July 2018 in the following terms:

> "*In regards to the specific issue, although the deed of covenant payment was made to a person over the age of 65 years your wife, which is a condition for relief, the situation remains that the payment was made from your jointly assessed income. As previously advised, for the covenant to be effective for tax purposes you, as disponer, would have been required to divest yourself of the income involved under the terms of an irrecoverable arrangement. From*

the information available this was not the case and the funds involved were assessable on you and were already available to your wife under joint assessment."

10. Having received the Response of 15th May 2018, the Appellant contacted the Respondent on 18th May 2018 requesting the return of the Deed of Covenant and the Respondent attended to this on 28th May 2018.

11. Subsequently, on 2nd December 2020, the Appellant submitted a further Deed of Covenant with a payment date of 10th November 2020 and made a second claim for the relief. This second claim was met with the same response as the first claim for the relief and was refused.

12. A Notice of Appeal dated 28th October 2020 against the Respondent's decision was filed with the Commission. While the notice of appeal pre-dated the Appellant's second claim for the relief, it was agreed between the parties and the Commission that the second claim made on 2nd December 2020 would form the basis of the appeal since the substantive issues were identical to the first claim.

Legislation

13. The legislation relevant to this appeal is as follows:

Section 126 (2B) TCA 1997

Notwithstanding the provisions of section 112(1), where an increase in the amount of a pension to which section 112, 113, 117 or 157, as the case may be, of the Social Welfare Consolidation Act 2005 applies is paid in respect of a qualified adult (within the meaning of the Acts), that increase shall be treated for all the purposes of the Income Tax Acts as if it arises to and is payable to the beneficiary referred to in those sections of that Act.

Section 237 TCA 1997

Annual payments payable wholly out of taxed income.

(1) Where any annuity or any other annual payment apart from yearly interest of money (whether payable in or outside the State, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether payable half-yearly or at any shorter or more

distant periods), is payable wholly out of profits or gains brought into charge to income tax—

(a) the whole of those profits or gains shall be assessed and charged with income tax on the person liable to the annuity or annual payment, without distinguishing the same,

(b) the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled on making such payment to deduct and retain out of such payment a sum representing the amount of the income tax on such payment at the standard rate of income tax for the year in which the amount payable becomes due,

(c) the person to whom such payment is made shall allow such deduction on the receipt of the residue of such payment, and

(d) the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction as if that sum had been actually paid.

(2) Where any royalty or other sum is paid in respect of the user of a patent wholly out of profits or gains brought into charge to income tax, the person paying the royalty or other sum shall be entitled on making the payment to deduct and retain out of the payment a sum representing the amount of income tax on the payment at the standard rate of income tax for the year in which the royalty or other sum payable becomes due.

(3) *This section shall not apply to any rents or other sums in respect of which the person entitled to them is chargeable to tax under Case V of Schedule D or would be so chargeable but for any exemption from tax*.

Section 792 TCA 1997

(1) (a) In this subsection, "relevant individual" means an individual who is—

(i) permanently incapacitated by reason of mental or physical infirmity, or

(ii) aged 65 years or over.

(b) Any income which, by virtue of or in consequence of any disposition made directly or indirectly by any person (other than a disposition made for valuable

and sufficient consideration), is payable to or applicable for the benefit of any other person, but excluding any income which—

(i) arises from capital of which the disponer by the disposition has divested absolutely himself or herself in favour of or for the benefit of the other person,

(iI) being payable to a relevant individual for the individual's own use, is so payable for a period which exceeds or may exceed 6 years, or

(v) being applicable for the benefit of a named relevant individual, is so applicable for a period which exceeds or may exceed 6 years,

shall be deemed for the purposes of the Income Tax Acts to be the income of the person, if living, by whom the disposition was made and not to be the income of any other person.

(2) This subsection shall apply to a disposition or dispositions of a kind or kinds referred to in subparagraphs (ii) to (v) of subsection (1)(b) made directly or indirectly by a person being an individual (in this subsection referred to as "the disponer") except in so far as, by virtue or in consequence of such disposition or dispositions, income is payable or applicable in a year of assessment, in the manner referred to in subparagraph (iv) or (v) of that subsection, to or for the benefit of an individual referred to in subsection (1)(a)(i).

(b) Notwithstanding subsection (1), in relation to the disponer, any income which—

(i) is payable or applicable in a year of assessment by virtue or in consequence of a disposition or dispositions to which this subsection applies, and

(ii) is in excess of 5 per cent of the total income of the disponer for the year of assessment,

shall be deemed for the purposes of the Income Tax Acts to be the income of the disponer, if living, and not to be the income of any other person.

(c) Where paragraph (b) applies in relation to the disponer, for the purpose of determining for income tax purposes the amount of income which remains the income of persons other than the disponer for a year of assessment by virtue or in consequence of a disposition or dispositions to which this subsection

applies, the aggregate of the income so remaining shall be apportioned amongst those other persons in proportion to their entitlements under such disposition or dispositions for that year.

(4) As respects the year of assessment 1997-98, this section shall apply subject to paragraph 27 of Schedule 32 in respect of a disposition to which that paragraph applies by a person in so far as, by virtue or in consequence of such a disposition, income is payable in that year of assessment to or for the benefit of an individual to whom that paragraph applies.

Section 1017 TCA 1997

Assessment of husband in respect of income of both spouses.

(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.

(2) Any relief from income tax authorised by any provision of the Income Tax Acts to be granted to a husband by reference to the income or profits or gains or losses of his wife or by reference to any payment made by her shall be granted to a husband for a year of assessment only if he is assessed to tax for that year in accordance with this section.

(3) Subject to subsection (4), for a year of assessment prior to the current year of assessment in which this section applies as a consequence of-

(a) an election made (including an election deemed to have been duly made) under section 1018,

(b) an election made under section 1019(2)(a)(ii), or

(c) section 1019(4)(a),

a husband or a wife who is not assessed under this section may elect to be so assessed and such election shall apply in place of any earlier election or deemed election for that year of assessment.

Subsection (3) shall not apply where the husband or the wife is a chargeable person (within the meaning of section 959A).

<u>Section 1018 TCA 1997</u>

Election for assessment under section 1017.

(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.

(2) Where an election is made under subsection (1) in respect of a year of assessment, the election shall have effect for that year and for each subsequent year of assessment

(3) Notwithstanding subsections (1) and (2), either the husband or the wife may, in relation to a year of assessment, by notice in writing given to the inspector before the end of the year, withdraw the election in respect of that year and, on the giving of that notice, the election shall not have effect for that year or for any subsequent year of assessment.

(a) A husband and his wife , where the wife is living with the husband and where an election under subsection (1) has not been made by them for a year of assessment (or for any prior year of assessment) shall be deemed to have duly elected to be assessed to tax in accordance with section 1017 for that year unless before the end of that year either of them gives notice

in writing to the inspector that he or she wishes to be assessed to tax for that year as a single person in accordance with section 1016.

(b) *Where a husband or his wife has duly given notice under paragraph (a), that paragraph shall not apply in relation to that husband and wife for the year of assessment for which the notice was given or for any subsequent year of assessment until the year of assessment in which the notice is withdrawn, by the person who gave it, by further notice in writing to the inspector*.

Submissions

Appellant

14. The Appellant stated that he entered into a Deed of Covenant with his wife on 30th November 2017 and continued to service the Deed of Covenant on an annual basis since that date.

15. The Appellant advised that he set up the Deed of Covenant using the information published on the Respondent's website. The Appellant stated that having satisfied the criteria on the Respondent's website he referred to section 792 TCA 1997 and was of the view that as he was making an "*absolute capital transfer*" to his wife that he met the legislative requirements and as such that the payment made to his wife qualified for tax relief.

16. The Appellant submitted that the Respondent's decision to deny him relief was "*flawed*" as he was being discriminated against as a married couple being taxed jointly as opposed to a married couple being separately assessed. The Appellant submitted that the Respondent was discriminating against him by wrongly claiming that both his and his wife's income was their "*joint income*" and as such the Appellant could not divest his interest in the portion of the income referable to the covenant payment. The Appellant stated that this view was "*presumptuous and not evidence based*" and that he rejected this position "*completely*" as if he and his wife were separately assessed then the Respondent could not support such viewpoint as their income would then be considered "*separate*".

17. The Appellant stated (incorrectly, see below) in his submissions that he and his wife were a single income couple. This misconception appears to have stemmed from the fact that his wife did not have any earned taxable income (since her pension payments

were not liable to tax as the tax due on her pension was reduced to nil by her available tax credits).

18. The Appellant stated that as his wife had no earned taxable income, she did not fall within the Respondent's "*criteria for tax assessment*" and as such could not avail of the Respondent's tax credit system for tax reduction purposes. The Respondent submitted that the payment of the covenant to his wife facilitated the use of his wife's unused tax credits and was in compliance with the provisions of the TCA 1997.

19. The Appellant submitted that the provisions of section 792 (1) (b) TCA 1997 was designed to curtail reciprocal arrangements and as he had divested himself "*completely*" of the funds given to his wife, this section did not prevent the availability of relief to him. The Appellant explained that the pension income received by his wife was "*her income*" and was paid into her bank account (this is correct and negates the Appellant's submission that he and his wife were a single income couple).

20. Separate and distinct to his wife's pension income, the Appellant advised that "*his income*" (the State and private pension) were paid into his bank account and as that was his money, he was free to do with it what he pleased. The Appellant advised that from his money he withdrew the amount of the covenant in the form of a bank draft and gave this to his wife annually. The Appellant stated that as his wife lodged this bank draft into her bank account, this was evidence that he had divested himself of the income and as his wife was "*free to do what she wished with that money*" that this was evidence of the fact that he had no pecuniary or other interest in those funds. The Appellant stated that he was prepared to offer a sworn affidavit confirming that he had divested himself completely of the covenant funds and that those funds were payable solely out of his income.

21. The Appellant advised that when he originally set up the covenant in 2017, he inadvertently disregarded the 5% cap on income provided under section 792 TCA 1997. The effect of this provision is that in defined circumstances a valid covenant payment is restricted to 5% of the covenantor's income. The Appellant acknowledged in applying this cap to his income would result in a maximum allowable covenant payment in the sum of €3,750 per annum. In those circumstances, the Appellant requested that the Commission amend the amount of the qualifying covenant for the purpose of the appeal from €5,200 per annum to €3,750 and pro-rata the allowable tax accordingly.

22. In summation, the Appellant submitted that as he set up the covenant in good faith and in compliance with section 792 (1) (b) TCA 1997, he should be afforded the tax relief

on the covenant payment to his wife. The Appellant further submitted that the Respondent's decision denying him relief was unreasonable as there was no evidence tendered by them to support how he used his income, was in contravention of the various provisions of the TCA 1997 and discriminatory in that as a jointly assessed couple, he was treated less favourably than if he was assessed on a single basis. On those grounds, the Appellant requested that the Commission allow the claim.

Respondent

23. The Respondent submitted the provisions of section 792 (1)(b) TCA 1997 stated that where a covenant is made which is not for "*valuable or sufficient consideration*" then that income is deemed to be income of the person making the covenant and thus does not qualify for tax relief under those provisions. The Respondent submitted that as the Appellant was jointly assessed for tax purposes with his wife then his income was already available to his wife and *vice versa*. Given this position, the Respondent stated that it was not possible for valuable consideration to have been paid and the only benefit derived from the transaction was the tax relief claimed by the Appellant.

24. The Respondent submitted that for a covenant payment to be effective for tax purposes, the Appellant was required to have divested himself absolutely of the income involved under the terms of an irrecoverable arrangement. The Respondent conceded that while the monies involved may have passed to his wife, as the Appellant and his wife were jointly assessed and this had the effect of the Appellant being assessable on both his and his wife's income, then it was not possible to divest himself from the income since all the assessable income was treated as his own.

25. The Respondent submitted that the Appellant was incorrect in stating in "*several places*" in his Notice of Appeal that he has a single income. The Respondent noted that this single income consisted of two sources, one being his occupational pension and the other his contributory State pension. Concerning the latter, the Respondent stated that a portion of this was is in respect of his wife as a qualified adult within the meaning of the Social Welfare Acts. The Respondent submitted that this income by virtue of section 126 (2B) TCA 1997 was taxable in the Appellant's hands but did not constitute a "single income".

26. The Respondent stated that while that income was taxed solely in the hands of the Appellant, it was money that his wife had an entitlement to benefit from, so much so that, were the Appellant and his wife to separate, she would be entitled to request that it be paid directly to her by the Department of Social Protection. As such the Respondent submitted that the Appellant was incorrect to state that he had a single

income by virtue of his wife's independent entitlement to receive her portion of the State pension.

27. The Respondent advised that section 126 (2B) TCA 1997 was inserted into the TCA 1997 with the express purpose of preventing any reliefs to the qualifying adult in respect of the additional income payable as a result of an increase to a pension in respect of a qualifying adult. The Respondent submitted that if the effect of the Deed of Covenant were correct, then the provisions of section 792 TCA 1997 would wholly undermine the provisions of section 126 (2B) TCA 1997.

28. The Respondent submitted that while the income of the Appellant and his wife were considered separate streams, for taxation purposes as they elected to be jointly assessed the income of the Appellant's wife was treated as his income also. The Respondent submitted given this treatment and applying the principle of fungibility there was no way of fragmenting the income referable to the covenant payment. As such the Respondent submitted that it was a logical impossibility for the Appellant to seek to treat a portion of the Appellant and his wife's income referable to the covenant payment as being divested solely by the Appellant. The Respondent further noted that the (initial) amount of the covenant payment, €5,200 was less than the amount of the Appellant's wife's pension payment which amounted to approximately €8,600 per annum and as such, some or all of the covenant payment could have been funded by the portion of income assessed on the Appellant referable to his spouse.

29. The Respondent submitted that the Appellant's submissions stating that the provisions of section 792 TCA 1997 were discriminatory were ill conceived. They stated that the Appellant was free to avail of separate assessment if he considered that more beneficial and was not mandated to be jointly assessed with his wife. The Respondent noted the many advantages of a married couple electing to be jointly assessed such as the availability of unused tax credits and tax bands being transferrable but advised that as the Appellant had elected to be jointly assessed then he was liable to any adverse sequela of that election, perceived or otherwise.

30. The Respondent submitted that as the sole purpose of the covenant payment to the Appellant's wife was to gain tax advantage. They stated that this was evident from the Appellant's submission to the Commission of 28th October 2020 in which he stated:

> "*My wife has earned no taxable income and as a result she does not fall within the Revenue criteria for tax assessment. Therefore, she cannot in her own right, avail of the revenue tax credit system for tax reduction purposes*".

31. The Respondent advised that the purpose of section 792 TCA 1997 was to allow for tax relief where income is divested of for defined, socially beneficial purposes and where the recipient is not otherwise able to access the money which is transferred pursuant to the covenant. The Respondent submitted that to allow the Appellant the relief sought would amount to an abuse of section 792 TCA 1997 as the transaction advocated by the Appellant was not envisaged by the section and as such was contrary to its objectives.

32. The Respondent submitted that its rights to determine objective reasons under the legislation was affirmed in *Revenue Commissioners v O'Flynn Construction Ltd and Others* [2011] ITR 113: [2011] IESC 47 ("*O'Flynn"*), where it was held:

> "*as has been observed in many cases, "no commercial man in his right senses is going to carry out a commercial transaction except upon paying the smallest amount of tax involved". Indeed the subsection recognises this, as the inclusion of the word "primarily", is intended to preserve the right of the taxpayer to structure a business driven transaction in a tax efficient manner. However, such must be duly compliant with any specific rule, set of conditions or prohibition: in the instant case this means that the main purpose of the arrangement must not be tax driven. In order to determine this, an objective view of the transaction must be taken so as to access the relative importance of the reasons behind it"*.

33. In summary, the Respondent submitted that the onus of proof was on the Appellant to prove that he had divested himself of the income subject to the covenant payment and as he could not so do, as the payment was made from jointly assessed income, the Commission should dismiss the appeal. Further or in the alternative, the Respondent submitted that the appeal should be dismissed by the Commission as an abuse of section 792 TCA 1997.

Material Facts

34. The Commissioner finds the following material facts:-

35.1 The Appellant's income consists of an occupational pension scheme and contributory State pension.

35.2 The Appellant's wife's only source of income (aside from the disputed covenant) was the qualified adult contributory State pension.

35.3 The Appellant and his wife elected and were assessed for tax purposes on the joint assessment basis.

35.4 The Appellant's wife did not pay any tax on her earnings as those earnings were below her taxable threshold.

35.5 On 23rd February 2018, the Appellant submitted a claim for repayment of tax in the sum of €1,040.

35.6 The repayment was due in part in respect of a payment the Appellant made as a Deed of Covenant to his wife ("the first claim").

35.7 The Deed of Covenant was entered into between the Appellant and his wife on 30th November 2017. Under the terms of that Deed, the Appellant agreed to transfer the sum of €5,200 annually to his wife.

35.8 The Appellant submitted Forms 185 and 54 to the Respondent notifying them of and claiming tax relief on the understanding the Deed of Covenant met the legislative requirements and was entitled to qualify for tax relief.

35.9 The Appellant's wife was over 65 years of age.

35.10 On 18th May 2018, the Appellant requested the return of the Deed of Covenant previously furnished to them. The Respondent duly complied with this request.

35.11 On 2nd December 2020, the Appellant submitted an identical claim to the first claim seeking that tax relief be granted on the full annual payment of €5,200 paid to his wife.

35.12 During the course of the appeal, the Appellant advised the Commissioner that he inadvertently did not restrict the amount of the qualifying covenant payment to that specified under Statue (5% of his income). The Appellant acknowledged that the qualifying amount of the payment should be changed from €5,200 per annum to the lesser figure of €3,750 per annum and the tax relief be applied to that sum on a pro-rata basis if applicable.

These material facts are not at issue between the parties and the Commissioner accepts them.

Analysis

35. 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*) ("*Perrigo*") 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"

36. Section 237 TCA 1997 "*Annual payments payable wholly out of taxed Income*" permits a taxpayer to obtain a tax deduction against their assessable income where certain conditions are fulfilled whether within that section or a corresponding section of the TCA 1997.

37. The Appellant seeks to claim such a tax deduction of payments made to his wife under a Deed of Covenant. As Deeds of Covenant are legislated for under section 792 TCA 1997, it follows that in order for the Appellant to be entitled to a tax deduction for the payment made to his wife he must comply with the provisions of that section.

38. Section 792 TCA 1997 requires a number of conditions to be fulfilled including sub-section (b) (i) which requires that the payment made must "*arise from capital which the disponer of the disposition has divested absolutely himself in favour of the other person*".

39. In applying the principles promulgated in *Perrigo* and in giving the words in section 792 TCA 1997 their "*ordinary, basic and natural meaning*", it is evident from that section that the Appellant is required not only to have capital but to have divested himself of that capital absolutely in favour of another person.

40. In looking at the former requirement, the Commissioner considers it appropriate to look at the source of the Appellant's capital from which the covenant payment is being made. It was noted during the course of the hearing that the Appellant was of the opinion that as the funds were paid from "*his bank account*" to his wife and then lodged into "*her*" bank account then this fulfilled the requirements that the funds were paid from his capital and divested by him.

41. However, such a viewpoint ignores the taxation treatment of the funds lodged into the Appellant's bank account. The Appellant by his own evidence advised and confirmed to the Commission that both he and his wife were taxable on a joint assessment basis.

42. That basis of assessment is provided for in the TCA 1997 by section 1017 TCA 1997. Subsection 1 (a) of that section provides that where joint assessment is availed of by a married couple the husband shall be assessed and charged to income tax, not only in respect of his total income but also his wife's total income. The section concludes with "*for the purposes of the Income Tax Acts that last-mentioned income shall be deemed to be his income*".

43. As the Appellant availed on joint assessment for the periods under review and as section 1017 (1) (a) TCA 1997 states that his wife's income shall be deemed to be his (the Appellant's) income, then it follows that it is not possible for the Appellant to have divested himself of income receivable by him and his wife. Accordingly, while the Appellant may have transferred the sum of €5,200 to his wife on an annual basis since 2017, it is not possible for those sums to be treated as a tax qualifying deed of covenant as the payments made by virtue of section 1017 (1) (a) TCA 1997 would be treated as income of the Appellant. As such, it would not be possible for the Appellant to divest himself of those funds. For the same reasons, it is not possible for the capital sum being transferred to be the capital of the Appellant alone.

44. Section 1018 TCA 1997 provides that joint assessment is not mandatory and it follows as the Appellant and his wife were jointly assessed for the periods under appeal, they elected for this treatment. It is noted by the Commissioner that had the Appellant not availed of joint assessment for the periods under appeal this would have resulted in him paying more income tax since he could not have availed of his wife's unused tax credits and standard rate band.

45. The Commissioner also considered the Respondent's submissions that the sole purpose of the transaction entered into between the Appellant and his wife was to procure a tax benefit. As stated in paragraph 6 and 7 of this determination section 15 (3) TCA 1997 provides that a married couple with two incomes are entitled to avail of a higher standard rate band than a married couple with one income. Given that joint assessment allows the transfer of unused tax credits and standard rate bands, it is evident that the purpose of the transaction entered into between the Appellant and his wife was to create a second stream of income for her so that the tax which would otherwise be chargeable on the Appellant at the higher rate would be taxable on the Appellant's wife at the standard rate in accordance with the provisions of section 15

(3) TCA 1997. Given the principles promulgated in *O'Flynn* and as the sole purpose of the transaction between the Appellant and his wife was the avoidance of tax, the Commissioner further determines that the Appellant's claim must fail.

46. Finally as the Appellant's claim for relief fails on the above grounds, the Commissioner is not required to comment on the provisions of S126 (2B) TCA 1997.

47. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

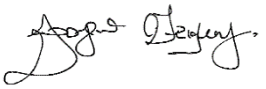
> "*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable."*

The burden of proof has not been discharged to satisfy the Commissioner that the Appellant is entitled to avail of the provisions of section 792 TCA 1997 on the payment of sums of money to his wife under a deed of covenant.

Determination

48. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in refusing the Appellant's application for the deed of covenant to be treated as a qualifying deed of covenant. Accordingly, the Appellant's request for a refund of the relevant tax is refused and the appeal is dismissed. The Commissioner appreciates that the Appellant may be disappointed with the determination but he was correct to check his legal entitlements.

49. This Appeal is determined in accordance with Part 40A TCA 1997 and in particular, section 949AK thereof. 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
15th September 2022