AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

156TACD2022

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 One Parent Family Tax Credit for the years 2010 to 2013, inclusive under section 462 Taxes Consolidation Act, 1997 (hereinafter the "TCA 1997") and Single Person Child Carer Credit for the years 2014 and 2015 under section 462B TCA 1997. The One Parent Family Tax Credit and Single Person Child Carer Credit are hereinafter referred to as "the tax credit". The amount of tax at issue is €10,080.

2. The appeal proceeded by way of oral hearing held in person in the offices of the Commission on 8th September 2022. In addition to receiving oral submissions, the Commissioner had the benefit of written arguments supplied by both parties.

Background

3. The Appellant and his former wife were married in 1980 and had three children during the course of the marriage. The Appellant separated from his wife in January 1986

when she left Ireland for the United Kingdom ("UK") with the three children of the marriage. The Appellant remained in Ireland where he continued to work as an employee taxed under the Pay As You Earn ("PAYE) system. As an individual taxed under the PAYE system the Appellant was not required to submit an annual tax return to the Respondent but would have received notification from the Respondent of his tax credits and tax-rate bands on an ongoing annual basis.

4. The Appellant elected to be jointly assessed with his wife after his marriage in 1980 and was granted the married person's allowance and taxed as a married person (meaning that he was given additional tax allowances and a wider lower rate tax band than that of a single person).

5. The Appellant was informed that his former spouse had dissolved the marriage in the UK on [redacted] 1987. While the Appellant states that he visited his local tax office in 1986 and verbally informed them that his wife had deserted the family home and taken the children with him, the Respondent disputes this. The Appellant continued to receive the married person's tax allowances and band up to an including the tax year 2015.

6. On 4th August 2016 the Appellant was subject to a compliance intervention initiated by the Respondent. The Appellant was informed on that date that the Respondent had information in their possession which proved that he was separated and requested that he provide them with the date of his separation and any legal documents relating to that separation.

7. The Appellant provided the requested information and documentation and following a review of this by the Respondent the married person's tax credits and allowances were withdrawn by the Respondent for the years 2010 to 2015 inclusive. Amended notices of assessment were issued by the Respondent for those years.

8. Following the withdrawal of these credits and the issuance of the amended notices of assessment, the Appellant submitted claims for the tax credit for the years 2010 to 2015 inclusive.

9. These tax credits were not granted by the Respondent and it is the refusal to grant those credits that forms the subject matter of the within appeal.

10. A Notice of Appeal dated 8th August 2017 against the Respondent's decision was filed with the Commission. The Appellant was represented with his Agent at the appeal hearing and the Respondent was represented by two staff members.

Legislation

11. *The legislation relevant to this appeal is as follows:*

<u>*Section 462 TCA 1997*</u>

One-parent family tax credit.

(1) (a)In this section, "qualifying child", in relation to any claimant and year of assessment, means—

(i) a child—

(I) born in the year of assessment,

(II) who, at the commencement of the year of assessment, is under the age of 18 years, or

(III) who, if over the age of 18 years at the commencement of the year of assessment—

(A) is receiving full-time instruction at any university, college, school or other educational establishment, or

(B) is permanently incapacitated by reason of mental or physical infirmity from maintaining himself or herself and had become so permanently incapacitated before he or she had attained the age of 21 years or had become so permanently incapacitated after attaining the age of 21 years but while he or she had been in receipt of such full-time instruction,

and

(ii) a child who is a child of the claimant or, not being such a child, is in the custody of the claimant and is maintained by the claimant at the claimant's own expense for the whole or part of the year of assessment.

(b)This section shall apply to an individual who is not entitled to a basic personal tax credit mentioned in paragraph (a) or paragraph (b) of section 461.

(2) Subject to subsection (3), where a claimant, being an individual to whom this section applies, proves for a year of assessment that a qualifying child is resident with the claimant for the whole or part of the year, the claimant shall be entitled to a tax credit (to be known as the "one-parent family tax credit") of €1,650, but this section shall not apply for any year of assessment—

(a) in the case of a husband or a wife where the wife is living with her husband,

(b) in the case of civil partners who are not living separately in circumstances where reconciliation is unlikely, or

(c) in the case of cohabitants.

(3) A claimant shall be entitled to only one tax credit under subsection (2) for any year of assessment irrespective of the number of qualifying children resident with the claimant in that year.

(4) (a)The references in subsection (1) (a) to a child receiving full-time instruction at an educational establishment shall include references to a child undergoing training by any person (in this subsection referred to as "the employer") for any trade or profession in such circumstances that the child is required to devote the whole of his or her time to the training for a period of not less than 2 years.

(b)For the purpose of a claim in respect of a child undergoing training, the inspector may require the employer to furnish particulars with respect to the training of the child in such form as may be prescribed by the Revenue Commissioners.

(5) Where any question arises as to whether any person is entitled to a tax credit under this section in respect of a child over the age of 18 years as being a child who is receiving full-time instruction referred to in this section, the Revenue Commissioners may consult the Minister for Education and Science.

(6) This section shall cease to apply for the year of assessment 2014 and subsequent years of assessment.

<u>Section 462B TCA 1997</u>

Single person child carer credit

(1) (a)In this section—

"order", in relation to a child, means an order made by the court undersection 11 of the Guardianship of Infants Act 1964 granting custody of the child to the child's father and mother jointly;

"qualifying child" in relation to any primary claimant and year of assessment means a child—

(i) who is born in the year of assessment,

(ii) who, at the commencement of the year of assessment, is under the age of 18 years, or

(iii) who, if over the age of 18 years at the commencement of the year of assessment—

(I) is receiving full-time instruction at any university, college, school or other educational establishment, or

(II) is permanently incapacitated by reason of mental or physical infirmity from maintaining himself or herself and had become so permanently incapacitated before he or she had attained the age of 21 years or had become so permanently incapacitated after attaining the age of 21 years but while he or she had been in receipt of such full-time instruction,

and who—

(A) is a child of the primary claimant, or

(B) not being such a child is in the custody of the primary claimant, and is maintained by the primary claimant at the primary claimant's own expense for the whole or the greater part of the year of assessment or, in respect of a child born in the year of assessment, for the greater part of the period remaining in that year of assessment from the date of birth of that child.

(b) This section shall apply to an individual who is not entitled to a basic personal credit referred to in paragraph (a) or (b) of section 461.

(c) This section shall not apply for any year of assessment—

(i) in the case of either party to a marriage unless—

(I) the parties are separated under an order of a court of competent jurisdiction or by deed of separation, or

(II) they are in fact separated in such circumstances that the separation is likely to be permanent,

(ii) in the case of either civil partner in a civil partnership unless the civil partners are living separately in circumstances where reconciliation is unlikely, or

(iii)In the case of cohabitants.

(2) (a)This paragraph applies to an individual (in this section referred to as the "primary claimant"), being an individual to whom this section applies, who proves for a year of assessment that a qualifying child is resident with him or her for the whole or the greater part of that year of assessment or, in respect of a child born in that year of assessment, for the greater part of the period remaining in that year of assessment from the date of birth of that child, provided that where a child is the subject of an order and the child resides with each parent for an equal part of the year of assessment, this paragraph shall apply to whichever of the parents referred to in that order is the recipient of the child benefit payment made under Part 4 of the Social Welfare Consolidation Act 2005.

(b)This paragraph applies to an individual (in this section referred to as the "secondary claimant"), being an individual to whom this section applies, who proves for a year of assessment that a qualifying child of a primary claimant is resident with him or her for a period of, or periods that in aggregate amount to, not less than 100 days.

(3) Subject to subsection (5), an individual to whom subsection (2) (a) applies, shall be entitled to a tax credit (in this section referred to as a "single person child carer credit") of €1,650.

(4) Subject to subsection (5), and notwithstanding subsection (3), where for any year of assessment a primary claimant would be entitled to a single person child carer credit but for the fact that he or she has, in the form specified by the Revenue Commissioners, relinquished his or her claim to that credit, a secondary claimant shall be entitled to claim a single person child carer credit in respect of the qualifying child concerned.

(5) A claimant under this section shall be entitled to only one single person child carer credit for any year of assessment irrespective of the number of qualifying children resident with the claimant in that year.

(6) (a) The references in subsection (1) (a) to a child receiving full-time instruction at an educational establishment shall include references to a child undergoing training by any person (in this subsection referred to as "the employer") for any trade or profession in such circumstances that the child is required to devote the whole of his or her time to the training for a period of not less than 2 years.

(b) For the purpose of a claim in respect of a child undergoing training, the inspector may require the employer to furnish particulars with respect to the training of the child in such form as may be prescribed by the Revenue Commissioners.

(7) Where any question arises as to whether any person is entitled to a single person child carer credit in respect of a child over the age of 18 years as being a child who is receiving full-time instruction referred to in this section, the Revenue Commissioners may consult the Minister for Education and Skills.

(8) For the purposes of this section a child shall be treated as resident with an individual for any day where the child so resides for the greater part of that day.

Section 865 TCA 1997

(1) (a)In this section and section 865A—

"Acts" means the Tax Acts, the Capital Gains Tax Acts, Part 18A, Part 18C and Part 18D and instruments made thereunder;

"chargeable period" has the meaning assigned to it by section 321;

"correlative adjustment" means an adjustment of profits under the terms of arrangements entered into by virtue of section 826(1);

"tax" means any income tax, corporation tax, capital gains tax, income levy, domicile levy or universal social charge and includes—

(i) any interest, surcharge or penalty relating to any such tax, levy or charge,

(ii) any sum arising from the withdrawal or clawback of a relief or an exemption relating to any such tax, levy or charge,

(iii) *any sum required to be deducted or withheld by any person and paid or remitted to the Revenue Commissioners or the Collector-General, as the case may be, and*

(iv) *any amount paid on account of any such tax, levy or charge or paid in respect of any such tax, levy or charge;*

"valid claim" shall be construed in accordance with paragraph (b).

(b) For the purposes of subsection (3)—

(i) where a person furnishes a statement or return which is required to be delivered by the person in accordance with any provision of the Acts for a chargeable period, such a statement or return shall be treated as a valid claim in relation to a repayment of tax where—

(I) all the information which the Revenue Commissioners may reasonably require to enable them determine if and to what extent a repayment of tax is due to the person for that chargeable period is contained in the statement or return, and

(II) the repayment treated as claimed, if due—

(A) would arise out of the assessment to tax, made at the time the statement or return was furnished, on foot of the statement or return, or

(B) would have arisen out of the assessment to tax, that would have been made at the time the statement or return was furnished, on foot of the statement or return if an assessment to tax had been made at that time,

(ii) *where all information which the Revenue Commissioners may reasonably require, to enable them determine if and to what extent a repayment of tax is due to a person for a chargeable period, is not contained in such a statement or return as is referred to in subparagraph (i), a claim to repayment of tax by that person for that chargeable period shall be treated as a valid claim when that information has been furnished by the person, and*

(iii) to the extent that a claim to repayment of tax for a chargeable period arises from a correlative adjustment, the claim shall not be regarded as a valid claim until the quantum of the correlative adjustment is agreed in writing by the competent authorities of the two Contracting States.

(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.

(2A) Where a chargeable person (within the meaning of Part 41A) makes a claim under subsection (2) for repayment of tax which, but for an error or mistake referred to in that subsection, would not have been due it shall not constitute a valid claim for the purposes of subsection (3) unless the return and self assessment for the period to which the claim relates is amended, in accordance with section 959V, to correct the error or mistake.

(2B) Where a chargeable person (within the meaning of section 950) makes a claim under subsection (2) for repayment of tax which, but for an error or mistake referred to in that subsection, would not have been due and the claim relates to an accounting period which commenced before 1 January 2013 or to a year of assessment before the year of assessment 2013 it shall not constitute a valid claim for the purposes of subsection (3) unless the person's return for the accounting period or year of assessment, as the case may be, to which the claim relates is amended in accordance with section 959V to correct the error or mistake, and for this purpose section 959V shall apply to such an amendment as if—

(a) subsections (2) and (4) of that section were deleted,

(b) references in that section to "return and a self assessment", "return and the self assessment" and "return or self assessment" were references to "return", and

(c) references in that section to section 959Z were references to section 956.

(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.

(5) Where a person would, on due claim, be entitled to a repayment of tax for any chargeable period under any provision of the Acts other than this section, and—

(a) that provision provides for a shorter period, within which the claim for repayment is to be made, which ends before the relevant period referred to in subsection (4), then this section shall apply as if that shorter period were the period referred to in subsection (4), and

(b) that provision provides for a longer period, within which the claim for repayment is to be made, which ends after the relevant period referred to in subsection (4), then that provision shall apply as if the longer period were the period referred to in subsection (4).

(6) Except as provided for by this section, section 865A or by any other provision of the Acts, the Revenue Commissioners shall not—

(a) repay an amount of tax paid to them, or

(b) pay interest in respect of an amount of tax paid to them.

(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.

(8) Where the Revenue Commissioners make a repayment of tax referred to in subsection (2), they may if they so determine repay any such amount directly into an account, specified by the person to whom the amount is due, in a financial institution.

(9) Nothing in this section shall prevent the Revenue Commissioners from examining a claim subsequent to any repayment having been made and—

(a) making or amending an assessment, as the case may be, under—

(i) Chapter 5 of Part 41A,

(ii) section 954 or 955, as appropriate, where the claim relates to an accounting period which commenced before 1 January 2013 or to a year of assessment before the year of assessment 2013, or

(iii) section 960Q

or

(b) making a determination under section 960Q, in the case of persons who are not chargeable persons.

…

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

172 (1) For the purposes of this Part, a cohabitant is one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

(2) In determining whether or not 2 adults are cohabitants, the court shall take into account all the circumstances of the relationship and in particular shall have regard to the following:

(a) the duration of the relationship;

(b) the basis on which the couple live together;

c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;

(d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;

(e) whether there are one or more dependent children;

(f) whether one of the adults cares for and supports the children of the other; and

(g) the degree to which the adults present themselves to others as a couple.

(3) For the avoidance of doubt a relationship does not cease to be an intimate relationship for the purpose of this section merely because it is no longer sexual in nature.

…

Submissions

Appellant

12. The Appellant advised the Commission that he did not file any tax returns with the Respondent for the periods 1980 to 2009 as he was of the view that he was not required to so do as all his income for those periods was PAYE income and as such was taxed at source.

13. The Appellant further advised that following the breakdown of his marriage, he met his new partner in 1998 and had two daughters with his new partner who were born in 1999 and 2008. The Appellant stated that he and his new partner initially lived separate and apart while his daughters resided with him at all times. In or around 1999, the Appellant advised that his new partner moved in with him and their daughters and they lived under the "*same roof*" since that time.

14. The Appellant stated that his relationship with his new partner suffered significant difficulties which caused their contact to extend solely to that necessitated in the giving of care, protection and parenting of their two daughters. The Appellant advised that despite the decayed relationship with his new partner, he stayed with her under the same roof as "*having lost his first three children he did everything in his power to protect his young family*".

15. The Appellant advised that he could not begin to comprehend his daughters being taken into care by a Government Agency which he feared could occur if he did not allow his partner unrestricted access and tenure to the home at which their children resided. The Appellant stated that the central aim was to ensure that his children had an established, safe, secure and happy home at all times.

16. The Appellant was of the view that he was not cohabiting with his partner as she was only allowed access and lodgings at the residence for "*the sake of the children*" and he and his partner had no intimate relationship between them.

17. The Appellant stated that he made continuous representations to the Respondent that he did not cohabitate for the years 2010 to 2015 but that they persisted in ignoring his representations. The Appellant advised that the Respondent informed him following an exchange of correspondence that he was not entitled to the credits as he had "*failed to produce documentary evidence that the mother of [his] children does not reside with [him] at the above address during the years 2010 to 2015*". The Appellant submitted the fact the mother of his children lived with him and the children was not valid grounds

to deny him the tax credits, as for the Respondent to be permitted deny him the tax credits, he was required to be married or in a civil partnership (which he was not) or cohabiting – which he claimed he was not.

18. The Appellant produced an exhibit from the "New Oxford Dictionary of English (1998)" which defined the word "*cohabit*" as to "*live together and have a sexual relationship without being married*". The Appellant submitted that as he did not have an intimate relationship with his partner, then he was not cohabiting and accordingly the tax credits ought to be granted to him.

19. The Appellant further stated that he should not be denied eligibility for the tax credits as the claim forms he submitted for the tax credit for the tax years 2010 to 2013 (Form OP1 – Claim for One-Parent Family Tax Credit) did not ask whether he cohabited with another person as it asked – "*In the year to which this tax credit is claimed are you living with another person as a couple whether married or in a civil partnership or not?"*.

20. The Appellant advised that the Respondent changed the claim Form for the tax credit which he claimed in 2014 and 2015 to a Form SPCC1 "Claim for Single Person Child Carer Credit Primary Claimant" and that Form reworded part of the eligibility criteria to "*In the year to which this tax credit is claimed are/<u>were</u> you living with another person as a couple whether married or in a civil partnership <u>or cohabiting</u>?*"

21. On the grounds that the Appellant was of the view that he was not requested in the years 2010 to 2013 to confirm when claiming the allowance that he was cohabiting and as he was not married or in a civil partnership for those years, the Appellant submitted that he should be allowed the tax credit for those years if the Commissioner determined that he was cohabiting with his partner for the years 2010 to 2015 inclusive.

Respondent

22. The Respondent advised that they only became of aware of the Appellant's marriage being dissolved in 2016 after they conducted a PAYE compliance intervention. This PAYE intervention was conducted following the Appellant's claim for additional tax credits arising from service charge and medical expense claims which he had submitted to them in 2016.

23. The Respondent noted that the subject matter of the appeal was not the withdrawal of the married person's tax treatment which he had availed of from the date of his marriage in 1980 up to 2015 but rather the refusal of the Respondent to grant the tax credit to the Appellant.

24. The Respondent advised that as they had received the claims for the tax credits in 2016, they were precluded from allowing the Appellant's claim by section 865 TCA 1997. The Respondent advised that this section prohibits the granting of an allowance or the repayment of tax made outside a period of four years after the end of the chargeable period to which the claim relates.

25. Further or in the alternative the Respondent submitted that the Appellant was not entitled to the tax credits as he did not fulfil the statutory requirements to avail of those tax credits.

26. The Respondent submitted as it was a condition for the granting of the tax credits that the Appellant not be cohabiting with a partner and as they had information that he was, the Commissioner should uphold the assessments and dismiss the Appellant's appeal.

27. The Respondent stated that they were entitled to seek repayment of what they considered to be the wrongly claimed tax credits and tax bands which the Appellant had claimed from the date the Appellant's dissolved marriage was recognised in Ireland. However, as a concession, the Respondent advised that were only seeking repayment for the tax years 2010 to 2015 inclusive and accordingly were not requesting the Commission to adjudicate on any year prior to the 2010 tax year.

Evidence Presented to the Commission

28. During the course of the hearing, arising from questions posed by the Commissioner, the following information was presented to the Commission –

    25.1 The Appellant advised that he subsequently married his partner in 2016 and was required to get a divorce in Ireland in order to consummate that marriage as his UK marriage dissolution was not recognised by the State.

    25.2 The Appellant stated that he only married his partner in order to secure housing assistance and his relationship with his partner did not improve after the marriage.

    25.3 The Appellant and his (new) wife were still married and living together at the date of the appeal.

    25.4 During the years under appeal, 2010 to 2015, the Appellant's partner resided in the family home at all times with the Appellant and their children.

25.5 During those years the Appellant, his partner and children went on holidays together and celebrated family events such as birthdays and Christmas together.

25.6 The Appellant continued to work full time throughout the periods under appeal and used his wages to pay for household expenditure while his partner worked a 3 day week and used her wages to contribute towards household expenditure.

Material Facts

29. The Commissioner finds the following material facts:-

26.1 The Appellant and his former wife separated in January 1986 and took the children of the marriage to the UK with her.

26.2 On [redacted] 1987, the Appellant was informed that his former wife had the marriage dissolved in the UK.

26.3 The Appellant met his new partner in 1998 and had two children in that relationship in 1999 and 2008.

26.4 Aside from a brief period at the commencement of the relationship with his new partner, the Appellant and his partner lived in the same residence with their two children.

26.5 The Appellant and his partner frequented holidays with their children and apportioned household expenditure between themselves.

Analysis

30. While not central to the appeal, for the purpose of comprehension, the Commissioner deems it necessary to analyse the Appellant's entitlement for tax purposes to be taxed as a married person.

31. Ireland traditionally had a quaint perception on the subject of divorce within this jurisdiction and it was not until the passing of the 1995 referendum (which removed the prohibition on divorce) and the subsequent enactment of the Family Law Divorce Act 1996 that a person resident in the State could lawfully get a divorce in this country or have a marriage dissolution or similar obtained in another Country recognised in this jurisdiction.

32. This position was at variance with European Union ("EU") law which Ireland as a member of the EU under the principle of supremacy of EU law was bound to abide by. Prior to the recognition of divorce in Ireland and in the following years, an issue routinely presented to the Irish courts was what weight should be attached to a foreign divorce in domestic proceedings? This issue was fraught with difficulty and led to conflicting High Court decisions issuing on the recognition of foreign divorces in Ireland (see, for example, *G.McG. v. D.W [2000] 1 IR 96* and *M.E.C. v. J.A.C. [2001] 3 IR 399*).

33. The matter was extensively examined by the Supreme Court in *H v H [2015*] *IESC 7* where it was held that the State did not recognise the validity of foreign divorces granted prior to the 2nd October 1986 in a country where neither party of the marriage in question was domiciled at the date of the institution of the divorce proceedings but where one party was resident in that date. That case also established that it was not until the implementation of Council Regulation (EC) No 2201/2003 on the 27th November 2003 that Ireland recognised foreign divorces on the basis of habitual residence (as well as domicile and other jurisdictional grounds).

34. Hence, as the Appellant's marriage was dissolved in the UK on [redacted] 1987 and his ex-wife was not likely domiciled in the UK at that time (having lived in Ireland and some years after the dissolution returned to this jurisdiction), it was not until 27th November 2003 that the Appellant's marriage dissolution could have been recognised in this State for tax purposes (while the Appellant informed the Commission that he was required to get a divorce is 2016 so that he could marry his partner, for the avoidance of doubt this was required to comply with "non-tax" requirements). Given that the Appellant and his former spouse separated in 1986 and while they would have been treated as a married couple for tax purposes by virtue of the foregoing until 27th November 2003, this would have created an anomaly whereby the Appellant was lawfully entitled to claim married person tax treatment from the date of his marriage until 27th November 2003.

35. The Respondent recognised that the Appellant should have informed them of this position in 2003 and had he so done, he would have been taxed as a single person from that year onwards (if he was cohabiting). As this position would have given rise to additional tax liabilities for the years 2003 onwards, the Commissioner notes that the Respondent had decided that they would not seek to rectify the position or disallow tax credits other than for the tax years 2010 to 2015 under care and management provisions. The parties agreed to proceed on this basis and the Commissioner on hearing the submissions from the Respondent agreed to address those years only.

36. The provisions of section 462 and 462B TCA 1997 are almost identical. They permit a qualifying person to avail of an additional tax credit in circumstances where they have a child (or children) living with them who are generally under 18 years of age. Those sections further require that a person not be married, in a civil partnership or co-habiting in order to avail of the tax credit.

37. As the Appellant had qualifying children, was not married and was not in a civil partnership for the periods under appeal, the central issue to be determined by the Commissioner is whether the Appellant was cohabiting with his partner for the years 2010 to 2015 inclusive.

38. The Appellant submitted that he was not co-habiting with his partner for the years under appeal as his relationship was purely platonic for those years. However, the provisions of 172 (3) Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 make it clear that the absence of a sexual relationship is not sufficient grounds to determine that persons are not co-habiting with one another.

39. Section 172 (2) of that Act sets out the conditions which a court may consider in forming an opinion as to whether a couple are co-habiting with one another. In adopting that approach and leaving aside the fact that the Appellant and his partner married in 2016, the Commissioner having considered the longevity of the Appellant and his partners relationship, some 24 years, the dependent children of that relationship, the living and financial arrangements between Appellant and his now wife, forms the conclusion that the Appellant and his now wife were cohabiting for the years 2010 to 2015 inclusive.

40. As the Appellant is unable to fulfil the requirements under section 462 and 462B TCA 1997 as he was cohabiting with his now wife for the periods under appeal, it follows that his appeal must fail and entitlement to the tax credit be denied.

41. Regarding the Appellant's submission that he should be afforded the tax credit for the years 2010 to 2013 as the Form OP1 did not require him to indicate whether he was cohabiting with another person, the Commissioner finds this argument to be without merit. The Form OP1 asks whether the applicant was "*living with another person as a couple whether married or in a civil partnership or not?*" Owing to the use of the words "or not" on that Form it follows that a person may be living with another person as a couple and they may or may not be married or in a civil partnership with that person. As the provisions of section 462(2) (c) TCA 1997 state that a person may not be cohabitating with another person in order to be eligible for the credit this is fatal to the Appellant's submission and this submission is disregarded.

42. As the Appellant's claim for relief fails on the above grounds, the Commissioner is not required to consider the provisions of section 865 TCA 1997.

43. 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:-

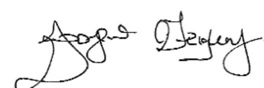
    "*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable*."

    The burden of proof has not been discharged to satisfy the Commissioner that the Appellant is entitled to avail of the provisions of section 462 and 462B TCA 1997 and as such, the appeal is denied.

Determination

44. 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 tax credits to be granted to him in respect of his dependent children. Accordingly, the assessments are upheld and the appeal is denied. It is understandable the Appellant will be disappointed with the outcome of this appeal. The Appellant was correct to check to see whether his legal rights were correctly applied

45. 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
21st September 2022