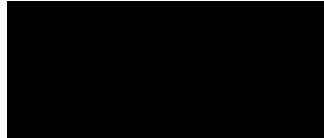




158TACD2022

Between



Appellant

-and-

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) of the decision of the Revenue Commissioners (“the Respondent”) to assess the Appellant as being liable to repay the sum of €14,863.19 in respect of income tax chargeable for the year 2017.
2. The appeal was conducted by way of remote hearing that took place on 6 September 2022. The Commissioner had the benefit of written and oral submissions provided by both parties.

Background

3. The Appellant is a German resident who previously paid tax on his income in Ireland for the years 2017 and 2018 under the PAYE system.
4. On or about 19 October 2018 the Appellant contacted his pension provider, [REDACTED], stating that he wished to make a one-off additional voluntary contribution to his pension that would maximise tax relief available to him in respect of the previous year, 2017.

5. On 22 October 2018 an employee of the pension provider indicated that it was open to the Appellant to make a contribution of up to €25,783.34 for the purpose of seeking relief. It is apparent that at some point prior to the end of this month the Appellant made this additional voluntary contribution.
6. On or about 22 August 2019 the Appellant, with the assistance of tax agents whose services he acquired in early 2019, filed a return of income tax for the year 2017 in which he claimed relief in respect of the additional voluntary contribution from October 2018.
7. The filing of this return and claim for relief resulted in the automatic generation and issue of a refund of €14,863.19 in respect of tax due for the year 2017.
8. Thereafter, the claim for relief for the year 2017 arising from the payment made in 2018 was reviewed by the Respondent and rejected on the grounds that it was made out of time. A Notice of Amended Assessment issued on 19 November 2019 assessing the Appellant as having to repay the sum of €14,863.19 previously refunded to him. The Respondent also assessed the Appellant as being liable to pay a surcharge under section 1084 of the Taxes Consolidation Act 1997 ("the TCA 1997") in the amount of €1,486.32.
9. The Appellant duly appealed this assessment by way of Notice of Appeal delivered to the Commission on 19 December 2019. Prior to the hearing of the appeal the Respondent conceded that the Appellant was not liable to pay the surcharge assessed. Accordingly, the only issue for determination relevant to the claim for relief was the Appellant's liability to repay the €14,863.19 previously refunded to him by the Respondent.

Legislation and Guidelines

10. Chapter 1 of Part 30 of the TCA 1997 concerns occupational pension schemes. Section 774 therein concerns exemptions and reliefs available in respect of certain "*exempt approved schemes*", including the Appellant's own pension scheme.
11. Under section 774 of the TCA 1997, a taxpayer is entitled to have an additional voluntary contribution treated as an expense deductible against earnings. In general, this will be against the earnings from the year in which the contribution was in fact paid.
12. However, section 774(8) provides that:-

"Subject to paragraphs (b) and (ba) of subsection (7) where in relation to a year of assessment any contribution, which is not an ordinary annual contribution, is paid by an employee under the scheme after the end of the year of assessment but before the specified return date for the chargeable period within the meaning of Part 41A), the contribution may, if the individual so elects on or before that date, be treated for the

purposes of this section as paid in the earlier year (and not in the year in which it is paid); but where the amount of that contribution, together with any other contribution to the scheme paid by the individual in the year to which the contribution relates (or treated as so paid by virtue of any previous election under this subsection), exceeds the maximum amount of contributions allowed to be deducted in that year, the election shall have no effect as respects the excess.”

13. The effect of this subsection is that, in relation to additional voluntary contributions, a taxpayer may elect to have their contribution treated as if it was paid in the tax year previous to that in which it was in fact made. This means that it is deductible against earnings for that year. The entitlement to this particular treatment of an additional voluntary contribution is conditional, however, on a taxpayer electing for it on or by the specified return for the previous year. In the Appellant’s case the specified return date for 2017 was 31 October 2018.

14. A variety of guidance documents published by the Respondent were provided by the Appellant as part of his appeal documents. One of these was a printout from a web page on the Respondent’s website entitled “*Pensions and tax*”. After setting out the types of pension plans in respect of which relief can apply and various limits imposed by legislation, the document provides:-

“You may pay a once-off or special pension contribution after the end of a tax year, but before the following 31 October. If you do, you can choose on or before 31 October, to have the tax relief for the contributions allowed in the earlier tax year. When you use Revenue Online Service (ROS), the deadlines for paying contributions and making this choice are extended.”

15. The Appellant also drew attention to a page on the Respondent’s website headed “*Four Year Rule*” this summarises the effect of section 865 of the TCA 1997 in the following manner:-

“There is a limit to how far back you can claim tax refunds under Pay As You Earn (PAYE) and Self-assessment.

This limit is set to four years, meaning you can only request or claim refunds from the last four years. For example, claims for 2015 must be made by 31 December 2019. Claims made after this cannot be repaid.”

16. The Appellant cited the statement of the Respondent on its website regarding its role as encompassing the “*provision of policy advice on taxation issues*”. He also cited the statement on the same page headed “*Our commitment to quality service*” that:-

“Revenue devotes a great deal of time and effort to providing a top quality service to our customers. We have a responsibility to provide clear information and to make dealing with us as easy as possible.

By providing even better customer service and more taxpayer education and assistance, we aim to help all of our customers pay the right amount of tax and duty at the right time. We want to ensure that our customers know their entitlements and to make claiming them simple and straightforward.”

17. The Appellant also provided a copy of the “About” section of the government website, “gov.ie”, which links to the website of the Respondent. This describes the gov.ie website as being:-

“a central portal for government services and information. It combines the websites of Irish government departments and is a trusted source that makes interactions with the government more user-focused.”

18. Directive 2014/54EU of the European Parliament and Council (“the Directive”) is designed to ensure the protection of the right to the free movement of workers enshrined in Article 45 of the Treaty of the Functioning of the European Union (“the TFEU”). The Directive does not confer any substantive rights but seeks to ensure uniform application of Article 45 throughout the EU. One of its innovations, for example, is the creation of the obligation on Member States to designate a structure/body to promote equal treatment of Union workers and members of their family on the grounds of nationality, as well as to tackle unjustified restrictions and obstacles to their right to free movement. Member States are also required under the Directive to create competent authorities, and where necessary judicial procedures, for the enforcement of Article 45 rights. Article 2 therein, entitled “Scope” provides:-

“This Directive applies to the following matters, as referred to in Articles 1 to 10 of Regulation (EU) No 492/2011, in the area of freedom of movement for workers:

...(c) access to social and tax advantages...”

Submissions

Appellant

19. The Appellant submitted that the guidance documents published by the Respondent failed to indicate that there was a requirement that he notify it of his election under section 774(8) of the TCA 1997 to have his additional voluntary contribution treated as having been paid in the preceding year. He said that his starting point in arriving at an understanding of his

obligations as a taxpayer was the material published on government pages. He followed the advice provided and should not be disadvantaged for so doing. The correspondence with his pension provider prior to making the additional voluntary contribution in late October 2018 clearly evidenced that he had a genuine belief at that time, arising from government guidance, that he needed only to pay the money into his pension prior to the end of that month in order to have it applied to the preceding year.

20. The Appellant submitted also that he considered the Respondent's guidance as having been published in fulfilment of its obligations under the Directive to ensure equality and equity for workers from European countries. In written argument he submitted:-

"[The Respondent's] argument in my reading now implies the requirement of intimate, detailed knowledge of the Irish tax law which would be in contradiction to the directive and not in line with the Government's and Revenue's own commitment and obligation."

Respondent

21. The Respondent submitted that the legislation was clear in its meaning. In order to have his contribution treated as if paid in the preceding year, it was essential that he have "elected" to do so before the specified return date, namely 31 October 2018. This he failed to do, only electing by way of the making of a return on or about August 2019. Consequently, the Respondent could only treat the contribution as having been paid in the tax year 2018. Relief arising from the additional voluntary contribution could not be claimed in respect of the year 2017.
22. Regarding the guidance documentation, the Respondent submitted that it could not have the effect of supplanting legislation. Even if the guidelines and manuals it had published on the matter of pension contributions failed to mention the need to elect prior to the end of the specified return date for the chargeable period, this could not have the effect of disapplying conditions imposed in legislation by the Oireachtas.

Material Facts

23. The facts material to this appeal are as follows:-

- The Appellant paid tax on his income under the PAYE system for the years 2017 and 2018;
- On or about 19 October 2018 the Appellant contacted his pension provider to indicate that he wanted to make a one-off additional voluntary contribution that would maximise the tax relief available to him for the previous year;

- The Appellant made this contribution prior to the end of the specified return date for the year 2017;
- On or about August 2019, the Appellant submitted a Form 11 tax return for the year 2017 in which he sought credit for the additional voluntary contribution made on or about the end of October 2018;
- The filing of this return resulted in the automatic generation and issue to the Appellant of a refund in the amount of €14,863.19 for the tax year 2017;
- Upon review of this repayment, the Respondent determined that the Appellant was not entitled to the refund and duly issued a Notice of Amended Assessment for the year 2017 in which the Appellant was assessed as having underpaid tax for that year in the amount of €14,863.19. It is this that is under appeal.

Analysis

24. Section 774(8) of the TCA 1997 provides that if a taxpayer wishes to have an additional voluntary pension contribution treated as having been paid in the preceding year, they must “elect” that it be so treated on or before the specified return date for that year. It is implicit in the word “elect” that the choice of a taxpayer to have an additional voluntary contribution so treated must be communicated to the Respondent.
25. In this instance, while the additional voluntary contribution was made prior to the specified return date, the Appellant’s election to have it treated as being paid in the preceding year did not take place until the filing of the Form 11 return in August 2019. This was outside the period prescribed by legislation. The Appellant’s correspondence with his pension provider dating from late October 2018 shows that he intended the credit for the additional voluntary contribution to be applied to the year 2017. However, the formation of this intention prior to the specified return date is not itself enough to avail of the option under section 774(8) of the TCA 1997.
26. The Appellant argued that the guidance material published online diverged from section 774 of the TCA 1997 by indicating that the limit of what was required of him was that he had paid the additional voluntary contribution by 31 October 2018. Firstly, the Commissioner does not agree that this is correct. The printout from the “*Pensions and tax*” webpage, referred to in paragraph 14 above, states clearly that one can “choose” to have tax relief on their contribution allowed for the previous year, if they do so on or before the specified return date for that year. The word “choose” is a synonym of “elect” as used in the context of section 774(8) of the TCA 1997. Again, it is implicit that choice must be

communicated. As regards this piece of guidance, the Commissioner does not consider it to be obviously deficient, but perhaps could be more explicit in this respect.

27. Secondly, even if it were the case that the Respondent's guidance failed to express the need for election to avail of the treatment under section 774(8) of the TCA 1997, this would not permit the Appellant to succeed in this appeal. At this point it is necessary to confirm that the scope of the jurisdiction of the Commissioner in this appeal is to establish by reference to relevant legislation the Appellant's correct charge to tax for the tax year 2017 (see *Lee v Revenue Commissioners [2021] IECA 108*). Documents in the nature of guidelines published by the Respondent, while often a useful aid, cannot have the effect of replacing or amending legislation. In this instance the legislation imposes a deadline for election that the additional voluntary contribution to be treated as paid in 2017, which the Appellant did not meet.

28. The Commissioner finds also that the Directive does not have any bearing on the outcome of this appeal. The Directive requires that Member States give effect to the right under Article 45 of the TFEU for workers to move freely within the EU. One of the matters that it seeks to guard against is discrimination or unequal treatment on the grounds of nationality in relation to access to social and tax advantages. In this case there is no question of the Appellant being the subject of unequal treatment or discrimination. On the contrary, the Appellant received precisely the treatment afforded to others under the tax code. As already noted, the Commissioner has found that the guidance material furnished by the Appellant did not fail to state the need to elect prior to the end of the specified return date for the chargeable period in question. Even if it had, however, the Commissioner finds that the Directive does not require a Member State to implement measures that disapply its taxation laws on the grounds that a person from another Member State cannot be expected to understand it to a sufficient level. To do so would in fact be unequitable. For this reason also the assessment of the Respondent whereby it found the Appellant chargeable to additional tax for 2017 in the amount of €14,863.20 must stand.

Determination

29. The Commissioner finds that as a consequence of the refunding to the Appellant of the sum of €14,863.20, the Appellant underpaid tax chargeable to the year 2017 in that amount. As such, the Respondent's amended assessment of 19 November 2019 must stand, albeit that the surcharge demanded under section 1084 of the TCA 1997 in the amount of €1,486.32 is not payable.

30. This appeal is determined under section 949AK of the TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

A handwritten signature in black ink, appearing to read 'COHiggins', written in a cursive style.

Conor O'Higgins
Appeal Commissioner
27 September 2022