



66TACD2022

Between:

██████████

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter “the Commission”) as an appeal against Notices of Amended Assessment which were raised by the Revenue Commissioners (hereinafter the “Respondent”) as follows:
 - i. 2014 – 2017 raised on 24th November 2018 for appeal █████/18;
 - ii. 2018 raised on 15th October 2019 for appeal █████/19;
 - iii. 2019 raised on 12th February 2020 for appeal █████/20;
 - iv. 2020 raised on 5th March 2021 for appeal █████21; and
 - v. 2021 raised on 22nd March 2022 for appeal █████/22.
2. The total amount of tax at issue is €29,607 for the following years:
 - i. 2014 €3,914
 - ii. 2015 €3,868

iii.	2016	€3,991
iv.	2017	€3,895
v.	2018	€3,950
vi.	2019	€3,978
vii.	2020	€4,053
viii.	2021	€1,958

3. The oral hearing took place remotely before the Commissioner on 12th April 2022. ■■■■■ (hereinafter the “Appellant”) appeared on his own behalf at the oral hearing and was not represented. Senior Counsel appeared on behalf of the Respondent. The Commissioner heard submissions on behalf of the Appellant and on behalf of the Respondent. The Appellant presented his appeal professionally at all times and it was evident he had spent considerable time in its preparation. This assisted the Commissioner at the hearing.

Background

4. The Appellant is in receipt of the State Pension (Contributory) from the Department of Employment Affairs and Social Protection (hereinafter the “DEASP”). For each of the respective years under appeal the Appellant submitted Form 11 returns to the Respondent containing two entries for income from the DEASP, one figure representing the Appellant’s State Pension (Contributory) and the other representing the amount paid by the DEASP in respect of the Appellant’s wife as an increase for a qualified adult.
5. The Respondent treated the Appellant as the beneficiary of both amounts received from the DEASP and the Appellant was assessed in the total amount pursuant to section 126(2B) of the Taxes Consolidation Act 1997 (hereinafter the “TCA1997”) as amended by section 12 of the Finance (No. 2) Act 2013 which had effect from 1st January 2014.
6. As a result of the Respondent treating the Appellant as the beneficiary of both amounts received from the DEASP, the increase in the standard rate band provided for in section 15(3) of the TCA1997 and of the Employee Tax Credit provided for in section 472 of the TCA1997 were not available in respect of the Appellant’s wife.
7. The Appellant has appealed the decision of the Respondent to treat him as being the beneficiary of both amounts received from the DEASP.

Legislation and Guidelines

8. The legislation relevant to the within appeal is as follows:

Section 15 of the TCA1997:

Section 15 of the TCA1997 prescribes in tabular format, the rates at which income tax is charged and the bands of income to which the rates are applied.

Section 15(2) of the TCA1997 sets out the graduated charge to income tax and the tax bands applicable where a husband and wife are treated as jointly assessed in accordance with section 1017 of the TCA1997.

Section 15(3) of the TCA1997:

“Subject to subsections (4) and (5)—

(a)where an individual is charged to tax for a year of assessment in accordance with section 1017 or 1031C, and

(b)both the individual and his or her spouse or civil partner are each in receipt of income in respect of which the individual is chargeable to tax in accordance with that section,

the part of his or her taxable income chargeable to tax at the standard rate specified in column (1) of Part 3 of the Table to this section shall be increased by an amount which is the lesser of—

(i)€26,300, and (this amount varies from time to time, comment added)

(ii)the specified income of the individual or the specified income of the individual’s spouse or civil partner, whichever is the lesser.”

Section 126(2B) of the TCA1997:

“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 472(4) of the TCA1997:

“Where, for any year of assessment, a claimant proves that his or her total income for the year consists in whole or in part of emoluments (including, in a case where the claimant is a married person assessed to tax in accordance with section 1017, or a civil partner assessed to tax in accordance with section 1031C, any emoluments of the claimant’s spouse or civil partner deemed to be income of the claimant by that section for the purposes referred to in that section) the claimant shall be entitled to a tax credit (to be known as “the employee tax credit”) of –

(a) Where the emoluments (but not including, in the case where the claimant is a married person or a civil partner so assessed, the emoluments, if any, of the claimant’s spouse or civil partner) arise to the claimant, the lesser of an amount equal to the appropriate percentage of the emoluments and €1,650, and

(b) Where, in a case where the claimant is a married person or a civil partner so assessed, the emoluments arise to the claimant’s spouse or civil partner, the lesser of an amount equal to the appropriate percentage of the emoluments and €1,650.”

Section 2 of the Social Welfare Consolidation Act 2005 (hereinafter the “SWCA2005”):

“ ...

‘beneficiary’ means a person entitled to any benefit, assistance, child benefit or family income supplement as the case may be;

...”

Section 39 of the Social Welfare Consolidation Act 2005:

“(1) Benefits under this Part shall be of the following descriptions and are so described in this Act—

...

(h) old age (contributory) pension,

...”

Section 112(1) and (1A) of the Social Welfare Consolidation Act 2005:

“(1) Subject to this Part, the weekly rate of old age (contributory) pension shall be increased by the amount set out in column (3) of Part 1 of Schedule 2 for any period

during which the beneficiary has a qualified adult, subject to the restriction that a beneficiary shall not be entitled for the same period to an increase of pension under this subsection in respect of more than one person.

(1A) The amount of the increase of pension referred to in subsection (1), in respect of any claim for State pension (contributory) made after 24 September 2007, shall be paid—

(a) directly to the qualified adult concerned, or

(b) to such other person as may be nominated by the qualified adult for the purpose of receiving the increase of pension referred to in subsection (1) on behalf of the qualified adult.

(1B) Where a beneficiary ceases to be entitled to State pension (contributory) the payment to a qualified adult of the increase of pension referred to in subsection (1) shall also cease.”

Submissions

Appellant's Submissions

9. The Appellant takes issue with the manner in which the Respondent treated the increase in the State Pension (Contributory) which was paid on foot of his wife being a qualified adult. In particular he takes issue with the Respondent treating him as the beneficiary of the increase paid on foot of his wife being a qualified adult. It is the Appellant's position that the increase paid was his wife's income and therefore that the increase in the standard rate band provided for in section 15(3) of the TCA1997 and of the Employee Tax Credit provided for in section 472 of the TCA1997 should have been applied to his returns for the relevant tax years.
10. The Appellant submitted that he is relying on case law and the Irish Constitution (Bunreacht na hEireann) (hereinafter “the Constitution”) together with income tax provisions relating to the income of a married woman and in particular, he submitted that he is relying on section 15(3) of the TCA1997.
11. The Appellant submitted that the Supreme Court held in *Murphy v Attorney General* [1982] I.R. 241 (hereinafter “*Murphy*”) that it was repugnant to the Constitution to include a wife's income as that of her husband for tax purposes.
12. The Appellant further submitted that the increase in the State Pension (Contributory) which was paid on foot of his wife being a qualified adult was his wife's income, as a

beneficial recipient, for income tax purposes. He submitted that in the case of *Ó Coindealbháin (Inspector of Taxes) v O'Carroll* [1989] I.R. 229 (hereinafter "*O'Carroll*") established that a Garda Síochána child's pension should be regarded as the income of the child and not the income of the parent or guardian. In that case the High Court held that that the children's portion of a Garda Síochána widow's pension was the beneficial property of the children and should not be assessed as income of the surviving parent. The Appellant also referenced the case of *O'Siochain (Inspector of Taxes) v Neenan* [1999] IR 533 in which he submitted that the principles established in *O'Carroll* were affirmed by the Supreme Court.

13. The Appellant also submitted that the High Court in *O'Neill v Revenue Commissioners* [2018] IEHC 388 (hereinafter "*O'Neill*") established that the State pension was income of the wife and not that of the husband.
14. Following the decision of the High Court in *O'Neill* the Respondent accepted that the increase for a qualified adult to the Appellant's pension was income of his wife and appeals which were before the Tax Appeals Commission for years prior to 2014 were concluded on that basis.
15. The Appellant urged the Commissioner to disapply section 126(2B) of the TCA1997. The basis for this, he submitted, was that the Supreme Court in *Murphy* held that section 192 of the Income Tax Act 1967 was unconstitutional. The Appellant submitted that section 126(2B) of the TCA1997 is on all fours with section 192 of the Income Tax Act 1967 and submitted that as a result the Commissioner should treat section 126(2B) of the TCA1997 as being unconstitutional and should disapply the provisions of same.

Respondent's Submissions

16. The Respondent submitted that section 112(1) of the SWCA2005 provides that the weekly rate of the State Pension (Contributory) shall be increased for any period during which the beneficiary (in this instance the Appellant) has a qualified adult.
17. The Respondent further submitted that section 126(2B) of the TCA1997, which has effect from 1st January 2014, provides that where an increase in the amount of State Pension (Contributory) in respect of a qualified adult is paid pursuant to section 112(1) of the SWCA2005 such increase shall be treated for the purposes of the Income Tax Acts as if it arises to and is payable to the beneficiary (in this instance the Appellant).
18. The Respondent submitted that the decisions of the Supreme Court and High Court which the Appellant relies on were decided in relation to matters which arose prior to the commencement of section 126(2B) of the TCA1997, that is to say in relation to matters

relating to tax years prior to 2014. As a result, the Respondent submitted, this case law does not apply to increases in the State Pension (Contributory) which are paid on foot of the beneficiary having a qualified adult for 2014 and subsequent years and therefore, the Respondent submitted, that the decisions do not apply to the within appeals.

Material Facts

19. The material facts in the within appeal are not at issue and the Commissioner accepts the following material facts:

- i. The Appellant was a beneficiary of the State Pension (Contributory) pursuant to section 112 of the SWCA2005 for the relevant years;
- ii. The Appellant's wife was a qualified adult as a result of which an increase in the Appellant's State Pension (Contributory) was paid pursuant to section 112(1) of the SWCA2005.

Analysis

20. As with all appeals before the Commission 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."

21. It is not in dispute that the Appellant was, for the relevant years, a beneficiary of the State Pension (Contributory) as defined by section 2 of the SWCA2005. It is also not in dispute that the increase in the amount of the State Pension (Contributory), which was paid as a result of the Appellant's wife being a qualified adult, was paid pursuant to section 112(1) of the SWCA2005.

22. The Commissioner has considered the submissions made by the Parties along with the law in relation to the tax treatment of increases in the State Pension (Contributory) which are paid on foot of a spouse being a qualified adult.

23. Section 126 of the TCA1997 sets out the tax treatment of various payments under the Social Welfare Acts. Section 126(2B) of the TCA1997, as inserted by section 12 of the Finance Act (No. 2) 2013, applies to payments of the State Pension (Contributory) for the tax years 2014 and for all subsequent tax years.

24. The wording of section 126(2B) of the TCA1997 sets out a mandatory provision whereby the Respondent, and in turn the Commissioner, must treat payments made by the DEASP in respect of an increase in the amount of a State Pension (Contributory) paid pursuant to section 112 of the SWCA2005 for all of the purposes of the Income Tax Acts as if such payment arises to and is payable to the beneficiary of the State Pension (Contributory) pursuant to section 112 of the SWCA2005. In particular the Commissioner notes that the use of the word “shall” therein. This indicates an absence of discretion in the application of the provision by the Respondent, and in turn by the Commissioner, and imposes a mandatory obligation to treat the increase paid as being income of the beneficiary and not of the qualified adult.
25. Section 126(2B) of the TCA1997 does not provide for extenuating circumstances whereby, an increase in the amount of a State Pension (Contributory) which is paid as a result of a spouse being a qualified adult may be treated otherwise than as set out in that section.
26. The Commissioner finds that the said increase for a qualified adult paid on foot of the Appellant’s wife being a qualified adult was paid pursuant to section 112 of the SWCA2005 and that the Respondent was correct in treating it as if it arose to and was payable to the Appellant as beneficiary pursuant to section 126(2B) of the TCA1997.
27. The legislation and case law which the Appellant relies on in support of his claim relate to increases for qualified adults in the State Pension (Contributory) which were paid up to and including 31st December 2013. Such increases were paid under the umbrella of legislation which was in place prior to the commencement of section 126(2B) of the TCA1997 on 1st January 2014. The within appeals relate to increases for a qualified adult which were paid after 1st January 2014.
28. In relation to the Appellant’s urging that the Commissioner should disapply section 126(2B) of the TCA1997 on the basis that it is unconstitutional, the Commissioner makes no comment or finding on the constitutionality of this section.
29. It has previously been found, in a decision of the Commission, that Commissioners do not have the requisite jurisdiction to declare a legislative provision as being unconstitutional.¹
30. The scope of the jurisdiction of an Appeal Commissioner has been set out in a number of cases decided by the Courts, namely; *Lee v Revenue Commissioners* [IECA] 2021 18 (hereinafter “*Lee*”), *Stanley v The Revenue Commissioners* [2017] IECA 279, *The State*

¹ Commission decision 08TACD2021, decision of Chairperson Maney dated 8th December 2020, at paragraph 237.

(Whelan) v Smidic [1938] 1 I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 and *the State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577.

31. Most recently Murray J. in *Lee* held as follows:

“From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge. The ‘incidental questions’ which the case law acknowledges as falling within the Commissioners’ jurisdiction are questions that are ‘incidental’ to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment.”²

32. The Commission is a statutory body created by the Finance (Tax Appeals) Act 2015. Section 6(2) of the Finance (Tax Appeals) Act 2015 sets out the functions of Commissioners appointed pursuant to that Act. Commissioners therefore have the jurisdiction set out in statute and do not have jurisdiction to consider or decide on the constitutionality of legislation. This is the work of the Courts.

Determination

33. For the reasons set out above, the Commissioner determines that the Appellant has failed in his appeal and has not succeeded in showing that the relevant tax was not payable.

34. It is understandable that the Appellant might be disappointed with the outcome of this appeal. The Commissioner commends the Appellant and the Respondent for the manner in which this appeal was conducted. The Appellant was correct to check to see whether his legal rights and those of his wife were correctly applied.

35. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular, section 949 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 TCA1997.

² At paragraph 64



Clare O'Driscoll
Appeal Commissioner
27th April 2022

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