



91TACD2022

Between



Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal of decisions of the Revenue Commissioners (“the Respondent”) to issue P21 Balancing Statements dated 19 April 2018, which assessed the Appellant as having underpaid tax on her PAYE income for the years 2013, 2014 and 2015. The Appellant also appeals the decision to offset those underpayments assessed against a larger overpayment for 2016.
2. After the Appellant filed her Appeal with the Tax Appeals Commission (“the Commission”) on 18 May 2015, the Respondent accepted that the Appellant made no underpayment in respect of 2014 and 2015 as she was non-resident for tax purposes in the State for these years. The sole remaining issues therefore are whether the Appellant made an underpayment in relation to the tax year 2013 and, if so, the treatment of that underpayment.
3. In determining these issues, three questions arise in this appeal. The first is whether the Appellant was tax resident in the State for the tax year 2013. The secondly is whether the Respondent was correct in deciding that the pension arrears payment for 2013 that was received in 2016 was assessable in respect of the year it was earned, rather than the year

it was received. The third is whether the Respondent was entitled to offset any underpayment against the subsequent overpayment.

4. This appeal proceeded by way of oral hearing heard on 31 March 2022.

Background

5. The Appellant was an employee of ██████████ (“the Employer”) until she ceased her employment on █████ June 2013. On █████ July 2013 she left the State to reside permanently in the United States. She remained there until she returned on █████ August 2016 and, in accordance with section 819(3) of the Taxes Consolidation Act 1997 (“the TCA 1997”), elected to be resident in the State for that year. The Appellant gave evidence that she was resident in the State for 191 days in 2013, as well as for the entirety of 2012.
6. In March 2016, shortly before her return to the State, the Appellant received a lump sum payment of €76,277.40 in respect of pension arrears from the Employer dating back to her retirement in June 2013. Thereafter in 2016 she received pension payments totalling €30,438.36. She also received €2,454.40 in additional income from a separate employer for whom it appears she did part-time work. In 2016, income tax of €41,872.22, as well as the Universal Social Charge (“USC”) of €8,733.48, was deducted at source from these payments.
7. In March 2018, the Appellant’s former agent submitted a Form 12 tax return on her behalf for 2016 and the Respondent duly issued P21 Balancing Statements for the tax years 2013 – 2016. While the Respondent assessed the Appellant as having overpaid tax on the income she received in 2016, underpayments for each of the previous three years were offset against this overpayment. The net position was that the Appellant was assessed as being entitled to a refund of €24,230.97 in overpaid tax.
8. In reaching this decision, the Respondent decided, firstly, that the Appellant was resident in the State under section 819 of the TCA 1997 for the years 2013, 2014 and 2015 and thus was chargeable to tax. This being so, it then assessed the portion of the pension arrears relating to 2013, 2014 and 2015 as being assessable in respect to those years, rather than the year of receipt. As noted already, the Respondent now accepts that there was no charge due in respect of the latter two of these three years.

Legislation and authorities

9. Section 819 of the TCA 1997 governs residency for tax purposes and subsection (1) therein provides:-

“For the purposes of the Acts, an individual shall be resident in the State for a year of assessment if the individual is present in the State—

(a) at any one time or several times in the year of assessment for a period in the whole amounting to 183 days or more, or

(b) at any one time or several times—

(i) in the year of assessment, and

(ii) in the preceding year of assessment,

for a period (being a period comprising in the aggregate the number of days on which the individual is present in the State in the year of assessment and the number of days on which the individual was present in the State in the preceding year of assessment) in the aggregate amounting to 280 or more.”

10. The basis of determining a person resident under section 819(1)(b) of the TCA 1997 is described commonly as the “look-back rule”.

11. Section 112 of the TCA 1997 sets out the basis of assessment for tax charged on income under the PAYE system, including in respect of pension payments. Subsection (1) therein provides:-

“Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.”

12. Computation based on the amount of PAYE income from “the year of assessment” was the prescribed method until the enactment of section 77 of the Finance Act 2017, which amended section 112 of the TCA 1997 by adding subsection (3). This took effect from 1 January 2018 and provides:-

“Notwithstanding subsection (1) and subject to subsections (4) and (6), the income tax under Schedule E to be charged for the year of assessment 2018 and subsequent years of assessment in respect of emoluments to which Chapter 4 of Part 42 applies or is applied shall be computed on the amount of the emoluments paid to the person in the year of assessment.”

13. Thus, it can be seen that from 2018 the amount of tax charged in respect of income earned under the PAYE system came to be calculated by reference to the amount received in payment during the year of assessment by the taxpayer. This change however does not apply in this instance, as it post-dates the payment received by the Appellant in respect of her pension arrears.

14. Section 960H of the TCA 1997 is entitled "Offsets between taxes". Subsection 2 therein provides:-

"Where the Collector-General is satisfied that a person has not complied with the obligations imposed on the person in relation to either or both—

(a) the payment of tax that is due and payable, and

(b) the delivery of returns required to be made,

then the Collector-General may, in a case where a repayment is due to the person in respect of a claim or overpayment—

(i) where paragraph (a) applies, or where paragraphs (a) and (b) apply, instead of making the repayment, set the amount of the repayment against any liability, and

(ii) where paragraph (b) only applies, withhold making the repayment until such time as the returns required to be delivered have been delivered."

Submissions

Appellant

15. At the hearing of this appeal the Appellant, who was no longer represented by her tax agent, did not make submissions. In written argument lodged on her behalf by her former agent, it was submitted that the Appellant was not resident in the State for the purpose of taxation for the year 2013. It was further submitted that the Respondent erred by "*appropriating amounts from tax suffered in 2016 and applying them to 2013*".

Respondent

16. The Respondent submitted that the Appellant was tax resident for 2013 on the grounds both that she resided in the State for 191 days of that year and because, under the "look-back rule" in section 819(1)(b) of the TCA 1997, she spent in aggregate over 280 days there between 2012 and 2013.

17. The Respondent submitted that the portion of the arrears paid in 2016 in respect of the Appellant's pension entitlements for 2013 had been assessed for the year that it was earned, rather than the year received. This was, it submitted, in accordance with section 112 of the TCA 1997, prior to its amendment by the Finance Act 2017, which took effect only from 1 January 2018. In support of this contention regarding the reading of section 112(1) of the TCA 1997, the Appellant cited the judgment of the High Court in **Bedford v BH, [1968] IR 320**. In this judgment, Mr Justice Kenny held in the context of an arrears payment made to a company director that tax deducted under the PAYE system was assessable in the "year of assessment" to which it was attributable. This was so even if the payment was received in a subsequent year.

Material Facts

18. The following are the facts material to this appeal:-

- the Appellant retired from her employment with the Employer on ■ June 2013;
- the Appellant moved to the United States permanently on ■ July 2013 and resided there until ■ August 2016. For the year 2016 the Appellant opted under section 819(3) of the TCA 1997 to be resident in the State;
- in 2016 the Appellant received a lump-sum payment from the Employer in respect of her pension entitlements from her retirement up to the date of payment. This comprised payment for the years of assessment 2013, 2014, 2015 totalling €76,277.40. The Appellant also received an amount in pension arrears up to the date of payment in 2016 and further pension payments for that year in the amount of €30,438.36;
- income tax of €41,872.22 (plus USC of €8,733.48) was deducted at source from the full amount of the Appellant's income received in 2016;
- in 2018 the Appellant's agent submitted a Form 12 return on her behalf, which calculated an overpayment in respect of the years 2013, 2014 and 2015 of €24,230.97 (€21,773.01 in income tax). The Appellant initially issued P21 Balancing Statements that sought to offset the sum of tax underpaid in respect of each of these years against the overpayments.
- the Respondent now accepts that there was no underpayment for 2014 and 2015, as the Appellant was then tax resident in the United States and has issued amended P21 Balancing Statements for these years to this effect;

- The 2013 amount that remains offset by the Respondent against the 2016 overpayment is €6,277.26.

Analysis

19. The first question to be addressed concerns the Appellant's tax residency for the year 2013. Section 819(1)(a) of the TCA 1997 provides that if a person resides in the State for over 183 days or more in a year of assessment they will be deemed to be tax resident for that year. There was no dispute that the Appellant resided in the State for 191 days of the year of assessment 2013. As such, she must be found to be tax resident for that period.
20. In its Statement of Case, the Respondent in fact relied on the "look-back rule" as the basis for finding the Appellant to be tax resident. It would seem this was because it was not certain at the time of the delivery of this document exactly how many days the Appellant had resided in the State during the year of assessment 2013. Whatever the reason, for the sake of completeness the Commissioner finds that, having also spent the entirety of the year of assessment 2012 in the State, the Appellant was resident for tax purposes under the test prescribed by section 819(1)(b) of the TCA 1997.
21. Having made this finding, the next question is the treatment by the Respondent of the Appellant's charge to income tax for the year 2013. At the time of the payment of the pension arrears, section 112 of the TCA 1997 provided that tax was to be computed on the amount of income "for the year of assessment". Addressing the equivalent provision in the Finance Act 1959, the High Court held in *Bedford v BH* that this meant that arrears payments needed to be assessed for the year they were earned, not the year received. This did not change until the coming into force of the Finance Act 2017, which provided expressly that from 2018 onwards the computation of income tax under the PAYE system would be based on the date of receipt of income.
22. The consequence of this legislation is that the Respondent was correct in finding that there had been an overpayment in respect of the total income received and deducted at source by the Employer in 2016, but that there had been a corresponding underpayment for 2013 in respect of the portion of the pension arrears attributable to that year.
23. That being so, the Respondent was empowered under section 960H(2) of the TCA 1997 to offset the sum underpaid in 2013 against the larger sum overpaid in 2016. Its decision to exercise this discretionary statutory power cannot be disturbed by the Commission.

Determination

24. The Commissioner finds that the decisions of the Respondent to assess the Appellant as having underpaid income tax in 2013 and to offset it against an overpayment in 2016 must stand. The Commissioner appreciates the Appellant may be disappointed with this determination. The Appellant was correct to seek clarity in this appeal of the tax treatment for the years in question, as set out above.
25. This appeal has been determined in accordance with section 949AL and 949AK of the TCA 1997. The determination contains full findings of fact and reasons. 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.



Conor O'Higgins
Appeal Commissioner
4th May 2022