



**Between**

██████████

**Appellant**

and

The Revenue Commissioners

**Respondent**

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**Determination**

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**Introduction**

1. This is an appeal to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 (“TCA 1997”) brought on behalf of ██████████ (“the Appellant”) against a refusal by the Revenue Commissioners (“the Respondent”) of a claim made by the Appellant for a repayment of income tax, in accordance with the provisions of section 865 TCA 1997, in respect of the years of assessment 2010, 2011 and 2012. The amount of overpayment of tax at issue is in the sum of €2,579.38 for the year 2010, the sum of €1,798.56 for the year 2011 and the sum of €1261.14 for the year 2012.
2. Also at issue, is a liability to Capital Gains Tax (“CGT”) assessed in the sum of €6,253, inclusive of surcharge and penalties, for the year 2014, which the Respondent states cannot be offset for the year 2014, as repayment cannot be made by reference to section 865 TCA 1997 for the years 2010 to 2012 inclusive. Consequently, the Respondent is prevented from permitting an offset for the liabilities arising in 2014, in the sum of €6,253.
3. On 20 August 2018, the Appellant duly appealed to the Commission. The appeal proceeded by way of a hearing on 26 June 2023. The Appellant represented himself and

was present at the hearing of the appeal to give sworn oral testimony and to make submissions on his behalf. The Respondent was represented by Junior Counsel and made submissions on behalf of the Respondent.

## Background

4. The Appellant was in the [REDACTED] trade and is now retired. The Appellant and his wife, now deceased, were jointly assessed.
5. The Appellant's daughter, who assisted the Appellant with his appeal, submits that in 2017, she became aware that the Appellant was unable to cope with the business administrative responsibilities and was not compliant with his tax returns to the Respondent. The Appellant's daughter endeavoured to put the Appellant's affairs in order by submitting in 2017, the required income tax Form 11 returns for 2010, 2011 and 2012. On 16 June 2017, Income Tax Notices of Assessment for the requisite years were automatically issued by the Respondent.
6. On 31 October 2017, the Appellant's daughter filed CGT returns on his behalf, which related to a disposal of shares in 2014, which the Appellant held in [REDACTED]. On 8 March 2018, the Respondent issued a CGT Notice of Assessment resulting in a liability of €6,253 (€5,685 tax payable for the period and €568 for late submission of return).
7. The Appellant's income tax returns, resulted in an overpayment of tax of €2,579.38 for 2010, €1,798.56 for 2011 and €1,261.14 for 2012. The CGT return resulted in a liability of €6,253 (€5,685 tax payable for the period and €568 surcharge for late submission of return).
8. The Appellant requested that the CGT liability be offset by the income tax refunds due for the years 2010, 2011 and 2012 and for a waiver of interest and charges applied to the CGT liability.
9. On 2 May 2018, the Respondent informed the Appellant's daughter that repayment of the overpaid income tax was disallowed under Section 865 TCA 1997, because the returns were filed after the 4 year time limit. In addition, therefore CGT assessed as payable was not permitted to be offset where repayment of tax is prohibited. The position is set out in the Respondent's outline of arguments at page 60 of the Book of Documents as follows:

Year of Assessment	Year Return Submitted	Overpaid IT	CGT Due	Surcharge	Balance Unpaid

2010	2017	€2,579.38			Disallowed
2011	2017	€1,798.56			Disallowed
2012	2017	€1,261.14			Disallowed
2014	2018		€5,685	€568	€6,253
<b>Total</b>		<b>€0</b>	<b>€5,685</b>	<b>€568</b>	<b>€6,253</b>

### Legislation and Guidelines

10. The legislation relevant to this appeal is as follows:-

11. Section 865 of the TCA 1997, Repayment of Tax, *inter alia* provides:-

“(1)...

(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 taxes 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 shall be treated as a valid claim when that information has been furnished by the person, and*

*(iii)....”*

*(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.*

*(6).....*

*(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.*

12. Section 865B TCA 1997, No offset where repayment prohibited, *inter alia* provides:-

*(1) In this section—*

*“Acts” means—*

- (a) the statutes relating to the duties of excise and to the management of those duties,*
- (b) the Tax Acts,*
- (c) the Capital Gains Tax Acts,*
- (d) Parts 18A, 18C and 18D,*
- (e) the Capital Acquisitions Tax Consolidation Act 2003 and the enactments amending or extending that Act,*
- (f) the Stamp Duties Consolidation Act 1999 and the enactments amending or extending that Act,*
- (g) the Value-Added Tax Consolidation Act 2010 and the enactments amending or extending that Act*
- (h) the Finance (Local Property Tax) Act 2012, and*
  - (i) any instruments made under any of the statutes and enactments specified in paragraphs (a) to (h);*

*“relevant period”, in relation to a repayment, means—*

- (a) in the case of corporation tax, the accounting period of the company in respect of which the repayment arises,*
- (b) in the case of income tax, capital gains tax, income levy, universal social charge or domicile levy, the year of assessment in respect of which the repayment arises,*
- (c) in the case of stamp duties, the year of assessment or accounting period, as the case may be, within which falls the event in respect of which the repayment arises,*
- (d) in the case of gift tax or inheritance tax, the year of assessment or accounting period, as the case may be, within which falls the latest of the dates referred to in section 57(3) of the Capital Acquisitions Tax Consolidation Act 2003 and in respect of which the repayment arises,*
- (e) in the case of excise duty, the year of assessment or accounting period, as the case may be, within which falls the act or event in respect of which the repayment arises,*
- (f) in the case of value-added tax, the year of assessment or accounting period, as the case may be, within which falls the taxable period in respect of which the repayment arises, and*
- (g) in the case of local property tax, the year within which the repayment arises;*

*“repayment” includes a refund;*

*“tax” means any income tax, corporation tax, capital gains tax, value-added tax, excise duty, stamp duty, gift tax, inheritance tax, income levy, domicile levy, universal social charge or local property tax and includes—*

*(a) any interest, surcharge or penalty relating to any such tax, duty, levy or charge,*

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

*(c) 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*

*(d) any amount paid on account of any such tax, duty, levy or charge or paid in respect of any such tax, duty, levy or charge; “taxable period” has the same meaning as in section 2 of the Value-Added Tax Consolidation Act 2010*

*(2) Subject to subsections (3) and (4), where a repayment of any tax cannot be made to a person by virtue of the operation of—*

*(a) section 865,*

*(b) section 105B of the Finance Act 2001,*

*(c) section 99 of the Value-Added Tax Consolidation Act 2010,*

*(d) section 159A of the Stamp Duties Consolidation Act 1999,*

*(e) section 57 of the Capital Acquisitions Tax Consolidation Act 2003, or*

*(f) any other provision of any of the Acts, then, notwithstanding any other enactment or rule of law, that repayment shall not be set against any other amount of tax due and payable by, or from, that person.*

*(3) Where a repayment of tax cannot be made to a person in respect of a relevant period, it may be set against the amount of tax to which paragraph (a) of subsection (4) applies which is due and payable by the person in the circumstances set out in paragraph (b) of that subsection.*

*(4) (a) The amount of tax to which this paragraph applies is the amount, or so much of the amount, of tax that is due and payable by the person in respect of the relevant period as does not exceed the amount of the repayment that cannot be made to the person in respect of that relevant period*

*(b) The circumstances set out in this paragraph are where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or*

*any other action that is taken for the recovery of tax, at a time that is 4 years or more after the end of the relevant period.*

*(5) No tax shall be set against any other amount of tax except as is provided for by the Acts.*

## **Evidence and Submissions**

### *Appellant's evidence*

13. The Appellant gave sworn oral evidence and the Commissioner sets out hereunder a summary of the evidence given by the Appellant:-

13.1. The Appellant testified that he is now aware that he is outside the relevant dates for a refund of the income tax overpaid. However, the Appellant is looking for clemency in relation to this and the amount due.

13.2. The Appellant stated that he was jointly assessed with his late spouse. The Appellant said that during the requisite years, he was under a lot of pressure with work and had considerable financial commitments. The Appellant testified that he was responsible for supporting certain members of his wider family, including his brother and that he was only a modest [REDACTED], with a modest income. The Appellant said that it all got on top of him and he was late submitting his income tax returns.

13.3. The Appellant gave evidence that in 2014, he sold shares that he held in [REDACTED] as he was under immense financial pressure. The Appellant said that he had acquired the shares based on [REDACTED]  
[REDACTED]

13.4. The Appellant testified that he was shocked to hear that the offset for the CGT liabilities, with his overpayment of income tax, was not being permitted. The Appellant said that he never had money to make things easier for himself. The Appellant confirmed that he is now in his 70's and he has been [REDACTED] since he was 16 years old.

### *Respondent's submissions*

14. Counsel made submissions on behalf of the Respondent. The Commissioner sets out hereunder a summary of the submissions made:-

- 14.1. The appeal relates to repayments of overpaid income tax for the years 2010, 2011 and 2012, disallowed under section 865 TCA 1997 because the claims were made outside the 4 year time limit and payable CGT for 2014, was not allowed to be offset against same.
- 14.2. On 31 October 2017, the Appellant's daughter, on behalf of the Appellant, filed CGT returns which related to the disposal of the Appellant's shares in ██████ in 2014.
- 14.3. On 8 March 2018, the Respondent issued a CGT Notice of Assessment resulting in a liability of €6,253 (€5,685 tax payable for the period and €568 for late submission of return).
- 14.4. The income tax returns resulted in an overpayment of tax in the sum of €2,579.38 for 2010, €1,798.56 for 2011 and €1,261.14 for 2012. The CGT return resulted in a liability of €6,253 (€5,685 tax payable for the period and €568 surcharge for late submission of return).
- 14.5. The Appellant requested that the CGT liability be offset by the income tax refund due for 2010, 2011 and 2012 and for a waiver of interest and charges applied to the CGT liability.
- 14.6. On 2 May 2018, the Respondent informed the Appellant's daughter that repayment of overpaid income tax was disallowed under Section 865 TCA 1997, as the income tax returns were filed after the 4 year time limit. CGT payable was not allowed to be offset where repayment of tax is prohibited.
- 14.7. The Respondent's position is that, in accordance with Section 865 TCA 1997, the Appellant's claim for repayment of overpaid income tax was outside of the 4 year time limit. Therefore, the Respondent is unable to repay the income tax paid. The Respondent cannot, as a matter of law, set off this amount against a charge under CGT.

### **Material Facts**

15. Having read the documentation submitted, and having listened to the sworn oral evidence and submissions at the hearing of the appeal, the Commissioner makes the following findings of material fact:

- 15.1. The Appellant was in the ██████ trade and is now retired. Since the age of 16 years, the Appellant has been ██████.



- 15.2. The Appellant had considerable financial commitments during the requisite years and was responsible for supporting certain members of his wider family, including his brother.
- 15.3. In March 2017, the required income tax Form 11 returns for 2010, 2011 and 2012 were submitted to the Respondent.
- 15.4. On 16 June 2017, Income Tax Notices of Assessment for the years 2010, 2011 and 2012 were automatically issued by the Respondent.
- 15.5. On 31 October 2017, the Appellant's daughter filed CGT returns which related to a disposal of the Appellant's shares in ██████ in 2014.
- 15.6. On 8 March 2018, the Respondent issued a CGT Notice of Assessment resulting in a liability of €6,253 (€5,685 tax payable for the period and €568 for late submission of return).
- 15.7. The Appellant's income tax returns resulted in an overpayment of tax in the sum of €2,579.38 for 2010, €1,798.56 for 2011 and €1,261.14 for 2012.
- 15.8. The Appellant requested that the CGT liability be offset by the income tax refund due for the years 2010 to 2012 inclusive and for a waiver of interest and charges applied to the CGT liability.
- 15.9. The balance of loss to the exchequer herein is in the total sum of €613.19, taking into account the amount assessed by the Respondent to CGT in the total sum of €6,253, less the amount gained by the Respondent in overpayment of income tax in the total sum of €5,639.08.

## **Analysis**

16. The appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49 ("*Menolly Homes*"), at paragraph 22, Charleton J. stated

*"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable"*.

17. The Commissioner also considers it useful herein to set out paragraph 12 of the Judgement of Charlton J. in *Menolly Homes*, wherein he states that:

*"Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute..."*

18. The Appellant's appeal relates to a refusal by the Respondent to permit a claim for a repayment of income tax pursuant to section 865 TCA 1997, made by the Appellant in respect of the years of assessment 2010, 2011 and 2012, in the sums of **€2,579.38, €1,798.56 and €1,261.14** respectively, as the claim was made outside of the four year time limit prescribed in **section 865(4) TCA 1997**.

19. In addition, the Appellant's appeal relates to a refusal by the Respondent to permit the sum of **€6,253** due and owing for the year 2014, to be offset against the overpayment of income tax for the years 2010, 2011 and 2012, as a consequence of the provisions of **section 865B TCA 1997**, in circumstances where a repayment of tax cannot be made.

20. The Commissioner observes that when considering the monetary value or loss to the exchequer only, in relation to this appeal, what was overpaid is in the total sum of €5,639.08 and what is due to the Respondent, by the Appellant, having been assessed to CGT, is in the sum of €6,253. The Commissioner observes that the balance of the loss to the exchequer taking into account what is gained in overpayment less the amount assessed to CGT due and owing is therefore in the total sum of **€613.19**. Counsel for the Respondent agreed with the amount "if looked at that way", but restated the provisions of section 865 TCA 1997. The Commissioner is acutely aware of the mandatory nature of section 865(4) TCA 1997.

21. Furthermore, in relation to the collection of the CGT due for 2014, the Commissioner notes the Respondent's outline of arguments at page 60 of the Book of Documents wherein the Respondent states "*According to a note of a call dated 21 May 2018, Revenue offered to the Appellant's daughter to request the Sheriff to hold off on collection to allow for an appeal. She replied that she had already arranged this. The Appellant's daughter, on behalf of her father, is requesting that these refunds be offset against CGT due for 2014 and for a waiver of interest and charges applied to the CGT liability.*"

22. The Commissioner intends firstly to deal with the provisions relating to the repayment of income tax in accordance with section 865 TCA 1997 and the four year time limit, as it is applicable to the Appellant's appeal and will thereafter, consider the application of section 865B TCA 1997 to the Appellant's appeal herein. The Commissioner notes that the

Appellant accepts the law in relation to the time limit and the offset provision, but is seeking clemency in relation to these matters. Nevertheless, the Commissioner will proceed to set out the law as it is applicable to the Appellant's appeal.

### **Section 865 TCA 1997**

23. The Appellant has been denied a repayment of tax by the Respondent on the grounds that he does not meet the criteria as outlined by section 865(4) TCA 1997, namely that a claim for repayment of tax for the chargeable period was not made within four years after the end of the chargeable period.
24. The Commissioner notes that in March 2017, the Appellant's daughter filed his income tax self-assessment forms for the years 2010, 2011 and 2012. The Commissioner has considered the Appellant's evidence that the requisite years were difficult years for him both personally and financially. The Commissioner notes that he was responsible for supporting members of his wider family and that he was under immense financial pressure, such that it all got too much and he neglected his administrative duties namely, his tax returns. Further, the Commissioner notes that the CGT liabilities arise from shares which were sold by the Appellant, having acquired his shares in relation to his [REDACTED] and being a member of the original co-operative.
25. Section 865 TCA 1997 provides for a general right to repayment of tax. The definition of tax in the section includes income tax and capital gains tax. It also covers: any interest, surcharge or penalty relating to the tax, levy or charge; any sum relating to a withdrawal of a relief or an exemption and sums required to be withheld and remitted to the Respondent; and amounts paid on account of tax (for example, payments in excess of liability).
26. Section 865(2) TCA 1997 provides that a person who has paid tax which is not due, or which but for an error or mistake in the person's return would not have been due, is entitled to repayment of that tax.
27. Section 865(3) TCA 1997 provides that a repayment of tax referred to in section 865(2) TCA 1997 is not due unless a valid claim to repayment has been made. A return or statement which a person is required to deliver under the Acts and which contains all the information that the Respondent may reasonably require to determine if and to what extent a repayment is due, is regarded as a valid claim. The Commissioner is satisfied that the Appellant's submission of his tax returns in March 2017, is regarded as a valid claim for the purposes of section 865(3) TCA 1997.

28. In relation to a limitation period for a repayment of tax, section 865(4) TCA 1997 provides that '*...a claim for repayment of tax under the Acts for any chargeable period shall not be allowed unless it is made- ..... within 4 years, after the end of the chargeable period to which the claim relates.*'. [Emphasis added].
29. As the Appellant's claim for repayment relates to the tax years 2010, 2011 and 2012 inclusive, a valid claim for repayment must have been made on or before 31 December 2014, 31 December 2015 and 31 December 2016 for years at issue. The Appellant filed his returns for the aforementioned years in March 2017 and as set out above, it is this date that establishes a valid claim for the purposes of section 865(3) TCA 1997. Having regard to this date, the Commissioner is satisfied that the claim falls outside of the 4 year time limit prescribed in section 865(4) TCA 1997.
30. As the claim for repayment of tax by the Appellant was made outside the four-year period specified in section 865(4) TCA 1997, the claim for repayment in the amounts of €2,579.38, €1,798.56 and €1,261.14, was disallowed. The Commissioner notes that correspondence issued on 2 May 2018 from the Respondent, informing the Appellant's daughter that repayment of income tax was disallowed under section 865 TCA 1997.
31. The use of the word "shall" as set out in section 865(4) TCA 1997, indicates an absence of discretion in the application of this provision. The wording of the provision does not provide for extenuating circumstances in which the four year rule might be mitigated. The Commissioner has no authority or discretion to direct that repayment be made or credits allocated to the Appellant where the claim for repayment falls outside the four year period specified in section 865(4) TCA 1997.
32. Previous determinations of the Commission have addressed the matter of repayment in the context of the four year statutory limitation period. These determinations may be found on the Commission website<sup>1</sup>.

### **Section 865B TCA 1997**

33. In addition, the Appellant seeks that the outstanding CGT tax liabilities for the year 2014, in the sum of €6,253, is offset against the overpayment of income tax for the years 2010, 2011 and 2012. The Commissioner observes that the Respondent relied on section 865B (2) TCA 1997 to deny the claim.
34. Section 865B TCA 1997 provides that, where a repayment of tax cannot be made to a person because a claim is lodged outside of the relevant time limit as provided for in

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<sup>1</sup> [www.taxappeals.ie](http://www.taxappeals.ie)

section 865(4) TCA 1997, offset against any other tax liabilities of the person is prohibited. Section 865B TCA 1997 also confirms that there is no right of offset outside of that already provided for under the tax codes. Section 865B TCA 1997 provides that the rules apply to these taxes regardless of when the tax is or was paid.

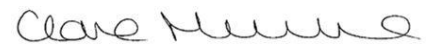
35. Section 865B(4)(b) TCA 1997 contains an exception to the general rule regarding offsets. It applies where tax is due and payable for a tax year or accounting period by virtue of action taken by the Respondent to assess or recover tax, at a time that is four years or more after the end of the year or period involved. Having regard to the facts of this appeal, the application of section 865B(4) TCA 1997 does not arise herein, as it was the Appellant who filed his tax returns on 31 October 2017, rather than any action of the Respondent.
36. Where a repayment of tax is claimed outside the relevant time limit, the Respondent cannot offset the tax involved against any other tax liability of the taxpayer as no repayment is due to the taxpayer.
37. As set out above, in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. The Commissioner determines that a repayment is not available to the Appellant in relation to tax overpaid in respect of the years 2010, 2011 and 2012, as a valid claim for repayment was not made within the four year statutory period contained in section 865(4) TCA 1997.
38. Additionally, in accordance with section 865B(2) TCA 1997, the Commissioner has no option, but to determine that the tax overpaid arising in respect of the years 2010, 2011 and 2012, is not available for offset against outstanding CGT tax liabilities for the year 2014, in the sum of €6,253. Section 865B(2) TCA 1997 does not permit tax overpaid to be offset against tax liabilities, in circumstances where a repayment claim in respect of the tax overpaid would not be available.
39. The Commissioner has every sympathy for the position that the Appellant's finds himself in and notes that clemency is sought. It is clear to the Commissioner that the Appellant has worked throughout his life in the [REDACTED] trade to support not only his family, but also his wider family, which was incredibly difficult at times. Unfortunately, the Commissioner has no discretion to assist in these circumstances due to the four year rule prescribed by legislation. Hence, the appeal is denied.

#### **Determination**

40. As such and 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 Respondent

was incorrect to apply the provisions of section 865 TCA 1997 and section 865B TCA 1997.

41. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax and duties. The Appellant was correct to appeal to have clarity on the position.
42. This appeal is hereby determined in accordance with Part 40A TCA 1997 and in particular, section 949 thereof. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Claire Millrine  
Appeal Commissioner  
21 August 2023