AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

143TACD2023

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This appeal comes before the Tax Appeals Commission (hereinafter the "Commission") against a Notice of Amended Assessment to Income Tax for the year 2013 raised by the Revenue Commissioners (hereinafter the "Respondent") on 27 September 2017.

2. The amount of tax in dispute is €14,161.

Background

3. [redacted] (hereinafter the "Appellant") was employed by an employer in [redacted] and was subsequently assigned to perform the duties of her employment for [redacted] (hereinafter the "Employer") between 6 February 2012 and 31 April 2014.

4. The Appellant claims that she entered into a Tax Equalisation Agreement (hereinafter the "Agreement") with her employer for the period of her assignment in Ireland whereby she maintained the same net in-hand salary as she received in [redacted] whilst working in Ireland. Pursuant to the Agreement, the Appellant had an obligation to repay any refund of Irish tax to her employer.

5. The terms of the Appellant's employment in Ireland meant that she qualified for the Special Assignee Relief Program (hereinafter "SARP") under the provisions of section 825C of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997").

6. During 2013, the SARP scheme provided relief from Income Tax on 20% of an assignee's income, profits or gains from their employment between €75,000 and €500,000. No relief in relation to Universal Social Charge (hereinafter "USC") applied under the SARP scheme and Pay Related Social Insurance (hereinafter "PRSI") was payable where the assignee was not liable to social insurance contributions in their home country.

7. The Appellant claimed relief under the SARP scheme by way of a Form 11 Income Tax Return which she signed on 18 August 2015 and which the Employer subsequently filed with the Respondent.

8. The P35 for 2013 filed by the Employer with the Respondent in early 2014 returned the following relevant information in relation to the Appellant's employment:

Pay	€282,366
Tax Paid	€105,582
Gross Pay	€284,126

USC	€ 19,208

9. On 28 August 2015 the Appellant, through her Tax Agent, filed a Form 11 Income Tax return for 2013 which contained the following relevant information:

Taxable Pay	€242,699
Amount of Income relieved under SARP	€ 50,310
Income Tax Payable	€ 68,691
Gross Pay for USC	€244,459
USC Payable	€ 16,431
Balance of Tax Overpaid	€ 39,668

10. The Appellant claims that the amount of €242,699 reflects her relevant income for 2013.

11. On 27 September 2017 the Respondent raised a Notice of Amended Assessment to Income Tax for the year 2013 as follows:

Amount of Income arising	€282,366.00
SARP relief	€ 62,210.00
USC payable	€ 19,207.00
Amount of Tax Chargeable	€102,583.58
Credits (personal)	€ 3,300.00
Amount of Tax Payable	€ 99,283.00
Credits (other) - Paid PAYE - USC deducted under PAYE - Less Refunded / Offset - Total	 €105,582.00 € 19,208.00 € 23,634.85 €101,155.15

Amount of Tax Overpaid	€ -1,871.57
Less amount paid directly to Collector General for this period	€23,634.85
Balance of Tax Overpaid for this period	€25,506.42

12. The amount of tax being appealed therefore is €14,161 being the difference between the Appellant's final self-assessment for 2013 which indicated a Balance of Tax Overpaid of €39,668 and the Respondent's Notice of Amended Assessment for 2013 which indicated a Balance of Tax Overpaid of €25,506.

13. The Appellant did not appear at the oral hearing of this appeal.

Legislation and Guidelines

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

Section 825C of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997")(as in force from 1 January 2013 to 31 December 2014)

"*825C Special assignee relief programme*

(1)In this section -

'associated company', in relation to a relevant employer, means a company which is the relevant employer's associated company within the meaning of section 432;

'relevant employer' means a company that is incorporated, and tax resident, in a country or jurisdiction with the government of which arrangements are for the time being in force by virtue of subsection (1) or (1B) of section 826;

'relevant employment', in relation to a relevant employee, means an employment held by the relevant employee with a relevant employer;

'relevant income', in relation to a relevant employee and a tax year, means the relevant employee's income, profits or gains for a tax year from an employment with a relevant employer or with an associated company, including any specified amount for which a deduction is claimed under subsection (3) but excluding the following:

(a)any expense to which section 118 applies;

(b)any amount treated as emoluments of an employment under section 121(2)(b)(ii);

(c)any sum treated for the purposes of section 112 as a perquisite of an employment by virtue of section 122;

(d)any payment to which section 123 applies;

(e)any sum deemed to be profits or gains arising or accruing from an employment by virtue of section 127(2);

(f)any bonus payment, whether contractual or otherwise;

(g)any gain to which section 128 applies;

(h)any shares or share based remuneration provided by or on behalf of the relevant employer or associated company of the relevant employer;

'Revenue officer' means an officer of the Revenue Commissioners;

'specified amount', in relation to a relevant employee and a tax year, means an amount determined by the formula -

(A-B) × 30 per cent

where -

A *is the amount of the relevant employee's income, profits or gains from his or her employment with a relevant employer or associated company for the tax year, excluding any amount that is not assessed to tax in the State, and after deducting any contribution or qualifying premium in respect of which there is provision for a deduction under section 774(7), 787, 787E or 787N, but where this amount exceeds €500,000, A shall be €500,000 (in this section referred to as the 'upper threshold'), and*

B *is €75,000 (in this section referred to as the 'lower threshold');*

'tax year' means a year of assessment for income tax purposes.

(2)(a) In this section 'relevant employee' means an individual who -

(i)for the whole of the 12 months immediately before his or her arrival in the State was a full time employee of a relevant employer and exercised the duties of his or her employment for that relevant employer outside the State,

(ii)arrives in the State in any of the tax years 2012, 2013 or 2014, at the request of his or her relevant employer to -

(I)perform in the State the duties of his or her employment for that employer, or

(II)to take up employment in the State with an associated company,

(iii)performs the duties of his or her employment in the State for that relevant employer or for that associated company, as appropriate, for a minimum period of 12 consecutive months from the date he or she takes up residence in the State, and

(iv)was not resident in the State for the 5 tax years immediately preceding the tax year in which he or she first arrives in the State for the purposes of performing the duties referred to in subparagraph (iii).

(b)In determining whether the duties of an employment are performed in the State, any duties performed outside the State, the performance of which is merely incidental to the performance of those duties in the State, shall be treated as having been performed in the State.

(3) (a)Where, for a tax year, a relevant employee -

(i)is resident in the State for tax purposes and is not resident elsewhere,

(ii)performs in the State the duties of his or her employment with a relevant employer or the duties of an employment with an associated company, and

(iii)has relevant income from his or her relevant employer or from the associated company which is not less than €75,000,

and makes a claim in that behalf, then that relevant employee shall be entitled, in respect of each of the 5 consecutive tax years commencing with the tax year for which he or she is first entitled to relief under this section, to have an amount of income, profits or gains from his or her employment with a relevant employer or from his or her employment with an associated company equal to the specified amount deducted from the income, profits or gains to be assessed on that relevant employee.

(b)A claim made under this section shall be accompanied by a certificate from a relevant employer or associated company, as the case may be, confirming that the conditions set out in subparagraphs (i), (ii) and (iii) of subsection (2) (a) are satisfied.

(4)A relevant employee shall be first entitled to claim relief under this section only for -

(a)the first tax year in which he or she arrives in the State for the purposes set out in subsection (2)(a)(ii) provided that for that tax year he or she is resident in the State for tax purposes and not resident elsewhere,

(b)if not resident in the State for tax purposes for that first tax year, the tax year following that first year provided that for that following tax year he or she is resident in the State and not resident elsewhere, or

(c)where in that first tax year, he or she is resident in the State for tax purposes and is also resident elsewhere, the tax year following that first tax year provided that for that following tax year he or she is resident in the State for tax purposes and not resident elsewhere.

(5)Where a relevant employee performs in the State the duties of a relevant employment or the duties of an employment with an associated company for less than an entire tax year in respect of which a claim under this section is made, the upper and lower thresholds and the amount of relevant income shall be reduced proportionately.

(6)In any tax year in which a relevant employee is entitled to make a claim for relief under subsection (3), the payment or reimbursement by the relevant employer or by an associated company of -

(a)the reasonable costs associated with one return trip from the State for the relevant employee, his or her spouse or civil partner, and a child of the relevant employee or of the relevant employee's spouse or civil partner to -

(i)the country of residence of the relevant employee before his or her arrival in the State,

(ii)the country of residence of the relevant employee at the time of first employment by the relevant employer, or

(iii)the country of which the relevant employee or his or her spouse or civil partner is a national,

and

(b)the cost of fees, not exceeding €5,000 per annum in respect of each child of the relevant employee or each child of his or her spouse or civil partner, paid to a school established in the State and which has been approved by the Minister for Education and Skills for the purposes of providing primary or post-primary education to students,

shall not be chargeable to tax.

(7)Where for a tax year a relevant employee makes a claim for relief under this section -

(a)relief shall not be given under section 823A, 825A or 472D for that tax year, and

(b)section 71(3) shall not apply to any of the income, profits or gains from an employment with a relevant employer or with an associated company.

(8)Where for a tax year a relevant employee makes a claim for relief under this section, the relevant employee shall, notwithstanding anything to the contrary in Part 41A or section 1084, be deemed for that tax year to be a chargeable person for the purposes of Part 41A.

(9)Notwithstanding the requirement on a relevant employer or associated company, as the case may be, to deduct tax under Chapter 4 of Part 42 on the specified amount, no such tax deduction need be made where, following an

application by the relevant employer or associated company, as appropriate, a Revenue officer confirms in writing that no such deduction need be made.

(10)Where for a tax year a relevant employer or associated company, as the case may be, certifies that an employee meets the conditions as set out in subparagraphs (i), (ii) and (iii) of subsection (2)(a), the relevant employer or associated company shall be required to deliver to the Revenue Commissioners an annual return setting out -

(a)in respect of each such employee -

(i)the name and PPS Number, and

(ii)the amount of income, profits or gains in respect of which tax was not deducted in accordance with subsection (9),

and

(b)details of the increase in the number of employees employed, or details of the number of employees retained, by the relevant employer or associated company as a result of the assignment to the State of employees who benefit under this section.

(11)Where for a tax year a relevant employee is entitled to relief under Part 35 for tax paid, under the laws of a territory other than the State, on the income, profits or gains from an employment with the relevant employer or with an associated company, the amount of such income, profits or gains shall be excluded from the construction of 'A' in the formula in the definition of 'specified amount' in subsection (1).

(12)Notwithstanding anything in the Tax Acts, the income, profits or gains from an employment with a relevant employer or with an associated company shall, for the purposes of this section, be deemed not to include any amounts paid in respect of expenses for which deductions would be due under section 114."

Submissions

15. The following is a summary of the submissions made by both Parties and in addition the evidence adduced on behalf of the Appellant.

Witness Evidence – [redacted]

16. The following is a summary of the direct evidence adduced to the Commissioner by [redacted] (hereinafter the "Witness") who is a Director of Tax at [redacted] and also a payroll Tax Advisor to the Employer.

17. The Witness stated that for a person who works under a tax equalisation agreement or in a tax equalised situation, they do not have an agreed gross salary figure with their employer. Instead, she stated, they have an agreement with their employer in relation to the net salary figure which they will receive. She stated that the reason an employer would offer an employee a tax equalised salary is to ensure that a move from one tax jurisdiction to another would not disadvantage an employee.

18. She stated that tax equalisation agreements set out the amount of tax liability which the employee will pay, which is normally the same taxes as the employee would pay in their home tax jurisdiction and which is referred to as "Hypothetical Tax" or "Hypotax". In addition she stated that tax equalisation agreements will in normal course set out that the employer will pay the balance of any tax liability which is payable in addition to the Hypotax amount. This, she stated, was what was agreed between the Appellant and the Employer as part of the general terms and conditions of the Appellant's employment.

19. The Witness stated that tax equalisation agreements impact on tax calculations as the employer does not know what the employee's gross pay situation is for tax purposes. She stated that, in a tax equalisation situation, and employer must work backwards from the net pay position and perform a "re-gross" calculation which will establish the employee's gross pay position. This, she stated, is necessary because when an employer pays tax, there is also tax on the tax which the employer pays and therefore tax is payable on the tax paid by the employer. She stated that the calculation is a circular calculation which is necessary in order to calculate what the Employer's ultimate tax cost is.

20. The Witness referred to the Employer's "International Assignment Home Net Tax Policy" document the key objectives of which are set out at paragraph 1.1 and which are stated as being:

> "*Maintain the assignee's income and social tax liability at a level approximating the income and social tax liability they would incur if they remained solely taxable in their home country and did not receive any assignment-related allowances and benefits;*
>
> *Facilitate compliance with all tax and social security laws and filing requirements.*"

21. The Witness also referred to paragraph 2 of the Employer's "International Assignment Home Net Tax Policy" which states:

> "*The principal feature of this Tax Policy is that the assignee is retained on their home country salary structure and receives their core compensation with approximately the same effective income tax rate and social tax burden that would have been payable on this core compensation had the assignee remained at home.*"

22. The Employer's "International Assignment Home Net Tax Policy" also refers to the Hypotax situation under the Agreement at paragraph 2.2 and in section 4 thereof which sets out detail in relation to an employee's Hypotax situation.

23. The Witness stated that the Appellant was paid through the Employer's monthly payroll system whereby the Employer in Ireland shadowed the Employer's payroll system in [redacted], looking at the payments made to the employee and determining the taxability of those payments in Ireland. This, she stated, necessitated a re-gross calculation to determine what liability was required to be paid to the Respondent on a monthly basis.

24. The Witness stated that in SARP qualified employee situations, an employer has the option to claim SARP relief on a monthly basis through the payroll system or to claim SARP relief by way of a year-end tax return to the Respondent. She stated that in the Appellant's case, SARP relief was not claimed through the monthly payroll system and for 2013 the Appellant submitted her SARP relief claim by way of a Form 11 return submitted to the Respondent in August 2015.

25. The Witness stated that, as the SARP relief was not claimed by the Appellant through the payroll system, the P35 return made by the Employer to the Respondent indicated that the Appellant's gross pay figure was €282,366. She stated that the taxes paid through the Employer's payroll system were €124,790 and this ignores any refund which was due to the Appellant through the Form 11 return for 2013 which she filed with the Respondent in August 2015.

26. The Witness stated that the gross pay amount submitted by the Appellant in her Form 11 return for 2013 was €242,699 which reflected the Appellant's gross pay after the circular calculation had been carried out. The result of the Appellant's submission of her Form 11 return for 2013 was that a tax refund of €39,668 was indicated.

27. The Witness stated that the Notice of Amended Assessment issued by the Respondent on 27 September 2017 contained a gross salary of €282,366 and indicated a tax refund of €25,506. The difference of €14,162 between the tax refund of €39,668 indicated on the

Appellant's Form 11 return and the tax refund of €25,506 indicated in the Notice of Amended Assessment issued by the Respondent is the issue which is under appeal.

28. The Witness referred the Commissioner to a number of examples in relation to re-gross calculations in a tax equalisation situation which had been created for the purposes of this appeal, to include an example which she stated reflected the re-grossing exercise which had been undertaken in respect of the Appellant's salary and which demonstrated where the gross salary figure of €242,699 for 2013 came from. The figures for this example were accompanied by a more detailed circular calculation iterations which the witness stated was the calculation which established the Appellant's total tax liability. The Witness also referred to a calculation which had been carried out based on the Respondent's gross pay figure of €282,366

Appellant's Submissions

29. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Appellant. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.

30. The Appellant submitted that that the Respondent's assessment is incorrect in all material respects, having regard to the amounts paid to or on behalf of the Appellant.

31. It is the Appellant's submission that the Respondent's assessment of the 2013 income tax and USC liability in the amount of €99,283 is excessive. It is also the Appellant's view that the Respondent's assessment of the amount of income arising in 2013 of €282,366 is excessive. The Appellant submitted that the additional emoluments included on the Respondent's assessment are over and above the amount of income tax and USC which the Appellant's employer actually paid in 2013.

32. The Appellant accepted that the payment of tax by an employer is an emolument of the employment in line with S112 TCA 1997.

33. The Appellant submitted that the payment of tax by the Employer accordingly falls within the definition of "specified amount" as per section 825C(2B)(b)(i) of the TCA1997 as it forms part of the amount of the relevant employee's income, profits or gains for the tax year from the employment. The Appellant submitted that the SARP relief under section 825C of the TCA1997 should therefore form part of the re-grossing calculation.

34. The Appellant submitted that the methodology used in the re-grossing calculation submitted in support of the Appellant's position is consistent with the accepted approach of re-grossing in the Respondent's Tax and Duty Manual 42- 04-65 Chapter 5.

35. The Appellant submitted that the Employer is obliged to incur any Irish taxes on behalf of the Appellant under the Agreement. It was submitted that, as a result it follows, should there be a reduction in the taxes that the Appellant must pay, the Employer will benefit from the reduction in taxes being paid on behalf of the Appellant whether directly or otherwise.

36. The Appellant submitted that the aim of the SARP relief was to reduce the cost to employers of assigning skilled individuals in their companies from abroad to take up positions in the Irish based operations of their employer.

37. In support of this the Appellant submitted that the Respondent's "Report of the Office of Revenue Commissioners Analysis of Special Assignee Relief Programme 2012 and 2013" establishes a legitimate expectation that employers could in fact benefit from SARP relief in cases where the employees are equalised. The Appellant pointed to the following extract from that report: "*The aim of the relief is to reduce the cost to employers of assigning skilled individuals in their companies from abroad to take up positions in the Irish-based operations of their employer or an associated employer, thereby facilitating the creation of jobs and the development and expansion of businesses in Ireland*."

38. In addition, the Appellant pointed to the Finance Bill 2012: Second Stage Dáil Éireann debate on Tuesday, 14 Feb 2012 wherein the Minister for Finance stated in respect of the Special Assignee Relief Programme that, "*This incentive is about reducing the costs to businesses of attracting key individuals from abroad to work in the Irish-based operations of their employer. The relief is designed to help firms which wish to assign employees from other parts of their company to come here to expand or develop their Irish operations which will help retain or increase employment here.*"

39. The Appellant referred to the case of *Revenue and Customs Commissioners v Martin* [2014] BTC 527 which it was submitted analysed the concept of "negative taxable earnings" where the payment of the tax refund back to the employer by the employee (or directly from Revenue to the employer as it was submitted is the case in this appeal) reduces the employee's taxable income. This case it was submitted refers to the repayment of part of a bonus to the employer and found that the payment by the employee

back to the employer arose directly from his employment and was made for the purposes of the employment.

40. The Appellant also referred to the case of *Perro v Mansworth (HMIT)* [2001] Sp C 286 and the comments of the Special Commissioner as follows: "*Both parties are agreed that the payments of tax by the appellant's employer were emoluments*". It was submitted that the individual in this case was assigned to the UK under a guaranteed net pay equalisation agreement. It was submitted that the agreed approach of HMRC in calculating the taxable amount therein shows that the gross up taxes are equal to the amount of the tax ultimately due. It was submitted that in the Respondent's assessment, the gross up taxes are not equal to the amount of the tax ultimately due. That is to say that the employee's gross pay less taxes is not equal to the employee's fixed net pay within the Respondent's assessment. This is at odds with the accepted method of re-grossing as in *Perro v Mansworth* and the Respondent's own practice manuals.

41. The Appellant submitted that it was possible for SARP relief to be claimed through the monthly payroll system operated by the Employer and that, if she had done so, her "relevant income" as defined in section 825C of the TCA1997 would have been €242,699. It was submitted that whether the claim for SARP relief was made through the monthly payroll system operated by the Employer or whether the claim for SARP relied was made through the submission of a Form 11 Income Tax return should not impact on the Appellant's overall tax liability. The Appellant submitted extensive calculations both in the hearing documentation submitted prior to the first day of the oral hearing and also in supplemental submissions which the Commissioner directed the Parties to make following the first day of oral hearing.

Respondent's Submissions

42. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Respondent. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.

43. The Respondent submitted that whether the Appellant entered into a tax equalisation agreement with her employer is irrelevant to the operation of the SARP relief pursuant to section 825C of the TCA1997. The Respondent submitted that tax equalisation agreement is a private matter as between the Appellant and her employer.

44. The Respondent submitted that the Revenue Statement of Practice IT/3/07, which was in place in 2013 and up to 31 December 2017, makes it clear that tax equalisation agreements are private matters as between the employee and employer and have no application or relevance to the calculation of taxes due. The Statement of Practice provides *inter alia* as follows:

    - "*The detail of a tax equalisation or tax protection arrangement is a matter for the employee and his/her employer*"
    - "*The income attributable to the performance of the duties of a non-Irish employment in the State is chargeable to tax under Schedule E and that therefore the appropriate deductions must be made under the PAYE system. Any method of calculation used by an employer must satisfy this requirement.*"
    - "*… a tax equalisation arrangement between an employee and his/her employer may contain an agreement that the employee will reimburse certain refunds of tax to the employer. Such an arrangement is a matter for the employer and the employee.*"

45. The Respondent submitted that the relief available to the Appellant is provided for in section 825C(2B) of the TCA1997.

46. The Respondent submitted that according to the P35 filed by the Employer, the Appellant earned a gross taxable salary of €282,366 in 2013. This, the Respondent submitted, is the "relevant income" in the context of section 825C of the TCA1997 and is the amount on which the SARP relief calculation is based. The Respondent submitted that this is the position which it adopted when calculating the SARP relief.

47. The Respondent submitted that in the Appellant's case the SARP relief available for 2013 in accordance with section 825C(3)(a) of the TCA1997 has the effect of reducing the Appellant's relevant income (€282,266) by €62,210 leaving taxable income of €220,156. The Respondent submitted that applying the rates of income tax and USC applicable in 2013 the calculation gives rise to income tax and USC of €99,283.58.

Material Facts

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

i. The Appellant was assigned by her employer company in [redacted] to perform the duties of her employment for [redacted] between [redacted] 2012 and [redacted] 2014;

ii. The terms of the Appellant's employment in Ireland meant that she qualified for the Special Assignee Relief Program under the provisions of section 825C of the TCA1997;

iii. The Appellant was a "relevant employee" as defined in section 825C(1) of the TCA1997;

iv. The employer was a "relevant employer" as defined in section 825C(1) of the TCA1997;

v. The Appellant claimed relief under the SARP scheme by way of a Form 11 Income Tax Return which she signed on 18 August 2015 and which the Employer subsequently filed with the Respondent;

vi. The P35 for 2013 filed by the Employer with the Respondent returned the following relevant information in relation to the Appellant's employment:

Pay	€282,366
Tax Paid	€105,582
Gross Pay	€284,126
USC	€ 19,208

vii. On 28 August 2015 the Appellant, through her Tax Agent, filed a Form 11 Income Tax return for 2013 which contained the following relevant information:

Taxable Pay	€242,699
Amount of Income relieved under SARP	€ 50,310
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USC Payable	€ 16,431
Balance of Tax Overpaid	€ 39,668

49. On 27 September 2017 the Respondent raised a Notice of Amended Assessment to Income Tax for the year 2013 as follows:

Amount of Income arising	€282,366.00
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USC payable	€ 19,207.00
Amount of Tax Chargeable	€102,583.58
Credits (personal)	€ 3,300.00
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Amount of Tax Overpaid	€ -1,871.57
Less amount paid directly to Collector General for this period	€23,634.85
Balance of Tax Overpaid for this period	€25,506.42

50. The following material fact is at issue in this appeal:

    i. The Appellant had entered into a Tax Equalisation Agreement with her Employer for 2013;

    ii. The Appellant's "relevant income" in 2013.

51. 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 (hereinafter "*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".*

The Appellant had entered into a Tax Equalisation Agreement with her Employer for 2013:

52. It has been submitted by the Appellant that she entered into a Tax Equalisation Agreement with her Employer.

53. No specific document in the form of a signed Tax Equalisation Agreement between the Appellant and her Employer has been submitted in support of this appeal.

54. As part of the hearing documentation submitted on behalf of the Appellant was a document published by [redacted] entitled "*International Assignment Home Net Tax Policy*" [redacted], updated in October 2014 (hereinafter the "IAHNTP").

55. The Commissioner has considered the IAHNTP which is a 23 page document. The document sets out at section 1.1 the Policy Objectives as being:

> "• *Maintain the assignee's income and social tax liability at a level approximating the income and social tax liability they would incur if they remained solely taxable in their home country and did not receive any assignment-related allowances and benefits;*
>
> • *Facilitate compliance with all tax and social security laws and filing requirements.*"

56. In addition, section 6.5 of the IAHNTP sets out the following:

> "*6.5 Tax Bills and Refunds*
>
> *Any tax bill, notice or correspondence received by the assignee from the host country tax authorities should be forwarded to the nominated tax service provider in the host country.*
>
> *The tax provider will review the tax bill and advise on the responsibility for payment as appropriate.*

The assignee is obliged to provide the necessary authorisations to the relevant tax authorities to arrange for refunds to be paid directly to the Company (where possible).

Any refund received by the assignee should be forwarded directly to the Company unless the nominated tax service provider instructs otherwise. In the event that the assignee receives a host country tax refund, the assignee is obliged to forward this refund to the Company. The nominated tax service provider will reconcile the Company and personal liabilities to determine whether the Company or assignee owes any further amounts."

57. Under cross examination, the Respondent put it to the Witness that no evidence of the Appellant having entered into a Tax Equalisation Agreement had been submitted during the conduct of this appeal. In response the Witness stated that the IAHNTP is a policy document forming part of the wider documentation contained in a Roche International employment contract.

58. The Commissioner has considered the evidence adduced by the Witness in this regard. The Commissioner notes that the IAHNTP submitted was published in October 2014, however the Commissioner notes that it is the [redacted] edition of the policy document. Whilst no evidence has been submitted as to what edition of the policy was in force in 2013, or indeed what edition of the policy was in force when the Appellant began her employment in [redacted], the Commissioner is satisfied on the balance of probabilities that an international [redacted] business which has a mobile international workforce would have such a policy in place.

59. Therefore, on the balance of probabilities, the Commissioner finds as a material fact that the Appellant was party to a tax equalisation policy with her Employer during 2013.

<u>The Appellant's relevant income in 2013:</u>

60. There is no dispute between the Parties as to the meaning or interpretation of section 825C of the TCA1997. The dispute between the Parties is the quantum of the Appellant's 2013 "relevant income" for the purposes of section 825C of the TCA1997 and for the purposes of claiming SARP relief.

61. "Relevant income" is defined in section 825C(1) of the TCA1997 as meaning a "*relevant employee's income, profits or gains for a tax year from an employment with a relevant employer …including any specified amount for which a deduction is claimed under*

subsection (3) but excluding…" eight separate exclusions none of which apply to the Appellant's 2013 income position.

62. "Tax year" for the purpose of SARP is defined in section 825C(1) of the TCA1997 as meaning "*a year of assessment for income tax purposes"*.

63. It is contended on behalf of the Appellant that the correct amount for her "relevant income" is €242,699. The amount of €242,699 was calculated through a circular calculation which was submitted on behalf of the Appellant during the course of the appeal.

64. On the other hand, the Respondent contends that the figure of €282,366 which was included in the P35 for 2013 returned by the Employer to the Respondent represents the Appellant's "relevant income". This is the amount which was included in the Employer's P35 return for 2013 which was submitted to the Respondent and is the gross pay amount on which the Notice of Amended Assessment raised by the Respondent is based.

65. The Commissioner notes that it is contended on behalf of the Appellant that, prior to her assignment to Ireland, she had a net pay position in [redacted] of €157,577. The Commissioner notes that no documentary evidence of the Appellant's net pay position of €157,577 in [redacted] in 2011 or any time prior to her arrival in Ireland in [redacted] 2012 has been submitted during the course of this appeal.

66. The Commissioner further notes that a net pay position of €157,577 is the starting point of the circular calculation submitted on behalf of the Appellant and which resulted in the figure of €242,699 as being the Appellant's relevant income. The figure of €242,699 was input as the Appellant's gross pay figure in her Form 11 Income Tax return for 2013 which was submitted to the Respondent in August 2015.

67. The circular calculation "re-grosses" the Appellant's claimed net pay position and through in or around 10 iterations purports to establish that the Appellant should pay €85,121 as a tax liability, thereby bringing her "relevant income" amount to €242,699. The re-grossing circular calculation takes into account the affect that claiming and receiving SARP relief might have on the Appellant's 2013 pay.

68. The Appellant has set out, in supplementary submissions directed by the Commissioner, the position in which the Appellant's pay would have been had the SARP relief claim for 2013 been made in 2013 through the Employer's monthly payroll system. These calculations establish that, if the Appellant had made her SARP relief claim for 2013 in 2013 through the Employer's payroll system, her "relevant income" would have been €242,699. The Commissioner has already found as a material fact, and it is not disputed

on behalf of the Appellant, that the Appellant's claim for SARP relief for 2013 was not made in 2013 but rather was made in August 2015.

69. It was submitted by the Appellant that whether the claim for SARP relief was made through the monthly payroll system operated by the Employer or whether the claim for SARP relief was made through the submission of a Form 11 Income Tax return should not impact on the Appellant's overall tax liability.

70. Charleton J in *Menolly Homes* stated at paragraph 12 of his judgment as follows:

> "*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…*"

71. The Commissioner considers that this also applies to claims for tax relief. There is no equity in the application of a relief. Tax reliefs, such as SARP relief, arise through legislation. A relief is not applicable unless the circumstances of the relief are defined by statute, in this instance section [redacted] 825C of the TCA1997.

72. The charge to tax, or in this case the relief, is contained in section 825C of the TCA1997 which has set out the meaning of "relevant income" as being a "*relevant employee's income, profits or gains for a tax year from an employment with a relevant employer …including any specified amount for which a deduction is claimed under subsection (3)…*".

73. The tax year in question is 2013.

74. The P35 for 2013 return submitted by the Employer to the Respondent indicates that during 2013 the Employer processed pay of €282,366 to include the payment of Income Tax and USC relating to the Appellant's employment.

75. The Commissioner notes the provisions of section 825C(9) of the TCA1997 which states:

> *"(9)Notwithstanding the requirement on a relevant employer or associated company, as the case may be, to deduct tax under Chapter 4 of Part 42 on the specified amount, no such tax deduction need be made where, following an application by the relevant employer or associated company, as appropriate, a Revenue officer confirms in writing that no such deduction need be made.*"

76. The Employer did not receive a confirmation in writing pursuant to section 825C(9) of the TCA1997.

77. The stark fact is that the Appellant did not apply for SARP relief for 2013 until August 2015. The fact that the Appellant was entitled to SARP relief in 2013 but did not claim it until August 2015 means that no change to the amount of the pay figure of €282,366 can or should be made simply on the basis that had the Appellant applied for SARP relief in 2013 her "relevant income" amount would have been reduced. What the Appellant seeks to do is to persuade the Commissioner to apply an "if / then" hypothesis to her 2013 position, that is to say if she had made a claim for SARP relief in 2013, then her relevant income would have been €242,699. The Commissioner cannot and will not do this.

78. In addition, the Appellant seeks to have the Commissioner infer into the legislation viewpoints set out in pre-legislative debates in Dáil Éireann. The Appellant also seeks to have the Commissioner determine a claim for a legitimate expectation which she states she had based on information contained in guidance documents published by the Respondent which she claims should inform the Commissioner's determination.

79. 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 Appeal Commissioners appointed pursuant to that Act. Appeal Commissioners therefore have the jurisdiction set out in statute and do not have jurisdiction to set aside a decision of the Respondent based on alleged unfairness, breach of legitimate expectation or disproportionality, as such grounds of appeal do not fall within the jurisdiction of an Appeal Commissioner and thus, do not fall to be determined as part of this appeal. This comes within the jurisdiction and remit of the Courts.

80. The scope of the jurisdiction of an Appeal Commissioner, has been discussed in a number of cases, namely; *Lee v Revenue Commissioners* [IECA] 2021 18 (hereinafter "*Lee*"), *Stanley v The Revenue Commissioners* [2017] IECA 279, *The State (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 and is confined to the determination of the amount of tax owing by a taxpayer, in accordance with relevant legislation and based on findings of fact adjudicated by the Appeal Commissioner or based on undisputed facts as the case may be.

81. 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."

82. Therefore, the jurisdiction of an Appeal Commissioner does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings.

83. Applying the provisions and definitions of section 825C of the TCA1997 to the factual position of the Appellant's pay in 2013, the Commissioner finds as a material fact that the Appellant's "relevant income" in 2013 was €282,366.

84. The Commissioner has considered the impact of the Tax Equalisation IAHNTP on the Appellant's "relevant income" and finds that there is none. A Tax Equalisation Agreement between an employer and an employee is a private contractual agreement and has no legislative basis. Both Parties agree and have submitted that there is no legislative provision which provides for a Tax Equalisation Agreement to have an impact on a claim for SARP relief.

85. For the avoidance of doubt the Commissioner accepts the following as material facts in this appeal:

    i. The Appellant was assigned by her employer company in [redacted] to perform the duties of her employment for [redacted] between [redacted] 2012 and [redacted] 2014;

    ii. The terms of the Appellant's employment in Ireland meant that she qualified for the Special Assignee Relief Program under the provisions of section 825C of the TCA1997;

    iii. The Appellant was a "relevant employee" as defined in section 825C(1) of the TCA1997;

    iv. The employer was a "relevant employer" as defined in section 825C(1) of the TCA1997;

    v. The Appellant claimed relief under the SARP scheme by way of a Form 11 Income Tax Return which she signed on 18 August 2015 and which the Employer subsequently filed with the Respondent;

vi. The P35 for 2013 filed by the Employer with the Respondent returned the following relevant information in relation to the Appellant's employment:

Pay	€282,366
Tax Paid	€105,582
Gross Pay	€284,126
USC	€ 19,208

vii. On 28 August 2015 the Appellant, through her Tax Agent, filed a Form 11 Income Tax return for 2013 which contained the following relevant information:

Taxable Pay	€242,699
Amount of Income relieved under SARP	€ 50,310
Income Tax Payable	€ 68,691
Gross Pay for USC	€244,459
USC Payable	€ 16,431
Balance of Tax Overpaid	€ 39,668

viii. On 27 September 2017 the Respondent raised a Notice of Amended Assessment to Income Tax for the year 2013 as follows:

Amount of Income arising	€282,366.00
SARP relief	€ 62,210.00
USC payable	€ 19,207.00
Amount of Tax Chargeable	€102,583.58
Credits (personal)	€ 3,300.00
Amount of Tax Payable	€ 99,283.00
Credits (other)	

- Paid PAYE	€105,582.00
- USC deducted under PAYE	€ 19,208.00
- Less Refunded / Offset	€ 23,634.85
- Total	€101,155.15
Amount of Tax Overpaid	€ -1,871.57
Less amount paid directly to Collector General for this period	€23,634.85
Balance of Tax Overpaid for this period	€25,506.42

ix. The Appellant was party to a tax equalisation policy with her Employer during 2013;

x. The Appellant's "relevant income" in 2013 was €282,366.

Analysis

86. Section 825C of the TCA1997 sets out the basis on which an assignee qualifies for SARP relief and on which SARP relief may be claimed.

87. Having found as a material fact that the Appellant's relevant income for 2013 was €282,366 the Commissioner must then take the relevant income and apply SARP relief and other relief for which the Appellant qualified in 2013 to her income in order to establish the Appellant's tax liability for 2013.

88. Section 825C(3) of the TCA1997 sets out that where a relevant employee is entitled to the benefit of SARP relief and makes a claim for SARP relief, then that relevant employee shall be entitled to have an amount of income, profits or gains from his or her employment with a relevant employer equal to the specified amount deducted from the income, profits or gains to be assessed on that relevant employee for that tax year.

89. The "specified amount" is defined in section 825C(2B) as meaning an amount defined by the formula: (A-B) x 30%

Where "A" is the amount of the relevant employee's income, profits or gains for the tax year from the employment; and

"B" (for the tax year 2013) is €75,000.

90. As a result the Commissioner determines that the "specified amount" relating to the Appellant's 2013 SARP claim is calculated as follows:

    (€282,366 - €75,000) x 30%

    = €62,209.80 (rounded to €62,210)

91. The Commissioner further finds that the calculation of the Appellant's income tax liability in 2013 is as follows:

Gross taxable earnings from employment	€282,366
Less "specified amount"	(€62,210)
Taxable pay	**€220,156**
PAYE: 32,800@20% = € 6,560 187,356@41% = €76,816	€83,376
Less tax credits	(€ 3,300)
Net PAYE	**€80,076**
USC: 10,036@2% = € 201 5,980@4% = € 239 268,110@7% = €18,768	€19,208
Total tax	**€99,284**
Less tax / USC paid per P35	(€124,790)
Balance of tax overpaid	**€25,506**

92. The Commissioner determines that, as a result of the above calculation, the correct calculation of the amount of balance of tax overpaid by the Appellant for 2013 is as set out in the Respondent's Notice of Amended Assessment raised on 27 September 2017 as follows:

Amount of Income arising	€282,366.00
SARP relief	€ 62,210.00
USC payable	€ 19,207.00
Amount of Tax Chargeable	€102,583.58
Credits (personal)	€ 3,300.00
Amount of Tax Payable	€ 99,283.00
Credits (other) - Paid PAYE - USC deducted under PAYE - Less Refunded / Offset - Total	 €105,582.00 € 19,208.00 € 23,634.85 €101,155.15
Amount of Tax Overpaid	€ -1,871.57
Less amount paid directly to Collector General for this period	€23,634.85
Balance of Tax Overpaid for this period	**€25,506.42**

93. The Commissioner therefore determines that the amount of tax overpaid by the Appellant in 2013 was €25,506.42.

Determination

94. For the reasons set out above, the Commissioner determines that the Appellant in this appeal has not succeeded in her appeal.

95. The Commissioner determines that the amount of tax overpaid by the Appellant in 2013 was €25,506.42.

96. It is understandable that the Appellant will be disappointed with the outcome of her appeal. The Appellant was correct to check to see whether her legal rights were correctly applied.

97. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular, section 949AL thereof. This determination contains full findings of fact and reasons for the

determination. Any party dissatisfied with the determination has a right of appeal to the High Court on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll
Appeal Commissioner
05 September 2023