



Between

146TACD2023

██████████

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) by ██████████ (“the Appellant”) against an amended notice of assessment to income tax dated 27 November 2019 raised by the Revenue Commissioners (“the Respondent”), in respect of the tax year ending 31 December 2016, in the amount of €429,996.90. The assessment arose on foot of the exercise by the Appellant of employee share options.
2. The appeal proceeded by way of a hearing on 4 September 2023.

Background

3. The Appellant is a citizen of the ██████████ ██████████. In 2016 he was employed by an Irish-registered company, and stated that he was seconded to a ██████████-based company. He submitted his Form 11 income tax return for 2016 on 16 November 2017. The return stated that his income for 2016 was €271,384. The return did not state that the Appellant was non-resident in the State.

4. On 27 November 2019, the Respondent issued an amended notice of assessment to income tax in the amount of €426,996.90. This assessment was based on total income in 2016 of €1,092,550, including share options in the amount of €821,166.
5. On 26 December 2019, the Appellant appealed the amended notice of assessment to the Commission. The appeal proceeded by way of a remote oral hearing on 4 September 2023.

Legislation

6. Section 128(2) of the Taxes Consolidation Act 1997 as amended ("TCA 1997") states that

"Where a person realises a gain by the exercise of, or by the assignment or release of, a right obtained by the person on or after the 6th day of April, 1986, as a director of a company or employee, the person shall be chargeable to tax under Schedule E for the year of assessment in which the gain is so realised on an amount equal to the amount of his or her gain as computed in accordance with this section and shall be so chargeable notwithstanding that he or she was not resident in the State on the date on which the right was obtained."

7. Section 128B(3) of the TCA 1997 states that

"Relevant tax shall be due and payable to the Collector-General within 30 days after the exercise of the right to acquire the relevant shares, and shall be so due and payable without the making of an assessment, but relevant tax which has become so due and payable may be assessed on the taxable person (whether or not it has been paid when the assessment is made) if the tax or any part of it is not paid on or before the due date."

Submissions

Appellant

8. The Appellant appeared in person and was not represented. He stated that he was [REDACTED] resident and not domiciled in Ireland. He stated that in 2016 he was employed by [REDACTED] and seconded to [REDACTED]; consequently he spent a significant amount of time in [REDACTED]. He stated that he paid tax on the sale of the shares in [REDACTED] and he believed that the Respondent's amended notice of assessment amounted to double taxation.
9. He stated that, due to the impact of Covid-19 as well as a number of mergers and acquisitions involving his former employers, he had found it extremely difficult to procure

documentation relating to the transaction. He submitted an IRS Form W-2 Wage and Tax Statement for 2016 which showed for “Wages, Tips and Other Compensation” a return of █970,469, and stated that the sale of the shares was included in this amount. He also referred to another IRS document which stated that he owed █437,149.41 in taxes.

10. In his Outline of Arguments, the Appellant also referred to Article 24 of the Double Taxation Treaty between █ and Ireland. On the morning of the hearing, he submitted a document entitled “Legal Opinion” from a █, which submitted that the Appellant was a █ resident and “*should not be liable to pay Irish CGT on the sale of the shares.*” He stated that he had intended to procure a statement from the legal adviser to his former employer, but due to █, this did not prove possible. He also submitted a letter in his own name, outlining the personal difficulties and stresses caused by the ongoing tax appeal. In response to a query from the Commissioner, the Respondent confirmed that it was not objecting to the hearing proceeding, notwithstanding the late submission of the documentation and the non-attendance by █.
11. On cross examination, the representative of the Respondent stated that the amended notice of assessment was raised on foot of the exercise of the Appellant’s share options, which was a separate transaction to the sale of the shares. In response, the Appellant stated that he understood that under █ law, there was no taxation liable on the exercise of share options that had vested after four years. He stated that the exercise and sale of the shares was done collectively. In response to questions from the Commissioner, the Appellant stated that he sold the shares in 2016 and made a capital gain on them, tax on which he paid to the █ authorities.

Respondent

12. The Respondent was represented by █, Assistant Principal. In written submissions, the Respondent stated that the Appellant had not provided it with documentation showing that the Appellant had paid tax on the share option gain in the █. It stated that the Appellant was employed by an Irish-registered company, █, in 2016, which filed a Form RSS1 showing that the Appellant had exercised share options in 2016 with a gain of €821,165.90.
13. The Appellant had filed a Form 11 for 2016 which showed a gross salary from his employer of €271,384.36, but which did not include the income from the exercise of the share options. Additionally, the Form 11 did not declare that the Appellant was not an Irish resident in 2016, and a full PAYE employee tax credit was claimed for the year.

14. At the hearing, ██████ stated that the notice of amended assessment was raised on the exercise of the share option, and not the sale of the shares. He stated that, under section 128 of the TCA 1997, income tax was owed on the gain arising from the exercise of the share option, and the tax was due within 30 days of the exercise of the option.
15. He stated that, even if the Appellant remitted tax on the sale of the shares in ██████ this would not alter that tax was due in Ireland on the exercise of the option. The Appellant's employer was an Irish-registered company and had submitted the Form RSS1 showing the exercise of the share option, resulting in a gain of €821,165.90.
16. Regarding the documentation submitted by the Appellant, he stated that the Form W-2 did not identify the Appellant's employer, and therefore the Respondent could not say whether or not it was the same as his Irish employer. Additionally, the income under "Wages, Tips and Other Compensation" was not broken down so the Respondent could not identify whether it included the proceeds of sale of the shares. Regarding the other document submitted, he stated that it appeared that the year had been manually altered to 2016, so the Respondent was not satisfied that it applied to the tax year in question. Furthermore, it only showed that the Appellant owed tax, not that he had actually paid the tax owed to the ██████ authorities.
17. ██████ stated that the Appellant's employment details for 2016 showed that he earned 52 weeks of insurable contributions in Ireland. He stated that income earned in Ireland should have taxation paid upon it in Ireland, and any credit arising should be applied to the Appellant's ██████ taxes.

Material Facts

18. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:
 - 18.1. The Appellant was employed by ██████, an Irish-registered company, in 2016.
 - 18.2. In 2016, the Appellant exercised employee share options, resulting in a gain of €821,165.90.
 - 18.3. The Appellant filed a Form 11 for 2016 which stated that his income for the year was €271,384. The Form 11 did not include the gain from the exercise of the Appellant's share options. The Form 11 did not state that the Appellant was non-resident in 2016.

- 18.4. The Appellant was resident in Ireland in 2016.
- 18.5. There was no evidence submitted which clearly showed that the Appellant had paid tax on the exercise of the share options, or on the sale of the shares, to the tax authorities of the [REDACTED]
- 18.6. On 27 November 2019, the Respondent raised an amended notice of assessment to income tax in the amount of €426,996.00. This amended notice of assessment arose on foot of the calculation of the tax owing from the gain on the exercise of the Appellant's share options.

Analysis

19. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent's amended notice of assessment is incorrect. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*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.*"
20. The Respondent raised the amended notice of assessment against the Appellant following receipt of Form RSS1 from the Appellant's employer, showing that he exercised share options in 2016, which resulted in a gain of €821,165.90.
21. Section 128(2) of the TCA 1997 states that where a taxpayer exercises an employee share option, the taxpayer shall pay income tax on any gain arising. Section 128B(3) requires that the tax be paid within 30 days of the exercise of the share option. It was not disputed by the Appellant that he did not pay tax in Ireland on the exercise of the share option. The Appellant stated that he paid tax on the sale of the shares in the [REDACTED] and that therefore to pay tax in Ireland would amount to double taxation.
22. The Commissioner has considered the evidence and submissions before him from the parties and is not satisfied that the Appellant has demonstrated that the amended notice of assessment is incorrect. Firstly, he considers that the Appellant seemed somewhat confused as to how the amended assessment arose. His arguments, and those contained within the "Legal Opinion" submitted on his behalf, were focused on capital gains tax arising on the sale of the shares. However, the Respondent raised the amended assessment on foot of the exercise of the share option. The Commissioner is satisfied that the Respondent was entitled to do so under section 128 of the TCA 1997. The Appellant contended that he understood that, in [REDACTED] law, no tax arose on the exercise

of a share option which vested four years after the option was awarded. However, no evidence to support this contention was provided. In any event, as explained below, the Commissioner is satisfied that Irish law is applicable in this instance.

23. The Appellant contended that he was non-resident in Ireland and therefore taxation on the shares was not payable in this jurisdiction. However, the Commissioner notes that the Appellant filed a Form 11 for 2016 which showed income of €271,384 and which did not state that he was non-resident. The Appellant's employer, [REDACTED] was an Irish-registered company, and it submitted the Form RSS1 showing the gain of €821,165.90 arising from the exercise of the Appellant's share option. The Commissioner further notes the employment details for the Appellant showing that he earned 52 weeks' income in 2016 from his Irish employer. While the Appellant stated that he spent a "significant amount" of time in the [REDACTED] in 2016, the Commissioner considers that no other evidence was submitted that would go to show that he was non-resident in Ireland in that year. Consequently, the Commissioner finds that the Appellant was resident in Ireland in 2016.
24. Furthermore, the Commissioner is not satisfied that the Appellant has demonstrated that he paid tax in the [REDACTED] on the shares, on either the exercise of the option or on the sale of the shares. The Form W-2 does not break down the income stated to come within "Wages, Tips and Other Compensation" so it is not possible to identify what proportion, if any, of the stated income of [REDACTED]970,469 for 2016 included the shares. Additionally, the Commissioner accepts the Respondent's concerns that it was not possible to identify the Appellant's employer on the Form W-2, as the identification number was mostly hidden. In respect to the other document submitted, the Commissioner agrees with the Respondent that the relevant year seemed to have been manually altered to 2016 (and the Commissioner did not understand the Appellant to deny this at the hearing) and that it concerned unpaid taxes.
25. Consequently, the Commissioner is satisfied that the exercise of the Appellant's share options in 2016 was a taxation event. He does not consider that the Appellant has demonstrated that he was non-resident in Ireland in 2016 or that he otherwise did not owe the tax arising to the Irish taxation authorities. In any event, he is not satisfied that the Appellant has demonstrated that he paid tax, on either the exercise of the options or on the sale of the shares, to the IRS in the [REDACTED]. Therefore, he finds that the Respondent was entitled to raise the amended notice of assessment.
26. The Commissioner appreciates that the Appellant has found the circumstances surrounding the raising of the amended assessment and the subsequent appeal stressful,

and he also acknowledges the other difficulties set out by the Appellant in his letter of 1 September 2023 to the Commission. Nevertheless, the Commissioner is obliged to apply the law, and for the reasons set out herein is satisfied that the appeal cannot be successful. The Commissioner would note that the Appellant may be entitled to credit in the [REDACTED] in respect of the amended notice of assessment raised by the Respondent.

Determination

27. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising the amended notice of assessment to income tax for 2016 in the amount of €429,996.90. Therefore, the assessment stands.
28. The appeal is hereby determined in accordance with section 949AK of the TCA 1997. 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.



Simon Noone
Appeal Commissioner
08 September 2023

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