AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

41TACD2023

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("hereafter the Commission") of the decision of the Revenue Commissioners ("hereafter the Respondent") of 21 October 2021 to withdraw, among other reliefs, Single Person Child Carer Credit ("hereafter SPCCC") claimed by the Appellant for the years 2017, 2018, 2019 and 2020 ("the years in question" where referred to collectively). The withdrawal of SPCCC resulted in the Appellant being assessed as having a liability of €9,838.00, plus penalties and interest.

2. This assessment arose from a compliance intervention conducted by the Respondent as a consequence of the Appellant making an application with [redacted] under the "Help to Buy" scheme on or about 8 February 2019, which listed their address as [redacted], [redacted]. [redacted] (hereafter referred to as "the Appellant's partner") is the natural father of the Appellant's 9 year old son, in respect of whom she made the claim for SPCCC.

3. The Appellant delivered her Notice of Appeal on 5 November 2021. The appeal proceeded by way of oral hearing, which took place remotely on 7 December 2022. In the course of

the hearing the Appellant gave oral evidence. The Commissioner had the benefit of written and oral legal submissions provided by both parties.

Background and Evidence

4. At all times material to this appeal the Appellant was a PAYE taxpayer assessed as a single person.

5. The Appellant gave evidence that on or about August 2012 she entered into an intimate relationship with her partner. At some point in late 2013 their son was born. They remain a couple to this day.

6. The Appellant gave evidence that from the birth of her son until November 2021 she resided at her parents' home in [redacted] ("the family home"). Over this period several of her siblings resided in the same place. She said that due to the modest size of the family home she was forced on occasion to share a room with her son and one of her own sisters.

7. The Appellant gave evidence that over the same period her partner lived during the working week with his parents in his hometown of [redacted].

8. The Appellant gave evidence that her partner remained in [redacted] during the working week because he was employed as a plasterer by his father's plastering business. All of the trade of this business was, according to the Appellant, located in and around the County [redacted] area. Her partner could not, therefore, join her in [redacted] for the whole of the week without also abandoning his livelihood and source of income.

9. The Appellant gave evidence that her partner would invariably join her in [redacted] on Friday evenings and would live with her in her family home for the duration of the weekend. There was some lack of clarity as to whether the Appellant's partner would return to [redacted] on Sunday evening or on Monday morning. The Commissioner does not, however, consider this question to be decisive to the determination of this appeal. The Appellant stated that if the weekend included a bank holiday Monday, her partner would remain an extra day with her before returning to [redacted].

10. The Appellant gave evidence that although they lived apart during the week, she and her partner had a longstanding plan to purchase a property together in the [redacted] area when they had funds sufficient to do so. She gave evidence that with this in mind they opened a joint bank account and each contributed the sum of €500 per month for the purpose of saving for the deposit on a mortgage. It was not clear from the Appellant's evidence when this account was opened and when they each began making contributions.

It was clear however that this occurred over the course of the years in question. The Appellant stated that a significant factor in their living apart was to avoid having to pay rent, thereby maximising their ability to save.

11. The Appellant gave evidence that notwithstanding their joint saving for a property they lived otherwise independent financial lives. They had separate bank accounts. She was the person who shouldered the majority of the financial burden of caring for her child. This included paying €100 per week to her mother for their presence in the family home. The Appellant did acknowledge however that her partner contributed money to the minding of her child.

12. The Appellant stated that when she and her partner made their application for Help to Buy relief they were still living apart from one another on weekdays, although they planned for that to end in the near future. It was only in November 2021, having managed to purchase a property in [redacted] with her partner, that they moved in together on a full-time basis.

13. The Appellant did not dispute that she and her partner were in an intimate and committed relationship during the years in question. In response to questions put to her during the hearing, she stated that she would sometimes attend social events with her partner, including on rare occasions weddings. She would, also on rare occasions, go on short breaks with her child and her partner, which they paid for together.

Relevant Legislation

14. Section 462B of the TCA 1997 makes provision for a tax credit of €1,650 for single persons who have a "qualifying child" residing with them for the greater part of a year, or the greater part of a year following the birth of a qualifying child.

15. Under section 462B (1)(c) of the TCA 1997, the credit is not available:-

> *"(i) in the case of either party to a marriage unless—*
>
> > *(I) the parties are separated under an order of a court of competent jurisdiction or by deed of separation, or*
> >
> > *(II) they are in fact separated in such circumstances that the separation is likely to be permanent,*
>
> *(ii) in the case of either civil partner in a civil partnership unless the civil partners are living separately in circumstances where reconciliation is unlikely, or*
>
> *(iii) in the case of cohabitants."*

16. The word “cohabitant” is not defined in section 462B of the TCA 1997. However, section 1031P of the TCA 1997 provides that it:-

> “[…] *has the same meaning as in section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010”*

17. Section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (hereafter “the 2010 Act”) provides:-

> *“(1) For the purposes of this Part, a cohabitant is one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.*
>
> *(2) In determining whether or not 2 adults are cohabitants, the court shall take into account all the circumstances of the relationship and in particular shall have regard to the following:*
>
> *(a) the duration of the relationship;*
>
> *(b) the basis on which the couple live together;*
>
> *(c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;*
>
> *(d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;*
>
> *(e) whether there are one or more dependent children;*
>
> *(f) whether one of the adults cares for and supports the children of the other; and*
>
> *(g) the degree to which the adults present themselves to others as a couple.”*

Submissions

Appellant

18. The Appellant submitted that she did not reside with her partner for the years in question. Rather, during this period they spent the majority of their time over 200 kilometres apart, each living in their respective family homes. It was only when they both moved to their newly purchased property in [redacted] in November 2021 that they began to “*live together”,* such that they could be considered to be cohabitants within the meaning of

section 462B of the TCA 1997. The fact that they made a joint application for relief in 2019 under the Help to Buy Scheme was irrelevant in this regard.

19. The Appellant emphasised that it was not her preference that she and her partner live apart, especially in circumstances where they had a dependent son. Their decision to live where they did during the working week was a sacrifice made so that, in the end, they could live together in a property they both owned. The Appellant also emphasised that the majority of the cost of the care of her child had fallen to her and that, their joint saving for the mortgage deposit aside, they lived independent financial lives and had their own personal bank accounts.

20. On this basis the Appellant submitted that she should be assessed as having no liability arising from her claiming of SPCCC for the years in question. The Respondent's decision to withdraw it had been in error.

Respondent

21. The Respondent described its position succinctly in the following terms at para 2.4.5 and 2.4.6 of its Statement of Case:-

> *"On the basis that the appellant and her partner cannot be considered to be living separately as the appellant's partner cohabits with his family 3 nights per week, the SPCCC credit was withdrawn from the taxpayer for the period 2017 to 2020.*
>
> *The appellant's case centres on whether Revenue accepts the point that she does not cohabit full time. This point is not in dispute. The credit has been withdrawn on the basis that the appellant does not meet the conditions of the credit under the provisions of S462B TCA 1997 as she is cohabiting with her partner."*

22. In support of its submission that the Appellant and her partner were cohabiting, the Respondent relied on the judgment of Baker J in *DR v DC [2015] IEHC 309.* This concerned an application under section 194 of the 2010 Act for financial provision arising from the death of an intestate cohabitant. The issue in *DC v DR* was whether the plaintiff was a "*qualified cohabitant"* capable of obtaining provision. In this regard the plaintiff had to prove, firstly, that he and the deceased met the definition of "*cohabitants"*, namely that they had "[lived] *together as a couple in an intimate and committed relationship".* Secondly, he had to show that the cohabiting relationship had existed for more than five years prior to the death of the deceased.

23. In deciding that the plaintiff was a cohabitant, Baker J found that the evidence suggested that the plaintiff and the deceased had been in an intimate relationship since 1995 and

that they had lived together since at least 2004, when they moved in together on a full time basis. The judgment does not address whether they lived together for the period 1995 – 2004, during which time the plaintiff resided with the deceased for two or three nights a week and spent the balance in his family's homestead caring for his elderly mother.

Material Facts

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

- the Appellant has been in an intimate and committed relationship with her partner since approximately August 2012;
- on or about late 2013 the Appellant and her partner had a son;
- from early on in their relationship the Appellant and her partner lived apart during the working week;
- for the period Friday to Sunday they would live together in the Appellant's parents' house in [redacted]
- over a number of years, and during all of the years in question, the Appellant and her partner had a joint bank account into which they both lodged €500 every month for the purpose of accumulating enough money for a mortgage deposit;
- the Appellant paid €100 per week to her mother as payment for her and her son's presence in the family home;
- the Appellant paid the majority of the costs associated with the care of the son, however the Appellant's partner also contributed to the cost of childcare;
- on or about November 2019, the Appellant and her partner jointly applied for Help to Buy Relief. The application form listed their address as [redacted]
- as a consequence of this application the Respondent commenced a compliance check in relation to the Appellant's claim for SPCCC for the years in question;
- on or about 21 October 2021 the Appellant decided to withdraw the Appellant's SPCCC for the years in question. This gave rise to a liability on the part of the Appellant of €9,838.00;
- on or about 19 November 2021, the Appellant and her partner purchased a property in [redacted] as their family home and moved there shortly thereafter;

- the Appellant delivered her Notice of Appeal in respect of the Respondent's decision on 5 November 2021;

Analysis

25. In making provision for a tax credit for single persons caring for a "*qualifying child*", section 462B of the TCA 1997 excludes persons who are, married, civil partners living together and cohabitants. While this section does not define the term "*cohabitant*", a definition can be located elsewhere at section 1031P TCA 1997, which is within Part 44B entitled "*Tax Treatment of Cohabitants".* Therein it is provided that the term is to have the same meaning as that given in section 172 of the 2010 Act.

26. The Commissioner can see no reason why the definition of a cohabitant under section 462B of the TCA 1997 should differ from that under section 1031P of the TCA 1997. The Commissioner finds as a matter of law that they are the same.

27. Section 172 of the 2010 Act provides that a cohabitant is one of two adults who live together in an intimate and committed relationship. Subsection (2) therein provides a non-exhaustive list of circumstances to which one should have regard when determining whether two adults are or were cohabitants.

28. The Respondent adverted in legal submissions to *DR v DC,* in which Baker J considered the question of cohabitation at some length in the context of a couple who it was not disputed had lived under the same roof for a considerable time before one of them died. The issue, rather, was whether they had ever had an intimate relationship. In addition to this authority, the Commissioner considers the subsequent judgment of Allen J in *GR v Regan [2020] IEHC 89* to be of assistance in the determination of this appeal. There, also, the plaintiff sought an order for provision under section 194 of the 2010 Act in circumstances where the deceased was of unsound mind at the time of his death and, for a considerable period prior to this event, the plaintiff and the deceased had not lived under the same roof other than at weekends and on holidays due to the deceased's work commitments in Scotland and Germany. At paragraph 39 of the judgment, Allen J cited a pre-existing judgment of the Court of Appeal in considering the question the couple in his case "lived together":-

> *"In M.W. v D.W. (Unreported, Court of Appeal, 2nd October 2017), [2017] IECA 255, one of the issues considered by the Court of Appeal was whether the law required that a couple should have lived physically in the same shared residence at all times. Finlay Geoghegan J (with whom Irvine and Hogan JJ agreed) said, at para. 29 of her judgement:-*

'The concept of 'living with the other adult as a couple or living 'together as a couple' as stated in s. 172(1) is a legal concept for the purposes of s.172. There was considerable debate in the submissions before this Court as to whether the concept of living together as a couple for the purposes of s.172 required both adults to live physically in the same shared residence at all times. Examples were given of persons in an intimate and committed relationship living together as a couple and holding themselves out as a couple but where either work demands of one or other or ill health and hospitalisation require the couples to physically live in different places or even different countries for periods of time. I conclude that the legal concept of living together as a couple for the purposes of s.172 does not require two persons to live physically at all times in the same shared premises. Hence, notwithstanding that a couple may not be physically living day by day in the same residence during the two-year period immediately prior to the end of the relationship, s.172 envisages that a court may decide on all the relevant facts that they, nonetheless continued to live together as a couple during that period."

29. It should be noted that this judgment of the Court of Appeal is no longer unreported, having been including in the Irish Reports after the delivery of Allen J's judgment in *GR v Regan*. Its citation in this respect is *MW v DC,* [2020] 3 IR 569.

30. As noted by Allen J at paragraph 36 of *GR v Regan,* the "overarching requirement" in relation to cohabitation is that there must be a relationship that is "*intimate and committed".* There was no question in this appeal but that the Appellant and her partner were in just such a relationship. The evidence was that the Appellant and her partner have been together as a couple without apparent interruption since they first met on or about August 2012. Over this time they lived in separate places during the week, but together in [redacted] from Friday to the end of the weekend. While the Appellant contributed the majority of the cost of the care of her son, her partner also contributed a smaller amount. They had a joint bank account into which they both paid the monthly sum of €500 over a considerable period so that they could raise the deposit for a house. They were successful in this when, with the aid of the Help to Buy scheme, they purchased their new home in [redacted] in November 2019. While the Appellant indicated that she and her partner lived modest social lives, she did say that they would attend weddings together and would go on holiday with their child on rare occasions. It would therefore seem that they presented themselves to others as a couple.

31. The fact that the Appellant and her partner did not live together physically during the working week does not, as a matter of principle, preclude them from being cohabitants

during the relevant periods. This much is clear from paragraph 29 of judgment of the Court of Appeal in *MW v DC.*

32. There is no doubt that the decision of the Appellant and her partner to live apart during the working week was a major sacrifice. However, the Commissioner finds that due to the consistency and longevity of the arrangement whereby the Appellant and her partner resided together in her family home at weekends, they must be construed as falling within, to take the words of Finlay-Geoghegan J, the "*legal concept"* of a cohabitant under section 462B of the TCA 1997. As has already been found, this has the same meaning as under section 172 of the 2010 Act.

33. In making this finding, the Commissioner has had regard to the following matters. The duration of the relationship by the time of the years in question suggests that it was, and remains, a durable one. The Commissioner heard evidence that there was no especial financial dependency of one partner on the other and they had separate personal bank accounts. The Appellant shouldered most, though not all, of the cost of care of the child. The Appellant and her partner, however, also had a financial arrangement whereby they planned jointly to purchase a property that would become their family home. The Commissioner regards this as a form of provision for not just their own future, but that of their child too.

34. The Commissioner has also had regard to the content of the form for Help to Buy, in which both parties identified their residence as that [redacted]. While the Appellant argued that this was merely form filling and not indicative of the real circumstances of their living arrangements, it suggests that, by this point in 2019 at least, the partner had come to view himself as a living with the Appellant on a part-time basis.

35. The foregoing analysis and conclusion may appear harsh to the Appellant. The Commissioner has sympathy for the position in which the Appellant and her partner find themselves. However, as is clear from *Lee v Revenue Commissioners [2018] IECA 108,* it is the function of the Commissioner to interpret legislation in the manner intended by the Oireachtas and thus determine whether tax is owing and, if it is, the amount. It is clear that the legislation is intended to provide support in the form of tax credits to those single persons who do not live in an intimate and committed relationship, whether by way of marriage, civil partnership or cohabitation and must care and provide for a child alone. As it has been determined already that the Appellant and her partner were in such a relationship by way of cohabitation, her appeal of the decision withdrawing her credit for SPCCC for the years in question must be refused.

Determination

36. The Commissioner finds that the decision of the Respondent to withdraw SPCCC for the years 2017, 2018, 2019 and 2020 should stand. The Commissioner understands that the Appellant may be disappointed by this determination. The Appellant was, however, correct to exercise her right under the legislation to seek confirmation of her legal rights.

37. This appeal is determined in accordance with section 949AL TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

Conor O'Higgins
Appeal Commissioner
06/01/2023