



AC Ref: 17TACD2017

BETWEEN

NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

## DETERMINATION

### Introduction

1. This appeal concerns the entitlement to the employee tax credit pursuant to Taxes Consolidation Act 1997, section 472 in respect of the tax arising on the increase in the rate of the old age (contributory) pension paid in respect of his Appellant's spouse and lodged directly into the Appellant's bank account in respect of the years ended 31<sup>st</sup> December 2006 to 31<sup>st</sup> December 2009 inclusive.

### Background

2. The Appellant, having satisfied the assortment of conditions prescribed by the Social Welfare Consolidation Act 2005, became entitled to the contributory old age pension (Contributory Pension). The Appellant also qualified for an increase to that pension (Increased Pension) as he had living with him a "*qualifying dependant*" defined by section 2 of the Act to include, *inter alia*, a spouse who is "*wholly or mainly maintained....*" by the recipient of the Contributory Pension.
3. The Contributory Pension was paid directly to the Appellant together with the Increased Pension up until 24<sup>th</sup> September 2007, the date the statutory change became operative. Thereafter the Increased Pension was to be paid directly to the "*qualified adult*" or a person nominated by the "*qualified adult*". Through a domestic mutual agreement, the Increased Pension continued to be paid into the Appellant's bank account up until June 2011 and thereafter it was lodged directly into a separate bank account held in the name of the Appellant's spouse.



## Legislation

### *Social Welfare Consolidation Act 2005*

4. Section 2 of Social Welfare Consolidation Act 2005 (the Principal Act) is the definition section in which a “qualified adult”, subject to sections 134, 187 and 297, means in relation to a person—

*(a) a spouse who is wholly or mainly maintained by that person but does not include—*

- (i) a spouse in employment (other than employment specified in paragraph 4 or 5 of Part 2 of Schedule 1), or*
- (ii) a spouse who is self-employed, or*
- (iii) a spouse who is entitled to or is in receipt of any benefit, pension, assistance or allowance (other than supplementary welfare allowance) under Part 2 or 3, or*
- (iv) a spouse who, by virtue of section 68 (1) or 147 (2), is or would be disqualified for receiving unemployment benefit payable under Chapter 12 of Part 2 or unemployment assistance payable under Chapter 2 of Part 3 in his or her own right apart from a spouse who qualifies as a qualified adult by virtue of regulations made under paragraph (c), or*
- (v) a spouse who is entitled to or is in receipt of an allowance the rate of which is related to the rates of unemployment assistance payable under section 142 or unemployment benefit payable under section 65 or 66, in respect of a non-craft full-time course approved by An Foras Áiseanna Saothair under the Industrial Training Act 1967, or*
- (vi) a spouse who is entitled to or in receipt of an allowance the rate of which is related to the rates of unemployment assistance payable under section 142 or unemployment benefit payable under section 65 or 66, in respect of participation in a scheme administered by the Minister for Education and Science and known as the Vocational Training Opportunities Scheme, or*
- (vii) a spouse who is entitled to or in receipt of an allowance the rate of which is related to the rates of unemployment assistance payable under section 142 or unemployment benefit payable under section 65 or 66, in respect of participation in a scheme administered by the Minister and known as—*

- 1. Back to Education Allowance, or*
- 2. Back to Work Allowance, or*
- 3. Back to Work Enterprise Allowance, or*
- 4. Part-Time Job Incentive,”*

5. As such, the financial means of the “qualified adult” are relevant in determining the entitlement to the Increased Pension.



6. The entitlement to the Principal Pension is in accordance with section 108(1) of the Principal Act which provides:

*“Subject to this Act, a person shall be entitled to old age (contributory) pension where he or she has attained pensionable age and satisfies the contribution conditions in section 109.”*

7. The rules setting out that entitlement is governed by section 109(1) of the Principal Act and states:

*The contribution conditions for old age (contributory) pension are—*

*(a) subject to subsection (3), that the claimant has entered into insurance before attaining the age of 56 years,*

*(b) that the claimant has qualifying contributions in respect of not less than 156 contribution weeks since his or her entry into insurance, and*

*(c) that the claimant has a yearly average or, in the case of a person who attains pensionable age on or after 6 April 1992, an alternative yearly average of not less than 48.*

8. Provision is made for an increase in the old age (contributory) pension where the “beneficiary” wholly or mainly maintains a “qualified adult”. Section 112(1) of the Principal Act sets out the entitlement to the increase and states:

*“Subject to this Part, the weekly rate of old age (contributory) pension shall be increased by the amount set out in column (3) of Part 1 of Schedule 2 for any period during which the beneficiary has a qualified adult, subject to the restriction that a beneficiary shall not be entitled for the same period to an increase of pension under this subsection in respect of more than one person.”*

9. Prior to the enactment of the Social Welfare and Pensions Act, 2007, the Department of Social and Family Affairs made arrangements with the “qualified adult” to pay the Increased Pension directly to that person. However, such an arrangement was statutorily formalised by section 14 of that Act by the insertion of the following subsections after section 112(1) of the Principal Act:

*“(1A) The amount of the increase of pension referred to in subsection (1), in respect of any claim for State pension (contributory) made after 24 September 2007, shall be paid—*



*(a) directly to the qualified adult concerned, or*

*(b) to such other person as may be nominated by the qualified adult for the purpose of receiving the increase of pension referred to in subsection (1) on behalf of the qualified adult.*

*(1B) Where a beneficiary ceases to be entitled to State pension (contributory) the payment to a qualified adult of the increase of pension referred to in subsection (1) shall also cease.”*

#### *Taxes Consolidation Act 1997*

10. Taxes Consolidation Act 1997 (TCA), section 126 governs the tax treatment of certain benefits payable under the Social Welfare Acts. Subsection 2 provides:

*(a) This subsection shall apply to the following benefits payable under the Acts –*

- (i) widow’s (contributory) pension,*
- (ii) orphan’s (contributory) allowance,*
- (iii) retirement pension, and*
- (iv) old age (contributory) pension.*

*(b) Payments of benefits to which this subsection applies shall be deemed to be emoluments to which Chapter 4 of Part 42 applies.*

11. Section 12 Finance (No. 2) Act 2013 amended TCA, section 126 by the insertion of subsection 2B, the effect of which was to treat the payment of the Increased Pension as if it arises to and is payable to the beneficiary (the Principal Recipient) with effect from 1<sup>st</sup> January 2014. That subsection provides:

*(a) “Notwithstanding the provisions of section 112(1), where an increase in the amount of a pension to which section 112, 113, 117 or 157, as the case may be, of the Social Welfare Consolidation Act 2005 applies is paid in respect of a qualified adult (within the meaning of the Acts), that increase shall be treated for all the purposes of the Income Tax Acts as if it arises to and is payable to the beneficiary referred to in those sections of that Act.”*

12. TCA, section 1017 provides for the joint assessment of the husband in respect of the total income of both spouses. In such circumstances, the total income of the wife is treated as the total income of the husband. Subsection 1 provides:



*“Where in the case of a husband and wife an election under section 1018 to be assessed to tax in accordance with this section has effect for a year of assessment –*

- (a) the husband shall be assessed and charged to income tax, not only in respect of his total income (if any) for that year, but also in respect of his wife’s total income (if any) for any part of that year of assessment during which she is living with him, and for this purpose and for the purposes of the Income Tax Acts that last-mentioned income shall be deemed to be his income,*
- (b) the question whether there is any income of the wife chargeable to tax for any year of assessment and, if so, what is to be taken to be the amount of that income for tax purposes shall not be affected by this section, and*
- (c) any tax to be assessed in respect of any income which under this section is deemed to be income of a woman’s husband shall, instead of being assessed on her, or on her trustees, guardian or committee, or on her executors or administrators, be assessable on him or, in the appropriate cases, on his executors or administrators.”*

13. Provision is made under TCA, section 1018 to enable married couples to elect to be jointly assessed under section 1017 and states:

*“A husband and his wife, where the wife is living with the husband, may at any time during a year of assessment, by notice in writing given to the inspector, jointly elect to be assessed to income tax for that year of assessment in accordance with section 1017 and, where such election is made, the income of the husband and the income of the wife shall be assessed to tax for that year in accordance with that section.*

14. The employee tax credit applies to individuals in receipt of certain emoluments chargeable to tax and is governed by TCA, section 472(4) and applies:

*Where, for any year of assessment, a claimant proves that his or her total income for the year consists in whole or in part of emoluments (including, in a case where the claimant is a married person assessed to tax in accordance with section 1017, any emoluments of the claimant’s spouse deemed to be income of the claimant by that section for the purposes referred to in that section) the claimant shall be entitled to a tax credit (to be known as the “employee tax credit”) of—*

- (a) where the emoluments (but not including, in the case where the claimant is a married person so assessed, the emoluments, if any, of the claimant’s spouse) arise to the claimant, the lesser of an amount equal to the appropriate percentage of the emoluments and €1,830 and*



*(b) where, in a case where the claimant is a married person so assessed, the emoluments arise to the claimant's spouse, the lesser of an amount equal to the appropriate percentage of the emoluments and €1,830."*

## Submissions

### *Appellant*

15. On behalf of the Appellant, it was submitted that the old age (contributory) pension was split between the Appellant and his spouse. The spouse received the Increased Pension directly in accordance with Section 14 of the Social Welfare and Pensions Act 2007. The Appellant's spouse was therefore in receipt of "*emoluments*" in accordance with TCA, Section 472. As such, the Appellant was lawfully entitled to claim the employee tax credit against the tax arising on the Increased Pension.

### *Respondent*

16. Counsel for the Respondent made the following submissions:

- (a) the Appellant was the beneficiary and the effect of the change in Social Welfare and Pensions Act 2007 which amended section 112 of the Principal Act was to appropriate part of the Appellant's income to the spouse;
- (b) the effect of such a legislative change did not affect the character of such income as the Appellant was the beneficiary of such income to the extent that the payment derived from the increase in his pension;
- (c) the Oireachtas left in place the existing wording entitling the Appellant to the increase in the pension without creating a new pension entitlement;
- (d) the change in the tax provisions treating the Increased Pension to be that of the Appellant should be considered to be neutral in light of the settled law, and
- (e) when the Appellant dies, the entitlement to the Increased Pension also ceases notwithstanding that the Appellant's spouse may qualify for a widow's pension but that pension constitutes a different pension.

17. Counsel for the Respondent submitted that the Appellant's interpretation of the social welfare statutory provisions was at odds with the judgement in *O'Siocháin (Inspector of Taxes) —v- Neenan* [1999] 1 IR 533. It was asserted that fortification for this view is derived from the following extract from that judgment where Murphy J. said at page 544 *et seq*:



*"It seems to me to be clear beyond debate that the scheme of the legislation was to "increase" and that is the word used, the pension of the widow to meet those particular circumstances. No doubt a widow or any other parent would be expected to make provision for his or her children and the Oireachtas was satisfied in enacting the Act of 1981 to rely on the moral obligations which that relationship imposes.*

*...the express provisions entitling the widow to the pension and the failure to draw any distinction between the entitlement to the pension and the increases thereon are coercive evidence of an intention that the beneficial entitlement to the entire of the social welfare payment should vest in the widow.*

*Whilst my judgment results in a liability to tax which would be avoided if it were the children who were entitled to all or part of the widow's pension this is not relevant to the proper construction of the Act of 1981."*

18. Furthermore, it was argued on behalf of the Respondent that the Increased Pension remained dependent on a person having made the requisite contributions and having reached the relevant age. The entitlement to the Increased Pension ends when the person entitled to it, in this case, the Appellant, dies. Any arrangement in relation to the adult dependent element of it does not survive the pension-holder.

### Analysis

19. It is agreed between the parties that the Appellant qualified for the Increased Pension for the years under appeal as he wholly maintained his spouse, the *"qualified adult"*, during those years. As a consequence, it is necessary to establish the identity of the beneficial owner of the Increased Pension for purposes of applying the appropriate tax provisions, including if applicable, the entitlement to the employee tax credit.
20. As in *O'Siocháin*, it is agreed between the parties, *"that the burden [of taxation] - irrespective of the person on whom the assessment might be made - is on the person ... beneficially entitled to the increased amounts."*
21. The relevant provision, namely the amendment made by the Social Welfare and Pensions Act 2007 to section 112 of the Principal Act which inserted subsection (1A), reads as follows:

*"The amount of the increase of pension referred to in subsection (1), in respect of any claim for State pension (contributory) made after 24 September 2007, shall be paid—*

*(a) directly to the qualified adult concerned, or*





*(b) to such other person as may be nominated by the qualified adult for the purpose of receiving the increase of pension referred to in subsection (1) on behalf of the qualified adult."*

22. Notwithstanding the Respondent's submission that *O'Siocháin* had direct application and as a consequence the reasoning and determination should be applied, there are discernible differences. In *O'Siocháin*, the Increased Pension was paid directly to the widow with no statutory obligation to expend such monies on the welfare of her children.

23. Furthermore, it was noted by Murphy J. at page 544, that:

*"a widow or any other parent would be expected to make provision for his or her children and the Oireachtas was satisfied in enacting the Act of 1981 to rely on the moral obligations which that relationship imposes."*

24. However, in the matter under appeal, it would appear that the Oireachtas was not satisfied to rely on the moral obligation of the Principal Recipient but rather created a statutory entitlement vesting beneficial ownership of the Increased Pension in the "qualified adult" with effect from 24<sup>th</sup> September 2007.

25. *O'Siocháin* can further be distinguished with reference to the concluding observation of Murphy J. where he said at page 547 that:

*"...the express provisions entitling the widow to the pension and the failure to draw any distinction between the entitlement to the pension and the increases thereon are coercive evidence of an intention that the beneficial entitlement to the entire of the social welfare payment should vest in the widow."*

26. It is clear that no such failure exists in this case. Notwithstanding the Increased Pension is directly associated with the old age (contributory) pension, the entitlement to such a payment vests in the "qualified adult" to the extent that the increase is paid directly to that person. There are no statutory conditions imposed on the "qualified adult" to account for such monies or how such funds should be expended. Such income is not held in trust for the Principal Recipient nor has the Principal Recipient any legal right to the Increased Pension.

27. While neither party referred to *E O'Coindealbhain (Inspector of Taxes) v Breda O'Carroll* [1989] IR 229, a review of that case provides further assistance in establishing a party's beneficial entitlement to a social welfare pension where the statute provides for additional resources to be made available to prescribed relatives. In that case, the





respondent's husband was a member of the Garda Síochána up to the time of his death. He was survived by his widow and three sons.

28. On his death, the respondent was granted a widow's contributory pension in accordance with Garda Síochána Pensions Order SI 199/1981 Articles 5 and 6. Pursuant to Article 5(d) of that Order, each child under the respondent's care was granted a contributory pension. The children's contributory pension was paid to the respondent in accordance with Article 8(1) of Garda Order. In holding in favour of the respondent, Lynch J. made the following determination at page 233:

*"The children's contributory pension is beneficial property of the children in respect of whom it is payable. When the children are young and living with their mother the children's contributory pension will ordinarily and naturally be paid to the mother with the knowledge that a good mother will do all that she can for her children and no book-keeping or close accounting is envisaged. Nevertheless, even in that case "the pension is to be applied for the benefit of the children for whom it is granted" Article 8(1).*

*If the circumstances are not such that the children have the benefit of living with a good mother then the pension may be paid to the child itself if of sufficient age, Article 8(1), or to some other person "for the child", Article 5(d) and 8(1), and that person must also apply the pension for the benefit of the children for whom it is granted. Article 8(1).*

*It is clear therefore that even when the children's contributory pension is paid to a good mother with no expectation of book-keeping or close accounting she nevertheless has not beneficial interest or property of the children in respect of whom it is payable. The answer to the Appeal Commissioner's question whether he was correct in holding that the sum representing the children's contributory pension paid to the respondent under the Garda Order should not be assessed as the personal income of the respondent is therefore "yes".*

29. In distinguishing *O'Coindealbhain*, Murphy J. in *O'Siocháin*, made the following observations at page 546:

*"In broad terms the Garda Síochána Pensions Order and the Social Welfare Act both achieved the purpose of making additional resources available in circumstances where there were increased needs. But this purpose was met by different procedures in the two schemes. The Garda Pensions Scheme provided what was described as a contributory pension for the children whereas the Social Welfare Scheme merely increased the widow's pension. Mr Justice Lynch was satisfied, and I believe he was entitled to be satisfied, on the terms used in the Garda pensions Scheme that the*



*children's contributory pension though paid in most cases to the mother was the property of the children."*

30. As such Murphy J, at the end of the summation of the judgement of Lynch J., concluded also on page 546 that *"Lynch J. had ample evidence of an intention to create a trust in favour of the children."*
31. Both *O'Siocháin* and *O'Coindealbhain*, determined that for the income to be considered to be that of a child it was necessary that such a person had a beneficial entitlement to such income. In *O'Siocháin* no entitlement existed as the Oireachtas relied on the moral obligations of the mother to adequately provide for the financial support of her children. In *O'Coindealbhain* it was held that while the funds were paid to the mother or a prescribed individual, those funds were held in trust for the child.
32. Notwithstanding the source of the entitlement to the Increased Pension was derived from the Principal Recipient's old age (contributory) pension, the effect of the amendment in the Social Welfare and Pensions Act 2007 mandated that the payment be made directly to the *"qualified adult"* therefore entitling that person to the exclusive right to such income with effect from 24<sup>th</sup> September 2007. There is no doubt that the old age (contributory) pension was increased however the effect of the legislative change in 2007 prescribed the entitlement to the Increased Pension to be enjoyed by the *"qualified adult"* with the full discretion in how it should be utilised or expended.
33. Prior to 2007, administrative actions were taken by the Department of Social and Family Affairs to pay the *"qualified adult"* the Increased Pension. In such circumstances, there can be no issue that while there was a moral obligation on the Principal Recipient to provide for the *"qualified adult"*, the entitlement to the Increased Pension, in accordance with the clarification of the law in *O'Siocháin*, vested in the Principal Recipient. As such, the *"qualified adult"* had no beneficial entitlement to such income but rather had to rely on the natural love and affection, discretion or indeed goodwill of the Principal Recipient to provide adequate financial support.
34. However, the Social Welfare and Pensions Act 2007 changed that discretionary aspect by making, in effect, a separate pension arrangement for the *"qualified adult"*. Such a legislative action created a legal and beneficial entitlement for the *"qualified adult"* to the Increased Pension.
35. As noted by Counsel for the Respondent, the significance of the amendment to TCA, section 126 by Finance Act (No.2) Act 2013 by providing that the *"increase shall be treated for all the purposes of the Income Tax Acts as if it arises to and is payable to the beneficiary referred to in those sections of that Act"* should not influence the current interpretation of the relevant provision. In confirming the settled law in this area,



Clarke J. in *Revenue Commissioners v Droog* [2016] IESC 55 made the following observation at paragraph 5.1:

*“However, the trial judge noted that this Court had, in Cronin (Inspector of Taxes) v Cork and County Property Company Limited [1986] IR 559, held that a subsequent amendment can at best be neutral in the context of the interpretation of the relevant legislation in its pre-amendment form and cannot be used to construe the statute as it was before the amendment in question.”*

36. Notwithstanding the change in tax law and the neutral interpretation of subsequent legislative changes, it is clear that the 2013 amendment to TCA, section 126 recognises that the beneficial entitlement to the Increased Pension vests in the “*qualified adult*” but treats such income “*for all the purposes of the Income Tax Acts as if it arises to and is payable to the*” Principal Recipient.
37. As such, the 2007 legislative change replaced the moral obligation with a statutory requirement to pay the Increased Pension directly to the “*qualified adult*”, in this case, the spouse of the Appellant. It is therefore my determination that the Appellant’s spouse had the beneficial entitlement to such income in respect of the period commencing after 24<sup>th</sup> September 2007.

#### *Employee Tax Credit*

38. The increased Pension constitutes emoluments pursuant to TCA, section 126.
39. As such, TCA, section 472(4)(b) provides an entitlement to the employee tax credit where the emoluments “*arise to the claimant’s spouse*” in cases where an election has been made for joint assessment. Therefore, as the beneficial entitlement to the Increased Pension, constituting emoluments, arose to the Appellant’s spouse by virtue of her beneficial entitlement to such income, the Appellant is entitled to the employee tax credit with reference to that income on the basis that the Appellant was jointly assessed pursuant to TCA, section 1017.

#### **Conclusion**

40. The amendment to the Principal Act, section 112 by section 14 of the Social Welfare and Pensions Act 2007 mandating that the Increased Pension be paid directly to the “*qualified adult*” with effect from 24<sup>th</sup> September 2017 had the effect of bestowing the beneficial entitlement of such income in the “*qualified adult*”. As a consequence, the entitlement to the employee tax credit should be applied to the tax arising on such income in respect of the period from 24<sup>th</sup> September 2007 to 31<sup>st</sup> December 2009.





However, no such amendment is required for the year of assessment ending 31<sup>st</sup> December 2006 to the extent that the Appellant's spouse was not beneficially entitled to the Increased Pension in respect of that year.

41. This appeal is hereby determined in accordance with TCA, section 949AK requiring that the assessments for the years ended 31<sup>st</sup> December 2007 to 31<sup>st</sup> December 2009 be reduced to reflect the entitlement to the employee tax credit. However, the assessment for 2006 should stand.

**APPEAL COMMISSIONER**  
**4<sup>th</sup> September 2017**

**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 as amended.**

