08TACD2018

Between/

[NAME REDACTED]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matters under appeal

1. The Appellant is a self-employed landscape gardener. He has appealed against assessments to income tax for the years 2012 and 2013 in the amounts of €1,454 and €1,368 respectively. These assessments arose because the accounts prepared for the Appellant's business claimed as deductible expenses the cost of the Appellant's meals while working, calculated at the Civil Service rates applicable to employees. The Respondents disallowed these expense claims on the grounds that they were not deductible expenditure permitted by subsection 81(2)(a) and (b) of the Taxes Consolidation Act, 1997 as amended (hereinafter **"TCA 1997"**) and assessed the Appellant to income tax accordingly. The Appellant has appealed against those assessments.

B. Grounds of appeal

2. The grounds of appeal as stated in the letter from the Appellant's agent dated 23 October 2015 are that the amounts assessed are in respect of subsistence "added back", and that Revenue in doing so are acting in a discriminatory manner by differentiating between self-employed and employed taxpayers, where they are not directed to do so by law.

C. Relevant legislation

3. The provisions of section 81 of TCA 1997 relevant to this appeal provide as follows:-

> *"(1) The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts.*
>
> *(2) Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of –*
>
> *(a) any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession;*
>
> *(b) any disbursements or expenses of maintenance of the parties, their families or establishments, or any sums expended for any other domestic or private purposes distinct from the purposes of such trade or profession…"*

4. The Appellant further relied upon sections 114 and 117 of TCA 1997 which provide as follows:-

> *"**114 General rule as to deductions***
>
> *Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."*

and:-

> ***"117 Expenses allowances***
>
> *(1) Subject to this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of section 112 as a perquisite of the office or employment of that director or employee and included in the emoluments of that office or employment assessable to income tax accordingly; but nothing in this subsection shall prevent a claim for a deduction being made under section 114 in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office or employment.*
>
> *(2) The reference in subsection (1) to any sum paid in respect of expenses includes a reference to any sum put by a body corporate at the disposal of a director or employee and paid away by him or her."*

D. ***Appellant's arguments***

5. The Appellant by his Statement of Case dated 13 May 2016 and by oral submissions made by his agent at the hearing of this appeal submitted that it is a commonly held precept of income tax that no claim may be made for subsistence (citing sections 81, 114 and 117 of TCA 1997) but that it had nonetheless been a common practice for quite some time for employees to be reimbursed for such expenses. The Appellant argued that these expenses are claimed by classes of taxpayers other than the self-employed, such as employees or company directors, at the Civil Service rates published by the Revenue Commissioners, but the Respondents choose not to raise assessments in respect of these expenses claims.

6. The Appellant argued that there is no statutory basis or case law which would permit or justify this difference in approach, and that the Respondents are prohibited from differentiating

between employees and self-employed taxpayers unless they are directed to do so by law. The Appellant argued that the practice of the Respondents in this regard is discriminatory, contrary to proper tax practice and contrary to the Respondents' Customer Service Charter.

7. The Appellant cited the decision of the European Court of Human Rights in ***Jusilla –v- Finland* (73053/01) [2006] ECHR 996**, which he submitted was authority for the proposition that he was entitled to fair and equal treatment at the hands of the tax authorities.

8. The Appellant further relied upon the decision of the Supreme Court in the case of ***Keogh –v- Criminal Assets Bureau* [2004] 2 I.R. 159**, which held that the Respondents' *'Taxpayers' Charter of Rights'* could in appropriate circumstances be justiciable at the instance of a taxpayer. The Appellant argued that the Charter entitled him to have his tax affairs dealt with in a fair, reasonable and consistent manner, and that the difference in treatment by the Respondents of expense claims by employees or company directors when compared to the treatment of such claims by self-employed taxpayers was in breach of that entitlement.

E. Respondents' Arguments

9. In their Statement of Case dated 5 July 2016 and at the hearing of the appeal before me, the Respondents first submitted that the arguments advanced by the Appellant had already been made by him in the context of an appeal brought by the Appellant against his income tax assessments for the years 2007 to 2011 inclusive. The arguments made by the Appellant had been had been considered and rejected by the Appeal Commissioners and, on appeal to the Circuit Court from the decision of the Appeal Commissioners, had been rejected by His Honour Judge Terence O'Sullivan in a decision given on 22 April 2015. The Respondents argued that the same approach should be taken in the instant appeal.

10. The Respondents further argued that the Appellant was not entitled to claim a deduction in respect of his meal expenses at Civil Service rates because he was a self-employed person and not an employee. Section 114 of TCA 1997 did not apply to the Appellant because he did not hold an office or employment of profit. They argued that the expenses claimed by the Appellant were in the nature of maintenance of the Appellant and/or were of a domestic or private nature and, as such, were excluded as permissible deductions by virtue of the provisions of subsection 81(2) of TCA 1997.

11. The Respondents accepted that the reimbursement at Civil Service rates of expenses incurred by employees might be accepted as a deduction if there was proof that such expenses had actually been incurred, but they pointed out that this was expressly permitted by statute. It was submitted by the Respondents that a difference in treatment between classes of taxpayers does not amount to discriminatory treatment.

12. Finally, the Respondents argued that even if the Appellant was permitted by statute to claim a deduction at Civil Service rates in respect of his meal expenses (which they did not accept), it would still be necessary for the Appellant to show that he had actually laid out or expended the cost of the meals. They pointed out that no evidence had been submitted by the Appellant to show that such expenditure had actually been incurred, and argued that they could not properly allow deductions for what appeared to be notional expenses.

F. Analysis & Findings

13. Dealing first with the decision of Judge Terence O'Sullivan given on 22 April 2015, I find that this is not determinative of the issues before me. It was accepted by the agent for the Appellant that the arguments advanced in respect of the years 2007 to 2011 were identical to the arguments and issues before me in the instant appeal. However, while the decision would in all likelihood have been of at least some persuasive value and effect, there is no written judgment

or agreed record of the decision save for the Form AS1, which merely records that the assessments under appeal were upheld by Judge O'Sullivan.

14. In the absence of a written judgment or agreed record, I cannot be certain of the precise reasons relied upon by Judge O'Sullivan in reaching his decision. Even if a written judgment or agreed record were available, section 942(3) of TCA 1997 provides that Judge O'Sullivan was exercising the powers and authorities of an Appeal Commissioner in hearing and determining the appeal before him, and therefore his decision would not be binding upon me. Accordingly, I must determine the issues before me *de novo*.

15. Having heard and carefully considered the arguments advanced by and on behalf of the Appellant and the Respondents, I am satisfied and find as a material fact that the Appellant, as a self-employed landscape gardener, is liable to income tax under Schedule D, Case I. As he is neither an office holder nor an employee, the provisions of section 114 of TCA 1997 do not apply to him and instead his entitlement to deduct expenses must be determined in accordance with section 81.

16. I am further satisfied and find as a material fact that any expenditure by the Appellant on his own meals while working constituted disbursements or expenses for his own maintenance and/or sums expended for a private or domestic purpose distinct from the purposes of his trade, within the meaning of section 81(2)(b). Accordingly, I find that the Respondents were correct in deciding that the Appellant's claims for meal expenses at Civil Service rates were not permissible deductions in assessing his liability to income tax for the years under appeal.

17. In light of the foregoing finding, it is not necessary for me to consider the argument advanced by the Respondents that the Appellant has failed to submit any or any adequate evidence to establish that he had actually incurred the expenses claimed in respect of his meals during the years in question. For the sake of completeness, however, I would observe that the burden of proof would have lain upon the Appellant in this regard.

18. The foregoing findings do not deal with the core argument advanced by the Appellant, namely that the difference in treatment by the Respondents of self-employed persons on the one hand and employees and office holders on the other is discriminatory and therefore unlawful.

19. The determinations that can be made by an Appeal Commissioner are those delineated in sections 949AK and 949AL of TCA 1997. Those provisions confine the Appeal Commissioners to making a determination in relation to the assessments, decisions, determinations or other matters which are the subject matter of the appeal actually before the Appeal Commissioners. The jurisdiction of the Appeal Commissioners is confined to interpreting tax legislation and ensuring that the Revenue Commissioners have complied with that legislation. The Appeal Commissioners do not have the jurisdiction to determine whether a legislative provision is discriminatory or unfair or otherwise unlawful; we are not empowered by statute to apply the principles of equity or to grant declaratory reliefs.

20. Accordingly, I am satisfied that it would be *ultra vires* for me to embark upon a consideration of, or to make a finding or determination in relation to, the issue of whether any difference in the treatment of the expense claims of self-employed persons and those of employees and office holders is, as argued by the Appellant, discriminatory or unfair or otherwise unlawful. I must therefore decline to consider this argument or to make any finding in relation thereto.

*G. **Determination***

21. Having carefully considered all of the evidence before me and the submissions made by the parties, I find, for the reasons detailed above, that the Respondents were correct to refuse the Appellant's claim that the cost of his meals while working, calculated at the Civil Service rates applicable to employees, was a deductible expense in calculating the profits of his business for the years under appeal.

22. I therefore refuse the Appellant's appeal against that decision and determine that the assessments under appeal stand.

Dated April 2018

Appeal Commissioner

The Appellant has requested that a case be stated for the opinion of the High Court