25TACD2019

Between/

APPELLANT

Appellant

-v-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. This matter comes before the Tax Appeals Commission as an appeal against a Notice of Amended Assessment for the 2014 tax year in the amount of €21,392.88, which was issued by the Respondent on the 5th of October 2016. The Notice of Amended Assessment was issued by the Respondent on foot of its refusal to grant the Appellant split year residence relief in respect of his US employment income in the year ended 31 December 2014.

2. The Appellant contends that he is entitled to avail of the split year residence relief on a concessionary basis for the year under appeal, and that he is accordingly entitled to a refund of tax in the amount of €6,456.93.

3. The parties have assented to the appeal being adjudicated without a hearing in accordance with section 949U of the Taxes Consolidation Act, 1997, as amended, and I am satisfied that such adjudication is possible and appropriate.

B. Facts relevant to the Appeal

4. The Appellant's spouse, who is an employee of **EMPLOYER REDACTED**, was posted to **FOREGIN POST REDACTED** in New York in August of 2013. The Appellant was granted a diplomatic spousal visa which entitled him to work in the United States. The Appellant and his spouse left Ireland in August 2013 with the intention of remaining abroad for three or four years. Accordingly, the Appellant intended to be non-resident in Ireland in 2014 and subsequent years.

5. The Appellant's wife was promoted from **OLD POSITION** to **NEW POSITION** in **EMPLOYER REDACTED** in November 2014 and was required to return to Ireland to take up her new post. As the Appellant's visa was dependent on his wife's posting, he could no longer work in New York and so he too returned to Ireland in November 2014.

6. The Respondent granted the Appellant split year residence relief on his exit from Ireland in 2013. Although the Appellant did not meet the statutory criteria for split year residence (which are set forth below), he was granted the relief on a concessionary basis by the Respondent, in accordance with the treatment outlined in Tax Briefing 17, on the grounds that his failure to meet the conditions necessary to qualify for the relief was due to unforeseen circumstances.

7. However, the Respondent has refused to also grant split year residence relief to the Appellant on a concessionary basis in respect of the 2014 tax year, with the consequence that the Appellant's US employment income has been included in the Notice of Amended Assessment for that year, and it is that refusal which has given rise to the instant appeal.

C. Legislation and Revenue Materials

8 . Section 819 of the Taxes Consolidation Act, 1997, as amended, provides as follows:-

> *(1) For the purposes of the Acts, an individual shall be resident in the State for a year of assessment if the individual is present in the State-*
>
> *(a) at any one time or several times in the year of assessment for a period in the whole amounting to 183 days or more, or*

(b) at any one time or several times-

(i) in the year of assessment, and

(ii) in the preceding year of assessment,

for a period (being a period comprising in the aggregate the number of days on which the individual is present in the State in the year of assessment and the number of days on which the individual was present in the State in the preceding year of assessment) in the aggregate amounting to 280 days or more.

(2) Notwithstanding subsection (1)(b), where for a year of assessment an individual is present in the State at any one time or several times for a period in the aggregate amounting to not more than 30 days –

(a) the individual shall not be resident in the State for the year of assessment, and

(b) no account shall be taken of the period for the purposes of the aggregate mentioned in subsection (1)(b).

(3) (a) Notwithstanding subsections (1) and (2), an individual-

(i) who is not resident in the State for a year of assessment, and

(ii) to whom paragraph (b) applies,

may at any time elect to be treated as resident in the State for that year and, where an individual so elects, the individual shall for the purposes of the Acts be deemed to be resident in the State for that year.

(b) This paragraph shall apply to an individual who satisfies an authorised officer that the individual is in the State-

(i) with the intention, and

(ii) in such circumstances,

that the individual will be resident in the State for the following year of assessment.

(4) For the purposes of this section—

(a) as respects the year of assessment 2008 and previous years of assessment, an individual shall be deemed to be present in the State for a day if the individual is present in the State at the end of the day, and

(b) as respects the year of assessment 2009 and subsequent years of assessment, an individual shall be deemed to be present in the State for a day if the individual is present in the State at any time during that day.

9. Section 822 of TCA 1997 contains the legislative provisions regarding split year residence and states as follows:-

(1) For the purposes of a charge to tax on any income, profits or gains from an employment, where during a year of assessment (in this section referred to as "the relevant year")-

(a) (i) an individual who has not been resident in the State for the preceding year of assessment satisfies an authorised officer that the individual is in the State-

(I) with the intention, and

(II) in such circumstances,

that the individual will be resident in the State for the following year of assessment, or

(ii) an individual who is resident in the State satisfies an authorised officer that the individual is leaving the State, other than for a temporary purpose-

(I) with the intention, and

(II) in such circumstances,

that the individual will not be resident in the State for the following year of assessment,

and

(b) the individual would but for this section be resident in the State for the relevant year,

subsection (2) shall apply in relation to the individual.

(2) (a) An individual to whom paragraphs (a)(i) and (b) of subsection (1) apply shall be deemed to be resident in the State for the relevant year only from the date of his or her arrival in the State.

(b) An individual to whom paragraphs (a)(ii) and (b) of subsection (1) apply shall be deemed to be resident in the State for the relevant year only up to and including the date of his or her leaving the State.

(3) Where by virtue of this section an individual is resident in the State for part of a year of assessment, the Acts shall apply as if-

(a) income arising during that part of the year or, in a case to which section 71(3) applies, amounts received in the State during that part of the year were income arising or amounts received for a year of assessment in which the individual is resident in the State, and

(b) income arising or, as the case may be, amounts received in the remaining part of the year were income arising or amounts received in a year of assessment in which the individual is not resident in the State.

10. It is also appropriate to have regard to the section of Tax Briefing 17 (No.1, 1995) dealing with what is referred to therein as 'Split Year Treatment', or 'SYT', to which both parties made reference in their Statements of Case and Outlines of Argument. The relevant paragraphs state as follows:-

"Where an individual qualifies for SYT, she/he is treated (for the purposes of charging to tax income from any employment) as being resident in the State for the part of the tax year after arrival/before departure and, non-resident for the remainder of that tax year. In effect, the year is split, to ensure that foreign employment earnings prior to arrival or after departure are not subject to Irish tax.

Procedure in Year of Departure

If the authorised officer (as defined in Section 149 Finance Act 1994) is satisfied that an individual resident in the State departs to live abroad other than for a temporary purpose and in circumstances where it is clear that he/she does not intend to be resident in the State in the following tax year SYT may be allowed immediately. The individual is therefore regarded as non-resident from date of departure so far as the taxation of employment income is concerned.

Procedure in Year of Arrival

Similarly, if the authorised officer is satisfied that a non-resident individual arrives into the State with the intention and in such circumstances that he/she will be resident in the State for the following tax year, SYT may be allowed immediately. In this way, the individual is regarded as resident from the date of arrival in so far as the taxation of employment is concerned.

Position if Intention not Fulfilled

If due to unforeseen circumstances (e.g. for domestic or health reasons or cancellation of an employment contract) the genuine intention with regard to residence/non-residence is not subsequently fulfilled, the decision taken by the authorised officer in regard to entitlement to SYT will not be reversed.

How the Intention as to non-residence is satisfied

Intended absence from the State for a continuous period of 15 months will generally ensure that this test is satisfied. However, each case will be examined individually, by reference to the number of days intended to be spent in the State in each tax year."

D. Submissions of the Parties

11. The Appellant argues that the Respondent is inconsistent in its operation of the non-statutory concession set out in Tax Briefing 17, and that the concession should be made available by the Respondent in respect of the 2014 tax year as it was granted to him in respect of the 2013 tax year.

12. The Appellant submits that it is inequitable for the Respondent to grant the relief in 2013 and yet to deny it in 2014, on the basis that it was the Appellant's unexpected return to Ireland which led to his ineligibility for the relief in both tax years. He further submits that it is not fair to differentiate between the tax treatment of his US employment income in 2013 and the tax treatment of his US employment income in 2014.

13. The Appellant further argues that where an individual who has departed from Ireland fails to establish eligibility for split year residence relief because of unforeseen circumstances, their position will be adversely affected in both the year of departure and the subsequent year of return. He argues that because the concession in Tax Briefing 17 is not specifically limited to applying to either the year of departure or the year of return, the intention of the concession is that the taxpayer should be granted relief in respect of both years in which the taxpayer would otherwise be adversely affected.

14. The Appellant submits that the decision by the Respondent to limit the concessional treatment to one year only, and to refuse it to the Appellant in respect of 2014, has given rise to an inequitable and unexpected tax position for 2014.

15. The Respondent has explained that split year residence relief was granted to the Appellant in respect of the 2013 tax year because:-

(a) The Appellant was resident in Ireland during 2013, based on the 183-day rule;

(b) The Appellant departed to live abroad in August 2013, other than for a temporary purpose; and,

(c) The Appellant departed in circumstances where it was clear that he did not intend to be resident in the State in the following year.

16. The Respondent accepts that unforeseen circumstances required the Appellant to return to Ireland prematurely in November 2014, before the conditions entitling him to split year residence relief in 2013 were satisfied. It was on this basis that the Respondent, acting in accordance with the treatment outlined in Tax Briefing 17, decided that the decision to allow the Appellant split year residence relief in respect of 2013 would not be reversed.

17. Turning to 2014, the Respondent argues that the Appellant does not meet the statutory criteria necessary to avail of split year residence relief for this year. One of the conditions necessary for eligibility is that the taxpayer must have been non-resident in the year preceding the year of arrival. In the instant case, the Appellant was resident in Ireland during 2013.

18. The Respondent submits that the Appellant was also resident in Ireland in 2014 on the basis of the 280-day "look-back" rule. The Appellant spent in excess of 30 days in Ireland in 2014 and the aggregate number of days he spent in the State during 2013 and 2014 exceeded 280 days. They submit that the Appellant is therefore liable to Irish taxation on all his income, including his foreign employment income, subject to relief under the Ireland/US Double Tax Agreement.

E. Analysis and findings

19. I am satisfied on the evidence before me and find as a material fact that the Appellant was resident in Ireland in 2013 as he was present in the State for more than 183 days. The Appellant has not submitted any evidence which could support a contrary finding, nor do the submissions made on his behalf argue for such a contrary finding.

20. It follows that the Appellant does not meet the prior year non-residence condition in section 822(1)(a)(i) and is therefore ineligible for split year residence relief in accordance with section 822.

21. In so finding, I have had regard to the decision of Kennedy C.J. in ***Revenue Commissioners –v- Doorley*** **[1933] IR 750**, where he stated:-

> *"The duty of the Court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred.*
>
> *I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the*

exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."

22. Equally, while one might have some sympathy for the Appellant as a result of his facing an unexpected tax liability because of the fact that he could not continue working in the United States for as long as he had anticipated, it would be inappropriate for me to embark on a consideration of whether the imposition of such a liability is unfair or inequitable or otherwise. As Rowlatt J stated in ***Cape Brandy Syndicate –v- IRC*** **[1921] 1 K.B. 64** (cited with approval in the more recent decisions of ***Revenue Commissioners –v- Droog*** **[2011] IEHC 142** and ***Revenue Commissioners –v- O'Flynn Construction*** **[2013] 3 IR 533**):-

"… in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

23. It appears from the submissions that the Appellant accepts that he does not qualify for relief under section 822; he does not argue that he meets the statutory criteria for eligibility but instead contends that the refusal by the Respondent to afford him the concessionary treatment outlined in Tax Briefing 17 is inequitable, unfair, contrary to the intention of the concession and has resulted in an unexpected tax liability.

24. The submissions made on behalf of the Respondent do not, on my reading, engage with or counter this aspect of the Appellant's argument. Nonetheless, the concessionary treatment outlined in Tax Briefing 17 is a non-statutory or extra-statutory concession granted by the Respondent in appropriate cases. The grant or refusal of such a concession by the Respondent is not a matter over which the Tax Appeals Commission has jurisdiction and accordingly I cannot properly make a determination on the fairness or otherwise of the refusal of the Respondent to extend the concession to the year 2014.

25. Even if the Appellant was to argue that he had an expectation that the concessionary treatment detailed in Tax Briefing 17 would be afforded to him in respect of the 2014 tax year, particularly as it had been afforded to him in respect of the prior year, such an expectation could at most, taken at its height, give rise to a possible cause of action on the part of the Appellant on the grounds of legitimate expectation. However, the

Tax Appeals Commission has no jurisdiction to consider or determine an appeal advanced on these grounds (see ***Kenny Lee –v- Revenue Commissioners*** **[2018] IEHC 46**).

26. Furthermore, in so far as the Appellant argues that it is unfair for the Respondent to allow the concession for 2013 but to deny it for 2014, when the same unforeseen circumstances rendered him ineligible under the statute for both years, I note and respectfully agree with the decision of Donnelly J in ***Coleman –v- Revenue Commissioners*** **[2014] IEHC 662**, where she stated:-

> *"Undoubtedly the Revenue Commissioners should apply the law in a fair, reasonable and consistent manner. That will be the result of applying the relevant statutory provisions as to tax due or exemption applicable. In my opinion, a commitment to fair, reasonable and consistent application of the law does not permit the clear provisions of a statute to be disregarded in favour of perceived consistency. Thus, the focus must always be on the implementation of the statutory code rather than a comparative analysis of cases. Otherwise, the result is endless comparison of cases in a heedless pursuit of supposed consistency and reasonableness to the exclusion of the actual implementation of the statutory code. Taxpayers' rights will be fully protected in a decision-making system which applies the law regarding the duty to pay tax or the right to avail of exemptions as set out in the statutory code."*

27. Accordingly, I find that the Appellant cannot succeed in this forum in his argument that the non-statutory concession should be allowed to him in respect of the 2014 tax year because the failure to allow him the concession for that year would result in an inequitable and/or unfair and/or unexpected outcome.

F. <u>Conclusion</u>

28. For the reasons outlined above, I find that:-

(a) The Appellant was resident in Ireland in 2013. Accordingly, he does not meet the prior year non-residence condition in section 822(1)(a)(i) and is therefore ineligible for split year residence relief in accordance with section 822.

(b) The Tax Appeals Commission does not have jurisdiction to consider the manner in which the Respondent operates a non-statutory or extra-statutory concession, and the Appellant cannot succeed in this appeal based on an argument that such a concession was refused by the Respondent in an inequitable or unfair manner or in a manner which resulted in an unexpected taxation position.

29. I therefore refuse the Appellant's appeal and determine in accordance with section 949AK(1) of the Taxes Consolidation Act, 1997, as amended, that the Notice of Amended Assessment issued on the 5th of October 2016 should stand, subject to any credit that may be allowed to the Appellant for foreign tax paid under the terms of the Double Taxation Agreement between Ireland and the United States.

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MARK O'MAHONY
APPEAL COMMISSIONER
18 April 2019