AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

160TACD2022

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the "Commission") as an appeal against a Notice of Amended Assessment raised on 10 February 2022 by the Revenue Commissioners (hereinafter the "Respondent") for the tax year 2021.
2. The total amount under appeal is €1,781.87.
3. The hearing of this appeal took place on 15 September 2022 by way of remote hearing.

Background

4. [redacted] (hereinafter the "Appellant") was both a PAYE employee and the director of a company during the tax year 2020.
5. In 2020 the Appellant received payments of €6,066.68 from the Government through his employer pursuant to the Temporary Wage Subsidy Scheme (hereinafter "TWSS")

pursuant to Section 28 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 (hereinafter the "EMA2020").

6. In addition, his employment having ceased, the Appellant received €1,050.00 from the Department of Social Welfare (hereinafter the "DSP") in Covid-19 Pandemic Unemployment Payments (hereinafter "PUP") pursuant to section 202 of the Social Welfare Consolidation Act 2005 (hereinafter the "SWCA2005").

7. On 13 September 2021 the Appellant filed a Form 11 return with the Respondent which indicated a tax liability of €3,011.87 which the Appellant did not agree with. The Appellant amended the self-assessment portion of the Form 11 by entering a self-assessed liability of nil.

8. In the returned Form 11 the Appellant had omitted an employee tax credit to which he was entitled and also omitted the income from the PUP received from the DSP.

9. A Notice of Amended Assessment issued to the Appellant to reflect same on 10 February 2022 which contained a liability of €1,781.87.

10. By way of Notice of Appeal dated 11 February 2022 the Appellant appealed the said Notice of Amended Assessment.

Legislation and Guidelines

11. The legislation relevant to the within appeal is as follows:

Section 28(1) of the EMA2020:

> *'"specified employee", in relation to an employer, means an individual who was on the payroll of the employer as at 29 February 2020, and the following is the case, the employer—*
>
> *(i) has submitted to the Revenue Commissioners a notification or notifications of the payment of emoluments to the employee in February 2020 in accordance with Regulation 10 of the Regulations, and*
>
> *(ii) has submitted the return required under section 985G of the Act for the month of February 2020 on or before the return date (within the meaning of section 983 of the Act) for that month;*
>
> *or*
>
> *(b) an individual to whom subsection (1A) applies;'*

Section 28(1A) of the EMA2020:

> *"(1A) This subsection applies to an individual who returns to work with his or her employer on or after 1 March 2020—*
>
> > *(a) following a period of absence for which the individual was in receipt of maternity benefit, adoptive benefit, paternity benefit, parental benefit, health and safety benefit, parent's benefit or illness benefit payable under the Social Welfare Acts, or a period of unpaid absence following on from and related to any such absence as aforesaid, or*
> >
> > *(b) having been on an apprenticeship and training course administered by An tSeirbhís Oideachais Leanúnaigh agus Scileanna in February 2020.*"

Section 112 of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997"):

> *"(1)Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.*
>
> *(2)(a)In this section, "emoluments" means anything assessable to income tax under Schedule E.*
>
> > *(b)Where apart from this subsection emoluments from an office or employment would be for a year of assessment in which a person does not hold the office or employment, the following provisions shall apply for the purposes of subsection (1):*
> >
> > > *(i)if in the year concerned the office or employment has never been held, the emoluments shall be treated as emoluments for the first year of assessment in which the office or employment is held, and*
> > >
> > > *(ii)if in the year concerned the office or employment is no longer held, the emoluments shall be treated as emoluments for the last year of assessment in which the office or employment was held.*
>
> *(3)Notwithstanding subsection (1) and subject to subsections (4) and (6), the income tax under Schedule E to be charged for the year of assessment 2018 and subsequent years of assessment in respect of emoluments to which Chapter 4 of Part 42 applies*

or is applied shall be computed on the amount of the emoluments paid to the person in the year of assessment.

(4)Where emoluments chargeable under Schedule E arise in the year of assessment 2017, and those emoluments are also chargeable to income tax in accordance with subsection (3) for the year of assessment 2018 or a subsequent year of assessment, the amount of the emoluments chargeable to income tax for the year of assessment 2017 shall, on a claim being made by the person so chargeable, be reduced to the amount of emoluments that would have been charged to income tax had subsection (3) applied for that year of assessment.

(5)Where a person dies and emoluments are due to be paid to that deceased person, the payment of such emoluments shall be deemed to have been made to the deceased person immediately prior to death.

(6)(a)In this subsection, "proprietary director" has the same meaning as it has in section 472.

(b)Subsection (3) shall not apply to——

(i)emoluments paid directly or indirectly by a body corporate (or by any person who is connected (within the meaning of section 10) with the body corporate) to a proprietary director of the body corporate, or

(ii)emoluments in respect of which a notification has issued under section 984(1)."

Section 126 of the TCA1997:

(3)(a)This subsection shall apply to the following benefits payable under the Acts—

(i)illness benefit,

(ii)jobseeker's benefit,

(iia)jobseeker's benefit (self-employed),

(iib)the payments, commonly known as the pandemic unemployment payments, made under section 202 of the Act of 2005 on and after 13 March 2020 to the relevant date (within the meaning of section 7 of that Act),

(iic)Covid-19 pandemic unemployment payment (within the meaning of the Act of 2005),

(iii)injury benefit which is comprised in occupational injuries benefit, and

(iv)pay-related benefit.

(b)Amounts to be paid on foot of the benefits to which this subsection applies (other than amounts so payable in respect of a qualified child within the meaning of section 2(3) of the Social Welfare Consolidation Act 2005 shall be deemed—

(i)to be profits or gains arising or accruing from an employment (and accordingly tax under Schedule E shall be charged on every person to whom any such benefit is payable in respect of amounts to be paid on foot of such benefits, and tax so chargeable shall be computed under section 112(1)), and

(ii)except in the case of amounts so payable in respect of jobseeker's benefit (self-employed), to be emoluments to which Chapter 4 of Part 42 is applied by section 984."

Section 202 of the SWCA2005:

(1) "Nothing in section 190, 191, 193 or 198 shall prevent the payment of supplementary welfare allowance in an urgent case and, in determining or deciding whether an allowance is payable by virtue of this section and the amount or nature of the allowance, the Executive or deciding officer shall not be bound by anything contained in sections 195 to 198 and Part 4 of Schedule 3 or in any regulations made under this Chapter which appears to the Executive or deciding officer inappropriate in the circumstances of the case.

(2) Where under subsection (1) supplementary welfare allowance is paid to a person who is engaged in remunerative full-time work, the Executive or deciding officer may, where the Executive or deciding officer is satisfied that in all the circumstances of the case it would be equitable so to do, determine or decide that the whole or part of the allowance so paid shall be recoverable from the person to whom it is paid."

Submissions

Appellant's Submissions

12. The Appellant submitted the following in his Statement of case:

"*I have paid all my taxes. Any mistakes done by previous employees or Revenue are not my responsibility and it's their work to paid them and be responsible of them. This*

situation is harming my personal health and I need to deregister from personal tax income.

[redacted]*from common understanding I know that I'm not responsible from the previous company's mistakes. In addition, the same company* [redacted] *fired me during the pandemic, leaving me in a awful situation without help on a middle of the global pandemic and economy recession.*

That being said, it's their work to recognize their mistakes and solve this situation from revenue.

I don't know any [relevant legislation]*, but it's common sense here, you can't ask an induvial* [sic] *to pay for a company's mistake. In addition, they are not considering all the harming and trouble this is causing me and my family in addiction with all the problems carried out since the pandemic started.*

I believe this case is clear, Revenue is asking me to pay in the middle of the economic recession, with inflation going more than 10%, a mistake from the company that fired me and treated bad during a pandemic. This is totally unacceptable and I will not take more responsibility for their incapacity."

13. At the oral hearing the Appellant submitted that it is difficult for him to understand all of the various tax provisions which seem to him to be more than complicated. He submitted that, as his former employer had requested financial assistance from the Government, it is not fair or logical that he has been left in a position that he owes money to the Respondent. He stated that he used the money which he received from his former employer to live and that he does not know why the Respondent has asked him for money which he does not have.

Respondent's Submissions

TWSS Payments:

14. The Respondent submitted that section 28 of the EMA2020 provides the statutory basis for the TWSS. The Respondent submitted that the purpose of the TWSS was to provide financial assistance to employees, while retaining the employer/employee relationship. The Respondent submitted that the EMA2020 was introduced in response to the impact of the Covid-19 pandemic.

15. The Respondent submitted that the TWSS which was originally approved for a period of 12 weeks from 26 March 2020 to the week ending 18 June 2020 and that it was subsequently extended until 31 August 2020.

16. The Respondent submitted that the Appellant fell within the definition of a "specified employee" of his former employer for the purposes of the TWSS as defined in section 28(1) of the EMA2020 in that:

    a. The Appellant was on the payroll of his former employer on 29 February 2020; and
    b. The Appellant's employer had submitted a payroll notification for February monthly emoluments in accordance with Regulation 10 of the Income Tax (Employments) Regulations 2018 (S.I. 345 of 2018).

17. The Respondent submitted that the TWSS payments were not to be regarded as emoluments for the purposes of the PAYE system and, instead, were to be treated as being income chargeable to tax under Schedule E pursuant to sections 19 and 112 of the TCA1997. The Respondent submitted that pursuant to section 28(5)(d) and (e) of the EMA2020 the TWSS payments which were made to the Appellant through his former employer were not regarded as emoluments for the purposes of the TCA1997 and were therefore not taxed in real-time by his employer.

18. The Respondent submitted that 69,500 employers registered with the Respondent for the TWSS scheme and that in excess of 663,900 employees received a subsidy through the scheme.

19. The Respondent submitted that, pursuant to section 28(19) of the EMA2020, it established TWSS guidelines to assist in the practical administration of the scheme. On 26 March 2020, the Respondent published comprehensive guidance on the proposed eligibility criteria entitled "*Covid-19 Temporary Wage Subsidy Scheme – Employer Eligibility and Supporting Proofs*" (hereinafter the "Eligibility Guidelines") and on the proposed operation of the scheme entitled "*Frequently Asked Questions on; Operation of the Transitional phase of the Temporary COVID-19 Wage Subsidy Scheme*" (hereinafter the "Operational Guidance"). The Respondent submitted that the Eligibility Guidelines were revised on 20 April 2020 and in addition the Operational Guidance was regularly updated to provide further clarity to employers as the TWSS progressed, such that there were 17 revisions issued between 26 March 2020 and 27 August 2020, with amendments clearly highlighted.

20. The Respondent submitted that it also published guidance for employees in receipt of the subsidy under TWSS. The first version, entitled "*(FAQ v1) on Guidance for PAYE Employees whose Employers have been affected by the COVID-19 Pandemic and are availing of the Temporary Wage Subsidy Scheme ('TWSS')*", was published on the 8th May 2020 and there were 5 subsequent revisions between that date and the 28th July

2020 (hereafter the "*Employee Guidance*" and together with the Eligibility Guidance and Operational Guidance hereinafter collectively the "Guidance").

21. The Respondent submitted that the Guidance explained to employers that the tax position for those employees who received TWSS payments was that:

> "*The payments are liable to income tax and USC; however the subsidy is not taxable in real-time through the PAYE system during the period of the Subsidy scheme. Instead the employee will be liable for tax and USC on the subsidy amount paid to them by their employer by way of a review at the end of the year. When an end of the year review takes place, it may be the case that an employee's unused tax credits will cover any further liability that may arise. Where this is not the case, and should an Income Tax liability arise, it is normal Revenue practice to collect any tax owing in manageable amounts by reducing an individual's tax credits for a future year(s) in order to minimise hardship. Additionally, if an individual has any additional tax credits to claim, for example health expenses, this will also reduce ant tax that may be owing.*"

22. The Respondent further submitted that at question 6 of the Employee Guidance explained to employee recipients of TWSS payments as follows:

> "*The subsidy payments are liable to Income Tax and USC; however, the subsidy is not taxable in the same way as your pay is normally through the payroll system during the period of the scheme. Instead you will be liable for Income Tax and USC on the subsidy amount paid by your employer through a review of your tax at the end of the year.*"

23. The Respondent submitted that the Appellant is liable for Income Tax and USC on the TWSS payments received and that the tax owing thereupon shall be collected at the end of the year.

<u>PUP Payments:</u>

24. In relation to the PUP payments received by the Appellant from the DSP, the Respondent submitted that section 126 of the TCA1997 provides the statutory basis for the tax treatment of certain benefits payable under Social Welfare Acts.

25. The Respondent submitted that Section 3 of the Finance Act 2020 amended section 126 of the TCA1997 and provided that PUP payments made under section 202 of the SWCA2005 are chargeable to Income Tax. Accordingly, the Respondent submitted, with

effect from the 13 March 2020, PUP payments were brought into the Income Tax charge under the TCA1997.

26. The Respondent submitted that there is no ambiguity in the provisions of the EMA2020 in that both TWSS payments and PUP payments are liable to tax as provided for in the assessment the subject matter of this appeal.

Material Facts

27. The following material facts are not at issue between the Parties and the Commissioner accepts same as material facts:

    i. The Appellant received €6,066.68 in TWSS payments through his former employer in 2020;

    ii. The Appellant received €1,050.00 in PUP payments from the DSP in 2020;

    iii. The Appellant was a specified employee as defined in section 28(1) of the EMS2020.

Analysis

28. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, is on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

> *"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 Commissioner as to whether the taxpayer has shown that the relevant tax is not payable."*

<u>TWSS Payments:</u>

29. Section 28 of the EMA2020, entitled "*Covid-19: temporary wage subsidy provisions*" provides the legislative basis for TWSS payments which were introduced in March 2020 and ended in August 2020.

30. It is not in dispute between the Parties that the Appellant was a specified employee as defined in section 28(1) of the EMA2020. Section 28(5)(a) of the EMA2020 provided that following notification by an employer of the payment of emoluments to a specified employee in the applicable period, in this case between March and August 2020, "*the Revenue Commissioners shall pay to the employer in relation to the specified employee a sum (in this section referred to as a "temporary wage subsidy")…*".

31. It is also not in dispute between the Parties that the Appellant received €6,066.68 in TWSS payments from the Government through his former employer in 2020.

32. In addition, section 28(5)(d) of the EMA2020 provided that "*on the payment of the emoluments to the specified employee which are the subject of the notification first-mentioned in this subsection by the employer, the employer shall include in that payment an additional amount equivalent to the temporary wage subsidy in relation to the specified employee,*". It is not in dispute between the Parties that the Appellant received payments from the Appellant's former employer which included TWSS payments.

33. Section 28(5)(e) of the EMA2020 provided that "*notwithstanding any other provision of the Act, the additional amount paid by the employer to a specified employee in accordance with paragraph (d) shall not be regarded as emoluments of the specified employee for the purposes of Chapter 4 of Part 42 of the Act and the Regulations, but shall be treated as income chargeable to tax on the specified employee under Schedule E within the meaning of section 19 of the Act,*".

34. The provisions of section 28(5)(e) of the EMA2020 meant that TWSS payments made by the Government to employees through their employers were not to be taxed in real-time as normally occurs with wages and/or salary payments made by employers to employees. Instead, the onus of discharging any liabilities which arose on foot of the receipt of TWSS payments was placed on employees and therefore employees in receipt of TWSS payments were obliged to file returns with the Respondent for the tax year 2020 and to discharge any resulting liabilities to the Respondent on filing their returns. As set out by the Respondent, Guidance was published by the Respondent in this regard pursuant to 28(19) of the EMA2020 which notified employees of this provision.

35. Having considered the legislation and the submissions of the Parties both written and oral, the Commissioner finds that the Appellant was subject to tax on foot of the TWSS payments which he received through his employer in 2020 and that the Notice of Amended Assessment raised by the Respondent on 10 February 2022 in this regard was correct.

<u>PUP Payments:</u>

36. It is not in dispute between the Parties that the Appellant received €1,050.00 in PUP payments from the DSP in 2020.

37. Section 126(3) of the TCA1997 provides that PUP payments shall be deemed to be profits or gains arising or accruing from an employment and that accordingly tax shall be charged on every person to whom the PUP is payable and that tax so chargeable shall be

computed under section 112(1) of the TCA1997. This means that where a taxpayer was in receipt of the PUP payment any amounts received were chargeable to tax.

38. The use of the word "*shall*" as set out in section 126(3) of the TCA1997, indicates an absence of discretion in the application of this provision. The wording of the provision does not provide for extenuating circumstances in which amounts received by way of PUP payment might not be chargeable to tax. The Commissioner has no authority or discretion to direct that PUP payments received are not chargeable to tax.

39. Therefore, the Commissioner finds that the Appellant was subject to tax on foot of the PUP payments which he received from the DSP 2020 and that the Notice of Amended Assessment raised by the Respondent on 10 February 2022 in this regard was correct.

Determination

40. For the reasons set out above, the Commissioner determines that the Appellant has failed in his appeal and has not succeeded in showing that the relevant tax was not payable. Therefore, the Commissioner determines that the Notice of Amended Assessment raised by the Respondent on 10 February 2022 was correct.

41. It is understandable the Appellant will be disappointed with the outcome of this appeal. The Appellant was correct to check to see whether his legal rights were correctly applied.

42. This Appeal is determined in accordance with Part 40A of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997") and in particular, section 949 thereof. 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 21 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll
Appeal Commissioner
20 September 2022