AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

161TACD2022

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") of decisions of the Revenue Commissioners ("the Respondent") assessing the Appellant as having underpaid tax under the PAYE system for the years 2007 – 2015. The Appellant contends that the sums assessed are in error on the grounds, firstly, that he is entitled to be assessed jointly with his former spouse for the years 2007 and 2008 and, secondly, that he is entitled to the application of a variety of credits and reliefs that would reduce or eliminate his underpayment.

Background & Evidence

2. The Appellant married his former spouse in [redacted] and for a significant period thereafter lived with her and their daughter in their family home in [redacted]. Of relevance to this appeal is the fact that for the years 2007 – 2010 the Appellant was assessed on his own income and that of his former spouse pursuant to section 1017 of the Taxes Consolidation Act 1997 ("the TCA 1997").

3. Both the Appellant and his former spouse gave evidence at the hearing of this appeal that over time their marital relationship deteriorated. The Appellant's former spouse said that by 2006 they were "*living in an impossible situation*". The Appellant said of the same time that although they continued to reside under the same roof they "*were not living as husband and wife".*

4. The Appellant and his former spouse gave evidence that on 3 June 2006 they both signed a document, addressed by the Appellant to his former spouse, which was worded follows:-

> "[Name of Appellant's spouse],
>
> *As agreed I am committing to paper what we have already agreed would be the terms of our separation.*
>
> *As long as I continue to reside in* [[redacted] address] *I will continue to pay all the mortgage, insurances, and utility bills as I have always done.*
>
> *As soon as* [the child of the Appellant and his former spouse] *is finished college I will move out from the family home into rented accommodation until I can afford my own home.*
>
> *As stated I will continue after this point to pay the Mortgage, insurances and make contribution to your household bills, i.e. the running of the family home as* [the aforementioned child] *also still will reside there.*
>
> *In order to meet this commitment I will transfer €1700 monthly to your account until such time as we have this agreement notarised.*
>
> *This is to give you some comfort that I will not renege on my commitments, which I am legally bound to honour as my name is on the mortgage.*
>
> *As soon as the mortgage is discharged the family home is yours and will be signed over to you, we will have to follow this up when we go for a divorce and any other necessary additions like a pension order can be resolved."*

5. The Appellant gave evidence that this was an agreement drawn up for the purpose of reassuring his spouse that he would continue to honour his obligations to her. The Appellant also said that he took informal legal advice before signing. The Appellant's former spouse gave evidence that she sought and received no legal advice prior to signing.

6. The agreement was never notarised, contrary to its express terms. The circumstances of the disclosure of the agreement to the Respondent are discussed later on in this section of the determination and are of relevance to the outcome of the appeal.

7. The Appellant and his former spouse gave evidence that, despite their marital breakdown, they each continued to reside in the family home between 2006 and July 2008 because of financial constraints and for the benefit of their child. They were clear, however, that during this period they had no emotional or physical relationship and were in fact separated. In 2008 the Appellant left the family home on a permanent basis. His former spouse continued to reside there with their child.

8. The Appellant gave evidence that following his departure he paid the sum of €1,700 per month to his former spouse.

9. On 8 October 2010 the Appellant and his former spouse were granted a decree of divorce on consent by order of the Circuit Court. In accordance with section 5(1) of the Family Law (Divorce) Act 1996 the Court was satisfied on the evidence given by the Appellant and his former spouse that they had lived separate and apart for four of the previous five years and there was no reasonable prospect of their conciliation.

10. Among the terms of the consent divorce agreement were:-

> *"2. That the Respondent do transfer to the Applicant* [[redacted] address] *now in the joint names of both parties into the sole name of the Applicant and the Respondent shall discharge the outstanding Mortgage of €70,000 approximately to Irish Nationwide Building Society by continuing to pay the monthly repayments in regard to the said Mortgage.*
>
> *3. The Respondent shall pay to the Applicant maintenance in the sum of €700 per month out of which the Applicant shall discharge the life premium on the Canada Life Insurance Policy on the Respondent's life, where the Applicant is the Beneficiary and she shall also discharge the premium on the Mortgage Protection Policy applicable to the mortgage as set out at paragraph 2 hereof."*

11. It was not in dispute that the amount paid by the Appellant in respect of the mortgage on the family home was €1,000 per month.

12. The Appellant's oral evidence was that the agreement from 2006 was produced to the Circuit Court in the course of the divorce proceedings.

13. In September 2011 the Appellant re-married.

14. On 22 August 2011 the Respondent wrote to the Appellant to inform him that he was the subject of a PAYE verification check inquiry. On 15 September 2011 further correspondence emanated from the Respondent requesting that the Appellant submit, amongst other information, the date of his separation from his former spouse and

subsequent divorce and the relevant documentation outlining the terms of their separation. This information was not provided by the Appellant and it would appear from the documents furnished that nothing material to this appeal occurred for almost five years.

15. On 22 September 2016 the Appellant was again selected for a PAYE verification check and asked to provide, along with other information, the date of his separation from his former spouse, the date of his divorce and a copy of his separation agreement.

16. In reply to the foregoing correspondence, the Appellant provided the Respondent with a copy of the order of the Circuit Court granting him and his former spouse their divorce and the accompanying terms of agreement, reached on consent.

17. On 28 October 2016 the Respondent again wrote to the Appellant requesting a copy of the Appellant's separation agreement pre-dating their divorce.

18. On various dates between 25 October - December 2016, the Respondent issued P21 Balancing Statements in respect of the Appellant for the years 2007 – 2015, which resulted in the following final assessments based on the Appellant being assessable alone:-

    - 2007 – underpayment of €5,780.87;
    - 2008 – underpayment of €5,245.59;
    - 2009 – underpayment of €4,142.53;
    - 2010 – underpayment of €2,786.66;
    - 2011 – underpayment of €2,716.70;
    - 2012 – underpayment of €572.51;
    - 2013 – overpayment of €73.02;
    - 2014 – underpayment of €860.78; and
    - 2015 – overpayment of €287.60.

19. In issuing the Balancing Statements the Respondent applied relief based on medical expenditure evidenced by documentation furnished by the Appellant.

20. On 4 January 2017 the Appellant contacted the Respondent to express his dissatisfaction with the assessments of underpayments in the Balancing Statements.

21. On 16 January 2017 the Appellant's newly appointed tax agent wrote to the Respondent, stating that for each of the years 2007 – 2010 the Appellant was jointly assessable on his income and that of his former spouse.

22. On 18 January 2017 the Respondent replied, stating that the Appellant was not entitled to be jointly assessed for these years as the date of their divorce suggested that they could not have been living with one another. The correspondence also stated that the Appellant could not deduct maintenance for the years prior to his divorce in the absence of an enforceable separation agreement.

23. On 26 January 2017 the Appellant delivered his Notice of Appeal "*against the Balancing Statements issued."* In the section of the Notice of Appeal outlining his grounds, the Appellant asserted the entitlement to joint assessment for the years 2007 – 2010, as well as the following credits and reliefs:-

    - for the years 2007 – 2009: tax relief arising from tuition fees paid in respect of his child's third level education, medical expenses and, in the alternative, marriage credit or one parent family credit;
    - for the year 2010: deduction in respect of maintenance payments under the Appellant's decree of divorce, tax relief arising from tuition fees paid, medical expenses relief and, in the alternative, marriage credit or one parent family credit; and
    - for the years 2011 – 2015: deduction in respect of maintenance payments under the Appellant's decree of divorce, medical expenses relief and one parent family credit.

24. On 22 February 2017 the Appellant's agent wrote to the Respondent attaching computations of his estimate of the Appellant's tax liability for the years 2007 – 2015, which suggested that he overpaid tax for these years. The correspondence also attached the aforementioned agreement dated 3 June 2006, signed by the Appellant and his spouse. It is not clear to the Commissioner whether this was the first time that the agreement was furnished to the Respondent. While there was no evidence provided of it having been disclosed before 22 February 2017, it is apparent in any event that its emergence could not have occurred any earlier than after the commencement of the Respondent's inquiry in September 2016.

25. The Appellant and his former spouse were examined and cross-examined on the circumstances in which the agreement came only to be disclosed to the Respondent after the commencement of its inquiry in 2016. The Appellant stated that it had not been provided in 2011 because he had been suffering from mental health difficulties. His former spouse stated that after signing it had been put away in a drawer and largely fallen from her mind. It was her understanding that it had not been witnessed or notarised because "*… it was just an agreement between myself and* [the Appellant]".

26. There was no dispute between the parties at the hearing, and the documents provided also indicated, that in February 2017 the Appellant submitted claims for the credits and reliefs listed in paragraph 23 of this determination.

27. The Appellant's Statement of Case, delivered on 19 May 2017, diverged from his Notice of Appeal in that it added the assertion of an entitlement to the deduction of maintenance payments in respect of the years 2008 and 2009. No entitlement to joint assessment for these years was asserted in this document in contrast to the Notice of Appeal. This was replicated in the Appellant's Outline of Arguments.

28. The Statement of Cases and Outline of Arguments also diverged from the Notice of Appeal in that service charges tax credit was sought for 2008, 2009, 2010 and 2011 and an additional claim for medical insurance relief (benefit in kind) was made for 2014 and 2015. Again, no argument was raised by the Respondent in opposition to the granting of these credits other than, in respect of the years up to and including 2012, the application of the time limit under section 865(4) of the TCA 1997.

Legislation and Guidelines

29. The primary legislation referred to by the parties in the hearting of this appeal was:-

- Section 1015 of the TCA 1997;
- Section 1017 of the TCA 1997;
- Section 1018 of the TCA 1997;
- Section 865 of the TCA 1997;
- Section 1025 of the TCA 1997 and;
- Section 459 of the TCA 1997.

30. In addition to the foregoing, the Commissioner considered the possibility of the relevance of section 865B of the TCA 1997 to the circumstances of the case. Accordingly, submissions were sought from the parties on this question after the conclusion of the hearing.

31. Chapter 1 of Part 44 of the TCA 1997 deals with income tax of "*Married, Separated and Divorced Persons*". Section 1015 of the TCA 1997 is the interpretation provision of that Chapter and subsection (2) therein provides:-

> *"A wife shall be treated for income tax purposes as living with her husband unless either—*

(a) they are separated under an order of a court of competent jurisdiction or by deed of separation,

or

(b) they are in fact separated in such circumstances that the separation is likely to be permanent."

32. Section 1017 of the TCA 1997 is entitled "*Assessment of husband in respect of income of both spouses"* and subsection (1) therein, in so far as relevant, 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…"

33. Section 1018 of the TCA 1997 is entitled "*Election for an Assessment under section 1017"* and subsection (1) therein provides:-

"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."

34. Section 865 TCA 1997 is headed "*Repayment of tax*". Subsection 2 therein provides:-

"*Subject to the provisions of this section, where a person has, in respect of a chargeable period, paid, whether directly or by deduction, an amount of tax which is not due from that person or which, but for an error or mistake in a return or statement made by the person for the purposes of an assessment to tax, would not have been due from the person, the person shall be entitled to repayment of the tax so paid."*

35. Section 865(3) TCA 1997 provides that no repayment of income tax shall be made unless a "valid claim" has first been made to the Respondents. Section 865(1)(b)(i)(I) TCA 1997 provides that a valid claim shall have been made where a person files a return that contains:-

"…all the information which the Revenue Commissioners may reasonably require to enable them determine if and to what extent a repayment of tax is due to the person for that chargeable period…"

36. Section 865(4) TCA 1997 sets the following time limit on the making of repayments by the Respondent:-

"Subject to subsection (5), a claim for repayment of tax under the Acts for any chargeable period shall not be allowed unless it is made—

in the case of claims made on or before 31 December 2004, under any provision of the Acts other than subsection (2), in relation to any chargeable period ending on or before 31 December 2002, within 10 years,

in the case of claims made on or after 1 January 2005 in relation to any chargeable period referred to in paragraph (a), within 4 years, and

in the case of claims made—

(i) under subsection (2) and not under any other provision of the Acts, or

(ii) in relation to any chargeable period beginning on or after 1 January 2003,

within 4 years after the end of the chargeable period to which the claim relates."

37. Section 865B of the TCA 1997 is entitled "*No offset where repayment prohibited"* and provides:-

"(2) Subject to subsections (3) and (4), where a repayment of any tax cannot be made to a person by virtue of the operation of—

(a) section 865,

(b) section 105B of the Finance Act 2001,

(c) section 99 of the Value-Added Tax Consolidation Act 2010,

(d) section 159A of the Stamp Duties Consolidation Act 1999,

(e) section 57 of the Capital Acquisitions Tax Consolidation Act 2003, or

(f) any other provision of any of the Acts,

then, notwithstanding any other enactment or rule of law, that repayment shall not be set against any other amount of tax due and payable by, or from, that person.

(3) Where a repayment of tax cannot be made to a person in respect of a relevant period, it may be set against the amount of tax to which paragraph (a) of subsection (4) applies which is due and payable by the person in the circumstances set out in paragraph (b) of that subsection.

(4)(a) The amount of tax to which this paragraph applies is the amount, or so much of the amount, of tax that is due and payable by the person in respect of the relevant period as does not exceed the amount of the repayment that cannot be made to the person in respect of that relevant period.

(b) The circumstances set out in this paragraph are where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax, at a time that is 4 years or more after the end of the relevant period.

(5) No tax shall be set against any other amount of tax except as is provided for by the Acts."

38. The Respondent's tax and duty manual entitled "*Repayments and Offsets of Taxes and Duties"* addresses the effect of section 865B of the TCA 1997 at headings 12 and 13 therein in the following terms:-

*"**12 Section 865B TCA – general rule regarding offsets***

Section 865B TCA, inserted by section 128 Finance Act 2012, provides that, where a repayment of tax cannot be made to a person because a claim is lodged outside of the relevant time limit, offset against any other tax liabilities of the person is prohibited. This is subject to the exception outlined in paragraph 13 below. Section 865B also confirms that there is no right of offset outside of that already provided for under the tax codes. These rules apply across all direct taxes, related charges and levies, stamp duty, gift and inheritance tax, excise duties, value-added tax and local property tax. Section 865B provides that the rules apply to these taxes regardless of when the tax is or was paid. Section 865B also ensures that a right to repayment of stamp duty, gift tax, inheritance tax, value-added tax and local property tax (or to interest in relation to such taxes) does not arise outside of tax legislation. A corresponding excise provision is contained in section 70(q) Finance Act 2012.

13 Exception to general rule

Section 865B(4)(b) TCA contains an exception to the general rule regarding offsets. It applies where tax is due and payable for a tax year or accounting period by virtue of

action taken by Revenue to assess or recover tax, at a time that is four years or more after the end of the year or period involved.

In such a case, an amount of tax which cannot be repaid because of the application of a time limit, but which relates to the same tax year or accounting period as the tax liability Revenue is pursuing, is available for offset against that liability. This is subject to the condition that the amount available for offset cannot exceed the amount of tax that becomes due and payable for the relevant year or period as a result of the assessing or recovery action so taken by Revenue; that is, assessing or recovery action taken outside the four-year period. It follows that where an amount of tax cannot be repaid because of a time limit, it cannot be offset against any tax outstanding for the year or period involved where that tax was originally due and payable within four years of the end of the year or period."

39. Section 459 of the TCA 1997 is entitled *"General provisions relating to allowances, deductions and reliefs"* and makes provision, among other things, for the making of and proving of claims. Subsection (6) therein provides:-

"Where, on the basis of the information furnished to them under section 894A(2) or any other information in their possession, the Revenue Commissioners are satisfied as to the title of an individual to relief under any of the provisions specified in the Table to section 458 or under section 188 then, notwithstanding any other provision of the Income Tax Acts to the contrary, if the Revenue Commissioners consider it appropriate in the circumstances, the relief due may be given to the individual without the making of and proving of a claim for that relief."

40. Section 1025 of the TCA 1997 is entitled "*Maintenance in Case of Separated Spouses"* and subsection (2) therein provides:-

"(a) This section shall apply to payments made directly or indirectly by a party to a marriage under or pursuant to a maintenance arrangement relating to the marriage for the benefit of his or her child, or for the benefit of the other party to the marriage, being payments –

(i)which are made at a time when the wife is not living with the husband,

(ii)the making of which is legally enforceable, and

(iii)which are annual or periodical;

but this section shall not apply to such payments made under a maintenance arrangement made before the 8th day of June, 1983, unless and until such time

as one of the following events occurs, or the earlier of such events occurs where both occur –

(I)the maintenance arrangement is replaced by another maintenance arrangement or is varied, and

(II)both parties to the marriage to which the maintenance arrangement relates, by notice in writing to the inspector, jointly elect that this section shall apply,

and where such an event occurs in either of those circumstances, this section shall apply to all such payments made after the date on which the event occurs.

(b) For the purposes of this section and of section 1026 but subject to paragraph (c), a payment, whether conditional or not, which is made directly or indirectly by a party to a marriage under or pursuant to a maintenance arrangement relating to the marriage (other than a payment of which the amount, or the method of calculating the amount, is specified in the maintenance arrangement and from which, or from the consideration for which, neither a child of the party to the marriage making the payment nor the other party to the marriage derives any benefit) shall be deemed to be made for the benefit of the other party to the marriage."

Submissions

Appellant

41. It should be noted that the Appellant raised objection in his Notice of Appeal, Statement of Case and Outline of Arguments to the assessments made by way of Balancing Statements for the years 2007 – 2011, on the grounds that they were outside the four year time-limit prescribed by section 959AB of the TCA 1997. At the outset of the hearing however the Appellant's agent indicated that this objection was not being pursued before the Commission.

The joint assessment issue

42. It was submitted on behalf of the Appellant that he did not "separate" from his former spouse within the meaning of section 1015 of the TCA 1997 until he departed the family home on or about July 2008. Consequently, he was entitled to be assessed jointly in accordance with section 1017 of the TCA 1997 for both 2007 and 2008.

43. It was submitted that it did not necessarily follow that because the Appellant and his spouse were "living apart" in the same home during this period within the meaning of

section 5 of the Divorce Act 1995, they were also not "living with" one another within the meaning of section 1015 of the TCA 1997.

44. In this regard it was submitted that section 1015 of the TCA 1997 requires physical separation that is likely to be permanent for a married couple to be taken to be living apart. The evidence of the Appellant and his spouse that they had no emotional or physical relationship was not relevant. The legislation did not require such a relationship. As per the evidence of the Appellant, the agreement drawn up in 2006 was intended to give "comfort" to his spouse that despite the breakdown of their relationship he would continue to meet his commitments to her and their child. It was not an indication that they were actually separated and likely to be separated permanently. It was further submitted that the document was in some respects "tentative" in nature and contingent on future events.

The credits, reliefs and deductions issue

45. It was submitted that the Respondent's reliance on section 865 of the TCA 1997 was misconceived. The Appellant was not seeking the repayment of tax. Rather he was seeking the adjustment of the amended Balancing Statements issued for the years 2007 – 2015 to reflect his credit and deduction entitlements. The Appellant submitted that section 459(6) of the TCA 1997 made it clear that there were no time constraints imposed on the Respondent where a taxpayer looks to reduce an estimate based on the application of reliefs and credits.

46. Following the hearing, and in light of the Respondent's reliance on section 865(4) of the TCA 1997, the Commissioner gave the parties the opportunity to furnish written submissions regarding the relevance to the Appellant's claim for credits and reliefs of section 865B(3) and (4) of the TCA 1997. This had not been adverted to by the parties at the hearing.

47. Section 865B provides as a general rule that a repayment due to a taxpayer cannot be "set against" tax due and payable where the time limit under section 865(4) of the TCA 1997 has been exceeded. This, however, is subject to an exception set out at subsections (3) and (4) therein. Where the Respondent takes any action for the recovery of an amount of tax "due and payable" by a taxpayer four or more years after the period to which it relates, that amount may be set against an amount of tax arising from the same period to which the taxpayer would, but for the application of the four year time-limit, be entitled to repayment. The exception provides however that the amount repayable cannot exceed the amount due and payable. In other words, all that can occur is the offsetting of taxes.

48. In relation to this provision, the Appellant provided a written submission on 9 September 2022, which suggested that the provision was not applicable to the circumstances of the Appellant's case. The crux of the Appellant's submission was that there was no "additional liability" which an overpayment time barred under section 865(4) of the TCA 1997 could be set against. While it was not entirely clear from the submission, it would appear implicit that the Appellant's agent viewed that the additional tax liability and the tax overpaid had to come under separate tax headings for one to be set against the other.

49. Regarding the claim for the deduction from assessable income of maintenance paid, the Appellant submitted that it was clear from the consent terms forming part of the order for divorce, that the maintenance paid to his former spouse included €1,000.00 per month in respect of the mortgage on the home, which was inhabited by his spouse. He paid a further €700.00 per month out of which his life insurance policy and the mortgage protection policy were paid. These were payments made for the benefit of the former spouse who not only inhabited the home but also took full ownership of it following the divorce. In addition, the Appellant submitted that payments made that went to the mortgage protection policy and the Appellant's life insurance were clearly for the benefit of the former spouse and thus were deductible.

50. The Appellant submitted that a deduction should be allowed in respect of maintenance for the years 2008 and 2009 based on the agreement dated 3 June 2006. Possibly somewhat in contradiction to what was argued regarding the Appellant's entitlement to be assessed jointly with his former spouse for 2007 and 2008, it was submitted that this agreement constituted evidence of his having a "legally enforceable obligation" for the purposes of section 1025 of the TCA 1997.

Respondent

The joint assessment issue

51. The Respondent submitted that the Appellant was not living with his former spouse during the period 2007 – 2008, as was required by section 1017 of the TCA 1997 for joint assessment. Section 1015 made clear that for a wife to be living with her husband they needed not to be separated under a court order or deed of separation or in fact be separated in circumstances where the separation was likely to be permanent.

52. The Respondent submitted that it is possible for spouses to be separated even though they reside in the same property. The question in this instance was whether they were living together as husband and wife. It was plain from the evidence, argued the Respondent, that from about 2006 onwards they were not doing so.

53. The Respondent did not agree with the submission that section 5 of the Divorce Act 1995 was not relevant. It would be highly unusual for diverging criteria to be applied to the same question – namely whether a husband and wife were in a subsisting relationship – in the context of divorce legislation and in the context of taxation legislation. The Appellant and his spouse had sworn in their divorce proceedings that for four of the five years preceding 2010 they had not been in a relationship, which should be determinative of this question in the appeal.

The credits, reliefs and deductions issue

54. With the exception of a portion of the sums in maintenance paid – discussed below – the Respondent did not object to the Appellant's entitlement to the credits and reliefs sought for the years 2013 – 2015.

55. In respect of the years 2007 – 2012, however, the Respondent argued that the right to credits and reliefs was subject to the four-year time limit for the repayment of tax prescribed by section 865(4) of the TCA 1997. In this regard, there was no dispute that the Appellant's claims were submitted in February 2017, or shortly thereafter. The Respondent submitted that, contrary to the Appellant's submission, a claim for reliefs and credits previously unclaimed did constitute a claim for the repayment of tax within the meaning of section 865 of the TCA 1997. The Appellant's claims for the years 2007 – 2012 were therefore out of time and it was correct to refuse repayment. The Appellant also submitted that the claim for the deduction of maintenance for the years 2008 and 2009 could not be allowed because there was no evidence to support an enforceable separation agreement. As regards the agreement of 3 June 2006, the Respondent submitted that it should not be taken as proof of an enforceable agreement, both because of doubts regarding its provenance and the fact that it was never notarised.

56. As with the Appellant, the Respondent was also given the opportunity after the hearing to address the relevance, or otherwise, of the exception to the rule against offsets set out in section 865B(3) and (4) of the TCA 1997. In this regard the Respondent submitted:-

> "*The exception applies where tax is due and payable for a tax year or accounting period by virtue of action taken by Revenue, to assess or recover the tax, at a time that is 4 years or more after the end of the year or period involved. In such a case, an amount of tax, from another taxhead, which cannot be repaid because of the application of a time limit, but which relates to the same tax year or accounting period as the tax liability Revenue is pursuing, is available for offset. This is subject to the condition that the amount available for offset cannot exceed the amount of tax that*

becomes due and payable for the relevant tax year or accounting period as a result of the assessing or recovery action so taken by Revenue.

It follows that where an amount of tax cannot be repaid because of a time limit, it cannot be offset against any tax outstanding for the year or period involved where that tax was originally due and payable within the four years of the end of the year or period.

The exception set out at Section 865B(3) and (4) is not applicable to the circumstances of this appeal as there is no statute barred repayment of tax available, for another taxhead, for offset in the same tax year or accounting period as tax due and payable by virtue of action taken by Revenue, to assess or recover tax, at a time that is 4 years or more after then end of the year or period involved."

57. With specific regard to the maintenance deductions sought in respect of the years 2013 – 2015, the Respondent submitted that the sums transferred to the Appellant's former spouse to meet the mortgage repayments on the home did not constitute a payment for her "benefit", as required by section 1025(2) of the TCA 1997. The Respondent said this was so because, as a co-mortgagor, he was under a legal obligation to make the repayments in any event. It also stated that the arrangement whereby the Appellant transferred to his former spouse the money to make the repayments was artificial. He could just as easily have made the payments directly himself, but chose not to do so. This did not entitle him to deduct.

58. The Respondent also submitted that the portion of the maintenance paid in respect of the mortgage protection policy and the insurance of the Appellant's life could not be deducted on the grounds that the policies were for his benefit, rather than for the benefit of his former spouse.

59. Regarding the claim for the deduction of maintenance payments for the years 2008 and 2009 and the part of 2010 prior to the divorce, the Respondent submitted that, even disregarding the fact that the claims were time barred under section 865(4) of the TCA 1997, they could not be allowed because the Appellant had failed to adduce sufficient evidence to prove that there was a legally enforceable agreement in being during this time. In arguing that the Appellant had failed to meet the burden of proof in this respect, the Respondent pointed to the fact that the Appellant had not provided the written agreement when it was first asked for in 2011. Its emergence did not occur until after the commencement of the inquiry in 2016. Moreover, there was no independent evidence of its existence at the relevant time. It was not referred to in the Circuit Court's divorce order or the consent agreement and it had not been notarised.

Material Facts

60. The facts material to this appeal are as follows:-

- the Appellant and his former spouse previously resided together with their daughter in their family home;
- over time their relationship deteriorated to the extent that by 2006 they were no longer living together as husband and wife, albeit that they both continued to reside in the family home;
- on or about July 2008, the Appellant left the family home on a permanent basis;
- on or about 8 October 2010, the Appellant and his spouse were divorced by Order of the Circuit Court, with the terms of the same being on consent;
- on or about 22 August 2011, the Appellant was the subject of a PAYE verification check. The Appellant did not respond to the Respondent's request that he provide his order for divorce;
- on or about 22 September 2016, the Appellant was again the subject of a PAYE verification check. On this occasion the Appellant furnished the Respondent with the Circuit Court order for divorce and consent terms;
- between 25 October 2016 – 16 December 2016, the Respondent issued P21 Balancing Statements for the years 2007 – 2015. The Balancing Statements issued calculated an aggregate underpayment by the Appellant for these years of €21,745.02;
- on 16 January 2017 the Appellant's newly appointed agent wrote to the Respondent stating that he was reviewing the Balancing Statements issued in respect of his client and that he was jointly assessable with his former spouse for the years 2007 – 2010;
- on 18 January 2017 the Respondent sent correspondence to the Appellant re-iterating that the Appellant was in its view not entitled to be jointly assessed with his former spouse for the years in which they were separated;
- on 26 January 2017 the Appellant, through his tax agent, delivered a notice of appeal in respect of the amended Balancing Statements issued in respect of the tax years 2007 – 2015. The notice of appeal contended that the Appellant was entitled to be assessed jointly with his former spouse for the years 2007 – 2010. The entitlement to various credits and reliefs for these years was asserted in

section 5 therein. The Statement of Case and Outline of Arguments differed from the Notice of Appeal in that additional credits and reliefs were sought;

- On 22 February 2017 the Appellant's tax agent wrote to the Respondent attaching computations of his estimation of the Appellant's position in relation to tax for the years 2007 – 2015. These computations appear to calculate the Appellant as having overpaid tax for these years;
- The parties agreed that the claims for the credits and reliefs in issue were not submitted until February 2017. The claim forms furnished to the Commissioner, namely for deductions for legally enforceable maintenance payments and one-parent family tax credit, indicate that they were submitted on 22 February and 15 February respectively. Supporting documentation regarding medical expenses and tuition fees also appear to have been submitted at this time.

Analysis

The joint assessment issue

61. The evidence of the Appellant and his former spouse in this case was clear. They both stated that by 2006 they were no longer living together as husband and wife, although they inhabited the same property.

62. Section 1017 of the TCA 1997 allows, where a wife is living with her husband, for the married couple to elect that the husband be assessed not only on his own, but also on his wife's income.

63. Section 1015(2)(a) of the TCA 1997 provides that a husband and wife are not living with each other where they are separated by court order or by deed of separation. In addition, section 1015(2)(b) of the TCA 1997 takes account of the actual circumstances of the marriage where there is no such order or deed. The key question is whether the married couple are in fact separated and likely to remain so.

64. The Commissioner cannot accept the submissions made on behalf of the Appellant regarding what constitutes being "separated" within the meaning of section 1015 of the TCA 1997. Section 5 of the Divorce Act 1995 refers to the need for a couple seeking divorce to prove that they have "lived apart" from one another for at least four of the previous five years. Section 1015 defines "living with" by reference to whether they are either judicially separated or, in reality, separated in circumstances where the separation is likely to be permanent. In the context of the law of divorce, it is well established that the question pertinent to establishing whether a married couple are "living apart" is whether

the common life between them has ended. This is a question of fact and it is similarly well established that it can be answered in the affirmative even if they continue to reside under the same roof. The Commissioner can see no reason why the answer to the same factual question should be different in the context of the law of taxation.

65. This being so, there can be no doubt on the evidence given that the Appellant and his spouse were separated prior to the tax years 2007 and 2008. Firstly, it must be so because they obtained an order for divorce in October 2010 on the basis that they were separated. Moreover, the evidence of the Appellant and his former spouse at the hearing of this appeal left no room for doubt. By 2006 their common life had broken down entirely and they were living separate lives, albeit that they resided under the same roof. Consequently, the decision of the Respondent to assess them separately for the years 2007 and 2008 must stand.

The claims for credits and reliefs

66. As part of this appeal the Appellant claimed that the amounts assessed by the Respondent as underpaid should be reduced because of his entitlement to a variety of credits and reliefs.

67. With the exception of the deduction sought in respect of maintenance payments (dealt with below) the only objection voiced by the Respondent in the Appeal to the claims for reliefs was the application of the time limit prescribed by section 865(4) of the TCA 1997 to the years 2007 – 2012.

68. It was submitted on behalf of the Appellant that no claim for repayment was being made, only a claim for the application of credits and reliefs for the purpose of determining his true charge to tax under the tax code. The Commissioner cannot accept this argument. The Appellant's right to the application of the various credits and reliefs sought in assessing his charge to income tax was dependant on him making claims for them. In the absence of any claims, the Respondent, on the information furnished, appears to have correctly assessed his charge in the original Balancing Statements and, subsequently, the amended Balancing Statements issued between October 2016 and December 2016.

69. It was common case that the Appellant did not make his claims for the credits and reliefs at issue until, at the earliest, February 2017. These represented new claims in relation to income tax which, if allowed, would have had the effect of entitling the Appellant to the repayment of part of the sum already correctly assessed by the Respondent as due and payable. In respect of the years 2007 – 2012 these claims were made more than four years after the chargeable periods ended, in contravention of the time-limit imposed under

section 865(4) of the TCA 1997. At its heart, this time-limit, and the concomitant time-limit imposed on the Respondent in the amending of assessments where there is no negligence or fraud, is designed to allow certainty and closure in relation to tax affairs. The logic of the Appellant's stance is that, at least in certain circumstances, he may make claims that could have been made years previously without regard to time constraints. This was exactly what the Oireachtas intended to prevent when it made provision for the time-limit in section 865(4) of the TCA 1997.

70. As regards section 459(6) of the TCA 1997, the Commissioner finds that it does not provide a basis for the allowing of the Appellant's claims. This is a provision granting the Respondent discretion to give reliefs without the need for the making and proving of a claim, notwithstanding anything to the contrary in the TCA 1997 that requires the making and proving of a claim. What it does not do, however, is override the requirement under section 865(4) of the TCA 1997 that claims made over four years after the end of a chargeable period shall not be allowed.

71. In considering this matter the Commissioner questioned whether the income tax sought to be repaid as a consequence of the claiming of credits and reliefs for the years 2007 – 2012 could be "set against" the additional income tax for the same periods that the Respondent assessed in the amended Balancing Statements as due and payable. It was for this reason that the Commissioner sought submissions on the relevance, or otherwise, of the exception to the rule against offsets provided in section 865B(3) and (4) of the TCA 1997. Having heard the submissions of the parties and their unanimity that it is not applicable to the circumstances of this appeal, the Commissioner is satisfied, however, that it is not of relevance.

72. Regarding the deduction sought in respect of maintenance, it appears to the Commissioner that the key test that section 1025 of the TCA 1997 imposes is that annual or periodical payments be "*for the benefit*" of the other spouse or former spouse. In this respect, the question regarding to whom payments are made does not appear to be relevant, or at very least decisive. The wording of the provision also does not appear to preclude deduction where there is some benefit to payer of the maintenance, although the benefit mainly rests with the recipient spouse or former spouse.

73. The terms of the consent agreement to the divorce were clear. The Appellant was to make periodic repayments in respect of the mortgage and he was to cede his interest to his former spouse. There is no question in the Commissioner's mind therefore that these were payments for her benefit and not for his own. This is so notwithstanding that as a joint mortgagor he had a contractual obligation with the lender to continue to repay.

Consequently, the sums paid for this purpose pursuant to the consent agreement to the divorce are deductible.

74. Similarly, the payments made pursuant to the consent agreement to the divorce in respect of the insurance policy on his life and the mortgage protection policy secured the positon of his former spouse in the event of his death. Again, they were for her benefit rather than his own. For this reason too, the sums paid periodically for these purposes in consequence of the divorce are deductible.

75. The Commissioner finds, however, that no deductions in respect of maintenance can be permitted prior to the divorce of the Appellant from his former spouse. The burden of proof in tax appeals rests with the Appellant. This was articulated by Charleton J in *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49, at para. 22 in the following terms:-

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

76. The Commissioner finds that having heard the oral evidence given by the Appellant and his former spouse on the subject, the absence of independent documentary evidence proving the existence of the written agreement dated 3 June 2006 prior to the commencement of payments totalling €1700 per month on or about the middle of 2008 is fatal to this aspect of the appeal. The Appellant did not provide this precise document when asked to do so explicitly by the Respondent in 2011. Its emergence occurred only after the commencement of the second inquiry. While not altogether clear, the correspondence suggests that it may even actually have been furnished for the first time after the issuing of the Balancing Statements assessing the underpayments and the bringing of this appeal. Whether this is what happened or whether it was provided earlier in the latter part of 2016, the Commissioner considers that in the circumstances it was incumbent on the Appellant to produce independent evidence corroborating the provenance of an unwitnessed and unsigned document. His failure to do this leaves room for doubt as to when it was created and has the effect that the Commissioner considers that he has not met the burden resting with him to prove the existence of a legally enforceable separation agreement prior to divorce. Consequently, the amounts assessed by the Respondent cannot be adjusted to take account of the monthly payments of €1700 prior to divorce.

Determination

77. This appeal is determined as follows:-

- the Commissioner finds that the Appellant was not entitled to be jointly assessed under section 1017 of the TCA 1997 for the years 2007, 2008, 2009 and 2010 and the Respondent's decision to this effect, reflected in its amended P21 Balancing Statements for these years, must stand;
- the credits and reliefs, aside from those relating to maintenance, sought by the Appellant in respect of the years 2013 – 2015 were not opposed by the Respondent at hearing. Therefore the amounts assessed as having been underpaid in the amended P21 Balancing Statements for these years should be revised to take account of his entitlement to the same;
- in respect of the years 2007 – 2012, the Commissioner finds that the credits and reliefs claimed, other than the relief in respect of maintenance payments for the years 2008, 2009 and part of 2010, must be refused on the grounds that they constituted a claim for the repayment of tax outside the four year time-limit prescribed by section 865(4) of the TCA 1997;
- the Appellant is entitled to the deduction of maintenance payments made in consequence of the consent agreement to his divorce. This includes the amounts paid in respect of the mortgage on the former family home and the amounts paid in respect of the mortgage protection and life insurance policies;
- the Appellant is not entitled to the deduction of maintenance payments pre-dating his divorce, having failed to satisfy the burden of proof that there existed a legally enforceable separation agreement obliging him to make such payments.

78. This appeal is determined under section 949AL and 949AK of the 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 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Conor O'Higgins
Appeal Commissioner
29 September 2022