AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

127TACD2024

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This Determination concerns the appeals of [redacted] ("the Appellant") made under section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") to the Tax Appeals Commission ("the Commission") of Notices of Amended Assessments to income tax ("amended assessments to income tax") made by the Revenue Commissioners ("the Respondent") for the years 2017 – 2019 ("the years in issue").

2. The particular question that arises in these appeals is whether the Appellant is entitled to the full amount of basic personal and employee tax credits, in circumstances where, being an official or servant of the European Union ("the EU"), he resided during the years in issue in [redacted]. Answering this question requires an analysis of the meaning and effect of Article 13 of Protocol (No 7) on the privileges and immunities of the European Union (OJ 2010 C 83, p. 266) ("Protocol No 7"), which is annexed to the Treaty of the Functioning of the EU ("the TFEU"), as well as sections 819 and 1032 of the TCA 1997.

Background

3. In May 2007, the Appellant began working in [redacted], an agency of the EU Commission located in [redacted]. Initially, he did so as a liaison officer for [redacted] and was an employee of and paid by that organisation.

4. On 1 September 2012, the Appellant took unpaid leave from [redacted] and became an "officer or servant" of the EU [redacted], paid by the EU Commission.

5. In May 2016, while still on unpaid leave, the Appellant retired from [redacted]. He remained, however, an officer or servant of the EU Commission in [redacted] until 31 August 2021, at which point he retired.

6. It was not in dispute in this appeal that, over the years in issue, the Appellant lived in [redacted] and was present in Ireland for less than 183 days in each year and less than 280 days in aggregate in each year and the year preceding it.

7. From 1 September 2012 until 31 August 2021, the Appellant's salary, paid by the EU Commission, was taxed by and for the benefit of the EU, in accordance with Article 12 of Protocol No 7. It was not subject to income tax in Ireland.

8. Following retirement from [redacted], the Appellant became the recipient of a pension, which was subject to income tax in Ireland. The pension payments received by the Appellant over the years in issue were €29,537 for 2017, €30,558 for 2018 and €30,773 for 2019.

9. The Appellant's [redacted] pension was his only source of income subject to Irish income tax. However, as he was a proprietary director of a company during the years in issue, he was obliged to file Form 11 income tax returns.

10. In filing his Form 11 income tax return for 2019, the Appellant included an expression of doubt regarding his entitlement to personal and employee tax credits. In not accepting the expression of doubt as valid and refusing to allow the full amount of credits available to individuals, the Respondent stated in correspondence of 21 May 2021:-

    "*You are not resident in Ireland, you are resident in* [redacted].

    Your [redacted] *pension is, however, taxable in Ireland under the provisions of the Ireland* [redacted] [double taxation agreement].

    As you are non-resident the provisions of section 1032 [of the TCA 1997] *apply, i.e. you are not entitled to any tax credits in Ireland other than as provided by that section.*

In brief you are only entitled to the credits in proportion your Irish taxable income bears to your worldwide income.

As you provided details of your EU income on the 2019 return I was able to enter the appropriate figures. Your Irish income is €30,773 ([redacted] Pension) and your worldwide income is €117,857 ([redacted] pension plus EU salary €87,084). As your Irish income represents 27.11% of your total income you were allowed €431 of the personal credit and €431 of the PAYE credit (both credits being €1,650 in full). This is the only context in which your EU salary is used in the computation of your tax due in Ireland.

An Amended Notice of Assessment 2019 will now issue.

If you want I can adjust your 2017 and 2018 assessments to allow any credits due once you provide me with details of your salary for those years. You will have a tax liability in each year."

11. On 22 May 2021, the Respondent issued an amended assessment to income tax in respect of 2019, whereby it allowed the Appellant the amount of €431 in personal and employee tax credits.

12. On 30 September 2021, the Respondent issued amended assessments to income tax for 2017 and 2018, whereby it allowed the Appellant personal and employee tax credits in the amounts of €406 and €410 in each instance. The amount of personal and employee tax credits allowed relative to the total tax credits available to an individual (€1,650 for both) were, as with 2019, in the same proportion as the Appellant's Irish income in the form of his [redacted] pension to his overall 'worldwide income' (i.e. his [redacted] pension plus his [redacted] salary).

13. The Appellant appealed the amended assessments to income tax for the years in issue by way of Notice of Appeal delivered to the Commission on 13 October 2021. In so doing he claimed he was entitled to the full allocation in each year of personal and employee tax credits, in the amount of €1,650.

Legislation and Guidelines

Relevant national legislation

14. Section 461 of the TCA 1997 makes provision for a "*Basic personal tax credit".* During the years in issue, the basic personal tax credit available to an individual was €1,650.

15. Section 472 of the TCA 1997 makes provision for an "*Employee tax credit"* that is available to persons in receipt of certain emoluments taxed under the PAYE system. During the years in issue, the employee tax credit available to an individual was €1,650.

16. Section 1032 of the TCA 1997 is entitled "*Restrictions on certain reliefs"* and, in so far as relevant, provides:-

> *"(1) Except where otherwise provided by this section, an individual not resident in the State shall not be entitled to any of the allowances, deductions, reliefs or reductions under the provisions specified in the Table to section 458.*
>
> *(2) Where an individual not resident in the State proves to the satisfaction of the Revenue Commissioners that he or she—*
>
> *(a) is a citizen of Ireland,*
>
> *(b) is resident outside the State for the sake or on account of his or her health or the health of a member of his or her family resident with him or her or because of some physical infirmity or disease in himself or herself or any such member of his or her family, and that previous to such residence outside the State he or she was resident in the State,*
>
> *(c) is a citizen, subject or national of another Member State of the European Communities or of a country of which the citizens, subjects or nationals are for the time being exempted by an order under section 10 of the Aliens Act, 1935, from any provision of, or of an aliens order under, that Act, or*
>
> *(d) is a person to whom one of the paragraphs (a) to (e) of the proviso to section 24 of the Finance Act, 1920, applied in respect of the year ending on the 5th day of April, 1935, or any previous year of assessment,*
>
> *then, subsection (1) shall not apply to that individual, but the amount of any allowance, deduction or other benefit mentioned in that subsection shall, in the case of that individual, be reduced to an amount which bears the same proportion to the total amount of that allowance, deduction or other benefit as the portion of his or her income subject to Irish income tax bears to his or her total income from all sources (including income not subject to Irish income tax)."*

17. Section 819(1) of the TCA 1997, headed "*Residence",* provides:-

> *"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 or 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."

Relevant EU legislation

18. Article 12 of Protocol No 7 provides:-

"Officials and other servants of the Union shall be liable to a tax, for the benefit of the Union, on salaries, wages and emoluments paid to them by the Union, in accordance with the conditions and procedure laid down by a European law. That law shall be adopted after consultation of the institutions concerned.

Officials and other servants of the Union shall be exempt from national taxes on salaries, wages and emoluments paid by the Union."

19. Article 13 of Protocol No 7 provides, *inter alia*:-

"In the application of income tax, wealth tax and death duties and in the application of conventions on the avoidance of double taxation concluded between Member States of the Union, officials and other servants of the Union who, solely by reason of the performance of their duties in the service of the Union, establish their residence in the territory of a Member State other than their State of domicile for tax purposes at the time of entering the service of the Union, shall be considered, both in the State of their actual residence and in the State of domicile for tax purposes, as having maintained their domicile in the latter State provided that it is a member of the Union. This provision shall also apply to a spouse, to the extent that the latter is not separately engaged in a gainful occupation, and to children dependent on and in the care of the persons referred to in this Article.

Movable property belonging to persons referred to in the first paragraph and situated in the territory of the State where they are staying shall be exempt from death duties in that State. Such property shall, for the assessment of such duty, be considered as

being in the State of domicile for tax purposes, subject to the rights of third States and to the possible application of provisions of international conventions on double taxation."

Submissions

20. Set out hereunder is a summary of the legal submissions of the parties.

Appellant

21. The Appellant submitted that the key to this appeal was Article 13 of Protocol No 7. This, he said, had the effect that he was to be deemed resident in Ireland, not the [redacted] where he actually resided, over the years in issue. Article 13 was EU law that had the effect of dis-applying the residency rules imposed under section 819(1) of the TCA 1997 in so far as "officers or servants" of the EU were concerned.

22. The Appellant submitted that the consequence of his deemed Irish residency was that the restrictions on the obtaining of reliefs and credits imposed under section 1032 of the TCA 1997 did not apply to him. He was, therefore, entitled to the full personal and employee tax credits of €1,650 for each of the years in issue and the charges to income tax assessed in the amended assessments under appeal should be adjusted accordingly.

23. The Appellant further stated that, to his knowledge, other Irish persons who serve or have served as officers or servants of the EU in Members States other than Ireland have been treated as Irish resident. He submitted that his own treatment by the Respondent should be no different and for this reason also his appeal should be allowed.

Respondent

24. The Respondent emphasised, firstly, that it was an agreed fact that the Appellant was not "*present in the State"* in the years in question for the periods specified in section 819(1)(a) and (b) of the TCA 1997. As such, he was not "*resident in the State"* over that time for the purposes of that legislation.

25. It was submitted that section 1032 of the TCA 1997 was clear in restricting income tax reliefs and credits available to persons in the position of the Appellant who, with an Irish income and 'worldwide income', were entitled only to the same proportion of the total credit amount as their Irish income bore to their worldwide income. The Appellant had been allocated personal and employee tax credits in accordance with this formula.

26. The Respondent submitted that Article 13 of Protocol No 7 did not have the effect suggested by the Appellant. What it stated was that an officer of servant of the EU who changed their *"actual residence"* from their place of "*domicile for tax purpose"* would be considered to remain domiciled in the latter place, provided it was an EU Member State. The Respondent submitted that the concept of domicile and residency are not synonymous. The latter does not have a statutory definition and is, it was said, defined under common law as being the place where a person intends to reside on a permanent basis. This is, by default, the place of a person's birth, though it can change over time. Residency, as noted already, is defined in the context of taxation by section 819 of the TCA 1997, which definition it was agreed the Appellant did not conform with on account of his physical absence from the State over the years in issue.

Material Facts

27. The facts material to the determination of the legal issues arising in this appeal are as follows:-

- the Appellant is a former [redacted], who on or about May 2007 took up the position of that organisation's liaison officer with [redacted], the EU agency for [redacted];
- during the course of the Appellant's time as [redacted]'s liaison officer with [redacted], he was a [redacted] employee, paid by the State;
- on or about 1 September 2012, the Appellant took extended leave from [redacted] and took up the role of a servant or officer of the EU [redacted] paid by the EU Commission;
- on or about May 2016, the Appellant retired from [redacted], though he remained employed by the EU [redacted];
- since his retirement in May 2016 from [redacted], the Appellant has been in receipt of a [redacted] pension;
- the Appellant's [redacted] pension was €29,537 for 2017, €30,558 for 2018 and €30,773 for 2019;
- on or about September 2021, the Appellant retired from employment as an officer or servant of the EU [redacted];

- in 2021, the Appellant filed Form 11 income tax returns for the years in issue. In so doing, the Appellant included an expression of doubt regarding the extent of his entitlement to personal and employee tax credits;
- the Respondent did not accept these expressions of doubt as being valid;
- following the filing of the Form 11 income tax returns for the years in issue, on 22 May 2021 the Respondent made amended assessments to income tax in respect of the year 2019 and on 30 September 2021 in respect of the years 2017 and 2018;
- therein, the Respondent allowed personal and employee tax credits in the amounts of €406 for 2017, €410 for 2018 and €431 for 2019;
- the amount of credits allowed by the Respondent in the appealed amended assessments to income tax for the years in issue relative to the maximum personal and employee tax credits available to an individual (€1,650 in respect of both types of credit) was in the same proportion to the Appellant's [redacted] pension relative to his overall 'worldwide income' for the same years;
- the Appellant appealed the assessments to income tax for the years in question by way of Notice of Appeal delivered to the Commission on 13 October 2021.

Analysis

28. The facts in this appeal were not in dispute and give rise to a net legal question relating to the meaning of Article 13 of Protocol No 7. Is it, as the Appellant in essence contends, a 'deeming' provision that requires that he, as a consequence of the supremacy of EU law, be treated as though he was in fact resident in Ireland for the purposes of section 819(1) of the TCA 1997, even though he did not meet the residency conditions set out therein? If the Appellant is correct in this regard, he would be entitled to the full amount of personal and employee tax credits available to individuals over the years in issue, as he would not be subject to the restrictions imposed under section 1032(2) of the TCA 1997 on the quantum of credits and reliefs available to citizens of Ireland resident elsewhere in the EU.

29. Before proceeding to answer this question, it is first necessary to emphasise that the jurisdiction of an Appeal Commissioner is to determine whether an appellant has a charge to tax and, if so, its precise amount. This must be done by the application of relevant legislation to the facts of the case (see *Lee v Tax Appeals Commissioners* [2021] IECA 18).

30. In the course of the appeal hearing, the Appellant made reference to others whom he said had been in a similar or the same position to him and yet, by contrast, were permitted to avail of the full amount of personal and employee tax credits. In the first instance, the Commissioner would note that the Appellant did not seek to call any witnesses to give evidence that they were so treated and, even in his own hearsay evidence, he gave no specific details in this regard. As such, there is no admissible evidence on which to conclude that the Appellant has been treated less favourably than others in the same position. More fundamentally, however, it is held that to determine this appeal in favour of the Appellant on the basis of the treatment of others would exceed the jurisdiction, described in the preceding paragraph herein, which has been conferred on the Commissioner for the determination of tax appeals. This appeal, it is worth repeating, is to be determined solely by reference to the relevant national legislation, namely sections 819 and 1032 of the TCA 1997, and/or by reference to Article 13 of Protocol No 7, should it be held to have any impact on the interpretation or application of the aforementioned national legislation.

31. As noted already, there is agreement that, for the years in issue, the Appellant was living in [redacted] and was not "*present"* for the periods specified in section 819(1) of the TCA 1997, such that he could be said to be "*resident in the State".* For the purposes of that legislation only, this means that the Respondent was, on account of section 1032 therein, correct to restrict the Appellant's personal and employee tax credits in the manner done in the appealed amended assessments for the years in issue.

32. Article 12 of Protocol No 7 provides that officials and servants of the EU be taxed "*for the benefit of the Union"* and be *"exempt from national taxes on salaries, wages and emoluments paid by the Union."* However, Article 13 of Protocol No 7 proceeds to state that the "*domicile for tax purposes"* of a person who moves their *"residence"* from one Member State to another, solely on account of the performance of their duties as an official or servant of the EU, shall not change.

33. "Domicile" is a word that is not defined in Protocol No 7. It is, however, a significant and complex concept in private international law that has been described, in very basic terms, as "*the country where* [a person] *intends to reside permanently or indefinitely*".[1] It is a *"connecting factor"* that links a person with a specific legal system and is distinct from other such factors, for example that of nationality.

[1] See Working Paper of The Law Reform Commission on Domicile and Habitual Residence, September 1981 and *Dicey and Morris on the Conflict of Laws, Chapter 7, 10th Edition, 1980.*

34. Every person who takes up employment as an officer or servant of the EU and moves their residence from one Member State to another on account of the performance of their duties has, prior to moving, a place of domicile. The effect of Article 13 of Protocol No 7 is, it appears to the Commissioner, to ensure that for the purposes of taxation this domicile does not change merely on account of the changing of the place of residence so as take up a position of employment with one of the EU's institutions. A person's place of domicile has, on account of Article 12, no bearing on the taxation of their salary arising from employment by the EU. However, without Article 13 there could be doubt as to the correct national legal system 'personal' to that EU employee in the context of their taxation. For example, in the Appellant's case there might be conflict as to whether he fell to be taxed on his non-EU income in either Ireland or [redacted]. However, with Article 13 there is no such doubt. He is clearly domiciled in Ireland.

35. What, in the view of the Commissioner, Article 13 of Protocol No 7 does *not* do is prescribe that the national tax law of its Member States treat those officers or servants of the EU who have moved abroad to another Member State in order to carry out their duties, as remaining resident in the place from which they came. This is unsurprising. Aside from under Article 12 of Protocol No 7, the EU does not under its Treaties have competence as regards the imposition of direct taxation (see *Airbnb Ireland and Airbnb Payments UK*, C-83/21, EU:C:2022:1018, paragraph 41). Such competence resides solely with the Member States, and Ireland, in exercising it, has decided that the level of reliefs and credits available is to be determined, *inter alia*, by whether a person is "*Resident in the State"* within the meaning of section 819(1) of the TCA 1997.

36. As the Appellant was not "*present in the State*", and therefore was not resident in accordance with the provisions of section 819 of the TCA 1997 over the years in issue, the terms of section 1032(2) of the TCA 1997 require that the amount of personal and employee tax credits available to him relative to the maximum amount allowed in respect of an individual, be in the same proportion as was his [redacted] pension income to his overall 'worldwide' income. This being the level of personal and employee credits allowed by the Respondent, the Commissioner finds that the amended assessments to income tax for the years in issue that are under appeal are correct and stand affirmed. Hence, the Appellant's appeal fails.

Determination

37. The Commissioner finds that the amended assessments to income tax of the Respondent for the years 2017 and 2018, made on 30 September 2021, and the amended

assessment to income tax for 2019, made on 22 May 2021, are correct and stand affirmed.

38. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax. The Appellant was correct to appeal to have clarity on the position.

39. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

40. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

41. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Conor O'Higgins
Appeal Commissioner
12 July 2024