



**27TACD2018**

**BETWEEN/**

**NAME REDACTED**

**Appellant**

**V**

**THE REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

**Introduction**

1. This is an appeal against a decision of the Respondent to withdraw from the Appellant, the incapacitated child tax credit (hereafter 'the tax credit') contained at section 465 of the Taxes Consolidation Act 1997 (hereafter 'TCA 1997') in respect of the tax years of assessment 2014 and 2015.

**Background**

2. The Appellant's daughter, hereafter 'Jane', born in 1996, has suffered from epilepsy since she was two years old. Detailed records evidencing Jane's medical history including; care plans, GP reports, records from Temple Street hospital and paediatric neurology reports, were furnished. These records date from 1999 to 2016. Jane had very many health complaints over the course of her life. While in secondary school Jane broke two limbs during a seizure which led to a fall. As a result of her condition, she encountered many difficult times at school. The Appellant, who was a nurse by profession, ceased working at various times in her career in order to care full time for Jane during periods of acute ill-health, returning to work once these periods had passed.

3. On 29 March 2016, the Respondent wrote to the Appellant withdrawing the tax credit in respect of the years 2014 and 2015 on the basis that; *'The incapacity of the child must be such that it permanently prevents the child from being able in the long term (i.e. when over 18 years of age) to maintain himself or herself independently. If the incapacity can be corrected or relieved by the use of any treatment, device, medication or therapy, for example coeliac disease, diabetes, hearing impairment which can be corrected by a hearing aid etc. the child will not be regarded as permanently incapacitated for the purposes of this relief.'*
4. The letter demanded payment of €5,245.47 within 30 days. This sum comprises;
  - €2,621.60 in respect of 2014
  - €2,623.87 in respect of 2015
5. Further letters issued on 31 May 2016 and 26 July 2016 demanding payment of the sum within 30 days.
6. The Appellant was distressed to receive these letters. Based on Jane's condition, the Appellant believed that she was entitled to the tax credit for the tax years of assessment 2014 and 2015. The Appellant struggled financially over the years and did not have the means to discharge the amount due. At hearing the Appellant produced up to date information in relation to Jane's health, the Appellant's job, her earnings and her living arrangements.

## Legislation

### Section 465 TCA 1997 - Incapacitated child tax credit

*(1) Where a claimant proves that he or she has living at any time during a year of assessment any child who*

*(a) is under the age of 18 years and is permanently incapacitated by reason of mental or physical infirmity, or*

*(b) if over the age of 18 years at the commencement of the year, is permanently incapacitated by reason of mental or physical infirmity from maintaining himself*



*or herself and had become so permanently incapacitated before he or she had attained the age of 21 years or had become so permanently incapacitated after attaining the age of 21 years but while he or she had been in receipt of full-time instruction at any university, college, school or other educational establishment,*

*the claimant shall, subject to this section, be entitled in respect of each such child to a tax credit (to be known as the “incapacitated child tax credit”) of [€3,300].*

*(2)*

*(a) A child under the age of 18 years shall be regarded as permanently incapacitated by reason of mental or physical infirmity only if the infirmity is such that there would be a reasonable expectation that if the child were over the age of 18 years the child would be incapacitated from maintaining himself or herself.*

*(b) A tax credit under this section shall be in substitution for and not in addition to any tax credit to which the individual might be entitled in respect of the same child under section 466.*

.....

### **Submissions and Analysis**

7. The question of whether the Appellant was entitled to the tax credit turns on the question of whether the Appellant’s daughter, Jane, was ‘*permanently incapacitated*’ within the meaning of section 465 TCA 1997.
8. The Appellant stated that although Jane had remained seizure free since 2013, Jane continued to suffer violent headaches. Her epilepsy had not been cured or eliminated. The Appellant stated that one of the triggers for Jane’s seizures, was excessive tiredness. Medical reports confirmed that Jane suffered from a sleep disorder which required her to sleep for two hours during the day. A medical report dated on 6/7/2016 confirmed that Jane’s seizures occurred more frequently when she was sleep deprived. The medical report stated that Jane’s seizures decreased in adolescence due to a carefully managed routine of medication, day time resting and careful maintenance of night time sleep requirements, supervised and ensured by her mother, the Appellant.



9. The position of the Respondent was that the Appellant was not entitled to the incapacitated child credit in respect of 2014 and 2015 as Jane's condition was relieved by treatment and medication such that she remained seizure free and without medication during those years. The Respondent also relied on the fact that Jane had secured part time employment and thus the Respondent submitted that Jane was not permanently incapacitated from maintaining herself in accordance with s.465 TCA 1997.

10. In relation to a child who has reached the age of 18 '*at the commencement of the year*' the applicable legal test is contained in subsection 1(b) which provides;

*Where a claimant proves that he or she has living at any time during a year of assessment any child who .... if over the age of 18 years at the commencement of the year, is permanently incapacitated by reason of mental or physical infirmity from maintaining himself or herself and had become so permanently incapacitated before he or she had attained the age of 21 years.... the claimant shall, subject to this section, be entitled in respect of each such child to a tax credit (to be known as the "incapacitated child tax credit") of [€3,300]. [emphasis added]*

11. In order to avail of the relief, a claimant must demonstrate that the child '*is permanently incapacitated ..... from maintaining himself or herself*'.

12. In this appeal, Jane was over the age of 18 years at the commencement of 2015. In 2015, Jane was not taking medicine for epilepsy and had not suffered a seizure since 2013. However, her epilepsy had not been cured or eliminated and she continued to suffer violent headaches. The Appellant, a nurse by profession, stated that Jane's seizures had reduced on account of her active care and management of her daughter's condition including implementation of a solid routine of medication, day time resting and night time sleep requirements. This was confirmed by medical report dated 6/7/2016.

13. In 2015, Jane was living at home with her mother. She sat her Leaving Certificate and was offered a course in Limerick which would have required her to live away from home. She deferred her course fearing that her seizures could return if she were required to manage her own living arrangements. She told her mother she did not want to be sick in college. She took a part time job in a retail store in October 2015. Jane was reluctant to learn to drive as she was worried about seizures while driving.



14. The legislation provides that the concept of '*permanent incapacity*' is to be determined by reference to the question of whether the child is able to maintain himself or herself. The Respondent contended that a child is not incapacitated where the child has a job and is earning. However, while earning ability is a relevant factor, there is nothing in the legislation to suggest that the test is purely monetary. In this appeal the child had a permanent condition which was under active management and her capacity fell to be evaluated in that context.
15. In relation to a child under 18, the relevant test is contained in section 465(2)(a) which provides; '*A child under the age of 18 years shall be regarded as permanently incapacitated by reason of mental or physical infirmity only if the infirmity is such that there would be a reasonable expectation that if the child were over the age of 18 years the child would be incapacitated from maintaining himself or herself.*' [emphasis added]
16. The words '*shall be regarded as*' indicate that this is a deeming provision. If there is a '*reasonable expectation*' that the child would be incapacitated from maintaining himself or herself over the age of 18, then the tax credit will be allowed. This is a lower threshold than the test for over 18s contained at section 465(1)(b) which is not in the nature of a deeming provision.
17. It is entirely possible that a parent could have a reasonable expectation when a child is under 18, that that child will be incapacitated from maintaining himself or herself over the age of 18 but then, subsequently, discover (though good care and treatment or through a fortunate improvement in health) that the child has achieved independence post the age of 18. This does not mean that there has been non-compliance with s.465(2)(a). It does not mean that the parent's reasonable expectation was wrongly held and it does not mean that the tax credit for the years when the child was under 18 should be withdrawn. The reasonableness of the expectation of the parent (as regards the child's capacity) should be considered in the context of the child's condition at the time the expectation was formed and in relation to the relevant tax year of assessment to which it relates.
18. When this appeal came on for hearing in September 2018, Jane was 21 years old, her health condition was stable and she was growing more independent. She had completed a childcare course, had taken up a job in a high street retail store and had



very recently moved out of home and was sharing a house with her older brother. The tax years of assessment 2016-2018 do not form part of this appeal. I do not know if the Respondent formed the view that the tax credits for 2014 and 2015 were wrongly allowed as a result of Jane's stable health and growing independence in the later years of 2016, 2017 and 2018. However, for the reasons set out above, it would be erroneous to withdraw the tax credit on this basis.

19. If a '*reasonable expectation*' exists per s.465(2)(a) in respect of the relevant tax year of assessment as regards children under 18, then a subsequent period of good health and an improvement in capacity for independent living will not retrospectively invalidate such a reasonably held expectation. As regards section 465(1)(b) and children over 18, the test of whether the child has capacity to maintain himself or herself is not confined exclusively to the question of whether he/she can achieve a position of paid employment. It is necessary also to consider the extent to which the child has the capacity for independent living based on their health condition or disability.
20. In 2014 and 2015, Jane was experiencing a period of seizure free living due to the meticulous care provided by her mother over the history of her illness including appropriate management of medications, her sleep requirements and related care issues. While she earned money from her part time job, she did not at that time have capacity for independent living. There was no evidence that Jane would have been equipped to operate and run a household, manage her job, her daily routine, her rest requirements, her general health and her medical condition without assistance. There was no evidence that it would have been safe for Jane to live alone given her history of violent seizures.

### **Conclusion**

21. For the reasons set out above I am satisfied that the Appellant has satisfied the requirements of section 465 TCA 1997 and is entitled to avail of the incapacitated child tax credit in respect of the tax years of assessment 2014 and 2015. The appeal hereby is determined in accordance with section 949AL TCA 1997.

**COMMISSIONER LORNA GALLAGHER**

**October 2018**



