



125TACD2021

BETWEEN/



Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal in relation to the refusal by the Respondent of the Appellant's claim for repayment of income tax, in accordance with section 865 of the Taxes Consolidation Act, 1997 as amended ('TCA 1997') in respect of the tax years of assessment 2010 and 2011.

Background

2. The Appellant, [REDACTED] was a chargeable person for the relevant tax years of assessment.
3. The Appellant filed returns in relation to 2013 and 2014, which resulted in notices of assessment to tax in the sums of €4,549.64 and €10,120.83 respectively. These balances were discharged by the Appellant on 16 November 2015 and on 9 November 2015.
4. By letter dated 12 February 2016, the Appellant's agent wrote to the Respondent informing the Respondent that returns for 2010, 2011 and 2012 were in the process of being completed. Under cover of letter dated 26 February 2016, the Appellant submitted returns dated 26 February 2016, for the tax years of assessment 2010, 2011 and 2012 which were received by the Respondent on 8 March 2016.



5. Notices of assessment for the years 2010, 2011 and 2012 issued to the Appellant and his tax advisors on 18 March 2016. The notice of assessment for 2010, showed an overpayment of tax in the sum of €5,089.89 while the notices for 2011 and 2012 each showed an overpayment in the sums of €6.80 and €6.80.
6. On 23 March 2016, notification issued informing the Appellant and his advisor that the claim for repayment of tax in relation to 2010 and 2011 was disallowed on the basis that it was made outside of the four year statutory limitation period contained in section 865 TCA 1997. The repayment claim in relation to the tax year of assessment 2012 was allowed and was offset against the Appellant's preliminary tax for 2019. Further correspondence ensued between the parties on 5 April 2016, 10 May 2016, 17 May 2016, 8 June 2016 and on 11 October 2016. The Respondent's position was reiterated in this correspondence and the Appellant duly appealed.

Legislation

Section 865 TCA 1997 - Repayment of Tax

...

(2) 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.

....

[(3) A repayment of tax shall not be due under subsection (2) unless a valid claim has been made to the Revenue Commissioners for that purpose.]

[(3A) (a) Subject to paragraph (b), subsection (3) shall not prevent the Revenue Commissioners from making, to a person other than a chargeable person (within the meaning of [Part 41A]), a repayment in respect of tax deducted, in accordance with Chapter 4 of Part 42 and the regulations made thereunder, from that person's emoluments for a year of assessment where, on the basis of the information available to them, they are satisfied that the tax so deducted, and in respect of which the person is entitled to a credit, exceeds the person's liability for that year.

(b) A repayment referred to in paragraph (a) shall not be made at a time at which a claim to the repayment would not be allowed under subsection (4).]

(4) 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 –





- (a) 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,
- (b) 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
- (c) 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.

....

...

(7) Where any person is aggrieved by a decision of the Revenue Commissioners on a claim to repayment by that person, in so far as that decision is made by reference to any provision of this section, [the person may appeal the decision to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of that decision].

Submissions

7. The Appellant requested that the Tax Appeals Commission recommend to the Respondent that an ex-gratia payment be made to him in an amount commensurate with the overpayments of tax. The Appellant submitted that the overpayment in relation to 2010 arose because of an error by his then employer in relation to his salary income for 2010. He stated that the error that gave rise to the overpayment was not his error. The Appellant stated that he was at a loss to understand why the Respondent would refuse to refund the tax overpaid. The Appellant stated that he was a compliant taxpayer and an innocent party who had come to the hearing with clean hands. He submitted that the Respondent had collected taxes in excess of the amount owing and that the Respondent was obliged to refund the excess on equity grounds, on fairness grounds and in accordance with the Revenue Charter.
8. Through his tax agent, the Appellant argued that the manifestation of the issue arose in 2016, when the overpayment was identified. His position was that he made a claim for repayment within four years of the identification of the overpayment and that he was therefore within time. The Appellant cited the Supreme Court decision in *Brandley v Deane*



[2017] IESC 83 and the judgment of the High Court in *Smith v Cunningham and ors* [2018] IEHC 600) in support of his submission that the statutory limitation period should run from when the damage became manifest which in view of the Appellant was 18 March 2016, the date on which he was notified of the existence of the overpayment. The Appellant submitted that the decisions in *Brandley* and *Smith*, took precedence over the wording used in s.865 TCA 1997.

9. Alternatively, the Appellant argued that it was necessary 'to step outside' of the TCA 1997, and that the four year statutory limitation period contained in section 865(4) TCA 1997, should not be enforced. The Appellant submitted that refusal to process the repayment amounted to unfair treatment and was unconstitutional. The Appellant contended that on the basis of information he received on the 18th of March 2016, a new situation arose, being the overpayment of €5,089.89 and that the Respondent was obliged to process the repayment.
10. The Respondent's official in his submissions stated that in the three years preceding 2010, the Appellant's returns were filed on time and overpayments of tax were processed and were returned to the Appellant. The Respondent stated that the overpayment of tax in respect of 2010, would have been discovered within time, had the Appellant filed his returns on time.
11. The Respondent submitted that at all times the onus was on the Appellant as a chargeable person to self-assess, to submit the statutory forms, to pay the appropriate tax in respect of the relevant tax years of assessment and to do so on or before the specified return date in accordance with section 959I TCA 1997. The Respondent stated that in relation to the 2010 return, a pay and file notice was sent on 9 September 2011, while a reminder was sent on 10 February 2012. In relation to the 2011 return, a pay and file notice was sent on 7 September 2012, while a reminder was sent on 1 March 2013. The due date for the 2010 return was 31 October 2011, while the due date for the 2011 return was 31 October 2012. It was not in dispute that the returns were filed on 8 March 2016.
12. The Respondent submitted that a claim for repayment of tax may be made by taxpayers but that the claim must be made within four years after the end of the chargeable period to which the claim relates. The Respondent submitted that as the Appellant's claims in respect of the tax years of assessment 2010 and 2011 were out of time in accordance with the provisions of section 865 TCA 1997, the Respondent was obliged to comply with the provisions of section 865 TCA 1997, and was unable to process the repayment claims on behalf of the Appellant.



13. The Respondent submitted that the Supreme Court case of *Brandley v Deane* [2017] IESC 83 and the judgment of the High Court in *Smith v Cunningham and ors* [2018] IEHC 600 had no application to this appeal. Further, the Respondent submitted that the Appellant's contention that a failure to process the repayment would be in breach of the constitution was a submission which did not fall within the jurisdictional remit of the TAC. The Respondent's position was that the applicable legislative provision was section 865 TCA 1997, as amended and not the Statute of Limitations, 1957.

Analysis

14. The returns in relation to 2010 and 2011 were filed with the Respondent on 8 March 2016 and this fact is not in dispute. The Respondent submitted that the Appellant's claim for repayment was out of time in accordance with s.865(4) TCA 1997 which provides; '*... a claim for repayment of tax under the Acts for any chargeable period shall not be allowed unless it is made - within 4 years, after the end of the chargeable period to which the claim relates*' [emphasis added]. I accept the submission of the Respondent that these repayment claims were not made within four years after the end of the chargeable periods to which those claims related.
15. As part of this appeal, the Appellant requested that the Tax Appeals Commission recommend to the Respondent that an ex-gratia payment be made to him in an amount commensurate with the overpayments of tax however, the Commission does not possess jurisdiction to make such a recommendation. As a result, this request cannot be formally or materially considered.
16. The scope of the jurisdiction of the Appeal Commissioners and of the Tax Appeals Commission, has been discussed in a number of Irish cases, namely; *Lee v Revenue Commissioners* [2021] IECA 18, *Stanley v The Revenue Commissioners* [2017] IECA 279, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49, *The State (Calcul International Ltd.) v The Appeal Commissioners III* ITR 577 and *The State (Whelan) v Smidic* [1938] 1 I.R. 626. As is clear from the authorities, the jurisdiction of the Tax Appeals Commission does not extend to determining the constitutionality of a statutory provision, to the provision of equitable or declaratory relief nor to the provision of remedies available in High Court judicial review proceedings.



17. Having considered the submissions of the parties, I do not accept the Appellant's submission that the provisions of section 865(4) TCA 1997 should be disregarded or that time should run from the filing of the returns in March 2016. The express statutory wording contained in section 865(4) TCA 1997, does not support this interpretation. Limitation periods as contained in the Statute of Limitations 1957, which are founded in tort and breach of contract, do not apply in the context of a claim for repayment of tax under the Taxes Consolidation Act 1997. It follows that the jurisprudence in relation to such claims (including the Supreme Court judgment in *Brandley v Deane* [2017] IESC 83 and the judgment of the High Court in *Smith v Cunningham and ors* [2018] IEHC 600) which provides that limitation periods may in certain circumstances run from the date that damage is manifest or from the date of discoverability, is not jurisprudence which is applicable in the context of this appeal which relates to a claim for repayment of tax outside of the four year statutory limitation period contained in section 865 TCA 1997.

26. Section 865(4) TCA 1997 provides; '*... a claim for repayment of tax under the Acts for any chargeable period shall not be allowed unless it is made - within 4 years, after the end of the chargeable period to which the claim relates*'. In this appeal, the applicable provision is section 865 TCA 1997, and I am satisfied that the use of the word '*shall*' per s.865(4) TCA 1997, indicates an absence of discretion in the application of the provision. The wording of the provision does not provide for extenuating circumstances in which the four-year rule might be mitigated. In short, I do not consider that I have the authority or jurisdiction to determine that a repayment be made to the Appellant where the claim for repayment is outside the four-year period specified in s.865(4) TCA 1997.

27. Previous determinations of the Tax Appeals Commission have addressed the matter of repayment in the context of the four-year statutory limitation period. These determinations, numbered 18TACD2016, 19TACD2016, 21TACD2016, 26TACD2016, 2TACD2017, 8TACD2017, 11TACD2017, 26TACD2017 11TACD2017, 26TACD2017, 9TACD2018, 12TAC2018, 16TACD2018, 19TACD2018, 25TACD2018, 29TACD2018, 3TACD2019, 4TACD2019, 20TACD2019 and 155TACD2020 can be found on the Commission website at www.taxappeals.ie.

Determination





28. Pursuant to the wording of s.865 TCA 1997, and in particular the use of the word "*shall*" per subsection 865(4) TCA 1997, I determine that I do not have discretion as regards the application of the four-year statutory limitation period in circumstances where the claim has been made outside the four-year period. As a result, I have no option but to determine that the repayment claims on behalf of the Appellant in respect of the tax year of assessment 2010 and 2011, are out of time in accordance with the provisions of section 865(4) TCA 1997.

29. This Appeal is determined in accordance with s.949AL TCA 1997.

A handwritten signature in black ink, appearing to read 'Lorna Gallagher', written over the printed name.

COMMISSIONER LORNA GALLAGHER

28th day of July 2021

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.

