Poe Kiely
Hogan Lanigan
Solicitors

ONF

Q&A TAX Advice for Surrogacy

Prepared By

Alan Seery, Tax Partner
O'Neill Foley Chartered Accountants

Tax Advice for Surrogacy

Q & A with Alan Seery, Tax Partner O'Neill Foley Chartered Accountants

Can I claim income tax relief for surrogacy expenses?

Under Irish tax law, there is currently no tax relief for payments made to a surrogate mother for facilitating a surrogacy.

Some of the costs incurred may however qualify for tax relief as Irish tax law does not restrict relief for health expenses to those incurred in Ireland only or those incurred by/for the person claiming the credit or by a relative of the claimant only. Tax relief is available for the following expenses incurred as part of the overall surrogacy costs:

- IVF treatment where the treatment is carried out by a medical practitioner*
- Care received by a woman in respect of a pregnancy for the following services:

  - ✓ Services of a medical practitioner *
  - ✓ Diagnostic procedures carried out on the advice of a medical practitioner
  - ✓ Drugs or medicines supplied on the prescription of a medical practitioner
  - ✓ Transport by ambulance to a hospital
  - ✓ Maintenance in a hospital

** The medical practitioner has to be registered under the Medical Practitioners Act 2007 or an equivalent Act if the IVF treatment is carried out abroad.*

At what rate is relief available?

Health expenses in Ireland which qualify for tax relief are largely granted at 20% of the cost incurred. For example, if you incur qualifying health expenses of €10,000 you can claim a tax credit of €2,000, essentially reducing your tax liability by €2,000.

How do I claim relief?

If you file an annual tax return ("Form 11") for example if you are self-employed, you/your tax advisor can claim relief by completing the health expenses section of the Form 11.

If you aren't required to file an annual tax return, for example if you are a PAYE worker, you can submit a Form 12 to Revenue. You can access this via Revenue's "myaccount" service.

What paperwork do I require to claim the relief?

In order to claim the relief, receipts for the above expenditure must be retained. Documentation will need to be available to show that the costs were incurred and discharged by you. Please note that under current Irish tax law, receipts must be retained for a period of six years from the end of the tax year in which they were incurred.

How soon can I claim the relief?

You can claim the relief for qualifying health expenses incurred when the tax year (which is a calendar year) has ended. For example, if you incurred qualifying health expenses in 2019, you can claim the relief in 2020.

I incurred qualifying health expenses in 2015 but wasn't aware that I could obtain relief on them. Can I still qualify for relief on them?

Yes, you can claim relief on the last four year's health expenses. Therefore, in 2019 you can still claim tax relief on health expenses incurred in 2015. However, you will need to apply for the relief before 31 December 2019. The relief for expenses incurred in 2015 will expire on that date and you will not be able to make a claim for them in 2020.

Will I get a refund from Revenue for this amount?

You must have sufficient income to use the credit. If you have sufficient income and have paid tax through your payroll, you will obtain a refund of 20% of the qualifying expense incurred by filing a Form 12 (as referred to above). If you usually file an annual Form 11, the credit will be offset (and the relief obtained) against your overall tax liability.

The tax credit is not available for carry forward if there is insufficient income ("use it or lose it").

I have incurred significant travel and accommodation expenses relating to surrogacy. Are they allowable for tax purposes?

Revenue have issued guidance stating that where qualifying health care is available only outside of Ireland that "reasonable" travelling and accommodation costs are allowable. Conversely, where the treatment is available in Ireland, travel and accommodation costs are generally not allowable.

We have not gone public with our surrogacy journey. My neighbour works in Revenue, how can I avoid him having access to our health expense claim?

If your health expense claim is audited and you are asked to send the relevant receipts to your local tax office, you can ask for the audit to be carried out in a Revenue office other than your local office.

Can I get tax relief for the expenditure I incurred on egg donation as part of the surrogacy process?

Under current Irish tax rules, tax relief is available for IVF but unfortunately Revenue have not extended this relief to the fee incurred to purchase the donor egg. This is an area that a lobby group could consider discussing with the Minister for Finance.

I am a female who had a child by surrogacy with my husband. My accountant has advised me that my child will be treated differently for tax purposes than a birth child for tax purposes. Is that correct?

Your accountant is partly correct and partly incorrect!

"Child" is defined differently across Irish tax law. For example, the definition of a "child" for the purposes of the "Widowed Parent Tax Credit" and a "One Parent Family Tax credit" includes a child who is in the claimant's custody and is maintained at their expense. Your child would therefore have the same treatment as a birth child for the purposes of these credits. For the purposes of the "home carer tax credit", a child is "a child in respect of whom either the qualifying claimant or his or her spouse or civil partner is in receipt of child benefit." As couples who have had a child by surrogacy have not experienced difficulties in obtaining the child benefit payment, if you meet the other qualifying conditions you could avail of this credit. Your child would not be treated differently than a birth child for the purposes of this relief.

For Gift and Inheritance Tax purposes, a child is defined as including a step child and an adopted child. A non-birth mother may make a claim to Revenue that a child who has lived with her for a period of at least 5 years within the child's first 18 years and who was maintained by her is deemed to bear the relationship of a child with her. However, this is not an automatic right for a non-birth mother and child and in the absence of a claim, you would be a stranger to the child for gift/inheritance tax purposes. If you passed away prematurely (before the 5-year period is satisfied) and left assets to the child, the child (or someone on their behalf) would have to prove that you stood in loco parentis to the child. This is an area that it is hoped will be addressed by the relevant minister shortly to fully reflect changes in Irish society, specifically in the family unit.

My friend is a single parent and is in receipt of an extra credit from Revenue. As I am a single parent with a surrogate child can I also claim this tax credit?

Yes, a single female or male who has a surrogate child can also claim the One-Parent Family Tax Credit subject to other conditions being met i.e. the child must be under the age of 18 or if over the age of 18 is receiving full-time instruction at an educational establishment or is permanently incapacitated from maintaining him/herself. It is currently available at a rate of €1,650 per annum i.e. it reduces your tax liability for the year by this amount.

As a new parent can I claim any other tax credits?

In Ireland, a taxpayer does not receive additional tax credits for each child he/she has.

However, if applicable, you could claim the One-Parent Family/Home Carer Tax Credit as noted above. The Home Carer Tax Credit generally applies where there is one "stay at home parent" and is worth up to €1,500 per annum depending on the income of the stay at home parent. Apart from couples who have not married/formed a civil partnership, this would apply to a couple irrespective of whether a surrogate mother births a child.

I have heard that additional tax credits are given to a widow/widower with a child in the years following the death of his/her spouse/civil partner. Would this apply to a parent of a surrogate who is a widow/widower?

In the event that a parent dies, a widow(er)/surviving civil partner would be entitled to an additional tax credit (widowed parent tax credit) in respect of a "qualifying child(ren)" of €3,600 in the year following the death of the spouse, reducing by €450 per annum to €1,800 in the fifth year.

My husband and I recently had a child by surrogacy. I would like to revise our Wills now to include our child. Have you any tax advice in this regard?

You are correct to revise your Will in light of your new family circumstances and to ask for tax advice in this regard. As an aside, we would advise our clients to revisit their Wills every few years and also on the following occasions – a marriage, birth of a child/children, a marital breakdown.

Inheritances and gifts are subject to Capital Acquisitions Tax ("CAT"). The key points for you to note in relation to CAT are as follows:

- There is no CAT between spouses or civil partners.
- For gifts/inheritances made by a parent to a child the tax-free threshold is currently €320,000 which is effectively a lifetime limit.
- The tax-free threshold for strangers in blood is €16,250.
- The values of gifts/inheritances over the tax-free threshold amount are subject to tax at 33%.

Under the provisions of current Irish CAT law, a child is defined as including a step child and an adopted child. A non-birth mother may make a claim to Revenue that a child who has lived with her for a period of at least 5 years within the child's first 18 years and who was maintained by her is deemed to bear the relationship of a child with her. However, this is not an automatic right for a non-birth child and in the absence of an accepted claim by Revenue, you could be a stranger to the child for gift/inheritance tax purposes.

Are there any exemptions from CAT that a parent should be aware of?

There are exemptions from CAT. These are as follows:

(a) Transfer of a dwelling house – this generally applies to inheritances only. The main conditions are that the recipient owns no other dwelling house and has lived in the house transferred for a period of three years.
(b) Money for support, maintenance and education of a minor child by the natural father or the civil partner of the natural father.
(c) Money for support, maintenance and education of a child by the natural father or the civil partner of the natural father where the child is over 18 but under 25 and is in full time education or instruction or who, regardless of their age, is permanently incapacitated by reason of physical or mental infirmity from maintaining himself or herself.
(d) Money for support, maintenance and education of a child by a person who stands in loco parentis.

As a surrogate parent, in addition to tax have you any other financial advice?

Yes, I would advise all my clients to take out a permanent health insurance ("PHI") policy. This is essentially an insurance policy to secure the payment of a salary during a period of illness. However, not only is it very valuable if you find yourself unwell and not in a position to work for a period of time, it is also very efficient for tax purposes. Tax relief on a PHI is available at your highest rate of tax (40% for most people) resulting in a net payment of 60% for the policy.

You should also take advantage of favourable tax treatment for pensions – up to 40% of the pension contribution (subject to certain limits) made can be reclaimed from Revenue! It is never too early to start a pension.

I would also advise all clients to have a life assurance policy to protect their family in the event of your premature death. Life assurance policies taken out with pension policies can qualify for tax relief.

About the interviewee

Alan Seery is a Chartered Tax Advisor and Chartered Certified Accountant. He is a Tax Partner with O'Neill Foley since 2006 and is a leading expert on taxation specifically personal taxation and succession planning. O'Neill Foley is a firm of circa 50 accounting and tax professionals located in Kilkenny and is the largest leading independent firm of chartered accountants in the South East with clients across Ireland and overseas. If you would like advice on the above or any further tax advice, please contact Alan, FCCA,CTA (E: aseery@onf.ie or T: 056 7721157) or Grace Fields (LLB, FCA, CTA) - gfields@onf.ie. If you have any pensions/investment queries, please contact Ed Kissane (QFA, MSc.,SIA) - ekissane@onf.ie.

Disclaimer