Direct Tax Cases: Decisions from the Irish Courts and Tax Appeals Commission Determinations

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02	**Corporation Tax: *Revenue Commissioners v Mullglen Limited & Olgary Fishing Company Limited***	High Court
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01 Income Tax: Siobhan Fahy v The Revenue Commissioners [2023] IEHC 710

In the case of *Siobhan Fahy v The Revenue Commissioners* [2023] IEHC 710 (Quinn J) the High Court considered a taxpayer's appeal against Tax Appeals Commission (TAC) determination 139TACD2022 (which was considered in this article in *Irish Tax Review*, Issue 1 of 2023). The appellant carried on a solicitor's practice (as a sole trader). She had made a payment of €220,000 to a company of which she was the 99% shareholder. The TAC held that the payment was not deductible as an expense of her solicitor's practice. The Commissioner held as a material fact, on the basis of the evidence given by the appellant at the hearing, that "the appellant identified no benefit or gain to the solicitor's trade (Fahy Law) for the expenditure incurred for services provided by MLG" and that the payment had been "motivated by the appellant's desire to provide for and ameliorate her pension"; it followed that the payment was not made wholly and exclusively for the purposes of her trade and so had to be disallowed by s81(2)(a) TCA 1997.

Three questions were stated to the High Court.

- The first concerned the proper construction of s949AG TCA 1997. The appellant argued that, on her reading of s949AG, the Commissioner in making her determination should not have had regard to the evidence that the appellant, herself, gave before the TAC but, rather, should have had regard only to matters that had actually been considered by Revenue at the time that it raised the assessment. The High Court rejected this contention, noting that s949AG requires the TAC to also have regard to matters to which the Revenue Commissioners "may or were required by the Acts to have regard". The High Court accepted that Revenue

could have had regard to the motivations of the appellant had that information been available to it, and therefore the TAC could have regard to the appellant's evidence at the hearing.

- The court held that the second question put to it, and the manner in which it had been argued by the appellant before the court, amounted to no more than a rearguing of the points that had been argued before the TAC and held that this was not a sufficient or an appropriate basis on which to contend that an error of law had occurred.
- The third question before the court concerned whether the TAC had a general jurisdiction to consider the validity of a tax assessment. The appellant argued that the assessment raised on her was invalid on the basis that the assessment had, in error, referred to s959AI and stated that no appeal could be made against the assessment. Revenue accepted that this was a mistake but observed that the appellant had not been prejudiced by this wording as her agents had filed an appeal within the statutory period. The court reviewed s949AK TCA 1997 and the Court of Appeal's decision in *Lee v The Revenue Commissioners* [2021] IECA 18 and rejected the appellant's argument, holding that the TAC had no general jurisdiction to consider the validity of a tax assessment. Therefore the TAC had no jurisdiction to invalidate an assessment that erroneously referred to a non-applicable section (i.e. s959AI) and incorrectly stated on its face that the appellant had no right of appeal.

Accordingly, the court held in favour of Revenue on all three questions and rejected the appellant's appeal.

In his judgment Quinn J took the opportunity to distinguish between the circumstances in which the TAC has jurisdiction to consider the validity of a notice of assessment and those in which it does not. Although the court held that the TAC had no **general** jurisdiction to consider the validity of an assessment (and thus the appellant was unsuccessful in the particular facts), it stated that there are some circumstances in which the TAC has a **limited** jurisdiction to consider the validity of an assessment. In this regard Quinn J noted that s949AK(3) provides that the TAC can consider whether Revenue was precluded from raising an assessment under one of the grounds mentioned in s959AF(2) (which references s959AA, s959AB, s959AC and s959AD, i.e. assessments raised beyond the four-year rule), and in such circumstances the TAC has jurisdiction to determine that an assessment is void.

02 Corporation Tax: Revenue Commissioners v Mullglen Limited & Olgary Fishing Company Limited [2023] IEHC 614

In *Revenue Commissioners v Mullglen Limited & Olgary Fishing Company Limited* [2023] IEHC 614 (Egan J) the High Court considered an appeal by Revenue from the decision of the Tax Appeals Commission (TAC) that the appellants were entitled to claim allowances under s291A TCA 1997 (specified intangible assets) in respect of capital expenditure incurred by them on the acquisition of fishing capacity.

The central issue before the court was whether the TAC was correct to determine that fishing capacity (i.e. a fishing quota) and/or a sea-fishing boat licence was a "specified intangible asset" under s291A(1)(h) on the basis that it was "an authorisation without which it would not be permissible for…a product…of any process…to be sold for any purpose for which it was intended".

The questions before the court were:

- Is the scope of s291A limited to the field of intellectual property and the knowledge economy?

The court, considered each aspect separately and held (rejecting Revenue's arguments on this point) that:

- The definition of "specified intangible asset" in s291A is expressly not limited to intellectual property rights, and after considering the kinds of assets listed, the court noted that they are diverse. The court further noted that both licences and goodwill may qualify. Accordingly, the court concluded that the asset purchased does not need to be "intellectual property".
- The intangible assets do not necessarily need to be confined to the knowledge economy. The court reached this conclusion on the basis that references to "**any** authorisation without which it would not be permissible for...**a** product of **any** design, formula, process or invention to be sold for any purpose for which it was intended [emphasis in the judgment]". Egan J's reasoning was that "[t]he multiple uses of the words "a" and "any" indicate that, insofar as concerns the kinds of authorisations, products, companies and trades in issue, the provision is intended to be reasonably broad in scope."

  The court concluded that although the section includes intellectual property and knowledge economy intangible assets (e.g. computer software, formulae, scientific and industrial information), "the section is also capable of covering a significantly broader array of intangible assets".

- May fishing capacity be regarded as an authorisation without which it would not be permissible for a product of any process to be sold for any purpose for which it was intended?The court, allowing Revenue's appeal, held that:
  - For the purposes of s291A(1)(h) the **authorisation** must be in respect of the **product** of "any design, formula, process or invention", and not in respect of a raw material that is subjected to a process.
  - The fishing capacity or sea-fishing boat licence (or both), if it is treated as an authorisation, is not an authorisation in respect of a product **of a** process but, rather, is an authorisation to acquire a raw material (i.e. fish, a living aquatic resource).

03 Income Tax: Brendan Thornton v Revenue Commissioners / Paul McDermott v Revenue Commissioners [2023] IECA 316

Allen J delivered the judgment of the Court of Appeal in *Brendan Thornton v Revenue Commissioners / Paul McDermott v Revenue Commissioners* [2023] IECA 316 on 21 December 2023. The court was composed of Faherty J, Allen J and Butler J.

It heard the taxpayers' joined appeals against Egan J's decision in the High Court ([2022] IEHC 396), which was considered in this article in *Irish Tax Review*, Issue 3 of 2022.

The appellants were two of a number of participants in syndicates that entered into certain financial transactions.

Those transactions were treated by the taxpayers as having amounted to the carrying on of a trade in financial instruments. That trade, they argued, had generated losses (on the basis that certain dividend income that they received should be disregarded as s812 TCA 1997 should deem that income to have been received by another party, rather than them), with the result, the appellants claimed, that the losses should be allowed to shelter their other income and thereby reduce their income tax liabilities. Revenue had disallowed the losses on the basis that the appellants were not engaged in a trade and that the dividend income should be treated as received by them. Revenue had

also treated the appellants' expressions of doubt as insufficient.

The issues before the court were:

1. whether the dividend purchase transactions were part of a trade in financial instruments;
2. whether, per s812, the dividend income received by the appellants should be deemed as not having been received by them; and
3. whether the appellants had made valid expressions of doubt (EOD) in their tax returns.

The High Court had answered these questions as (1) no, (2) yes, (3) no. The taxpayer appealed the High Court's decision on issues (1) and (3). Revenue cross-appealed the decision on issue (2).

The Court of Appeal held, deciding each question in favour of Revenue, the following.

Trade in financial instruments

The High Court was correct to uphold the determination of the Tax Appeals Commission (TAC) that the appellants were not carrying on a trade. The Court of Appeal described the substance of the appellants' arguments in this regard as consisting of the proposition that the appellants' tax avoidance motivations in entering into the transactions ought to have been disregarded entirely by the TAC when considering whether they were carrying on a trade and that the TAC (and the High Court) had erred in considering the appellants' tax avoidance motivations [paras 55–56]. The court noted that at the oral hearing the appellants acknowledged that some weight ought to be given to their motives, but they then argued that the TAC had placed excessive weight on their motives and that the High Court had erred in not overturning the TAC's determination. The Court of Appeal noted that Egan J in the High Court had set out the three considerations that had informed her approach: (a) the court is bound by the TAC's findings of primary fact; (b) the evaluation of whether a transaction is trading is, itself, based on the interplay of a number of factual considerations, which it was not a function of the High Court to revisit; and (c) the assessment of the trading issue is a largely a matter of degree of judgment, which the legislature had vested in the TAC. The Court of Appeal observed that although the appellants had not overtly suggested that Egan J had erred in this approach, any argument regarding the weight to be attached by the TAC to fiscal motive must amount to an implicit argument that the function of the High Court was to second-guess the TAC's assessment of the trading issue. Accordingly, the court rejected this and the appellants' other arguments on the trading status issue.

Dividend income received

The High Court was incorrect to hold that s812 deemed the dividend to not be income of the appellants. The appellants had acquired the right to receive dividends in respect of shares that were owned by a British Virgin Islands (BVI) company. The appellants argued that s812 should apply to deem the dividend to be the income of the BVI company, and not their income, despite the fact that they received the dividends. The Court of Appeal held that the question was not whether s812 deemed the dividends to be income of the BVI company but, rather, whether the section introduced a fiction that the dividends (although received by the appellants) was deemed not to be their income. The court considered the history of the legislation and placed weight on the fact that it had been amended in 2006 by the repeal of s812(2)(a)(iii). Before that amendment, s812(2)(a)(iii) provided that where s812 deemed the dividend to be income of the owner, it "shall not be deemed to be income of any other person". The court held that s812 did not contain a secondary fiction. The appellants had actually received the dividends, and s812 did not deem them not to have received that income (regardless of whether s812 could operate to treat the BVI company as having also been in receipt of the dividend income).

Expressions of doubt

The High Court was correct to uphold the TAC's determination that the appellants had not made valid EODs on their returns. Although the Court of Appeal expressed disagreement with the TAC's determination that the EODs had not been genuine, it agreed with the High Court that an EOD must adequately alert the inspector to the essential issues giving rise to the existence of the relevant doubt (a point that it noted the appellants had not challenged). Although the EODs had referenced s812, they had made no reference to any doubt regarding whether the appellants were carrying on a trade (in respect of the financial transactions). Therefore no valid EOD had been made in respect of the trading status issue.

04 Corporation Tax: TAC Determination 16TACD2024

In this matter the appellant company had sought to amend its corporation tax return for 2020 to increase the amount of research and development (R&D) tax credits claimed. The appellant sought to make this amendment in January 2022, i.e. more than 12 months after the end of its accounting year.

Revenue initially made the amendment requested by the appellant and issued an amended notice of assessment in March 2022. Revenue subsequently issued a second amended assessment to reverse the increased R&D claim, which assessment purported on its face to have been issued under s959U TCA 1997 (and further stated that no appeal could be made against that assessment). In June 2022 Revenue issued a third amended assessment, this time stated as being issued under Part 41A TCA 1997.

The appellant appealed the second and third amended assessments, arguing that the second assessment was invalid as it purported to have been raised under s959U and that Revenue was precluded from raising the third assessment by s932 (which provides "[e]xcept as provided in Part 41A or where otherwise expressly authorised by the Tax Acts, an assessment to income tax or corporation tax shall not be altered before the time for hearing and determining appeals and then only in cases of assessments appealed against and in accordance with such determination…").

On the procedural issues the Tax Appeals Commission (TAC):

- Rejected the appeal against the second amended assessment on the basis that the Court of Appeal's judgment in *Lee v Revenue Commissioners* was clear authority that the TAC had no jurisdiction to determine the validity of the assessment and "[no] power to look behind the statutory provision invoked by the respondent when raising an assessment". Therefore, as the assessment stated that it had been raised under s959U, no appeal to the TAC could be made against that assessment (per s959AG).
- Rejected the appellant's argument that the respondent was precluded by s932 from raising the third amended assessment as s932 was contained in Part 40 and s23 of the Finance (Tax Appeals) Act 2015 provides that "Part 40 shall not apply to an appeal made on or after the commencement date". The Commissioner further stated that even if s932 was operative, then, as there was no (valid) appeal arising from the second amended assessment, the respondent did not breach s932.

On the substantive issue the TAC upheld the third amended assessment, holding that the appellant was precluded from making an R&D claim more than 12 months after the end the accounting period in which it incurred the expenditure.

05 Capital Gains Tax: TAC Determination 147TACD2023

In 1997 the appellant entered into two seven-year leases over farmland. Those leases provided him with an option to purchase the lands for the sum of £91,000 at their expiration. However, the relationship between the appellant and the landowner deteriorated, to the point where, in May 1998, the appellant, while placing his cattle on the leased lands, "heard the discharge of a shotgun and the 'hail fell over the top of his head down the field'... [the landowner] approached him and the farmhand with a sword and a struggle ensued". Therefore the appellant was effectively forced off the land. After the landowner's death the appellant initiated Circuit Court proceedings against the landowner's estate. Those proceedings were ultimately settled with an agreement that the lands would be sold and the appellant would receive 35% of the proceeds. The appellant received €134,375 from the estate in July 2013. His 2012 income tax return disclosed a sum of €134,375 as proceeds from the sale of agricultural lands with a net gain of nil and no reliefs claimed.

On 21 March 2019 Revenue raised a CGT assessment for the tax year 2013 in respect of CGT on the sum of €134,375. That assessment was appealed to the Tax Appeals Commission (TAC) on 19 June 2019 by the appellant's accountant, and the appellant subsequently engaged a solicitor shortly before the hearing of the appeal.

The questions before the TAC were:

- Should the appellant be allowed to make a time-limit argument (that the assessment had been raised beyond the four-year statutory period) as an additional ground of appeal where that ground had not been included in the grounds of appeal on his notice of appeal and raised in correspondence from the appellant's agent only on the eve of the hearing (24 March 2023)?

  On this preliminary issue of the admissibility of the time-limit argument, the TAC referred to High Court's decision in *Thomas McNamara v Revenue Commissioners* [2023] IEHC 15 (which was considered in this article in *Irish Tax Review*, Issue 1 of 2023) and held that "the Commissioner, who must abide by fair procedures for each of the parties in an appeal, is not satisfied that the time-limit issue could not reasonably have been included with the notice. To find in favour of the appellant would disregard the findings in *McNamara* and provide precedent for other appellants before the Commission to engage in the practice of submitting submissions in close proximity to the hearing. Had the appellant's solicitor submitted his request upon appointment, the Commissioner may have reached a different finding, but as he did not the Commissioner is not satisfied that the appellant could not reasonably have included the time-limit as a ground of appeal in the Notice."

- Does a "chose in action" (i.e. the claim against the deceased's estate that the appellant settled) have a base cost by reference to its value at the date it is acquired?

  The TAC rejected the appellant's arguments that he should be attributed a base cost by reference to a percentage of the market value of the lands on the date that he acquired his chose in action (i.e. in May 1998, when he was forced off the lands), noting that there was nothing in s552 TCA 1997 to support the appellant's submission that he was entitled to any notional base cost by reference to the value of the lands. The TAC further noted that the appellant had given no consideration to acquire the chose in action and therefore was subject to CGT on the full proceeds (less any deductions allowed under s552).

The determination notes that the appellant has requested an appeal to the High Court.