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

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01 Four-Year Time Limit and Jurisdictions of Appeal Commissioners and Courts

In the case of ***Colm Murphy v Revenue Commissioners*** [2023] IECA 160 the Court of Appeal considered the jurisdiction of the Appeal Commissioners (and a court, on appeal) to hear time-limit arguments. Haughton J delivered the judgment, with Noonan J and Donnelly J in agreement.

The taxpayer was selected for a Revenue audit in 2008 under the income tax, CGT and VAT tax heads. In April/May 2009 the taxpayer made disclosures to Revenue. On 18 May 2009 the audit was suspended as the matter had been escalated to a "Revenue enquiry" by Revenue's Regional Investigations Branch. In 2013 the taxpayer was informed by his local branch that the Revenue enquiry had been concluded and so his Revenue audit would recommence. Tax assessments subsequently issued in September 2013.

The taxpayer appealed those assessments to the Appeal Commissioners and subsequently to the Circuit Court. Before the Circuit Court he argued that the assessments should be statute barred as having been raised beyond the four-year time limit provided by s955 TCA 1997. The Circuit Court held that the taxpayer had not made a "full and true disclosure" and so could not rely on the four-year time limit. Nevertheless, the Circuit Court agreed to state the case to the High Court on a point of law.

At the hearing before the High Court the taxpayer also raised (for the first time) an argument concerning s956 TCA 1997, contending that Revenue was precluded from making enquiries beyond the four-year time limit, and submitted that the recommencement of the Revenue audit in 2013 was thus contrary to s956. The High Court heard this argument but ultimately dismissed it on the basis that because the taxpayer made three prompted disclosures after the tax returns were submitted, he could not benefit from the protection of the four-year time limit under s956 (i.e. had the original tax returns been full and complete, the disclosures (prompted by the original 2009 audit notice) would not have been required). The taxpayer appealed that decision to the Court of Appeal.

The Court of Appeal reviewed the case law on the relative jurisdictions of the Appeal Commissioners and of the High Court and the Court of Appeal. It held, in dismissing the appeal, that:

- The High Court did not have jurisdiction to consider the s956 TCA 1997 arguments raised by the taxpayer at the hearing of the case stated because no issue in relation to s956 had been properly raised or canvassed at the original hearing of the matter (before the Circuit Court) by the appellant.
- As a more fundamental, jurisdictional, point, the court concluded that:
    - The Appeal Commissioners have a limited jurisdiction, which extends to determine the quantum of tax on a lawful assessment.
    - The jurisdiction of the Appeal Commissioners does not extend to challenging the validity of the assessment, not even as a matter of "practicality and convenience" (in this regard Murray J's observations in *Stanley v Revenue* [2019] 2 IR 218 were cited with approval).
    - Accordingly, the taxpayer's arguments in respect of the assessment's having been raised beyond the four-year time limit prescribed by s955 and arguments concerning "procedural fairness" in general had been raised in the wrong forum. Neither the Appeal Commissioners nor the Circuit Court had jurisdiction to hear them; rather, the correct forum would have been the High Court on a judicial review.
    - On hearing a case stated (as opposed to a judicial review) from the Appeal Commissioners/Circuit Court, the High Court (and by extension the Court of Appeal) is exercising a limited jurisdiction provided to it by statute and it cannot assume to itself a broader jurisdiction than that conferred on it.

The case concerned a tax appeal taken under the process that pre-dated the Finance (Tax Appeals) Act 2015 and the establishment of the Tax Appeals Commission (TAC). It also concerned s955 and s956, which have subsequently been replaced by s959AA and s959Z, respectively, of TCA 1997. However, as the judgment notes, the jurisdiction of the High Court to hear appeals from the TAC under the 2015 Act (s949AR TCA 1997) is "in substantially the same terms" as under the prior procedure (s941(6) TCA 1997), and so the judgment is also relevant to the current process.

02 Revenue Offences – Settlement Agreement and Legitimate Expectation Regarding Prosecution

In the case of ***Brian Murphy v Revenue Commissioners and the Director of Public Prosecutions*** [2023] IECA 110 the Court of Appeal considered whether a settlement agreement precluded prosecution. Birmingham P delivered the judgment.

The appellant, who is facing prosecution on indictment for revenue offences, had brought judicial review proceedings before the High Court in an attempt to halt those prosecutions. The appellant had been unsuccessful before the High Court and

appealed that decision to the Court of Appeal.

The facts of the matter were that the appellant had entered into a tax settlement with Revenue. The settlement agreement concerned civil proceedings for recovery of a tax debt. During the negotiation of the settlement agreement the appellant had sought the removal of a clause stating that the settlement was without prejudice to prosecution, and the final version of the agreement, which he signed, had the "without prejudice to prosecution" language removed.

The appellant's argument was that his tax settlement with Revenue had been entered into on the basis that no criminal prosecutions would be continued or initiated against him and submitted that it was unjust and inequitable to permit prosecutions to proceed in such circumstances. He maintained that Revenue's actions amounted to representations and promises that no prosecution would ensue and that therefore he had a legitimate expectation that no prosecution would follow. The appellant asserted that he had a legitimate expectation that Revenue would adhere to its Code of Practice for Revenue Audit and the Revenue Customer Charter, which the appellant contended that Revenue had contravened.

The High Court had held that the settlement agreement referred solely to the debt collection proceedings and that if it had been intended also to preclude criminal proceedings it should have expressly stated as much. The High Court also noted that the Director of Public Prosecutions was not a party to the settlement agreement. The High Court concluded that the settlement agreement had to be read objectively and there was "no sensible basis for reading the settlement agreement as involving anything other than the compromise of the extant High Court debt collection proceedings explicitly referenced in the agreement".

The appellant appealed the High Court's judgment to the Court of Appeal. The question before the Court of Appeal was summarised at paragraph 25 of the judgment:

"We know that the draft agreement furnished to the taxpayer did not contain a without prejudice to prosecution or enforcement clause. It was silent on the issue. The question arises whether the absence of such a clause, where, on the basis of the attitude previously taken by the Revenue Commissioners, it might have been expected to be found, amounts to a representation by the Revenue Commissioners that there would be no prosecution."

For the following reasons, Birmingham P held, in dismissing the appeal, that the absence of a "without prejudice to prosecution or enforcement" clause did not amount to an unambiguous and unequivocal representation to the effect that there would be no prosecutions:

- The heading of the settlement agreement specifically referred to the title of the civil proceedings only, and the settlement agreement related to certain taxes in certain specific periods, whereas the prosecutions related to taxes in different periods. Therefore, factually, "[t]he prosecution related to a matter that was entirely separate and distinct".
- At the time of the settlement agreement there were criminal proceedings already in being, and therefore: "This was not a case of proceedings which might hypothetically or theoretically be instituted. These were proceedings already in being. By the time of the settlement of the civil debt proceedings, the taxpayer had also been informed that he was to be interviewed under caution in relation to other possible tax offences and that a decision to prosecute would be a matter for the solicitor for the Revenue Commissioners and the Director" (para. 26).
- No reasonable person would interpret the omission of a clause in the document expressly reserving the right to prosecute as amounting to an unambiguous commitment not to prosecute (para. 27).

- The taxpayer's actions at the time were inconsistent with his holding a belief that he had achieved a situation where ongoing prosecutions would be closed and no new prosecutions would be initiated. If the taxpayer had held such a belief, then he would have sought to have the criminal proceedings that were extant against him at that time struck out without delay (para. 28).
- The appellant had also contended that Revenue's agent had made an oral statement to him that she would seek approval for a settlement that would preclude prosecution. The Court of Appeal noted that the High Court judge had heard the parties' evidence and had found Revenue's agent's evidence to be credible and corroborated by contemporaneous documentation. The High Court judge therefore concluded, on the balance of probabilities, that the alleged oral representation had not been made (para. 29). Birmingham P held, based on the transcripts before him, that it was reasonable for the High Court to reach that finding (para. 30).

Note: The Court of Appeal consisted of a three-judge panel. Birmingham P's judgment is silent on whether the other panel members, McCarthy J and Kennedy J, were in agreement with it. As at the date of writing this case note, no individual judgments of McCarthy J and Kennedy J have been published on the Courts Service website.

03 VAT and Excise Duty – Right to Disclosure of Information by Revenue

In the case of ***Michael Quigley v Revenue Commissioners*** [2023] IEHC 244 the High Court considered the circumstances in which Revenue is required to disclose information to the taxpayer.

The taxpayer (hereafter "the appellant") brought judicial review proceedings in the High Court against (1) Revenue's decision to refuse to furnish him with the names, details and particulars of 44 of his customers whom Revenue had interviewed during its investigations into his sales and (2) the refusal by the Tax Appeals Commission (TAC) to direct Revenue to furnish that information.

Revenue's calculations of the appellant's tax liability were partly based on its interviews with 44 of the appellant's customers. In effect, because 75% of those 44 customers claimed never to have purchased mineral gas oil (MGO) from the appellant (even though the appellant's records showed that they were MGO customers), Revenue discounted his purported MGO sales to traceable customers by 75%, thereby increasing the appellant's liability to VAT and excise duty.

The appellant requested information on the 44 customers and documentation relating to their interviews with Revenue, and when that request was refused, he sought a direction from the TAC ordering Revenue to furnish that information. The TAC refused to issue the direction on the basis that the information originated from the appellant's own records and related to his own customers, whose identities he knew, and therefore "the information is to this extent within the appellant's own knowledge, possession and procurement" (para. 42).

The question before the High Court was whether the information sought by the appellant was required by him to vindicate his right to fair procedures in the appeal process before the TAC.

The High Court denied the orders requested by the appellant because the relief had been sought prematurely. The High Court held that the appellant has the burden of proof under the statutory framework of the tax appeals process. Therefore it was for the appellant to prove that his tax treatment was correct using his own records and evidence. The court noted that the issues surrounding the disclosure of the information sought from Revenue would fall away in circumstances where, despite having signalled that the information was the basis on

which the tax was assessed, Revenue did not actually look behind the appellant's records and his evidence at the hearing, i.e. in circumstances where the matter was left to be determined solely on the strength or otherwise of the appellant's evidence "without any challenge being maintained on the basis of third-party information".

However, the High Court noted that if, at the hearing, Revenue actually sought to introduce such third-party information to challenge the appellant's evidence, then the appellant's right to fair procedures would have to be protected by the TAC and he could make further submissions, at that point, if necessary:

> "If, however, the Applicant's records are impugned as to their veracity and his honesty is called into question during the course of the hearing before the Tax Appeals Commissioner, it will be a matter for the Tax Appeals Commissioner then seized of the appeal to vindicate his right to fair procedures and constitutional justice. This may entail refusing to allow a line of questioning or refusing to admit hearsay evidence. Alternatively, it may entail affording the Applicant an opportunity to challenge through cross-examination evidence called to impute the veracity of his records with such disclosure as fairness and effective cross-examination requires, even if this means the adjournment of proceedings so that records may be disclosed. A range of rulings designed to ensure fairness may arise for consideration and are available to the Tax Appeals Commissioner hearing the appeal. Should it become relevant and necessary to do so, it is open to the Applicant to make such further submission as may be considered appropriate including submissions in reliance on the line of authority from the CJEU." (para. 144)

04 Capital Gains Tax – "Interest in Land"

In tax appeal **72TACD2023** the TAC considered the meaning of the term "interest in land" for the purposes of s980 TCA 1997.

The appellant acquired a portfolio of loans that were secured on Irish land ("the portfolio"). The appellant is not Irish resident and does not have a branch in Ireland. In 2016 the appellant sold the portfolio to an unconnected purchaser. That purchaser requested that a CG50A clearance certificate be obtained for the purposes of s980 TCA 1997. The appellant engaged with Revenue and disputed that s980 applied to the sale. Ultimately, the appellant paid Revenue the sum of €1,092,085 on a "without prejudice" basis (being the amount of CGT that would arise if the disposal were within the scope of Irish CGT), and Revenue wrote to the purchaser to say that a CG50A would not be required and no deduction needed to be made by the purchaser under s980(4)(a). Revenue raised no assessment to CGT at the time of the payment in 2016.

In December 2020 the appellant sought a refund of the sum of €1,092,085 that it had paid to Revenue. Revenue refused the refund and raised a CGT assessment for that sum, which was then the subject of the appeal.

The questions before the TAC were:

- whether the disposal of a portfolio of Irish mortgage loans secured over Irish land constituted a disposal of an "interest in land" for the purposes of s5 TCA 1997,
- whether the disposal came within the charge to CGT imposed on non-residents pursuant to s29(3) TCA 1997,
- whether s537 TCA 1997 overrode s29 TCA 1997 and
- whether s643 TCA 1997 could relieve the charge to tax.

The TAC held, in dismissing the appeal, that the portfolio was an interest in land and that

the appellant was subject to CGT pursuant to s29(3) TCA 1997. The Commissioner referred to the High Court's judgment in the case of *Cintra v The Revenue Commissioners* [2023] IEHC 72, which had held that "land" for the purposes of s29(3)(a) should be interpreted in accordance with the meaning given to that word in s5 TCA 1997. The Commissioner quoted an extract from the judgment of Butler J, which included the finding "that 'land' for that purpose means a freehold or leasehold estate **or one of the lesser interests formally recognised by the Common Law and now codified in s.11(4) of the 2009 Act** [emphasis added by the Commissioner]".

The 2009 Act referred to in that extract is the Land and Conveyancing Law Reform Act 2009 (LCLRA 2009), and the Commissioner's decision notes that s11(4) LCLRA 2009 provides that "[t]he only legal interests in land which may be created or disposed of are – (a) an easement, (b) a freehold covenant, (c) an incumbrance,…". The Commissioner noted that "incumbrance" is defined in s3 LCLRA 2009 as including "an annuity, charge, lien, mortgage, portion and trust for securing an annual or capital sum;…". Accordingly, the Commissioner concluded that a mortgage was an "interest in land" for the purposes of s5 TCA 1997 and comprises "land" for the purposes of s29(3) TCA 1997.

The Commissioner also dismissed the appellant's s537 TCA 1997 argument on the basis that that section specifically applies to the conveyance of an asset "as security" (i.e. being the granting of the mortgage by the borrower to the lender), and the Commissioner accepted Revenue's argument that the section does not capture a secondary assignment of a security (i.e. between lenders).

The Commissioner also rejected the appellant's s643 TCA 1997 argument (which was that it held the portfolio as trading stock rather than as a capital asset chargeable to CGT), holding that the appellant had provided insufficient evidence (many of the appellant's key employees had moved on to other roles, and the evidence given on this issue at the hearing was largely treated as hearsay) and so had not discharged its burden of proof to show that it satisfied the conditions of that section.

05 Income Tax – "Proprietary Directors"

In tax appeal **92TACD2023** the TAC had to consider whether two individuals were "proprietary directors" of a company.

The issued share capital of the company consisted of 1,000 ordinary shares of £1.00 each and 4,000 A ordinary shares of £1.00 each. For the years under appeal the two appellants each held 300 ordinary shares, and other shareholders (who were close relatives of the appellants) held the balance of the issued shares of the company (i.e. the remaining 400 ordinary shares and the 4,000 A ordinary shares).

The company's articles of association provided that the A ordinary shares were non-voting and had no right to a return of capital on a winding-up (other than what had been paid up on them) but had a right to such dividends as may be declared by the company from time to time on that class of share. The company's articles of association imposed no limits on the rights attaching to the ordinary shares.

Section 472 TCA 1997 provides that an individual will be a "proprietary director" if he or she satisfies either an "ownership test" or a "control test". Revenue argued that the appellants were proprietary directors under the control test.

The question before the TAC was whether the appellants controlled more than 15% of the ordinary share capital of the company and so were proprietary directors for the purposes of s472 TCA 1997. Section 472 defines "proprietary

director" as "a director of a Company who is either the beneficial owner of, or able, either directly or through the medium of other Companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company".

The Commissioner held that the "ordinary share capital" of the company consisted of both the ordinary shares and the A ordinary shares as neither share class fell within the definition of "preference shares".

The Commissioner, allowing the appeal, accepted the appellants' argument that for the purposes of s472 it is control over the ordinary share capital that is at issue, and not control of the company or control of the voting rights in the company.

> "between them, the appellants have 100% of the voting rights in a general meeting and so collectively control the Company's affairs, but control of a Company's affairs does not equate to control of a Company's ordinary share capital. Control is exercised over shares by being in a position to enjoy the rights attached to those shares." (para. 65)

The determination notes that Revenue has sought to appeal the TAC's decision to the High Court.

06 Capital Gains Tax – "Stapled Investment" and "Debt on Security"

In tax appeal **94TACD2023** the TAC considered whether the loan element of a "stapled investment" was a "debt on security".

In 2005 and 2006 the appellant acquired "units" in a PLC. Each unit consisted of a zero-coupon loan note with a nominal value of €90 and an "A" ordinary share, which had a nominal value of €10. The units were described by the appellant's counsel as "stapled investments", for which the following definition was furnished:

> "a financial product that consists of two or more securities that are bound to form a single unit that cannot be bought or sold separately. Usually a stapled security consists of a unit in a unit trust and a share in a company. The two securities are bound via a number of contractual documents, including the unit trust deed, company constitution and associated stapling agreement. Investors receive a single security."

The terms of the investment provided that shares and loan notes had to be purchased together, no transfer of loan notes could be made unless the corresponding shares were also transferred, and where any person was required to transfer his shares (or a portion thereof), he would also have to transfer his loan notes (or the corresponding portion thereof).

The PLC's venture failed, and it was liquidated. The appellant suffered a total monetary loss on his investment. He claimed CGT losses on the full value of his investment (i.e. on both the loan and the share element).

The question before the TAC was whether the loan notes constituted a "debt on security" within the meaning of s541 TCA 1997 such that the appellant would be entitled to claim loss relief for CGT purposes on their disposal.

The appellant argued that, because of the terms of the investment, the shares and the loan notes were a single "stapled investment" that ought to be viewed as "strictly equity in nature" and thus allowable for CGT loss relief purposes.

The TAC held, in dismissing the appeal, that:

- Although they were contractually interdependent, separate deal notes were issued for the shares and the loan notes, and therefore the Commissioner was

required to look at the rights attaching to each in isolation.

- CGT losses are not allowed on normal debts but only on a “debt on security”.
- Although the term “debt on security” is not defined in legislation, case law had set out that the debt must have a “bundle of rights” that enable it to be realised or dealt with at a profit.
- The appellant’s loan notes had no such rights and, accordingly, could not amount to a “debt on security”.