

Notice of Assessments – To Appeal or Judicially Review

by James Burke

An appellant before the Taxation Appeals Commission ("TAC") often raises legal argument in relation to their dealings with Revenue and the circumstances surrounding the assessment. Legal arguments such as the vires of an assessment, legitimate expectation, unjust enrichment or estoppel are frequently invoked before the TAC. The TAC do not have jurisdiction to adjudicate on these issues. The TAC is a creature of statute and so it is restricted to its statutory powers. This article looks at the difference between appealing a notice of assessment and judicially reviewing a tax assessment and/or a notice of assessment. It is also possible for a taxpayer to judicially review the TAC but that is not the focus of this article.

1. Appeal of the assessment

The function of the Appeal Commissioners in a tax appeal is confined to determining whether the assessment should be reduced, increased or let stand¹. The powers of an Appeal Commissioner in respect of an assessment are delineated in sections 949AK and 949AL of the Taxes Consolidation Act 1997. Examples of issues the TAC considers such as whether a taxpayer satisfies the criteria for an exemption, whether they are entitled to tax relief or whether an expense is wholly and exclusively for the purposes of the trade.

The courts have emphasised that the function of the TAC is to determine the tax payable. The oft quoted statement of Romer LJ in *IRC –v– Sneath* [1932] KB 362, outlines the statutory function of the then Appeals Commissioner, putting it as follows: "The appeal is merely another step taken by the Commissioners at the instance of the taxpayer in the course of the discharge of their administrative duty of collecting surtax. In estimating the total income of the taxpayer, the Commissioners must necessarily form, and perhaps express, opinions upon various

incidental questions of fact and law. But the only thing the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the taxpayer's income for the year in question."

The decisions of the TAC are replete with acknowledgements of the TAC's statutory limitations and its parameters. The decision from the TAC in determination 60TACD20 where it expressly states that the TAC cannot assess the vires of an assessment is but one example of this. The TAC stated: "The jurisdiction of the Appeal Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued ultra vires the Revenue's statutory powers."²

While much of the caselaw predates the TAC, these judgments are regularly relied upon by the TAC when the taxpayer seeks to raise matters that are outside the parameters of the TAC's statutory power.

While the TAC's jurisdiction is limited to considering the assessment and whether to reduce, increase or let it stand, it can be required to make incidental rulings on the interpretation of the law and the admissibility of evidence. In *Kenny Lee v Revenue Commissioners*³, the High Court considered the TAC's jurisdiction to consider whether the parties had entered into a prior contract of settlement in respect of a liability.

The Court stated "Moreover, it is clear from the authorities just quoted that the statutory powers and authority of the Appeal Commissioners must entail the jurisdiction - indeed, the obligation - to give rulings on incidental questions of law or fact where necessary or appropriate"⁴

In *Kenny Lee* the Court held that the TAC did have jurisdiction to consider whether the parties had entered into a prior contract of settlement. The Court, however, held that the TAC did not have jurisdiction to consider whether the prior settlement gave rise to a claim for legitimate expectation or promissory estoppel.

It is clear from the foregoing that the appeal of a tax assessment is limited

1 Section 949AK(1) TCA (as inserted by Finance (Tax Appeals) Act 2015)

2 60TACD20 – at para 33

3 [2018] IEHC 46

4 [2018] IEHC 46 at para. 60

to considering whether the tax should be reduced, increased or let stand. The taxpayers grievance in respect of other matters does not come within the scope of the appeal.

There lies an appeal by way of a case stated from the TAC to the High Court. The Court's jurisdiction is limited in that this is an appeal on a point of law only, it is not an appeal on the facts of the case. The fact finding occurs before the TAC and the High Court then considers whether the law was applied correctly.

On appeal by way of case stated the High Court assumes the statutory clothing of the TAC. Ms Justice Donnelly in *Coleman v Revenue Commissioners*⁵ outlined the Court's limits, where she stated "More specifically, it is not for the High Court in these proceedings to take upon itself a fresh or original determination as to whether the book *Foot in Mouth* is or is not a biography. The role of the High Court is to determine the point of law set out in the case stated of the Appeal Commissioner."⁶

2. Judicial Review

Judicial review is the mechanism by which an aggrieved party asks the Court to review how an administrative decision was arrived at. Mr. Justice Clarke in *Sweeney v Fahy*⁷ explained judicial review as "judicial review is concerned with the lawfulness rather than the correctness of the decision sought to be challenged."

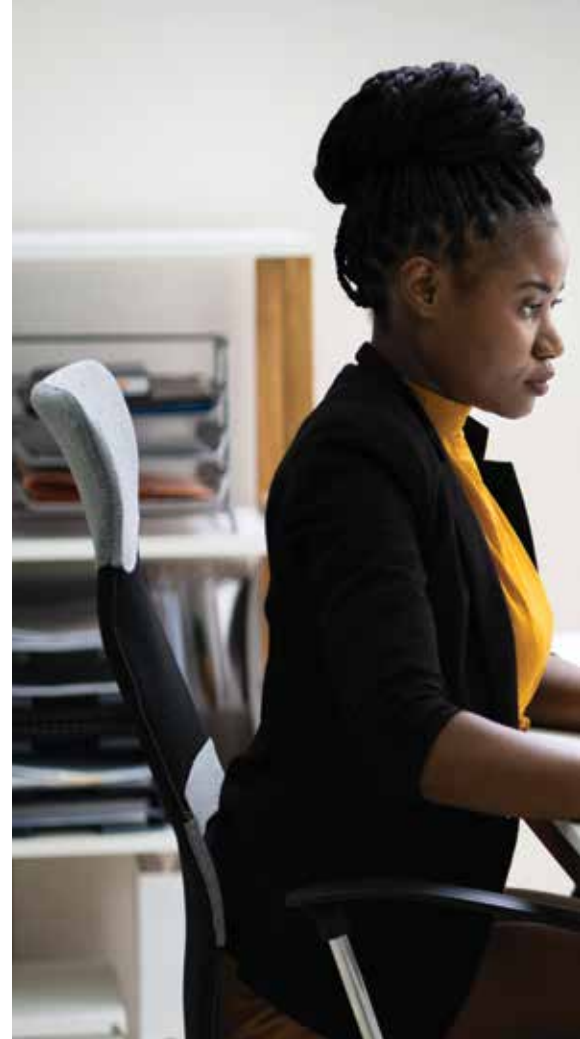
The grounds for judicial review are generally lack of jurisdiction, bias, not being afforded the opportunity to be heard, procedural unfairness or unreasonableness in the exercise of discretionary powers. It also allows an aggrieved party to raise issues such as legitimate expectation, promissory estoppel or where a taxpayer's constitutional rights are interfered

with. The lines between an appeal and an application for judicial review can be very fine. As will be seen below the Courts at times struggle with the delineation between the two remedies.

In tax cases, judicial review is the appropriate application in circumstances where for example, Revenue have acted outside their jurisdiction⁸, failed to provide information in a timely manner⁹ or the lawfulness of the assessment raised¹⁰. As addressed above, it is not the appropriate avenue if the issue is one of the correct amount of tax to be paid. I propose looking at a number of examples in more detail.

In *Stanley v Revenue Commissioners*¹¹ the Court considered the validity of the notice of assessment. The taxpayer received a substantial gift from his father in respect of shares in a construction firm. Revenue raised a notice of assessment which related to a period beyond the statutory 4 year time limit. The taxpayer maintained that the notice of assessment was issued outside the 4 year time limit and therefore invalid. Revenue contended that the applicant's return was not a correct return thereby allowing them to raise an assessment beyond the 4 year statutory time limit.

The taxpayer sought to quash the notice of assessment by way of judicial review. In refusing the relief sought, the High Court found that the applicant should have appealed the notice of assessment. The Court of Appeal did not agree. It held that ability of the TAC to hear and determine an appeal derived from the lawfulness of the notice of assessment. The notice of assessment is the foundation of the tax appeal and if the notice of assessment was invalid then the TAC did not have jurisdiction to hear the appeal. The Court stated "The jurisdiction of the Appeal



Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued ultra vires the Revenue's statutory powers.

A lawful assessment is a pre-requisite to the exercise by the Appeal Commissioners of their powers to hear and determine an appeal against an assessment. As the appellant has submitted, it is only where the notice is a valid notice of assessment that the issues of quantum of tax fall to be determined by the Appeal Commissioners on appeal. Where as in this case the issue raised is one of law and, specifically, of statutory interpretation as to the lawfulness

⁵ [2014] IEHC 662

⁶ [2014] IEHC 662 at para. 69

⁷ [2014] IESC 50 at [3.16]

⁸ *McNamee v Revenue Commissioners* [2016] IESC 33

⁹ *Keogh v CAB* [2004] IESC 32

¹⁰ *Viera v Revenue Commissioners* [2015] IESC 78

¹¹ [2017] IECA 279



of an assessment as opposed to the quantum of tax so assessed, the appellant was perfectly entitled to seek to have that issue determined by way of the present judicial review proceedings.”

Judicial review is also the appropriate remedy if a taxpayer maintains that the notice of assessment was raised capriciously, unreasonably or in bad faith. The High Court remarked on this in *Menolly Homes v Appeal Commissioners and Revenue Commissioners*¹² wherein it stated “There is an appropriate remedy to a person who claims that he is being assessed to V.A.T. in circumstances where he says that the tax inspector had no “reason to believe that an amount of tax is due and payable”, within the meaning of s.23(1) of the Value Added Tax Act. That remedy is judicial review of administrative action. If there are

circumstances upon which it may be argued that such an assessment was arrived at capriciously, unreasonably or in bad faith, then an applicant may seek a declaration that the notice of assessment is invalid; that the assessment be quashed; or that an injunction be issued to prevent its operation.”¹³

It is important to note that consideration must be given to judicial review upon receipt of the notice of assessment. An application for judicial review seeking to quash a notice of assessment must be brought within three months of the date of the notice of assessment¹⁴. As with an appeal, the time limits for judicial review are strict. In *Menolly Homes v Appeal Commissioners and Revenue Commissioners* the Court rejected the application for judicial review as it was out of time.¹⁵ Order 84, r 21(3) does provide for

an extension of time where the court is satisfied that there is good and sufficient reason for doing so however the courts are very reluctant to grant these applications.

While there are a number of examples of a taxpayer succeeding in its application for judicial review, the courts have regularly refused to grant the relief claimed. The bar is high to achieve success in a judicial review application.

Conclusion

When a taxpayer wishes to challenge an assessment raised by Revenue, it is important to carefully consider how the assessment was arrived at. It is appropriate to appeal the notice of assessment before the TAC where a taxpayer wishes to challenge the notice of assessment. Judicial review is the appropriate remedy where a person wants to challenge the lawfulness of the assessment. Appealing a notice of assessment and raising issues such as legitimate expectation, unjust enrichment, promissory estoppel before the TAC will not provide a remedy for the taxpayer.



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¹² [2010] IEHC 49

¹³ [2010] IEHC 49 at para. 37

¹⁴ O. 84, r. 21 (1) of the RSC

¹⁵ [2010] IEHC 49 at para. 38