Neutral Citation Number: [2011] IEHC 142

THE HIGH COURT

REVENUE

2010 1020 R

BETWEEN

THE REVENUE COMMISSIONERS

APPELLANT

AND

HANS DROOG

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 31st day of March, 2011.

1. The proceedings

1.1 This is an appeal by way of Case Stated for the opinion of the High Court pursuant to s. 941 of the Taxes Consolidation Act 1997 (TCA) by John O'Callaghan (the Appeal Commissioner) arising out of an appeal brought by the respondent taxpayer. On the appeal, the Appeal Commissioner found for the respondent, whereupon the appellant, the Revenue Commissioners, requested that he state a case for the opinion of the High Court.

1.2 Before identifying the question of law raised on the Case Stated, I propose setting out the factual background to the appeal and the Case Stated.

2. Factual background

2.1 The respondent filed his income tax return for the fiscal year 1996/1997 on 30th January, 1998. It was filed under the self-assessment system. In the return the respondent claimed relief for a loss of £50,046 in respect of his share of the losses of a partnership named as Taupe Partners, which was involved in the acquisition, distribution and licensing of films. As the Appeal Commissioners pointed out, the tax return was processed in the normal way under the self-assessment system. On 25th February, 1998 the respondent received an assessment for 1996/1997 in accordance with the return, which allowed relief in respect of the loss of £50,046 as claimed.

2.2 Just short of nine years later, on 22nd February, 2007 a nominated officer of the Revenue Commissioners (the Nominated Officer) gave notice in writing of an opinion pursuant to s. 811(6) TCA to the respondent. There were three elements in the notice. First, the Nominated Officer stated that he had formed the opinion that the transaction he outlined was a tax avoidance transaction within the meaning of s. 811 TCA (s. 811). The details of the transaction referred to an investment under the terms of a partnership agreement and an agreement of adherence, which were identified, and of certain activities carried out by Taupe Partners, the details of which are not of relevance for present purposes. Secondly, the Nominated Officer stated that he had determined the tax advantage which was to be withdrawn from the respondent for, *inter alia*, the year 1996/1997. In relation to that fiscal year, the tax advantage was set out at £24,022, representing the loss relief at the rate of 48% which the respondent had been allowed on his share of partnership losses amounting to £50,046 for 1996/1997. Thirdly, the Nominated Officer stated that he had determined that, should his opinion become final and conclusive, the loss relief claimed by the respondent would be withdrawn.

2.3 The respondent appealed pursuant to s. 811(7) to the Appeal Commissioner against the notice of opinion by notice dated 5th March, 2007. One of the grounds relied on by the respondent was that the notice of opinion was out of time by virtue of ss. 924, 955 and 956 TCA.

2.4 The appeal was heard by the Appeal Commissioner on 20th October, 2009, when it had been listed to deal solely with the ground of appeal by reference to ss. 955 and 956 TCA (s. 955/s. 956). The Appeal Commissioner delivered his determination on 18th December, 2009. His determination, as recorded in the Case Stated, was that the four-year time limits as set out in ss. 955 and 956 applied to the forming of an opinion under s. 811, so that the opinion was not valid. As recorded in the Case Stated, the Appeal Commissioner found as a fact that there was no suggestion of fraud or neglect of the respondent taxpayer in relation to the matters at issue.

3. Question by determination by the Court

3.1 The question for determination by this Court is whether the Appeal Commissioner was correct in law in holding that the four-year time limits in ss. 955 and 956 applied to the forming of an opinion under s. 811.

4. Statutory provisions in issue

4.1 I agree with the submission made by counsel for the respondent that it is logical to consider such of the provisions contained in Part 41 TCA (ss. 950 – 959) as are relevant to the issue to be determined by the Court before considering s. 811. The provisions of Part 41, which deal with self-assessment, were invoked by the respondent in making his tax return for the fiscal year 1996/1997. Section 811, which is contained in Part 33 TCA dealing with anti-avoidance, was invoked by the Revenue Commissioners, as I have stated, almost nine years after the respondent was assessed for that fiscal year. The relevant provisions of Part 41, which were

originally enacted in the Finance Act 1988, have been amended from time to time but the amendments are immaterial for present purposes. Those provisions were part of the taxation code for a year before the enactment of provisions which are now contained in s. 811, which were originally enacted by the Finance Act 1989. While I propose outlining the relevant provisions of Part 41 first and then outlining the provisions of s. 811, I should emphasise that the chronology of enactment does not affect the construction of Part 41 or s. 811.

4.2 I will then refer to s. 140 of the Finance Act 2008 (FA 2008), which amended s. 811A TCA, which was enacted in 2006, and explain why it cannot be determinative of the issue for the decision of the Court.

4.3 In outlining each of the relevant provisions, I will address the submissions made on behalf of the parties in relation thereto, although I consider that the answer to the question the Court has to determine turns on the resolution of a very net issue.

5. Part 41 TCA

5.1 For present purposes, the starting point in dealing with the relevant provisions of Part 41 is s. 950(2). Section 950 is the interpretation section and s. 950(2) provides as follows:

> "Except in so far as otherwise expressly provided, this Part shall apply notwithstanding any other provision of the Tax Acts or the Capital Gains Tax Acts."

Counsel for the respondent pointed to the requirement that a legislative derogation from or exception to the provisions of Part 41 must be "expressly" provided for. Counsel for the respondent in their written submissions gave three examples of TCA provisions which are expressed to apply "notwithstanding anything to the contrary in s. 950 …". One of those examples, which it was submitted are not exhaustive, was s. 895(6) TCA, which provides, insofar as is relevant to Part 41, that, where in any chargeable period a resident opens a foreign account, the resident shall, "notwithstanding anything to the contrary in s. 950 … , be deemed for that chargeable period to be a chargeable person for the purposes of s. 951 … " The kernel of the respondent's answer to the Revenue Commissioners' case is that every statutory exception to the application of any provision of Part 41, because of the requirement of s. 950(2), must be expressly enacted by a specific provision to that effect and no such specific provision was to be found in s. 811 in 2007. Therefore, the time limits stipulated in Part 41, which are contained in ss. 955 and 956, precluded the application of s. 811 to the respondent in 2007.

5.2 Section 955 deals with amendment of an assessment and the time limit for assessments. The time limit is stipulated in s. 955(2), para. (a) of which provides:

> "Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –
>
> (i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and
>
> (ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,
>
> by reason of any matter contained in the return."

The substantive power which s. 955(1) confers on an inspector to amend an assessment "at any time" is expressed to be subject to subs. (2). As counsel for the respondent submitted the time limit imposed by s. 955(2)(a) in its application as provided for in sub-paras. (i) and (ii) gives effect to a balanced scheme, in that it not only proscribes the imposition of additional tax on the taxpayer but it also precludes the taxpayer from seeking a repayment of tax outside the limitation period. Counsel for the Revenue Commissioners, however, pointed to what was characterised as an important qualification in para. (a) in that the proscription is on charging additional tax outside the limitation period "by reason of any matter contained in the return". In particular the terminology "by reason of" was emphasised and, as I understand it, it was suggested that that expression had a narrower scope than, say, "in reference to" or "relating to". It seems to me that on any comparative analysis of the return made by the respondent on 30th January, 1998 and the notice of opinion dated 22nd February, 2007, the only reasonable inference which can be drawn is that the intended outcome of the opinion was to claw back the loss relief on the partnership losses of which the respondent got the benefit on the original assessment by reason of the claim for that relief in the return, by imposing an additional charge for tax in the sum of £24,022 on the respondent. That being the case, the additional tax would arise "by reason of a matter contained in the return". While there is no reference to the return in the opinion, on any realistic evaluation of it, its purpose is to impose a liability for additional tax on the respondent by reason of the fact that he claimed relief in the return on the basis of a transaction which the Nominated Officer in 2007 opined was a tax avoidance transaction in respect of which he proposed to withdraw the relief.

5.3 The time limit stipulated in para. (a) of s. 955(2) is not absolute and is subject to exceptions set out at para. (b) of s. 955(2), which provides:

> "Nothing in this subsection shall prevent the amendment of an assessment –
>
> (i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),
>
> (ii) to give effect to a determination on any appeal against an assessment,
>
> (iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,
>
> (iv) to correct an error in calculation, or
>
> (v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid … where appropriate in accordance with any such amendment … ."

The exception contained in para. (b) on which counsel for the Revenue Commissioners focused, albeit as a "fall back" position and supra protest from counsel for the respondent on the basis that the point had not been raised before the Appeal Commissioner, was that contained in sub-para. (iii). The submission as to the application of that exception to the opinion of the Nominated Officer was that the giving of the notice of opinion under s. 811 was "an event occurring after" the return was delivered, which operated to disapply the four year time limit provided for in para. (a). Counsel for the respondent dismissed that submission as an attempt to "shoehorn" the notice of opinion into what he described as the wrong side of subs. (2). In my view, the rationale underlying para. (b) is obvious. Clearly, it is sensible that a taxpayer who made a return which did not contain a full and true disclosure of the facts should not be protected by the time limit in para. (a). As I understand it, as a matter of fact, it is common case that the respondent made a full and true disclosure in the return in issue here. It is also sensible that there should not be a time limit on correcting errors in calculation or the type of mistake of fact referred to in sub-para. (v). Whatever type of "event occurring after" the delivery of the return the Oireachtas had in mind in enacting sub-para. (iii), in my view, it cannot have been intended that the particular exception provided for in sub-para. (iii) would encompass an action by a nominated officer of the Revenue Commissioners pursuant to a power conferred by a separate and distinct element of the taxation code, such as the giving of a notice of opinion permitted under the anti-avoidance measures contained in s. 811. Therefore, in my view, the notice of opinion which issued on 22nd February, 2007 does not come within the exception set out in sub-para. (iii) or any other sub-para. of para (b).

5.4 There is also a time limit of four years stipulated in s. 956, which sets out the right of an inspector to make enquiries and to amend assessments. It is contained in para. (c) of s. 956(1), which provides:

> "Any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner."

As I have already recorded, the Appeal Commissioner found as a fact that the return made by the respondent in relation to the fiscal year 1996/1997 was not completed in a fraudulent or negligent manner, so that the single exception specified in para. (c) has no application to the respondent.

5.5 In order to identify the type of enquiries and actions which are subject to the time limitation contained in para. (c) of s. 956(1), one has to return to para. (b) of that sub-section, which provides:

> "The making of an assessment or the amendment of an assessment by reference to any statement or particular referred to in paragraph (a)(i) shall not preclude the inspector –
>
> > (i) from making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and
> >
> > (ii) subject to section 955(2), from amending or further amending an assessment in such manner as he or she considers appropriate."

The reference to "any statement or particular" referred to in para. (a)(i) is to "any statement or other particular contained in a return delivered by the chargeable person for that chargeable period". It was submitted on behalf of the Revenue Commissioners that the formation of an opinion under s. 811 is not an enquiry or action of the type referred to in s. 956(1), because it has nothing to do with the verification of the accuracy of a statement or particular contained in a return. It was submitted on behalf of the respondent that the focus of the Revenue Commissioners, which was on the reference to "accuracy" in s. 956(1)(b)(i), was too narrow because that sub-paragraph refers to "the accuracy or otherwise" of the statement or particular.

For what it is worth, I would interpret that expression as meaning no more than accuracy or non-accuracy.

5.6 However, from reading the Case Stated it would appear that it was the respondent taxpayer who brought s. 956 into contention. The applicability of the time limitation stipulated in that section to the notice of opinion was challenged by the Revenue Commissioners before the Appeal Commissioner on the basis that, in forming an opinion under s. 811, the Nominated Officer is accepting the return, but forming the opinion that a transaction has been undertaken that gives rise to a tax advantage (para. 5(c) of the Case Stated), which does not involve enquiries and actions of the type referred to in para. (b) of s. 956(1). In dealing with this argument, in setting out his reasons for his determination, the Appeal Commissioner stated (at para. 7(g) of the Case Stated):

> "The Revenue Commissioners suggested that we were still merely dealing with assessments but its (*sic*) very hard to see how an inspector can form an opinion under section 811 without having regard to the circumstances of the taxpayer in relation to which he would primarily be informed by the returns of the taxpayer. I don't think its (*sic*) realistic to consider that he could be working away merely with section 811 in his mind without falling foul of the prohibition on making enquiries. The consideration of the returns is a central part of the formation of an opinion by the inspector."

That practical approach, obviously, is based on knowledge of how the anti-avoidance regime operates within the Revenue Commissioners to which the Court is not privy. Notwithstanding that, it seems to me that it is reasonable to infer that the formation of the opinion of which notice was given in the letter of 22nd February, 2007 must have involved the making of enquires or the taking of action as to the entitlement of the respondent to loss relief in respect of the loss of £50,046 he incurred as a result of his involvement in the Taupe Partnership which were conducted outside the four year limitation period prescribed in s. 956. As counsel for the respondent submitted, the opinion could hardly have materialised on its own, without being preceded by enquiries into the claim for loss relief in the return.

5.7 It is undoubtedly the case that the Revenue Commissioners could not have imposed additional tax on the respondent in relation to the fiscal year 1996/1997 on 22nd February, 2007 having regard to the provisions of Part 41, if s. 811 had not been enacted. The core question on this Case Stated is whether the provisions of s. 811 were capable of operating against the respondent in 2007, notwithstanding the primacy afforded to the self-assessment regime provisions, including the time limits embodied in ss. 955 and 956, by virtue of s. 950(2).

6. Section 811

6.1 Section 811(4) confers a distinct power on the Revenue Commissioners in that it provides:

> "Subject to this section, the Revenue Commissioners as respects any transaction may at any time –
>
> (a) form the opinion that the transaction is a tax avoidance transaction,
>
> (b) calculate the tax advantage which they consider arises, or which but for this section would arise, from the transaction,
>
> (c) determine the tax consequences which they consider would arise in respect of the transaction if their opinion were to become final and conclusive in accordance with subsection (5)(e), and
>
> (d) calculate the amount of any relief from double taxation which they would propose to give to any person in accordance with subsection (5)(c)."

The linchpin of the argument of the Revenue Commissioners that s. 811 operated against the respondent, notwithstanding the primacy afforded to the provisions of Part 41 by s. 950(2), is the aspect of s. 811 which empowers the Revenue Commissioners "at any time" to form an opinion that a transaction is a tax avoidance transaction.

6.2 The consequences of the formation of an opinion under s. 811(4) are set out in para. (a) of s. 811(5) as follows:

> "Where the opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction becomes final and conclusive, they may, notwithstanding any other provision of the [Taxes] Acts, make all such adjustments and do all such acts as are just and reasonable … in order that the tax advantage resulting from a tax avoidance transaction shall be withdrawn from or denied to any person concerned."

6.3 In order to form an opinion that a transaction is a tax avoidance transaction the Revenue Commissioners have to apply the interpretative provisions contained in s. 811(1), (2) and (3). The expression "tax avoidance transaction" has the meaning assigned to it in s. 811(2), which provides:

> "For the purposes of this section and subject to subsection (3), a transaction shall be a 'tax avoidance transaction' if having regard to any one or more of the following –
>
> (a) the results of the transaction,
>
> (b) its use as a means of achieving those results, and
>
> (c) any other means by which the results or any part of the results could have been achieved,
>
> the Revenue Commissioners form the opinion that –
>
> (i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and
>
> (ii) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage … ."

As defined in s. 811(1) "tax advantage" has, as one would expect, a wide ranging scope but, for present purposes, it is sufficient to note that it captures a reduction, avoidance or deferral of any charge or assessment of tax or a refund of an amount of tax arising out of, or by reason of, a transaction. It is reasonable to infer that, in order to form an opinion as to whether the particular transaction involving the respondent at issue here was a tax avoidance transaction, the Nominated Officer would have to conduct enquiries in accordance with the requirements of the definition contained in s. 811(2) and, in particular, sub-para. (ii) on which counsel for the respondent laid particular emphasis.

6.4 The meaning of "tax avoidance transaction" is elaborated on in s. 811(3), para. (a) of which provides as follows:

> "Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the Revenue Commissioners shall not regard the transaction as being a tax avoidance transaction if they are satisfied that –
>
> (i) notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction –
>
> (I) was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and
>
> (II) was not undertaken or arranged primarily to give rise to a tax advantage,
>
> or
>
> (ii) the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided."

Counsel for the Revenue Commissioners laid emphasis on s. 811(2) and (3), as I understand it, in support of the Revenue Commissioners' contention that the formation of an opinion under s. 811 is not an enquiry or action as envisaged in s. 956. It is true that the methodology involved in reaching an opinion is complex, in that the Nominated Officer has first to determine whether the transaction complies with the requirements of s. 811(2). Even if it does, that is negated, if the Revenue Commissioners are satisfied that it meets the business purpose criterion or the non-misuse/abuse criterion provided for in sub-paras. (i) and (ii) of para. (a) of s.

811(3). Quite frankly, it is difficult to understand how the Revenue Commissioners could arrive at a conclusion that they were satisfied that those criteria were met without making enquiries. For instance, as counsel for the respondent pointed out, the formation of an opinion under s. 811(4) must be preceded by enquiries into the primary purpose of the transaction in issue. I think it is reasonable to infer that the opinion of the Nominated Officer of which notice was given on 22nd February, 2007 must have been preceded by enquiries outside the limitation periods stipulated in ss. 955 and 956.

6.5 In s. 811(1), the expression "tax consequences", in relation to a tax avoidance transaction, is defined as meaning such adjustments and acts as may be made and done by the Revenue Commissioners pursuant to subs. (5) in order to withdraw or deny the tax advantage resulting from the tax avoidance transaction. As is clear from the truncated version of para. (a) of s. 811(5) which I have quoted above, the "tax consequences" become operative when the opinion "becomes final and conclusive". An appeal process is provided for in s. 811(7), being the appeal process of which the respondent has availed. Paragraph (e) of s. 811(5) sets out when an opinion is "final and conclusive". That occurs if no appeal is brought within the time limit prescribed in s. 811(7) or, alternatively, –

> "as and when all appeals made under subsection (7) against any such matter or matters have been finally determined and none of the appeals has been so determined by an order directing that the opinion of the Revenue Commissioners to the effect that the transaction is a tax avoidance transaction is void."

Apart from the appeal to the Appeal Commissioners, s. 811 provides for an appeal by way of re-hearing to the Circuit Court and an appeal by way of Case Stated to the High Court, as is happening in these proceedings. Of course, there is also an appeal from the decision of the High Court on a Case Stated to the Supreme Court.

6.6 It was suggested on behalf of the Revenue Commissioners that the Oireachtas could not have intended that the whole appeal process envisaged in s. 811 could be gone through and that the point at which the opinion of the Nominated Officer would become final and conclusive could be reached within four years. Whether in 1989 the draftsman or the Oireachtas gave any thought to the likely duration from the point of formation of an opinion to it becoming final and conclusive, the appeal process having been exhausted, is wholly speculative and can have no bearing on the proper construction of s. 811 in the context of TCA as a whole.

6.7 Another argument based on s. 811(5), which was more strenuously advanced on behalf of the Revenue Commissioners on the basis that it is a substantive point, was that no question of further tax becoming payable as a result of the formation of an opinion under s. 811(4) can arise until the appeal process has been exhausted, whereupon the opinion becomes final and conclusive. Section 811(9) gives a variety of options to the Appeal Commissioner in determining an appeal, depending on the ground relied on by the taxpayer as set out in s. 811(7), and, as with every other aspect of s. 811, the likely outcome of an appeal is varied and complex. Irrespective of that, and irrespective of the mechanics necessary to recover additional tax from a taxpayer who was unsuccessful on an appeal pursuant to s. 811(7) when the appeal process was exhausted and the opinion became final and conclusive, in particular, whether an assessment would have to be made at that stage, in my view, the important point is that, once the opinion is formulated and notice thereof is given pursuant to s. 811(6), a process has commenced which may give rise to the taxpayer being liable for additional tax. Therefore, consideration of whether the process is permissible under the taxation code, including, in the case of a taxpayer who has been assessed in accordance with Part 41, whether the time limits stipulated in ss. 955 and 956 were applicable and have expired, is appropriate at the stage of notification of the opinion. It is not premature, as submitted on behalf of the Revenue Commissioners. For the avoidance of doubt, I have reached that conclusion without forming any view on whether an assessment would have to be raised to reverse a tax advantage when an opinion became final and conclusive.

6.8 For completeness, in my view, the fact that it is a nominated officer who, by virtue of s. 811(12), performs the actions and discharges the functions authorised by s. 811, whereas ss. 955 and 956 confer powers, subject to limitations, on an inspector, has no bearing on the determination of the question posed in the Case Stated. That question concerns the powers and functions of the Revenue Commissioners. That different officers are authorised to exercise and perform them is irrelevant, as is the manner of authorisation of different officers.

7. Section 140 FA 2008

7.1 Section 140 FA 2008 amended TCA by inserting a new sub-section, subs. (1A) into s. 811A TCA, which is in the following terms:

> "Without prejudice to the generality of any provision of this section or section 811, sections 955(2)(a) and 956(1)(c), as construed together with section 950(2), shall not be construed as preventing an officer of the Revenue Commissioners from –
>
> (a) making any enquiry, or
>
> (b) taking any action
>
> at any time in connection with this section or section 811."

Section 140 applies as respects any transaction where the whole or any part of the transaction is undertaken or arranged on or after 19th February, 2008. In other words, it has no application to the respondent.

7.2 In *Cronin (Inspector of Taxes) v. Cork and County Property Company Ltd.* [1986] I.R. 559 the Supreme Court held that a Court cannot construe a statute in the light of amendments that may thereafter have been made to it. In delivering judgment, Griffin J. stated:

> "An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be."

Counsel for the Revenue Commissioners was critical of the Appeal Commissioner who, having referred to s. 140 FA 2008 and to that decision, in outlining his reasons for his decision in the Case Stated, stated:

> "However, I noted that it contained exactly the sort of clarification, the buttressing provisions, that one would normally expect to find where it's (sic) intended that a particular provision should not be watered down by any other provisions in the Act. That is the only inference I draw from the 2008 amendment."

7.3 In my view, in making that comment, the Appeal Commissioner did not infringe the principle stated in the *Cronin* case, which as I understand it, precludes the Court or other arbiter from making the assumption that because a provision was amended it needed to be amended. Counsel for the respondent submitted that the formula of words utilised in s. 140 is a formula which would disapply the time limits stipulated in ss. 955 and 956 to s. 811. Be that as it may, the Court cannot treat that amendment as determinative of the question posed in the Case Stated.

8. The authorities referred to by the parties

8.1 The Court has had the benefit of helpful written submissions from both parties. I propose addressing only the authorities which I consider to be of particular relevance to the issue the Court has to determine.

8.2 Counsel for the Revenue Commissioners relied on the decision of the Supreme Court in *Keogh v. Criminal Assets Bureau* [2004] 2 I.R. 159 as being instructive as to the proper construction of the statutory provisions in issue here. At issue in that case were provisions of TCA in relation to assessment to income tax and the right to appeal an assessment, namely: s. 922, which provides that, where the Inspector of Taxes does not receive a statement from a person liable to be charged to income tax, the inspector shall make an assessment to income tax on that person; s. 933, which provides that a person aggrieved by any assessment to income tax is entitled to appeal to the Appeal Commissioners on giving notice in writing to the Inspector of Taxes within thirty days of the date of notice of assessment; s. 957(2)(a), which provides that, where an Inspector of Taxes makes an assessment on a person subject to self-assessment, no appeal shall lie against that assessment unless the chargeable person both delivers the return and pays the tax that would have been payable if an assessment had been made and further provides that the time for bringing an appeal against the assessment shall be treated as commencing when the return has been delivered and the tax paid. Mr. Keogh was seeking to quash assessments to income tax which had been made on him, which he purported to appeal merely by letter, and declarations that the assessments had not become final and conclusive and that the time for bringing an appeal against them had not commenced, in circumstances where he had not complied with the requirements set out in s. 957(2)(a).

8.3 As to the proper approach to construction of the relevant provisions of TCA in the *Keogh* case, Keane C.J., in the passage relied on by counsel for the Revenue Commissioners, stated as follows (at p. 170):

> "In construing the relevant provisions of the Taxes Consolidation Act 1997, the duty of the court is, as stated by Lord Russell of Killowen C.J. in *Attorney General v. Carlton Bank* [1899] 2 Q.B. 158 at p. 164: –
>
> > 'to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed',
>
> a passage which was cited with approval at pp. 763 to 764 by Kennedy C.J. speaking for the Supreme Court of *Saorstat Éireann in Revenue Commissioners v. Doorley* [1933] I.R. 750.
>
> It is true that, as pointed out in that and other authorities, where the court is considering whether a particular person is subject to a tax claimed to have been imposed by a statute, its sole task is to determine whether, having regard to the language used, the tax has been expressly imposed, the court cannot have regard, as might be possible in other contexts, to what might be assumed to be the intention or governing purpose of the Act, other than an intention to levy such tax as the statute imposes. We are here concerned with provisions in the Taxes Consolidation Act 1997 which do not impose any tax but set out the machinery by which the taxpayer is to be assessed and the appropriate tax recovered and in construing those provisions the court must apply the normal principles of construction to which I have already referred."

Counsel for the Revenue Commissioners submitted that it is not necessary for the Court to determine in this case whether s. 811 is a charging provision. As I understand the reliance on the *Keogh* case it is that, by analogy, the Court should treat s. 811 in conjunction with ss. 955 and 956 as provisions setting out the machinery for assessing and recovering tax and that the Court should apply normal principles of construction in construing them.

8.4 Counsel for the respondent, while contending that s. 811 imposes a charge and is a penal provision, accepted that the Court does not have to determine that point. The position adopted on behalf of the respondent was that the correct interpretation of the relevant provisions, irrespective of whether one takes the view that the provisions at issue are charging provisions and must be interpreted literally with no room for examining legislative intention (as set out in the judgment of Rowlatt J. in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 at p. 71), or whether one views the sections as merely setting out the machinery by which the taxpayer is to be assessed so that the "normal principles of statutory construction" apply (as laid down in the *Keogh* case), is the interpretation contended for by the respondent, namely, that s. 950(2) and, by extension, ss. 955 and 956, operate in priority to s. 811. While contending that there is no ambiguity in the relevant provisions, counsel for the respondent referred the Court to the following passage from the judgment of Geoghegan J. in *Harris v. Quigley* [2006] 1 I.R. 165 (at p. 183):

> "While, as far as possible, a taxing statute should be interpreted in the same way as any other statute and should not be interpreted, if at all possible, as to create an absurdity, nevertheless there is a countervailing principle that where there is an ambiguity a taxing statute will be interpreted in favour of the taxpayer."

8.5 Counsel for the respondent also referred the Court to the decision of the Supreme Court in *D.B. v. Minister for Health* [2003] 3 I.R. 12 where, in the context of construing a statutory provision which delimited the period within which a claimant to the Hepatitis C Compensation Tribunal might decide in writing either to accept or reject the award of the Tribunal or to appeal the award – "a period of one month or such greater period as may be prescribed from the date of receiving notice of the making of the award" (s. 5(9)(a) of the Hepatitis C Compensation Tribunal Act 1997), Denham J. stated: (at p. 21, 22):

> "It is necessary to consider the precise words of s. 5(9)(a). In construing statutes, words should be given their natural and ordinary meaning. …
>
> The words in s. 5(9)(a) are plain, they are precise and unambiguous. Thus the natural and ordinary meaning of the words apply, for they declare best the intention of the legislature. A literal approach should be taken to the section. …
>
> The period of one month is an integral and indispensable part of the scheme. The words are plain and unambiguous. It is a clear statutory time limit for the scheme. It is a statutory time bar."

9. Conclusions
9.1 For the fiscal year in issue, 1996/1997, the respondent was chargeable to tax under Part 41. By virtue of s. 950(2), except insofar as otherwise expressly provided, the provisions of Part 41 applied to his liability in that year notwithstanding any other provision of, *inter alia*, TCA. Those provisions included s. 955(2), which prohibited the making of an assessment for that year or the charging of additional tax for that year after the end of the four-year period stipulated and s. 956(1) which proscribed making enquiries or taking actions outside that time period. The core issue for determination on this Case Stated is whether anything in s. 811 expressly, as required in s. 950(2), displaces the time bars applicable by virtue of ss. 955 and 956.

9.2 As I have stated above, the linchpin of the Revenue Commissioners' case that s. 811 is not subject to the time bar imposed in ss. 955 and 956 is the fact that s. 811(4) empowers the Revenue Commissioners "at any time" to form an opinion that a transaction is a tax avoidance transaction. It was further pointed out that s. 811(5), which sets out the powers of the Revenue Commissioners where the opinion becomes final and conclusive, in para. (a) confers those powers "notwithstanding any other provision of the Acts". The net question, therefore, is whether by conferring power on the Revenue Commissioners to form an opinion "at any time" and to give effect to the consequences of the opinion when it becomes final and conclusive "notwithstanding any other provision of the Acts", the Oireachtas expressly disapplied the time bars stipulated in ss. 955 and 956.

9.3 The primacy quality which the expression "notwithstanding any other provision of the Acts" in s. 811(5)(a) is intended to have, in my view, is nugatory in effect when set up against the primacy quality attached to the provisions of Part 41 by virtue of s. 950(2), which the Oireachtas intended should subsist unless expressly disapplied. To put it another way, in my view, the expression "notwithstanding any other provision of the Acts" in s. 811(5)(a) does not neutralise the corresponding provision in s. 950(2), which can only be neutralised by an express statutory provision. Similarly, in my view, the words "at any time" in s. 811(4) do not have the effect of displacing the primacy given by s. 950(2) to the provisions of Part 41 in relation to self-assessed taxpayers and, in particular, the time bar on making assessments and imposing additional tax provided for in s. 955 or the time bar in relation to making an enquiry or taking an action provided for in s. 965. In the absence of express disapplication of the primacy of the provisions of Part 41, in my view, as a matter of construction, the words "at any time" in s. 811(4) must be read as meaning at any time within the time limitation period stipulated in ss. 955 and 956. Such construction is entirely consistent with the plain meaning of the words used in s. 811, which are clear and unambiguous. It gives rise to no absurdity. On the contrary it is entirely consistent with the use of the expression "at any time" in s. 955, where it is used in s. 955(1), albeit with the express saver for subs. (2) at the commencement of s. 955(1).

9.4 It is the case that, prior to the enactment of s. 140 FA 2008, on what I have found is the proper construction of s. 811 in its application to taxpayers whose liability to income tax, corporation tax or capital gains tax was subject to self-assessment in accordance with Part 41, those taxpayers were, as regards the application of s. 811, in a different position to, say, all other taxpayers in relation to the time span within which action could be taken against them under s. 811. Section 811, as drafted, applies to all taxpayers and, indeed, to all taxes, including capital acquisitions tax, stamp duty and value added tax, to which the provisions of Part 41 do not apply. The anomaly which existed in 2007, when notice of opinion issued to the respondent, was the consequence of the Oireachtas not having expressly excepted s. 811 from the time bars contained in ss. 955 and 956, which, by virtue of s. 950(2), in the absence of such express exception, applied to s. 811.

10. Answer to the question
10.1 The answer to the question posed in the Case Stated is that the Appeal Commissioner was correct in law in holding that the four-year time limits provided for in ss. 955 and 956 applied to the forming of an opinion under s. 811.