THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2021] IECA 18
Court of Appeal Record No. 2018/223
High Court Record No. 2015/269R

Whelan J.
Ní Raifeartaigh J.
Murray J.

BETWEEN:

KENNY LEE

PLAINTIFF/RESPONDENT

- AND -

THE REVENUE COMMISSIONERS

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Murray delivered on 28th day of January 2021

Issue and facts

1. This appeal presents a net issue as to the scope of the jurisdiction of the Appeal Commissioners and of the Circuit Court when hearing appeals against assessments to income tax pursuant to, respectively, ss. 933 and 942(1) of the Taxes Consolidation Act 1997 ('the TCA'). The plaintiff contended before the Circuit Court and High Court that the Appeal Commissioners and the Circuit Court were thereby invested with jurisdiction to determine whether (a) the alleged liability reflected in the assessments has been compromised by agreement and/or (b) the Revenue Commissioners ('Revenue') were estopped from asserting

such a liability. Revenue contended that the jurisdiction of the Appeal Commissioners and Circuit Court was limited to dealing with and considering '*an assessment to tax'* and that this did not extend to addressing whether any underlying liabilities had been settled by agreement or otherwise rendered unenforceable by prior representation. The Appeal Commissioner and the Circuit Court having reached different views on these questions, the High Court determined that while neither enjoyed jurisdiction to determine claims of legitimate expectation or estoppel, both had the power to determine if Revenue had compromised a tax liability. In my view, the trial Judge was correct in the first of these conclusions but erred in the second.

2. The factual context in which this issue presented itself was simple, if unusual. In May 2008 Revenue announced a voluntary disclosure initiative for persons holding untaxed funds in domestic deposit accounts. In order to avail of the '*qualifying disclosure'* provisions applicable to that process (s. 1077(E) TCA), an eligible person had to submit a notice of intention to make such a disclosure on or before 15 September 2008. They were required to follow that notice with full payment and disclosure on or before 15 January 2009. On 12 September 2008 a firm of accountants submitted on the plaintiff's behalf a notice of intention to make such a disclosure in relation to untaxed funds deposited by him in a named financial institution. The plaintiff thereby expressly undertook to submit computations and pay the tax, interest and penalties due by 15 January 2009.

3. On 9 January 2009, the plaintiff's solicitor wrote directly to Revenue enclosing a cheque drawn on the solicitor's client account in the amount of €12,500. That letter stated, *inter alia*, as follows:

'You might please note that the enclosed cheque from this office is the maximum amount our client can raise at this junction and leaves him in a very vulnerable financial position. It may be that our client does not owe this much tax or it may transpire that he owes somewhat more. The cheque is sent on the basis that if it is not accepted in [sic] *that means you might return the cheque to us. Our client recognises that this is not entirely satisfactory from a Revenue point of view but it is the best he can do in the circumstances.'*

4. Revenue wrote to the plaintiff's solicitors on 13 January acknowledging receipt of the '*submission'* and stating *inter alia* that the letter '*should be regarded as a receipt for the payment of €12,500'*. The cheque for €12,500 enclosed with the plaintiff's solicitor's letter was encashed by Revenue. Then, between July 2009 and December of the following year, Revenue and the plaintiff's solicitors exchanged correspondence with, essentially, the former requesting information, documentation and computations in relation to the offer of €12,500, and the latter protesting that the payment of €12,500 was offered on the terms set forth in the letter of 9 January and was accepted as such. It was, the plaintiff's solicitors said '*not open to the Revenue to seek to re-open any matter'* covered by that letter. Revenue refused to accept this and offered the return of the monies advanced by the plaintiff, while the plaintiff's solicitor insisted that the liabilities were settled.

5. That was the background against which, on 13 December 2010, Revenue issued to the plaintiff notices of assessment for the years 2000 to 2006 and notice of amended assessment for 2007 to 2009 inclusive. The aggregate tax liability to income tax of the plaintiff was assessed at €536,322. The plaintiff appealed against those assessments, asserting in his notice of appeal that the figures relied upon by Revenue as miscellaneous income were estimated and

excessive, and claiming that for the tax years up to 31 December 2008 a settlement had been made with Revenue, the amount tendered by him having been accepted in full and final satisfaction.

6. The proceedings came before a single Appeal Commissioner and were at hearing on 23 October 2012, 21 February, 21 March and 24 May 2013. No oral evidence was heard, the plaintiff relying instead on the correspondence exchanged between the parties. By decisions dated 4 January and 24 May 2013 the Appeal Commissioner rejected Revenue's argument that he had no jurisdiction to determine whether or not a settlement had been reached but found on the evidence that no such settlement had in fact been agreed. He proceeded to confirm the assessments under appeal.

7. The plaintiff appealed this decision to the Circuit Court, as he was entitled to do under the legislation then in force. That right of appeal has since been abolished by the Finance (Tax Appeals) Act 2015, which came into effect in March 2016. The appeal was heard and determined by His Honour Judge David Riordan on 24 January and 6 May 2014. The Circuit Court heard oral evidence. The plaintiff's solicitor testified that he intended the offer contained in the letter of January 9 to be in full and final settlement of any alleged liabilities in respect of the years 2000 to 2007 inclusive. A Revenue official gave evidence that the relevant cheque was encashed as part of normal administrative procedure and was treated as a payment on account of the plaintiff's final liabilities to tax, interest and penalties. Based on the foregoing, the plaintiff contended that the cashing of the cheque represented an unqualified acceptance of the offer contained in the letter of January 9 while Revenue (although disputing that the Court had jurisdiction to deal with the issue of whether there had been any settlement) asserted that

the purported accord and satisfaction was attended by ambiguity and misunderstanding to the extent that there was no *consensus ad idem* between the parties.

8. On the first day of sitting what was described as the '*preliminary jurisdictional point*' was argued and determined, the Judge deciding that he did not have power to adjudicate upon either whether or not a settlement had been agreed between the parties or whether Revenue was estopped from denying the existence of such a settlement. As recorded in the Case Stated giving rise to this appeal (at para. 28 and 29), the Judge decided:

> '*my role was confined to determining the amount, if any, of tax which was due and owing ...*
>
> *... the Appeal Commissioners ... erred in law in finding that he did have jurisdiction to decide whether a settlement had been reached, and that I would compound that error if I came to the same conclusion ...*
>
> *I therefore held that I did not have the jurisdiction to determine whether or not a settlement had been agreed between the parties or whether the respondent was estopped from denying the existence of such a settlement'*.

9. Having refused to state a case at that point (but doing so at the conclusion of the proceedings) the Circuit Court resumed hearing the matter in May whereupon the taxpayer did not give any further evidence, resting on his submission that the only evidence before the Court was that the quantum of the liability to tax on the relevant income had been reduced to zero. In his decision of the 6 May, the Judge determined that the letter from the taxpayer's solicitor

of 9 January 2009 did not cause his liability to be reduced to zero and proceeded to confirm the assessments under appeal.

10. Based on the foregoing, the case stated identified three questions of law for the opinion of the High Court. They were:

(a) *Does a Judge of the Circuit Court, hearing an appeal from the Appeal Commissioner, have jurisdiction under s. 942(3) of the Taxes Consolidation Act, 1997 (as amended), or pursuant to his inherent jurisdiction, to determine whether the parties to an appeal have entered into a settlement in respect of the liability at issue in the said appeal?*

(b) *Was I correct in my refusal on 6 May 2014 to state a case for the opinion of the High Court on my preliminary ruling of 24 January 2014 and my refusal to adjourn the further hearing of the appeal pending the determination of such a case stated?*

(c) *Was I correct in my determination that, on the evidence before me, I should confirm the assessments?*

11. The third of these questions is, obviously, ancillary to the first two. The parties accept that the second question has now been conclusively resolved by the decision of the Supreme Court in *O'Rourke v. Appeal Commissioners* [2016] IESC 28, [2016] 2 IR 615. There, the Court decided that an appeal from the Appeal Commissioners to the Circuit Court was not open at the point at which an intermediate finding was made, but only when the appeal was determined. An appeal, it held, was only determined where there was a final decision as to

liability to pay *and* as to the amount of tax for which the tax payer was liable. Accordingly, it followed, it was only once that determination was made that an appeal could be brought by the tax payer to the Circuit Court.

The decision of the High Court

12. Keane J. rooted his consideration of the first question in the provisions of s. 934 TCA, to which I will return. This provision, it is to be noted, defined the jurisdiction of both the Appeal Commissioners and of the Circuit Court in an appeal of the kind in issue in this case. He summarised the effect of the section and the issue presented by the provision, as follows (at para. 2):

> '*whether the obligation on both the Appeal Commissioners and the Circuit Court under s. 934 of the TCA – to abate; reduce; permit to stand; or increase any assessment that is the subject of an appeal – requires where relevant, or precludes in all circumstances, consideration of whether a prior settlement has been reached between the taxpayer concerned and the Revenue Commissioners in respect of the relevant liability'*.

13. The trial Judge thus expressed the essential basis for his conclusion that the first question presented in the case stated should be answered in the negative (at para. 68):

> *'In my judgment, in circumstances where the Oireachtas has enacted elaborate procedures for the determination of a tax payer's liability by assessment and appeal to the Appeal Commissioners, accompanied by right of appeal to the Circuit Court, it would be unwarranted and, indeed, unfair to adopt an artificially narrow construction of the*

powers and authority of those bodies to determine the incidental questions of fact and law that may arise in that regard, thereby requiring tax payers who wish to raise such questions to risk the attendant costs, and to occur the additional stress, prosecuting or defending separate proceedings issued.'

14. However, and noting the judgment of Charleton J. in *Menolly Homes v. Appeal Commissioners & anor.* [2010] IEHC 49, Keane J. continued (at para. 69):

'there are plainly some questions that it is more appropriate to raise by application for judicial review. The applicant claims that he has a legitimate expectation in his income tax liability for the assessment period(s) in question has been settled in the amount of €12,500 or, conversely, that the respondent is estopped from ascertaining otherwise both questions of that kind. The doctrine of legitimate expectation is a feature of public law; that of promissory estoppel one of equity. Neither the Appeal Commissioners nor the Circuit Court have the necessary public law jurisdiction to consider them. And, in the words of Charleton J. in Menolly Homes Limited (at para. 12) revenue law has no equity.'

15. Thus, on this basis, and having regard to that distinction, Keane J. determined that while the Appeal Commissioners and the Circuit Court had jurisdiction to consider what he termed '*a contract law claim that there exists prior accord or settlement'*, neither had jurisdiction to entertain a claim for legitimate expectation or for promissory estoppel. Claims of that sort, he said, must be raised in separate proceedings before the appropriate Court.

16. While the answer to the first question in the Case Stated in the Order of Keane J. simply states that a judge of the Circuit Court hearing an appeal from an Appeal Commissioner does have jurisdiction '*to determine whether the parties to an appeal have entered into a prior settlement or accord in respect of the liability at issue in the said appeal'*, it is clear that the jurisdiction as so determined by the trial Judge is limited to the power to decide whether there had been a settlement as a matter of contract, and does not extend to a function in determining whether the raising of an assessment may be precluded by either a legitimate expectation or an estoppel.

17. I stress this because the notice of appeal records Revenue as appealing '*the entire decision'* of Keane J. The taxpayer has not cross appealed the decision insofar as it held that the Appeal Commissioners had no jurisdiction in respect of the legitimate expectation or estoppel issues. Strictly speaking, therefore, the only question before this Court is whether the Appeal Commissioners and Circuit Court Judge had the power to embark upon a consideration of whether there had been a settlement. However, it is difficult to decide one of these issues without also having regard to the other. As noted by Sales J. (as he then was) in the course of his judgment in *Oxfam v. Her Majesty's Revenue and Customs* [2009] EWHC 3078 the fact that an appellate tribunal has the power to decide whether there is a contract compromising the liabilities the subject of an assessment may suggest that it is also empowered to decide if the tax authorities are precluded on the same facts from enforcing that liability because of a representation they have made, albeit one falling short of a contractually binding promise. If the Commissioners have jurisdiction to resolve one such claim based on particular facts (that based upon a contract), the conclusion that they do not have the power to determine whether the same facts give rise to an estoppel or legitimate expectation has to be based upon either a

distinction between these various legal theories duly reflected in the terms of the legislation, or a relevant difference in principle between the legal basis for the claims.

The position of the parties

18. Revenue's appeal depends on the proposition that the function of the Appeal Commissioners was defined by the assessment to tax. Those Commissioners, Revenue say, were empowered only to deal with and consider such an assessment. On this argument a settlement of the kind alleged by the plaintiff could not vary the charge to tax, and could not, therefore, be an incidental question to be considered by the Appeal Commissioners in assessing the tax liability that was before them. This distinction was most helpfully explained by Ms. Tighe SC in the course of her oral submissions as between findings that were relevant to the statutory charge to tax on the one hand (which did fall within the Commissioners' jurisdiction) and findings that were otherwise relevant to the relations between a taxpayer and Revenue on the other (which did not). The distinction is defined, Revenue says, by the assessment and the function of the Appeal Commissioners is only '*to determine the assessment'*.

19. The plaintiff, on the other hand, says that he does not contend for the making of any ruling other than as provided for under s. 934. He says that the Circuit Court (and therefore the Appeal Commissioner) was entitled to take into account the evidence given by both parties in relation to a settlement and depending on their view of the evidence, could determine that the assessments should be abated or reduced. There is, the plaintiff says, nothing in the words of s. 934 or the case law which precluded the Appeal Commissioners or the Circuit Court from considering the existence of a settlement in deciding whether to abate or reduce assessments. He does not, he stresses, say that the settlement in question precluded the making of an

assessment and in the course of his oral submissions Mr. O'Floinn SC sought to avoid the conclusion that he was seeking the enforcement of his client's contract with Revenue. He was, he said, merely asking that the Commissioners '*have regard'* to the agreement he alleged but was not asking them to '*enforce'* it in the sense of seeking any order to that effect. He was, he accepted, asking that it be '*given effect to'* so that for the years affected by the alleged settlement, the Commissioners would reduce the amount assessed to zero.

The statute

20. The issue is, first and foremost, one of statutory construction. The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation.

21. In defining the functions of the Appeal Commissioners in hearing an appeal brought pursuant to s .933 TCA or the Circuit Court in hearing an appeal under s. 942, the scope of that jurisdiction is determined by four features of the Act – the definition of the appellate jurisdiction of the Commissioners, the parameters of the permissible grounds of appeal, the orders the Appeal Commissioners may make at the conclusion of that process and the powers conferred upon those Commissioners to enable that appeal to be effectively heard. Each of these points to a jurisdiction directed to the assessments raised by Revenue and the charging provisions pursuant to which the liabilities reflected in those assessments are imposed. They strongly suggest that the function of the Appeal Commissioners at first instance and of the

Circuit Court on appeal is to determine if an assessment to tax is properly made having regard to those charging provisions, and no more.

22. As explained by Lord Dunedin in *Whitney v. Inland Revenue Commissioners* [1926] AC 37, at p. 52 there are three stages in the imposition of a tax – the declaration of liability, the assessment and the methods of recovery. The liability is declared by statute, which determines what persons are liable in respect of which property. The assessment particularises the exact sum which a person has to pay in the light of the applicable statutory charge.

23. That essential structure is maintained in the TCA. For chargeable periods prior to 2013, Part 39 of the Act provides for the issuing, by the Inspector, of assessments either on foot of returns made by a taxpayer or in default thereof. These are directed to the sums the Inspector determines '*ought to be charged'*. The '*charge'* together with the Inspector's opinion thus described define the assessment. Section 12 declares that income tax shall, subject to the provisions of the Income Tax Acts, '*be charged in respect of all property profits or gains'* described or comprised in the Schedules contained in the sections identified in the provision and in accordance with the provisions of the Income Tax Acts applicable to those Schedules. Section 15 uses similar language to specify the rate of tax, providing that the tax '*shall be charged for each year of assessment at the rate of tax specified'* in the Table to the Act.

24. A person so assessed has an entitlement to appeal, in default of which the assessment is '*final and conclusive'.* The assessment shall not be altered before the time for hearing and determining appeals against that assessment (s. 932). The appeal is stated to be against the '*assessment'* (s. 933((2)(a)) and it is with the '*assessment*' that a person must be '*aggrieved'* before they may appeal (s. 933(1)(a)). The notice of appeal must specify (s. 957(4)):

'*(a) each* ***amount or matter in the assessment*** *or amended assessment with which the chargeable person is aggrieved, and*

(b) the grounds in detail of the chargeable person's appeal as respects ***each such matter****.'*

(Emphasis added)

25. These provisions dictate that the Appeal Commissioners are concerned properly with the '*amount or matter in'* the assessment or amended assessment and that the only '*grounds'* of appeal envisaged are directed to '*such matter'.* Those limitations are reflected in the provisions enabling the Appeal Commissioners' ultimate orders on the appeal, and the preconditions to the making of the determinations that underlie them. Section 934(3) provides:

'(3) Where on an appeal it appears to the Appeal Commissioners by whom the appeal is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is ***overcharged by any assessment****, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand.'*

(Emphasis added)

26. The term '*overcharge'* as used here is directly related to both the concept of a '*charge'* to tax, and the process of assessment. Section 934(3), I stress, speaks not of an '*overcharge'* simpliciter but of an overcharge '*by any assessment'.* Similarly, s. 934(4) states:

> '*Where on an appeal it appears to the Appeal Commissioners that the person assessed ought to be* ***charged in an amount exceeding the amount contained in the assessment*** *they shall* ***charge that person*** *with the excess.'*
>
> (Emphasis added)

27. Accordingly, when the Appeal Commissioners decide that a person is '*overcharged by an assessment'* they address themselves exclusively to the amount '***chargeable*** *to income tax'*, when they decide that the appellant has been '*correctly* ***charged by the assessment'*** their function is directed to ordering '*that the amount which is* ***chargeable to income tax*** *... shall stand'* and when they determine that the appellant ought to be charged more they are similarly required to '***charge the excess*** *by increasing only the amount which is* ***chargeable to income tax'*** (s. 934(5)). When the Appeal Commissioners determine those issues, their decision is '*final and conclusive'* subject to the taxpayer's right of appeal or the right of either party to require a case to be stated to the High Court (s. 933(4)). Nothing here suggests a power to decide whether the liability underlying an assessment has been compromised: in fact s. 933(2) makes provision for agreements being entered into between Revenue and the taxpayer where an appeal is pending but before it is heard without providing anywhere for a jurisdiction on the part of the Appeal Commissioners to adjudicate upon or otherwise become involved in, that process.

28. This focus is reflected in the ancillary powers conferred on the Appeal Commissioners. The express facility afforded by s.934(1) to the inspector or other officer to adduce evidence and argument is directed to the assessment:

> '*The inspector or such other officer as the Revenue Commissioners shall authorise in that behalf … may attend every hearing of an appeal and shall be entitled –*
>
> *…*
>
> *(b) to produce any lawful evidence* ***in support of the assessment,*** *and*
>
> *(c) to give reasons* ***in support of the assessment****.'*
>
> (Emphasis added)

29. Section 935 empowers the Commissioners to issue '*precepts'* requiring the appellant taxpayer to deliver to them information as to the property of the appellant, his trade, profession or employment, together with his profits and gains and any deductions made in determining those profits or gains. Section 939(1)(a) confers the power on the Appeal Commissioners to summon and examine witnesses: the power is limited, however, in a manner suggesting that the Commissioners are concerned only with issues touching on the assessments:

> '*The Appeal Commissioners may summon any person whom they think able to give evidence* ***as respects an assessment*** *made on another person to appear before them to be examined and may examine such person on oath.'*
>
> (Emphasis added)

30. Here, the taxpayer's case is that if the liability to tax has been compromised, any attempt to assess it must be an '*overcharge'* because there is, legally, no liability in the first place. Therefore, it is said, the Appeal Commissioners should have assessed the liability at zero. On this argument, the reference in the statute to '*overcharge'* must include an assessment which cannot be legally enforced, and the function of the Appeal Commissioners is to hear any such evidence and reach such legal determinations as are necessary to decide any claim of this kind advanced by a taxpayer. Exactly the same contention, it is to be noted, can be advanced in the case of an assessment which is asserted to be in breach of a taxpayer's legitimate expectations, or indeed in circumstances where it is said that the inspector issuing the assessment has no legally sustainable basis for believing it should issue. In each of these cases, it could be said that there is no liability, therefore there can be no assessment and thus (the argument would run) any assessment that is issued in respect of that liability '*overcharges'* the taxpayer.

31. While one can readily see both the basis for, and (as a matter of practicality) sense of such an argument, it depends on affording the terms '*appeal'* and '*overcharge'* a broad interpretation that sits uneasily with the thrust of the Act as a whole. In construing similar provisions in *Aspin v. v. Estill* [1987] STC 723, Donaldson MR (at p. 725) described the functions of the Special Commissioners in that case as being '*to look at the facts and statutes and see whether the assessment has been properly prepared in accordance with those statutes.'* Everything in the TCA from the definition of the appeal ('*against an assessment*'), through to the grounds of appeal ('*amount or matter in the assessment ... with which the chargeable person is aggrieved'*), the focus of the Appeal Commissioners on an appeal (*'overcharged by any assessment*'), the orders they can make on an appeal ('*abate or reduce the assessment'*) and the powers of compulsion conferred upon them ('*evidence as respects an assessment*') points to their jurisdiction being confined in precisely this way. Read together the provisions

strongly suggest what is envisaged by s. 933 and the supporting legislative scheme is an appeal against an assessment alone directed solely to whether the Inspector has properly reflected the statutory charge to tax in the assessment itself, with the Appeal Commissioners abating, reducing, letting stand or indeed increasing the assessment as appropriate in the light of the facts and law found relevant to that inquiry. It is in my view impossible to avoid the conclusion that had the Oireachtas envisaged that the Commissioners would have a jurisdiction extending outside these parameters and capturing the enforceability of arrangements collateral to the assessment, these powers would have been crafted and defined quite differently.

32. In the course of their submissions, the parties referred to a number of decisions in which the nature of the jurisdiction conferred upon the Appeal Commissioners has been canvassed. While none of these decisions addressed the specific issue presenting itself in this appeal, in general terms they appear to me to support the analysis I have suggested of the relevant provisions. The cases can be reduced to two broad categories.

Sneath, Elmhirst and Smidic

33. In the first, and older, strand of authority the Courts sought to grapple with incidents of the jurisdiction of the appellate tribunal established under the Income Tax Act 1918. Although the decisions were not directly concerned with the extent of that jurisdiction, it was described throughout in consistently narrow terms. Thus, in *IRC v. Sneath* [1932] 2 KB 362, the question was whether the decision of those Commissioners as to an issue arising in one year of assessment, operated as a *res judicata* in respect of the same issue in subsequent years. In *R v. Income Tax Special Commissioners ex parte Elmhirst* [1936] 1 KB 487 the Court was concerned with whether a taxpayer who lodged an appeal against an assessment to income tax

(which might result in an increase in the assessment) could arrest the process of assessment thereby triggered by withdrawing his notice of appeal. In *State (Whelan) v. Smidic* [1938] IR 626, the former High Court was presented with the question of whether the predecessors to the Appeal Commissioners - the Special Commissioner for Income Tax constituted by the Income Tax Act 1918 as amended - were, upon hearing further evidence, precluded from reversing a decision of fact reached in the course of an appeal against an assessment to income tax.

34. In each case, the question so framed was answered in the negative, and in the course of so doing the respective Courts underlined the narrow scope of the Commissioner's jurisdiction. In *Sneath*, Lord Hanworth MR described the Commissioner's jurisdiction in terms that '*it is the amount of the assessment to be made upon the facts of the case before them that is determined by them'* (at p. 382). It was, he said, '*difficult to attribute to such a determination of an assessment in amount the decision of a lis inter partes'* (*id*.). Greer LJ distinguished what he described as '*estimating authorities'* from judges deciding litigation as between the subject and the Crown, and in that context described the Commissioners as (at p. 385):

> '*merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question'*.

35. Their function, he explained, was to determine upon the examination of the appellant and any other evidence before them what his assessment is to be for the year of tax with which the assessment is concerned (*id*.). Stressing that that function was to form estimates of income in each year of assessment on which the relevant tax was to be imposed, Romer LJ said (at p. 391):

'*In estimating the total income of the taxpayer the Commissioners must necessarily form, and perhaps express, opinions upon various incidental questions of fact or law. But the only thing that 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'*.

36. Similarly, in *ex parte Elmhirst*, the Court underlined the limited role of the Commissioners in calculating and estimating income: Lord Wright MR quoted Romer LJ in *Sneath* when he said that their function was '*merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment'* (at p. 494).

37. The Divisional Court in *Smidic* cited these decisions with approval, Hanna J. defining the Commissioners' jurisdiction as '*being confined to making a final determination as to the assessment to be put on the taxpayer'* (at p. 635). O'Byrne J. (with whom Maguire P. agreed) expressed it as being to determine on the evidence whether the taxpayer is liable to tax, and to measure the extent of such liability if any (at p. 641). O'Byrne J. also observed that the Commissioner may have to give '*rulings on questions of law or fact which will assist in determining the taxpayer's liability to tax and the extent of such liability'* (*id*.). He concluded by describing the powers of the Commissioners as follows (at p. 640 to 641):

'*the final determination of the Special Commissioners, on the hearing of an appeal against an assessment, must necessarily be an order directing: - (1) that the assessment shall abate altogether, or (2) that it be varied by increasing or diminishing it in a definite*

amount to be fixed by them, or (3), that the appeal be dismissed in which event the original assessment stands good'.

38. This description of the exercise undertaken by the Appeal Commissioners holds good today: in *O'Rourke v. Appeal Commissioners* (at para. 19) Charleton J. (with whom Clarke and Dunne JJ. agreed) cited *Smidic* with approval noting:

'It is this final issue as to quantum which has to be decided by the Appeal Commissioners. That is what their determination of the appeal is all about'.

39. Each of the statements addressing the jurisdiction of the Commissioners in these authorities – whether in their reference to the function of the appellate body as '*valuers'*, in their use of the term '*quantum'* in connection with the Commissioner's function or in their reference to their role in determining the taxpayer's income – comes back to the assessment. Of course, as indeed the comments of O'Byrne J. in *Smidic* expressly acknowledge, the appellate tribunal may have to determine issues of fact or law in order to decide if there is a liability to tax in the first place and may in that context have to decide questions of fact or law incidental to that issue or to questions of quantum. The questions of law thus arising before the Commissioners may sometimes be complex, and indeed may on occasion (and in particular when issues of European law arise) stray outside the direct interpretation of the tax code. However, they are always issues that come back to the question of whether there is a charge to tax properly applied in accordance with the relevant statutory provisions and, if so, its amount. That liability, and those questions, all arise from the assessment to tax which defines the appellate body's jurisdiction.

Aspin v. Estill, Menolly Homes and Stanley

40. The second category of decision addressed themselves to a more modern dilemma - the extent to which the Appeal Commissioners could entertain challenges to Revenue assessments based upon arguments rooted in public law. It is of course clear that if an assessment to tax is made *ultra vires* the powers vested in the Inspector or upon the basis of an arbitrary or capricious premise, the legality of the assessment can be challenged by way of judicial review (*Deighnan v. Hearne* [1990] 1 IR 499, at p. 504). In *Aspin v. Estill* [1987] STC 723 (which was not opened to Keane J. in this case) the question was whether similar complaints could be agitated before the relevant appeal body and, in particular, whether the taxpayer could raise alleged breaches by the tax authorities of representations alleged to have been made by them to him, as a basis for appeal within the framework of the Taxes Acts.

41. The taxpayer alleged that upon moving to England from the United States he was advised by an employee of the Inland Revenue Commissioners ('IRC') that a monthly retirement benefit paid to him consequent upon his employment in the United States was not taxable in the United Kingdom. He claimed that he relied upon this representation to the extent of allowing his residence visa to the United States to lapse. The IRC then proceeded to issue assessments in respect of that income. The taxpayer appealed the assessments to the General Commissioners contending both that the income was not taxable and that the IRC was precluded from raising assessments by reason of the representation made to the taxpayer by their agent. The arguments were rejected and the taxpayer sought to appeal to the High Court by way of case stated. The appeal was dismissed by the High Court.

42. Donaldson MR framed the issue before the Court of Appeal by reference to whether the General Commissioners had any jurisdiction to investigate facts underlying the allegation that erroneous advice was given to the taxpayer (at p.725). Noting that the function of the Commissioners was to look at the facts and the statutes and to determine whether the assessment had been properly prepared in accordance with those statutes, Donaldson MR drew a sharp distinction between that function and what he termed '*a judicial review jurisdiction'* which, he decided, was not vested in the Commissioners.

43. He concluded that what he termed '*the question of the lawfulness of the inspector making the assessment, whether in judicial review terms it was an abuse of power'* was a matter that could only be considered by the High Court. I have quoted his explanation of the function of the Special Commissioners earlier in this judgment. It concluded with the statement that the Commissioners were confined '*to the sole question of whether this income was in principle taxable'* (at p. 727). Nicholls LJ expressed that jurisdiction in similar terms when he said:

> '*The taxpayer is saying that an assessment ought not to have been made. But in saying that he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to the liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review.'*

44. *Aspin v. Estill* has been recently cited with approval in the Courts of England and Wales (see *Metropolitan International Schools Ltd v. Commissioners for Her Majesty's Revenue and Customs* [2019] EWCA Civ. 156 at para. 20). The judgments in *Aspin v. Estill* were focussed

on the fact that the taxpayer there wished to raise arguments derived from public law. However, in one sense the essential question addressed by the Court in that case is similar to that presenting itself here, that is whether the Appeal Commissioners (and on appeal from their decision the Circuit Court) has the power to embark upon a consideration of facts relevant not to the assessment to tax and relevant charging provisions, but to the distinct issue of whether Revenue has by its actions disabled itself from enforcing the relevant liability. The conclusion in that case that the Commissioners did not have such jurisdiction mirrors what appears to me to follow from the text of the statute. The observation by Donaldson MR that the Commissioner's concern was properly only with whether the income was '*in principle'* taxable, seems particularly apt.

45. While *Aspin v. Estill* was not cited in either case, Charleton J. in *Menolly Homes Ltd. v. The Appeal Commissioners* and this Court in *Stanley v. Revenue Commissioners* [2017] IECA 279 [2018] 1 ILRM 397 arrived at the same essential conclusion when they were presented with similar claims that the Appeal Commissioners had the jurisdiction to address arguments based on the alleged invalidity of assessments appealed to them.

46. In *Menolly,* Charleton J. was concerned with an application for Judicial Review of a decision of the Appeal Commissioners made in the course of an appeal against an assessment to Value Added Tax. The proceedings arose from the refusal of the Appeal Commissioner to direct the attendance of the Inspector of Taxes who had issued the assessment. The applicants wished to cross-examine the Inspector as to his belief that a sum was owing in respect of the tax. As recorded by Charleton J. (at para. 1) the cross examination was sought with a view to demonstrating either a lack of good faith, that the Inspector's opinion in issuing the assessment was not factually sustainable, or that his view was unreasonable. It arose in a context in which

Revenue was contending that a series of steps taken by the applicant and involving purchase and leasing transactions between two related entities had not, as the applicant contended, avoided a VAT liability that would otherwise have arisen on the sale of developed sites to consumers.

47. Central to the applicant's claim in that case was its contention that the Appeal Commissioner had jurisdiction to rule that the assessment was not properly raised, and thus to determine that it should not be enforced: the application (and asserted entitlement) to cross-examine the Inspector was grounded on the Commissioner enjoying that jurisdiction. The jurisdiction, it was claimed, arose from the power of the Commissioner to '*reduce or abate'* the liability. Following a detailed analysis of the relevant provisions, Charleton J. rejected the challenge and the contention underpinning it.

48. Several features of the relevant legislation were viewed by Charleton J. as relevant to that conclusion. First, the entitlement of an inspector of taxes to issue an assessment to VAT was defined by reference to whether he had '*reason to believe that an amount of'* such tax was due and payable to the Revenue Commissioners. Second, the entitlement to appeal against such an assessment as vested by s. 23(2) of the Value Added Tax Act 1972 ('the 1972 Act) was stated to arise at the instigation of a person who *'claims that the total amount is excessive'*. Third, the provisions of the Taxes Consolidation Act 1997 applicable to appeals were applied to an appeal of this kind. These included s. 934(3), with the result that the power of the Commissioners upon such an appeal extended to the reduction or abatement of the liability.

49. These provisions prompted Charleton J. to differentiate between appeals against assessments to VAT and appeals in income tax and corporation tax cases. He said (at para. 22):

> '*In exercising that power on appeal of an assessment by a tax inspector that an amount of VAT is due, however, unlike in an income or corporation tax appeal, the Appeal Commissioners are limited by the legislation to scrutinising the amount of VAT due. I feel compelled to read the legislation as drawing that distinction'*.

50. The Appeal Commissioners, he said, did not have jurisdiction to '*enquire into the validity of this assessment by the tax inspector to VAT liability'* (at para. 45). Their function was limited to '*entirely abating the liability, with reducing the amount of the assessment of the tax due, leaving it stand or with increasing it … they were concerned with the amount of the assessment only'* (*id.*). Earlier in his judgment Charleton J. described that jurisdiction by reference to their inquiring '*as to whether the taxpayer has shown that the relevant tax is not payable'* (at para. 22). The Court drew a distinction between entirely abating a liability and what Charleton J. described as '*a power to strike down'* the assessment (at paras. 32). That the Appeal Commissioners did not enjoy a jurisdiction of the latter kind followed from the limitation of the appeal to '*amount'* (at para. 35) and the absence of any basis on which the Appeal Commissioners could be said to have jurisdiction to enquire into whether the Inspector '*had reason to believe'* that amount was due. He explained (at para. 23) '*the actual wording of the jurisdiction to appeal only the excessive nature of the amount assessed is much more central. It determines the point.'* The mechanism for challenging the Inspector's belief, he decided, was Judicial Review (at para. 37).

51. Charleton J. considered in the course of his judgment English authority addressing the scope of the appeal against assessments to VAT in that jurisdiction. The language of the provisions defining the functions of the equivalent appeal body in the United Kingdom differs from that provided for in the 1972 Act, and indeed Charleton J. rightly counselled against over-reliance upon authorities arising in a markedly different statutory context. However, he clearly felt that the language of s. 83(1) of the Value Added Tax Act 1994 ('the 1994 Act') addressed in those cases, *did* confer a power to determine what Charleton J. described as '*the validity of the assessment made in the first instance'*. That arose from the use in that legislation of the phrase '*appeal … with respect to … an assessment … or the amount of such an assessment'* (see para. 24 of the judgment). The limitation of the right of appeal in respect of VAT assessments to persons claiming that the amount was '*excessive'* effected by the 1972 Act, effectively, limited the appeal in this jurisdiction to the latter limb.

52. Three points arising from that decision are relevant for present purposes. First, in analysing this decision it seems to me to be important to observe that while Charleton J. speaks at points of powers to '*strike down'* the assessment, I do not understand the argument as advanced by the taxpayer in that case to have suggested that the supervisory jurisdiction vested in the High Court over statutory bodies had been transferred in the case of assessments to tax to the Appeal Commissioners. Whatever the correct analysis of the jurisdiction of the latter, there is no question of it extending to enable the Commissioners to issue declarations of invalidity of any kind. That is a function vested in the Courts. What was being claimed in *Menolly Homes* was, in effect, that in *inter partes* proceedings the Appeal Commissioners could decide whether the facts established conduct which, were it the subject of Judicial Review proceedings, might render the assessment invalid, and – if so – to decline to enforce the assessment as between the parties on that ground. In that way, the Commissioners would

have been indirectly determining the issue of validity, but their ruling would have been personal to the taxpayer and would not have the *erga omnes* effect that would arise were an assessment quashed by *certiorari* or declaratory relief. This distinction was explained by Hogan J. in an analogous context in *Dun Laoghaire Rathdown County Council v. West Wood Club Ltd.* [2017] IECA 213 at para. 11 *et seq.* in terms which were not, I think, affected by the different outcome on appeal of that decision ([2019] IESC 43).

53. Second, while Charleton J. limited his conclusion that such an argument could not be advanced to the VAT appeal provisions, much of what he says applies also to the jurisdiction of the Appeal Commissioners in hearing income tax appeals. The latter are also, as Charleton J. described the appeal provisions with which he was concerned, '*a precise form of jurisdiction'* (at para. 12). The entitlement to appeal against an assessment to VAT was framed by reference to whether the taxpayer claimed the amount due to be excessive (s .23 of the 1972 Act) while appeals against income tax assessments may be brought by a '*person aggrieved'* at the assessment. However, the powers of the Appeal Commissioners in both types of appeal are defined by s. 934. While Charleton J. concluded that the restriction of the right of appeal in a VAT case to the assessment being excessive was central to this conclusion in that case, he also determined that the Commissioners had jurisdiction to decide that no VAT was due (see para. 34). Thus, when he decided that under the VAT legislation an appeal could only be taken ' *in respect of [the] amount'* (at para. 35) it must have followed that such an appeal could be brought where it was claimed that VAT was not payable at all.

54. Thus understood, the basis for the judgment was, as I read it, rooted in the cumulative effect of (a) the limitation on who could bring an appeal, (b) the statutory definition of jurisdiction of the Appeal Commissioners on such an appeal, and (c) the fact that the power of

issuing an assessment was defined by the belief of the Inspector. These, combined with practical concerns around whether it was intended that a tax appeal could collapse many years after the assessment because of the unavailability of an inspector for cross-examination, demanded the conclusion that the type of challenge sought to be advanced by the taxpayers in that case was not in fact envisaged by the Oireachtas at all. All of the same considerations – with the exception of the constraint arising from the phrase '*excessive'* in the VAT Acts - also apply to the function of the Appeal Commissioners in determining income tax appeals.

55. Third, I would note that insofar as Charleton J. discussed the case law in England and Wales, there appears since the judgment in *Menolly Homes* to have been some vacillation in that jurisdiction on the issue. In the course of his judgment in *Oxfam v. Her Majesty's Revenue and Customs* [2009] EWHC 3078, Sales J. argued trenchantly that in VAT appeals pursuant to s. 83 of the 1994 Act (the provision referred to by Charleton J. in *Menolly*) the Tribunal was empowered to embark upon a consideration of '*public law'* issues (in that case a claim of legitimate expectation). That view was influenced by the concession that the relevant Tribunal had the power to adjudicate on whether the respondents to the appeal had compromised a liability, and by the fact that in English law inferior tribunals have been found in other circumstances to enjoy a jurisdiction to consider public law issues without any express words to that effect being used in their constituting legislation (*Wandsworth LBC v. Winder* [1985] AC 461). The Court also observed the convenience to the taxpayer of being able to agitate all issues in one forum. I would note in passing that the fact that Irish law has not embraced the principle in *Wandsworth LBC v. Winder* may afford a further basis for distinguishing the English case law to that effect (see the most recent survey of the authorities on this issue in *Dun Laoghaire Rathdown County Council v. West Wood Club Ltd.* [2019] IESC 43).

56. The decision of the Upper Tribunal in *Revenue Commissioners v. Noor* [2013] UKUT 71 (TCC), [2013] STC 998 thereafter departed from the views expressed by Sales J. *Noor*, as it happens, was cited with approval by McDermott J. in *Citywest Logistical Limited (formerly known as Cassidy Wines Ltd.) -v- Revenue Commissioners* [2018] IEHC 18 in concluding that an argument based upon legitimate expectation, being an issue of public law, could not be considered by the High Court in adjudicating on an appeal by way of case stated from the Appeal Commissioners pursuant to s. 941 TCA. In *R&J Birkett v. The Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 89 (TCC) the Upper Tribunal conducted a detailed survey of the authorities, concluding that there was no firm principle that the First-tier Tribunal *never* had jurisdiction to consider what the judgment described as '*public law questions'*, the critical issue in any given case being whether under the statute in issue the '*public law point'* had to be resolved either within its jurisdiction as defined by the statute, or in the context of determining whether it had jurisdiction in the first place. Some appeal provisions would thus enable consideration of some public law arguments, but others would preclude any such contentions being advanced. *Birkett* was not referred to by the Court of Appeal in *Metropolitan International Schools* (the cases were concerned with different appeal provisions) but the latter decision (in which *Noor* was cited with apparent approval) suggests, at the very least, some scepticism as to the approach advocated by Sales J. in the *Oxfam* case.

57. The decisions to date in this jurisdiction have not equivocated on this issue. The suggestion in *Menolly* of a sharp division in Irish law between the jurisdiction of the Appeal Commissioners to adjudicate on a tax appeal, and the power of the High Court to determine issues of legal validity, was taken a step further in *Stanley*. There, the applicants sought Judicial Review of a notice of assessment issued by the respondent for Capital Acquisitions Tax, interest and penalties. The applicant claimed that the assessment was invalid, being made *ultra*

vires the powers of the respondent because it was issued outside the period of four years from the date on which the applicant had delivered what he claimed was a correct Capital Acquisitions Tax return. The Commissioners had the power to issue an assessment outside that period where they had reasonable grounds for believing that any form of fraud or neglect as defined in the Act had been committed by or on behalf of an accountable person in connection with a relevant return, and they contended that the making by the taxpayer of a return in that case had been an act of '*neglect'* within the meaning of those provisions because the taxpayer had (Revenue said) wrongly claimed a tax credit. Thus, Revenue said, the legislation enabled time to be so extended.

58. At the same time as he issued his proceedings, the taxpayer lodged an appeal to the Appeal Commissioners. The trial Judge determined *inter alia* that if the taxpayer considered that an assessment was issued outside the four year time limit and was thus invalid, that appeal provided the proper basis for agitating that complaint. In that event, he found, the Appeal Commissioners had jurisdiction to determine whether or not the return delivered by the taxpayer was a correct or incorrect one and accordingly whether the time limit should be disapplied.

59. In rejecting that conclusion, Peart J. (with whose judgment Finlay Geoghegan and Hogan JJ. agreed) explained the jurisdiction of the Appeal Commissioners, the power of the Court and the function of each in a passage relied upon by the respondents in this appeal (at paras. 33 to 34):

> '*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 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 … 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. Whereas in this case the issue raised is one of law and, specifically, of statutory interpretation as to the lawfulness of an assessment as opposed to the quantum of tax so assessed, the appellant was perfectly entitled to see to have that issue determined by way of the present judicial review proceedings.'

60. While observing the conclusion of the Court in that case that relief by way of Judicial Review was *available*, the proposition that it forms the *exclusive* mechanism for challenging an out of time assessment is notable. That case was concerned with the time limit on the issuing of an assessment to capital acquisitions tax provided for in s. 49 of the Capital Acquisitions Tax Consolidation Act 2003. The concept is similar to the provision made in respect of the time for an assessment to income tax under s. 955(1) of the Taxes Consolidation Act 1997. Section 955(3) expressly provides for an appeal against an assessment to tax on the basis that the time limit for raising the assessment has expired. It is hard not to think that the conclusion reached by the Court in *Stanley* was heavily influenced by the absence of a similar express power in the Capital Acquisitions Tax Consolidation Act 2003.

61. What is significant for present purposes is the acceptance by the Court of the contention advanced on behalf of the taxpayer in that case that '*the Appeal Commissioners' function is*

confined to determining whether the quantum of a lawful assessment is correct, and not whether the notice of assessment itself is lawfully issued' (at para 30). Of course, when the Court referred to '*quantum'* in connection with the jurisdiction of the Commissioners it was necessarily also encompassing a nil quantum as would arise where the tax was not properly due in accordance with the relevant charging provisions. Another way of framing the same conclusion is to look to the reason it could determine that no tax was due. *Stanley* makes it clear that this did *not* extend to an issue affecting the legal validity of the assessment.

Analysis and conclusion

62. The essential basis for the trial Judge's conclusion that the Appeal Commissioners did have jurisdiction to decide whether the liabilities the subject of the assessment had been compromised was one of practicality and convenience. It would, he felt, be unwarranted and, indeed, unfair to adopt an artificially narrow construction of the powers and authority of those bodies to determine the incidental questions of fact and law that may arise in regard to such a settlement, thereby requiring taxpayers who wish to raise such questions to risk the attendant costs in prosecuting or defending separate proceedings issued. The high point of the taxpayer's case is that the determination of such a claim might, on one view, be said to fall within the description of the Appeal Commissioner's jurisdiction as contained in the term '*abate'* in s. 934(3) TCA.

63. At first glance, that conclusion may appear to have some merit. The Court should endeavour to interpret the provisions in a manner that reduces cost and inconvenience to the parties, prevents a multiplicity of legal proceedings, streamlines the process of determining revenue liabilities and gives effect to the overall mandate that the TCA should provide '*an exclusive machinery for the ascertainment of a taxpayer's liability'* (*Criminal Assets Bureau*

v. Hunt [2003] 2 IR 168, at p. 185). If Revenue itself has agreed to accept a payment in full and final settlement of a tax liability, it is not necessarily a long jump to the conclusion that the tax purportedly assessed is not properly charged at all, and thus that a quasi-judicial body having jurisdiction to '*abate'* the assessment should reduce the charge in the assessment to nil.

64. I have explained earlier why I do not believe that the provisions of the TCA accommodate this construction. From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge. The '*incidental questions'* which the case law acknowledges as falling within the Commissioners' jurisdiction are questions that are '*incidental'* to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment. That is why the Court in *Aspin v. Estill* framed the powers of the equivalent tribunal in that jurisdiction as directed to whether the assessment has been properly prepared in accordance with the applicable statutes. As I have explained earlier in this judgement, that conclusion is firmly aligned both with the approach adopted in the older cases and the analysis suggested by the decisions in *Menolly* and in *Stanley.*

65. When that jurisdiction is matched against the legal character of an agreement by Revenue to compromise a tax liability, the difficulty in fitting an inquiry as to whether a liability to Revenue has been compromised into the Appeal Commissioner's function becomes more pronounced. Where Revenue settles such a claim the sum tendered is received by Revenue

pursuant to contract, and to that extent loses its character as tax, interest or penalties (*IRC v. Woollen* [1992] STC 944). Revenue's cause of action in that circumstance is on foot of the contract, and the remedy available to it is to recover the sums in question by an action in debt (*id.* at p. 948 per Dillon LJ). There is accordingly a distinction in principle between '*what the Revenue collect under the contract and what they might otherwise be entitled to collect under the statute'* (*id.* at p. 950 per Nolan LJ). As Hirst LJ. put it in *Woollen* – the liability '*sounds in debt and not in tax'*. That logic readily transfers to the issue in this case - for the same reason the liability under a contract is not '*in tax'*, it is not within the jurisdiction of the Appeal Commissioners. Those Commissioners have a jurisdiction in tax, not in contract and the function they discharge is to determine the taxes due under the statute, not under the contract. These are entirely distinct, and it is my view that a jurisdiction conferred under the former cannot without express provision extend to the determination of issues regarding the latter. None of these principles, I should say, are affected by the decision in *Stockler v. IRC* [2010] STC 2584 which was referred to at the hearing of this appeal. There, it was held that the particular compromise in issue in that case did not preclude the imposition of penalties for the purposes of certain provisions of the relevant English legislation: in fact the essential theory that a contract debt and a sum due '*as tax'* were legally distinct was emphatically confirmed (see Mummery LJ at para. 118).

66. The decisions addressing the relationship between the powers of the Appeal Commissioners and public law principles are in one sense irrelevant to the distinct issue of whether the Commissioners have the power to determine whether a liability has been settled. Both Charleton J. in *Menolly* and this Court in *Stanley* directed their attention to whether the Commissioners had a power to determine the '*validity'* of the assessments in issue in those

cases, and both Courts decided that they did not. However, in addressing these cases it is important to define the issues with which they were concerned more closely.

67. For reasons I have explained earlier, in neither case was there any question of the Commissioners embarking upon a determination as to '*validity'* as that term is narrowly and technically understood. The issue instead was whether the Commissioners had jurisdiction to apply public law principles to determine whether a specific assessment should be abated. While in these cases the focus was upon the issue of whether judicial review was the appropriate vehicle for the agitation of the taxpayers' complaints, in both decisions the Courts touched on the nature of the power vested in the Appeal Commissioners, and in each the Judges framed that power in a manner consistent with the case advanced by Revenue here. Charleton J. described the function of the Commissioners in a VAT appeal as limited to '*scrutinising the amount of VAT due'* (at para. 22) and referred to the Appeal Commissioners as being '*concerned with the amount of the assessment only'* (at para. 45) while Peart J. said that '*the Appeal Commissioners' function is confined to determining whether the quantum of a lawful assessment is correct'*. All of these descriptions address themselves to the underlying legislation and neither captures a power to look beyond the charging provisions pursuant to which the assessment issued.

68. The public law cases, however, highlight another issue with the argument advanced by the plaintiff here. Whatever about fitting an inquiry into whether an Inspector of Taxes has acted reasonably or in good faith in issuing an assessment within the statutory framework, if a taxpayer can agitate before the Appeal Commissioners whether a liability has been settled, it is not at all apparent to me that there is any rational basis on which it can be said that he should be prevented from contending that the Inspector should be precluded from proceeding to issue

an assessment by either a legitimate expectation, or an estoppel. The proposition that legitimate expectation is an exclusively '*public law remedy'* does not in my view provide a convincing explanation. I struggle to see how categorising a remedy as one derived from '*public law'* advances the debate. A claim in contract is one in '*private law'* and a claim of estoppel may be one in '*equity'.* None of these labels actually addresses the inquiry as to why a claim falling within one or other such description is not within the Commissioner's remit. The real point is that *none* of these forms of action has been entrusted to the jurisdiction of the Appeal Commissioners not because of their general legal categorisation, but because that jurisdiction is directed to the assessment and statutory charge alone. Arguments as to contract, legitimate expectation, estoppel or other theories which might, through one or more aspects of the general law operate to prevent Revenue from issuing, acting on or (as the case may) enforcing that assessment do not come within the jurisdiction so defined.

69. That leads to a further and related consideration. As I have noted, at first glance the construction adopted by the trial Judge advances the objectives of reducing costs for parties, and avoiding the complications that may attend the necessity to institute separate proceedings before the Courts to challenge the legal validity of assessments to tax, or to enforce settlement agreements or an estoppel in private law. However, the same considerations of cost and convenience dictate that if there is to be a more expansive jurisdiction vested in the Appeal Commissioners than that suggested by Revenue, it must be capable of clear and principled definition. Without such definition, the question of what is within and what is without their jurisdiction will only generate further confusion and uncertainty. Counsel for the plaintiff was pressed on that question of definition in the course of oral argument. He contended that notwithstanding his contention as to the jurisdiction of the Commissioners to take account of a compromise, there was a category of relief that could only be sought by way of judicial review.

These were cases involving improper motive, invalidity and *ultra vires.* Yet at the same time Mr. O'Floinn SC adopted the position that the Commissioners *would* have jurisdiction to entertain an argument that an assessment should be reduced to zero because it had been issued in breach of the constitutional right to fair procedures or even if issued following representations of the kind in issue in *Aspin v. Estill.*

70. The formulation and its limits beg a host of questions. From where in the legislation or in principle is this definition derived? Why is resiling from a legitimate expectation or for that matter a contractual obligation not an instance of '*improper motive'* or indeed of *'invalidity'* or '*ultra vires"*? The answer given – that in these latter instances the taxpayer was not asking for the assessment to be reduced or abated – appears to me to depend not on the substance of the question underlying these possible contentions, but upon how that question is formulated. So, while fully acknowledging the force of the reasoning of the trial Judge, I am not convinced that interpreting the jurisdiction of the Commissioners to include the determination of whether a liability has been settled by Revenue would as a matter of generality, advance interests of efficiency and convenience. If anything, it generates the prospect of an entirely new front of uncertainty and consequent litigation.

71. Thus, a consideration of how the law has evolved in England since the *Oxfam* decision suggests that in the absence of a clear and principled delineation of the jurisdiction of the Commissioners, a wide range of uncertainties present themselves, with some grounds being admissible in appeals against some forms of tax under certain statutory wording but other grounds being inadmissible in relation to other liabilities. I think that Sales J. was correct in concluding that if the Commissioners have the power to decide whether a claim to tax has been compromised as a matter of contract law, it must logically follow that they may advance a

claim based upon legitimate expectation. If they can advance a claim based upon legitimate expectation, it becomes hard to see why other actions of the Inspector which public law would hold to vitiate the assessments should not similarly fall to be considered. Irish law emphatically holds the latter not to be the case, and that logically leads back along the same path of reasoning to the conclusion that a claim based upon a compromise is not admissible either.

72. There is a further final factor which appears to me to be important in assessing the parameters of the statutory powers in issue and which, in particular, points to the conclusion that had it been intended to extend the jurisdiction of the Appeal Commissioners from the function of determining facts and law relevant to the charge and assessment to tax, to that of deciding whether assessments had been compromised or were otherwise vitiated in law, this would have been clearly stated and defined. The most recent consideration by the Supreme Court characterises the jurisdiction of the Appeal Commissioners as falling within Article 37.1 of the Constitution: the Appeal Commissioners, Keane CJ said in *Criminal Assets Bureau v. Hunt* were one of a '*huge number'* of tribunals and other bodies '*which determine matters in controversy between parties and whose functions and powers are properly categorised as 'limited functions and powers of a judicial nature'* (at p. 183). Earlier, Barron J. in *State (Calcul International Ltd) v. Appeal Commissioners* 3 ITR 577 had concluded that in fact the Commissioners powers did not fall within the administration of justice in the first place (although he said that if he were wrong in that regard he would also have deemed their function to fall within Article 37). In so concluding Barron J. focussed his attention on the precise function of the Commissioners. He said (at p. 12):

> '*their essential function is to decide whether the assessment raised by the tax inspector should be reduced or increased. They do not have the power to enforce their decision*

nor to impose liabilities. Essentially, their decisions are enforced by the institution of legal proceedings to recover the amount of tax determined by them as being payable. Equally in those cases where penalties may become payable proceedings must be instituted before they can be recovered. Nor do the Appeal Commissioners determine the amount of or impose such penalties. It is the statute which does so.

The essence of a tax assessment is the determination of the amount of tax to be paid by the taxpayer. It is the particular proportion of this taxable amount which is required by the tax code to be paid by way of tax. Undoubtedly questions of fact or law require to be decided to determine taxable income.

73. Here, the proposition that that the Commissioners' jurisdiction extends significantly beyond those limitations is central to the taxpayer's argument in this case. On his argument, the Appeal Commissioners have the power to determine a legal controversy that is distinct from the process of assessment on the basis of the relevant charging provisions and depending instead upon the formulation and enforcement of a common law contractual right. That determination would be final and conclusive of the parties rights, appealable since March 2016 from the Tax Appeal Commission (now the relevant appeal body) to the High Court only on a point of law. Similar issues would present themselves in respect of claims based upon legitimate expectations or estoppel. It is not necessary to address here the extent to which the conferral of such a jurisdiction would be constitutionally permissible. What is, I think, both critical, and clear is that had it been intended to confer these additional functions upon the Commissioners, it is reasonable to expect that it would have been expressly noticed in the legislation, and lucidly identified and delineated.

74. Finally, in the course of his submissions counsel for the plaintiff submitted that since the decision of the CJEU in C-378/17 *Minister for Justice, Equality and Law Reform v. The Workplace Relations Commission* [ECLI:EU:C:2018:979], the Appeal Commissioners may be invited to disapply domestic legislation which they determine to be incompatible with European law. The principle is only engaged where the Appeal Commissioners are dealing with an issue within their remit, whether in an appeal against an assessment to tax or otherwise. It was suggested that this in some sense implied a broadening of their jurisdiction as a matter of national law. This does not at all follow. The *Workplace Relations Commission* decision applies a principle of European law operative where a national tribunal is seized with a dispute, requiring that it give effect to the supremacy of European law in the course of determining that dispute. If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated. The same principle dictates that the Appeal Commissioners may entertain claims based upon the doctrine of abuse of rights in European law. These principles derive from the mandates of European law. Neither expand the jurisdiction of the body as a matter of national law.

75. For much the same reason, the reliance by the plaintiff on decisions confirming the obligations of the Commissioners to afford those before them fair procedures (*CG v. The Appeal Commissioners* [2005] IEHC 121, [2005] 2 IR 472) do not affect the matter. The Appeal Commissioners in conducting any proceeding are required to adhere to principles of procedural fairness. However, this is a requirement imposed upon them in connection with the discharge of their statutory remit. It does not change that remit.

Conclusion

76. The jurisdiction of the Appeal Commissioners and of the Circuit Court under those provisions of the TCA in force at the time of the events giving rise to these proceedings and relevant to this appeal (ss. 933,934 and 942) is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA. That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and see if the assessment has been properly prepared in accordance with those statutes. They may make findings of fact and law that are incidental to that inquiry. Noting the possibility that other provisions of the TCA may confer a broader jurisdiction and the requirements that may arise under European Law in a particular case, they do not in an appeal of the kind in issue in this case enjoy the jurisdiction to make findings in relation to matters that are not directly relevant to that remit, and do not accordingly have the power to adjudicate upon whether a liability the subject of an assessment has been compromised, or whether Revenue are precluded by legitimate expectation or estoppel from enforcing such a liability by assessment, or whether Revenue have acted in connection with the issuing or formulation of the assessment in a manner that would, if adjudicated upon by the High Court in proceedings seeking Judicial Review of that assessment, render it invalid.

77. That being so, I would, propose that this appeal should be allowed, and that the first question in the Case Stated be answered as follows:

> *'A Judge of the Circuit Court, hearing an appeal from the Appeal Commissioner, does not have jurisdiction under s. 942(3) of the Taxes Consolidation Act, 1997 (as amended),*

or pursuant to his inherent jurisdiction, to determine whether the parties to an appeal have entered into a settlement in respect of the liability at issue in the said appeal.'

78. As Revenue has been entirely successful in this appeal, it is my provisional view that it is entitled to the costs thereof and, having won the '*event'* in the High Court proceedings in accordance with the then applicable costs regime, is entitled to its costs of those proceedings also.

79. Whelan J. and Ní Raifeartaigh J. are in agreement with this judgment and the Orders I propose. Should the taxpayer wish to dispute any aspect of the order as to costs I thus suggest he should deliver a short submission (of no longer than 1,000 words) explaining why. That submission should be delivered within ten days of the date of this judgment, whereupon Revenue shall have ten days within which to respond to same in a submission of the same length.