

**THE HIGH COURT****JUDICIAL REVIEW****2006 No. 216 J.R.****BETWEEN****T. J.****APPLICANT****AND****THE CRIMINAL ASSETS BUREAU****RESPONDENT****Judgment of Mr. Justice Gilligan delivered on the 1st day of May, 2008**

1. By order of this Court (Peart J.) as made on the 27th day of February, 2006, the applicant was given leave to apply for judicial review for the following reliefs.

1. An Order by way of an injunction requiring the Respondent to furnish the Applicant with all details documents and information relating to the raising of income tax assessments by the Respondent in respect of the Applicant in relation to the tax years 1992/93 to 2003 inclusive
2. An Order by way of an interlocutory injunction restraining the Respondent from taking any role in the Applicant's appeal of the said assessments until such time as such details documents and information is disclosed
3. A declaration that the refusal on the part of the Respondent to furnish the information requested amounts to a breach of the Applicant's constitutional entitlement to natural justice and fair procedures and further infringes his entitlement to a fair hearing under Article 6 of the European Convention on Human Rights
4. An order of certiorari in respect of the Notices of Assessment delivered by the Respondent dated 21st February 2005
5. Such further or other relief as the Court may deem meet.
6. The cost of and incidental to these proceedings

2. The factual background to the proceedings is that the respondent is the Inspector of Taxes appointed in respect of the applicant. During the course of his investigations into the tax affairs of the applicant the respondent obtained certain papers pursuant to statutory powers pursuant to the Criminal Assets Bureau Act 1996 from the offices of the applicant's accountant.

3. On the 21st day of February, 2005, the respondent raised income tax assessments and amended assessments on the applicant for the years 1992/1993 through until the year 2003 inclusive, pursuant to s. 922(3) of the Taxes Consolidation Act 1997 as amended.

4. In accordance with s. 954(5) of the Taxes Consolidation Act 1997 as amended, there is no provision whereby a notice of assessment as raised has to set out or detail any particulars other than the amount of tax to be paid by the chargeable person and accordingly, in each of the assessments and revised assessments, the respondent set out the amount of income tax due under the heading Schedule D, Case IV-Miscellaneous Income, pursuant to s. 58 of the Taxes Consolidation Act 1997.

5. In accordance with s. 922(3) of the Taxes Consolidation Act 1997 as amended, the said notices of assessment and notices of amended assessment were assessed by the respondent on the basis of the Inspector's best judgment.

6. The applicant at all times was professionally advised by his accountant, and in March 2005, appealed against the assessments raised in relation to the income tax years 1992/1993 through until the year 2003 inclusive, pursuant to s. 933 of the Taxes Consolidation Act 1997 as amended. Once the applicant invoked the said appeal procedure the respondent functioned in accordance with the legislative appeal provisions contained within part 40 of the Taxes Consolidation Act 1997 as amended.

7. The applicant was notified by letter dated the 20th of January, 2006, from the respondent that the appeal of the assessments was listed for hearing before the Office of the Appeal Commissioners on the 10th of March, 2006.

8. By letter dated the 10th of February, 2006, from the plaintiff's solicitors on behalf of the applicant, the applicant sought disclosure of all the information forming the basis of the assessments as made by the respondent in its capacity as the Inspector of Taxes appointed in respect of the applicant.

9. By letter dated the 13th of February, 2006, the respondent offered to return all papers which were removed by the respondent from the offices of the applicant's accountants. These being the only papers furnished by, or on behalf of the applicant.

10. The case made out on behalf of the applicant through his solicitor is to the effect that the various assessments are round figures which have been assessed in respect of what is referred to as miscellaneous income. It is alleged that even the most cursory examination of the figures suggests that they are arbitrary. It is set out that the notice of assessments are not accompanied by any other documentation, and further that given the statutory remit on powers of the respondent, the applicant is entitled to assume that it is the respondent's position that the alleged income of the applicant arises from as yet unspecified criminal activity.

11. It is alleged on the applicant's behalf that he has made the necessary returns, accompanied by payment of certain specified monies and notices of appeal.

12. The applicant specifically requires to know the basis upon which the assessments had been made to a sufficient extent to enable him to comment upon the basis of the assessment, prepare a response to the assessments as made, and adduce whatever evidences required to satisfy the burden of proof that is thrown upon the applicant by the Statute.

13. The applicant's application for the basis of the assessments was met by a letter as dated the 13th of February, 2006, on the respondent's behalf, wherein the applicant's solicitor was advised:-

"Your client has at all times had professional guidance and he was provided with full information on his right of appeal. The

onus is on your client to prepare for appeal in accordance with the statute. He is entitled to the return of any tax papers which were removed from the office of Edward Clarke & Associates and I understand that there has been a written request from Mr. Clarke's office. This matter will be dealt with under separate cover."

14. The applicant's case is that effectively the respondent in its capacity as the applicant's designated Tax Inspector has refused to set out the basis for the assessment of income tax in relation to miscellaneous income covering the various periods of the assessments as raised.

15. The applicant makes the case that he has been put in an impossible situation, and effectively cannot deal with bare and unexplained assessments, that he has been denied the relevant information which would assist him and that it is anticipated by virtue of the respondents statutory functions that allegations of criminal wrong doing will be made against the applicant during the course of his appeal, of which he will have no notice.

16. Against this background the applicant makes the case that it is not possible for him to prepare for the appeal before the appeal commissioners in any meaningful sense, and further that the policy adopted in relation to the applicant amounts to an invidious and arbitrary discrimination.

17. The applicant's solicitor in a supplemental affidavit avers that it has been his experience in the course of a tax appeal when he was dealing directly with the Revenue Commissioners as opposed the Criminal Assets Bureau, that when documentation was sought from the Revenue Commissioners for the purpose of allowing the appellant to properly prepare for the appeal, such documentation was forthcoming.

18. In an affidavit as sworn on behalf of the respondent's, the Officer of the Revenue Commissioner refers to the general factual background and particularly avers that the figures contained within the notices of assessment are not arbitrary in nature, and that the assessments were prepared in accordance with the provisions of s. 922(3) of the Taxes Consolidation Act, 1997. Further the Officer of the Revenue Commissioner avers that there is no obligation on the respondent to furnish documentation with the notices of assessment, and this would not be the practise of the respondent or indeed the Revenue Commissioners.

19. In respect of the reference by the applicant to income arising from unspecified criminal activity, the Officer of the Revenue Commissioners refers to s. 58 of the Taxes Consolidation Act, 1997 which defines "Miscellaneous Income" as being profits or gains from an unlawful source, and also, where the source of the profits or gains is not known to the Inspector. It is averred that the applicant himself is the person who knows what income or gains, from whatever sources he has received in the year in question which are the subject matter of the assessments, and if the applicant contends that he did not receive any such income or gains, then it is a matter from him to satisfy the Appeal Commissioners at the hearing of the appeal.

20. With reference to the Customer Service Charter of the Revenue Commissioners, it is averred that there is no requirement on the respondent to provide to the applicant documentary evidence to support the miscellaneous income assessed to income tax being sought in the notice of assessment.

21. The Office of the Revenue Commissioners further avers that each notice of assessment sets out the estimated income in each year and s. 58 of the Taxes Consolidation Act 1997 stipulates that such income should be described as Schedule D, Case IV, Miscellaneous Income.

22. It is denied that the applicant has been put in an impossible position and the Officer refers to the fact that the applicant is in a position to proceed with his appeal, in accordance with his own books, records, statements and particular personal knowledge of his own earnings for the respective income tax years and the source of those earnings.

23. The Officer of the Revenue Commissioners avers that the respondent has acted in accordance with the taxes code and in accordance with established practise, and the provisions of the Taxes Consolidation Act 1997 governing appeals provides safeguards to ensure that an appellant gets a fair hearing. The treatment that the applicant has received is in accordance with established practise and in the circumstances does not, and can not amount to an invidious or arbitrary discrimination.

24. The Officer avers that the applicant is the person who has the best knowledge of his income and should be in a position to seek to uniquely challenge the said assessments at the appeal hearing before the Appeal Commissioners and in accordance with the Taxes Acts, the said assessments may either be confirmed or reduced by the Appeal Commissioner.

25. The Officer avers that the applicant has not made out any case, that he is unable to recollect the amounts of income earned by him over the years, or that he has no records, statements or other proof whatsoever in relation to this earnings.

26. Mr. Gageby, S.C. on the applicant's behalf, submits that the process, without the basis of the assessment being revealed to the applicant, is that of a trial by ambush, and in the particular circumstances of this case a clear indication that the respondent has information with which to ambush the applicant. It is conceded that the Appeal Commissioner may grant an adjournment in the event of a matter arising in respect of which the applicant has not been put on notice, but in such an eventuality extra legal costs would be involved, and it is submitted that there is duty on the respondent to minimise the applicants exposure to any additional costs and expenses.

27. Its is further contended on the applicant's behalf that the appeal to the Revenue Commissioners is by definition a reaction to the original assessment of the Inspector and that the procedure is clearly an adversarial process, as between the tax payer who disagrees with an assessment and the Revenue Commissioners who would presumably be prepared to stand over the assessment. The adversarial nature of the process is given effect by means of s. 934(1) of the Taxes Consolidation Act 1997 which states:-

"The inspector or such other officer as the Revenue Commissioners shall authorise in that behalf (in this section referred to as "**other officer**") may attend every hearing of an appeal, and shall be entitled -

- a. to be present during all the hearing and at the determination of the appeal,
- b. to produce any lawful evidence in support of the assessment, and
- c. to give reasons in support of the assessment."

28. Mr Gageby refers further to s. 934(3) of the Taxes Consolidation Act, 1997 which provides at (3) thereof:

"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."

29. Counsel for the applicant contends that in these circumstances, where the respondent has an entitlement and is expected to participate in the appeal process on an adversarial basis, the suggestion made by the respondent to the effect that it is for the applicant to maintain his appeal *in vacuo* takes on an air of unreality.

30. It is further contended on the applicant's behalf that he relies heavily on the respondent's customer service charter which states *inter alia* under the heading "Information and Assistance" that:

"You can expect.

to be given the necessary information and all reasonable assistance to enable you to clearly understand and meet your tax and customs obligations and to claim your entitlements and credits.

We expect you.

to provide true and correct information in all your contacts with Revenue and to advise Revenue in a timely manner of developments (such as change of address, commencement or cessation of business) that are relevant to your tax and customs affairs."

31. Mr Gageby relies *inter alia* on two decisions, namely *Keogh v. Criminal Assets Bureau* [2004] 2 I.R. 159 and *Glencarr Exploration plc v. Mayo County Council* [2002] 1 I.R. 84, to ground an argument that the applicant is entitled to fair procedures and that he is a person entitled to assert a legitimate expectation to be provided with the relevant information.

32. Further reliance is placed on a particular passage in the judgment in *Keogh* wherein at p. 174, Keane C.J. states:-

"It is beyond argument that the second respondents and their agents, as public authorities, are bound to observe fair procedures in the exercise of the powers conferred on them by the tax code and, where an actionable breach of those requirements has been established, that does not mean that the statute has been in any way amended as a result of a decision to that effect by a court. That view would be impossible to reconcile, in my judgment, with the obligation of the courts to ensure that public authorities perform the functions entrusted to them by statute in accordance with the Constitution and the law."

33. Mr. Gageby S.C. submits that apart from the legal entitlement to disclosure of the basis of an assessment, it appears from the second affidavit of Dara Robinson, solicitor, as sworn on the applicant's behalf, that the respondent's on a previous occasion through the Revenue Commissioners did provide similar information to another tax payer.

34. As regards the legitimate expectation argument as raised, Mr. Gageby S.C. relies further on the judgment of Keane C.J. in *Keogh* at p. 176 wherein he states:-

"In this case, we are concerned with a specific undertaking to give taxpayers full, timely and accurate information as to the provisions of a notoriously opaque and difficult code. While it is manifestly not the function of the second respondents or their inspectors to give gratuitous advice in all circumstances to members of the public as to their legal position, it was not asking too much of them in the present case not to respond to a letter such as that from the applicant in a manner which they must have known could have left him in the dark as to his rights. That would seem to me to be at variance with both the letter and the spirit of the undertaking in the charter. In the result, I am satisfied that the fair procedures which it was reasonable to suppose the respondents would observe were not applied in his case and that, in the light of the authorities to which I have referred, the applicant was entitled to be placed in the same position as if they had been met."

35. Mr. Gageby submits that in the present case, unlike *Keogh*, the respondent has refused to provide information rather than simply omitting to proffer same, that the information which has been withheld by the respondent is not information in relation to procedural rights which can be obtained elsewhere (i.e. in the legislation or from a professional adviser) as was the case in *Keogh* but rather it is information of a substantive type which is known only to the respondent, and further that unlike *Keogh* the applicant expressly relied upon the terms of the charter in seeking the information – as such the expectation on the part of the applicant that such information would be provided was a real one.

36. Further reliance is placed on the judgment of Fennelly J. in *Glencarr Exploration* wherein at pp. 162 to 163 he stated:-

"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavored to formulate seem to me to be preconditions for the right to invoke the doctrine."

37. Mr Gageby concludes by indicating that while the position adopted by the respondent in *Keogh* might be regarded as having been somewhat obtuse in the present circumstances the position adopted by the respondent is actively obstructive.

38. Mr. Connolly S.C. on behalf of the respondents refers to the fact that the tax code as set out in the Taxes Consolidation Act 1997 applies to all tax matters and that the basis of the entire tax scheme since 1989 has been that of self assessment. In essence

he submits on the respondent's behalf that the applicant is seeking discovery of documentation from the respondent's, whereas the legislation makes no provision for such a procedure.

39. It is submitted on the respondent's behalf that in effect the applicant is seeking to have the respondent make its case in advance of the appeal hearing and that there is no statutory basis for such a contention. The Revenue Commissioners Customer Service Charter does not require the Revenue Commissioners to explain exactly how a figure is arrived at.

40. It is submitted that the notice of assessment provides that the income be broken into the different categories of taxes and in the instant case the taxes are set out under the heading "Schedule D Case IV - Miscellaneous Income". This is in accordance with s.954 (5) of the Taxes Consolidation Act 1997 (as amended) which provides that it is not necessary to set out in the notices of assessment any particulars other than the amount of tax to be paid by the chargeable person.

41. Schedule D, Case IV - Miscellaneous Income is provided for in s. 58(1) of the Taxes Consolidation Act 1997 which states:-

*(1) "Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made-*

*(a) the source from which those profits or gains arose was not known to the inspector,*

*(b) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or*

*(c) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity,*

*and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains."*

Section 922(3) of the Taxes Consolidation Act, 1997 states that:-

*"Where-*

*(a) a person makes default in the delivery of a statement in respect of any income tax under Schedule D or F, or*

*(b) the inspector is not satisfied with a statement which has been delivered, or has received any information as to its insufficiency,*

*the inspector shall make an assessment on the person concerned in such sum as **according to the best of the inspector's judgment** ought to be charged on that person."* [emphasis added]

42. It is submitted that the Inspector in the present instance issued the assessment according to his best judgment and that in effect is what he is required to do pursuant to the relevant section and it is then a matter for the applicant at his appeal hearing before the Appeal Commissioners to present such evidence as he deems fit to challenge the amount of the assessments.

43. There is no entitlement for the applicant to be provided with the exact composition of the income assessed under Schedule D, Case IV. The applicant has the benefit of professional advice and it is submitted that he has all the relevant information as regards his income in respect of his tax returns. It is submitted that the applicant is the person most fully aware of all matters pertaining to his income or gains from whatever source and may have recourse to all relevant records he feels may support his appeal. It is open to the applicant at the hearing of the appeal before the Appeal Commissioners to call whatever witnesses he chooses and in the event that the applicant is in any way taken by surprise, it would then be a matter for the Appeal Commissioners to determine whether natural justice would be served by the granting of an adjournment to give the applicant time to consider the particular matter that causes any difficulty.

44. In essence, there is no statutory obligation on the respondent to detail precisely the basis of the assessments as raised.

45. It is further contended on the respondent's behalf that the applicant has not outlined any ground of prejudice and, in effect, is raising a hypothetical proposition alleging that he will suffer some form of prejudice at the hearing of his appeal before the Appeal Commissioners. There are no facts set out which support such an argument and it is submitted on the respondent's behalf that the consideration of any such matter is moot.

46. When the matter is before the Appeal Commissioners if the applicant has any particular grievance it would be open to him to apply to judicially review the decision of the Appeal Commissioners.

47. It is submitted on the respondent's behalf that they have at all times acted in accordance with the relevant legislation which does not provide for the procedure being sought by the applicant and there is no constitutional challenge to the relevant legislation and in particular the relevant sections thereof.

48. Mr. Gageby, on the applicant's behalf in reply, accepts that there is no constitutional argument raised. However, he submits that the respondent may not act in a capricious way. It is submitted that the Charter is capable of being altered and that the respondents must act in a fair manner but there has to be a strong presumption in favour of correctness.

## **Conclusion**

49. The applicant's tax appeal to the Appeal Commissioners is a civil matter and there is no question of the applicant facing any criminal charge that might require the constitutional protections that are afforded in criminal trials. The applicant has not laid out any grounds of prejudice other than the hypothetical proposition that he may suffer some form of prejudice at the hearing of his appeal before the Appeal Commissioners and that if, in such circumstances, an adjournment was necessary, the applicant would incur additional legal costs.

50. The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the

applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents. The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. The applicant in this case has the right of an appeal to the Appeal Commissioners and the right to a further appeal to the Circuit Court and the right to a further appeal on a point of law to the High Court and from there to the Supreme Court. Any reasonable approach dictates that if the applicant, on appeal to the Appeal Commissioners or to the Circuit Court, can demonstrate some form of prejudice, then an adjournment in accordance with fair procedures would have to be granted, and if not granted, the applicant would have an entitlement to bring judicial review proceedings. There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event it has to be borne in mind that since an assessment can only relate to the applicant's own income and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant.

51. I do not accept that the applicant has been put in an impossible situation and effectively cannot deal with bare and unexplained assessments. Furthermore, I do not accept there is any substance to the reference by Mr. Gageby on the applicant's behalf to allegations of criminal wrongdoing being made against the applicant of which he will have no notice. The allegations being made against the applicant by way of the assessments as raised are that he earned income and made gains which he has not previously declared to the respondent pursuant to the basic self assessment system that pertains in this country. Nobody is better placed to know what income he received or what gains were made than the applicant himself.

52. Insofar as the applicant's solicitor in the supplemental affidavit has averred that he has had previous experience of documentation being furnished by the Revenue Commissioners for the purpose of allowing an appellant to properly prepare for an appeal, this Court has no in depth knowledge of the situation that pertained in that instance or of the relevant background or as to the nature of the documents involved and this Court is satisfied that any such occurrence cannot be taken as a general precedence in every case.

53. Concerning the Customer Service Charter of the Revenue Commissioners, it is in my view, quite clear that there is no obligation imposed which would necessitate the respondents in advising a person such as the applicant as to the entire nature and background information available to the respondent. The wording of the Charter is quite explicit in stating that a person such as the applicant can be expected to be given the necessary information and all reasonable assistance to enable him to clearly understand and read his tax and customs obligations and no claim is made out by the applicant that he has any difficulty in understanding his tax obligations.

54. Clearly, the applicant is entitled to fair procedures and that aspect has already been referred to herein, but pursuant to the relevant legislation, he is not a person entitled to assert a legitimate expectation to be provided with the evidence which the respondent may have access to in respect of the applicant's own personal tax affairs against a background of a self assessment system. It is not the situation in the present instance that the respondent has made a statement or adopted a position amounting to a promise or representation express or implied as to how it will act in respect of furnishing all information in its possession which forms the basis of an assessment made according to the best of an Inspectors judgment. In my view no expectation has been created by the respondents whereby the applicant could reasonably anticipate that he would be provided with the information sought herein. I do not consider that there is anything unfair in the procedure that is applicable pursuant to the relevant legislation, and further do not consider that the position adopted by the respondents is in any way obstructive of the applicant.

55. In these circumstances I come to the conclusion that the applicant fails to establish any entitlement to the reliefs as sought and I dismiss the application.