Neutral Citation Number: [2016] IEHC 349

THE HIGH COURT

JUDICIAL REVIEW

COMMERCIAL

[2015 No. 697 JR]

BETWEEN:

CINTRA INFRAESTRUCTURAS INTERNACIONAL SLU

APPLICANT

-AND-

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 20th day of June, 2016

Introduction

1. One of the key issues in this case is whether two letters, from the Revenue Commissioners to a taxpayer, in which the Revenue disagree with the taxpayer's interpretation of tax legislation, and thereby refuses to give the taxpayer confirmation that it is exempt from capital gains tax on the sale of an asset, are subject to judicial review. As a result of the interpretation in question, the taxpayer says that it is an inevitable next step of these letters that the Revenue Commissioners will make a determination that capital gains tax is owed by the taxpayer. On this basis, *inter alia*, the applicant seeks an order of *certiorari* from this Court quashing the letters in question. Accordingly, an issue for this Court to resolve is whether letters of opinion from the Revenue to a taxpayer in this these circumstances are subject to judicial review.

Background to proceedings

2. This case involves an application by Cintra Infraestructuras Internacional Slu ("Cintra"), a company which is incorporated and tax resident in Spain, for an order of *certiorari* of, what it says is, a decision contained in two letters to its solicitors, from the Revenue Commissioners dated 15th September, 2015 and 19th October, 2015.

3. Cintra sold its shares in Eurolink Motorway Operation Limited ("Eurolink"), which is incorporated and tax resident in Ireland, on the 25th February, 2016. Cintra is also seeking a declaration that the sale of these shares is not subject to capital gains tax as the shares do not derive their value or the greater part of their value directly or indirectly from land in the State.

4. Additionally, Cintra seeks an order for the repayment by the Revenue to Cintra of withholding tax in the sum of €1,384,365, paid by the purchaser of those shares in Eurolink. From Cintra's perspective, the case centres around the issue of whether Cintra's shares in Eurolink derived their value from land in the State and in particular whether the term 'land', as used in s. 980 of the Taxes Consolidation Act, 1997 (the "1997 Act") is restricted to proprietary interests in land or whether it includes non-proprietary interests such as a licence to access land or other rights over land. This is because in this case the Revenue accept that Eurolink did not have any proprietary rights over the land in the State which it used for its business. However, Eurolink did have rights of access and other non-proprietary rights over land based in the State. The Revenue claims that these non-proprietary rights of Eurolink are sufficient for it to be said that shares in Eurolink constitute shares which derive their value directly or indirectly from land in the State.

5. On the 14th December, 2015, Humphreys J. granted Cintra leave to bring these judicial review proceedings and on the 11th January, 2016, McGovern J. admitted the proceedings into the Commercial List.

Relevant facts for this application

6. On the 24th March, 2013, the company in which Cintra was a shareholder, Eurolink, entered into a public private partnership ("PPP Contract") with the National Roads Authority, which is now known as Transport Infrastructure Ireland ("TII"). Under the terms of this contract, Eurolink agreed to design, construct, operate, maintain and finance the M4/M6 Kinnegad to Kilcock Motorway (the "Motorway"). Under the PPP Contract, Eurolink has the right to collect tolls and retain the vast majority of the tolls for the duration of the 30 year contract. In these proceedings, Cintra has described Eurolink's role as providing financing for the Motorway. This is because it provided €322 million in capital to finance the construction of the roads and in return it receives*, inter alia*, the vast majority of the tolls over a 30 year period. As part of its rights under the PPP Contract, Eurolink has been granted by TII, the owner of the roads, a licence to access the roads in order to perform its toll collection, maintenance and other obligations under the TII Contract.

7. Since Eurolink has the right to retain the majority of tolls collected on the Motorway for the duration of the 30 year term, the shares which Cintra sold in Eurolink are of some considerable value. A contract for the sale by Cintra to DIF Infra M4 Ireland Limited ("DIF") of 45.99% of the issued share capital in Eurolink was signed on 14th Sepember, 2015, and the purchase price under that contract was €9,229,100. It is the withholding tax on that consideration, in respect of possible capital gains tax payable on the sale of those shares by Cintra, which is the subject of the dispute between the parties in these proceedings.

8. One of the conditions in the contract for the completion of the sale of the shares was the provision by Cintra to DIF of a completed Form CG50A or a letter from the Revenue confirming that the CG50A form was not required. This condition relates to capital gains tax that is payable on the sale of certain assets. In summary, in order to facilitate the collection of capital gains tax on the sale of certain assets for a consideration of €500,000 or more, the 1997 Act obliges the purchaser of certain assets to withhold

15% of the purchase price of the asset and remit this 15% (known as 'withholding tax') to the Revenue. This sum is then used by the Revenue to offset the capital gains tax, if any, that is payable by the seller of the asset. In this context, a Form CG50A is a certificate to the effect that no deduction need be made by the purchaser. In this case, a Form CG50A, or a confirmation that the Form CG50A is not required, would enable DIF to pay the full consideration of €9,229,100 to Cintra without the deduction of 15% withholding tax of €1,384,365.

9. It is for this reason that on the 25th August, 2015, which was before the date of the signing of the contract for the sale of shares by Cintra and DIF (which was the 14th September, 2015), the solicitors to Cintra (William Fry) wrote to the Revenue requesting, instead of a Form CG50A, a confirmation from the Revenue that capital gains tax was not payable by Cintra on the grounds that the shares in Eurolink did not derive their value from land in the State.

Relevant statutory provisions

Sections 29 and 980 of the 1997 Act
10. It is relevant to set out, at this stage, some of the statutory provisions which are applicable to this case. Section 29(3) of the 1997 Act establishes the obligation of a non-resident taxpayer, such as Cintra, to pay capital gains tax:-

> "Subject to any exceptions in the Capital Gains Tax Acts, a person who is neither resident or ordinarily resident in the State shall be chargeable to capital gains tax for a year of assessment in respect of the gains accruing to such person in that year on the disposal of –
>
> (a) land in the State …"

Section 29(1) establishes that s. 29 applies not just to disposals of land, but also to shares which derive their value from land:-

> "In this section –
>
> […] references to the disposal of assets mentioned *in paragraphs (a)* and *(b)* of *subsection (3)* and in *subsection (6)* include references to the disposal of shares deriving their value or the greater part of their value directly or indirectly from those assets, (*emphasis added*) other than shares quoted on a stock exchange. […]"

The statutory provisions dealing with the retention of the withholding tax by the purchaser from the purchase price, its remittal to the Revenue and the fact that a purchaser who has been provided with a certificate i.e. a Form CG50A, does not have to deduct withholding tax are dealt with in s. 980, the relevant provisions being:-

> "" (2) This section shall apply to assets that are—
>
> […]
>
> (d) shares in a company deriving their value or the greater part of their value directly or indirectly from assets specified in paragraph (a), (b) or (c), other than shares quoted on a stock exchange…
>
> […]
>
> (4) (a) Subject to paragraph (b), on payment of the consideration for acquiring an asset to which this section applies—
>
> (i) the person by or through whom any such payment is made shall deduct from that payment a sum representing an amount of capital gains tax equal to 15 per cent of that payment,
>
> (ii) the person to whom the payment is made shall allow such deduction on receipt of the residue of the payment, and
>
> (iii) the person making the deduction shall, on proof of payment to the Revenue Commissioners of the amount so deducted, be acquitted and discharged of so much money as is represented by the deduction as if that sum had been actually paid to the person making the disposal.
>
> (b) Where the person disposing of the asset produces to the person acquiring the asset—
>
> (i) a certificate issued under subsection (8) in relation to the disposal, […] no deduction referred to in paragraph (a) shall be made...
>
> […]
>
> (8) (a) A person chargeable to capital gains tax on the disposal of an asset to which this section applies, or another person (in this section referred to as an 'agent') acting under the authority of such person, may apply to the inspector for a certificate that tax should not be deducted from the consideration for the disposal of the asset and that the person acquiring the asset should not be required to give notice to the Revenue Commissioners in accordance with subsection (9) (a).
>
> (b) If the inspector is satisfied that the person making the application is either the person making the disposal, or an agent, and that […]
>
> (ii) no amount of capital gains tax is payable in respect of the disposal,
>
> […] the inspector shall issue the certificate to the person making the disposal or, as the case may be, the agent, and shall issue a copy of the certificate to the person acquiring the asset."

Statutory provisions relating to the definition of 'land'
11. Cintra's position is that Eurolink did not have any estate or interest in land, rather it had a licence to enter the road network for the purposes of its contract and it claims these rights do not fall within the definition of 'land' in the 1997 Act. The Revenue Commissioners' position is that, it accepts that Eurolink did not have a proprietary interest in land, but they claim that the term land as used in the 1997 Act is not restricted to proprietary interests. In support of its view, the Revenue relies, *inter alia*, on s. 5 of the 1997 Act, which is the definition section of the capital gains tax provisions of the Act and it states:-

> "5.—(1) In the Capital Gains Tax Acts, except where the context otherwise requires—
>
> "land" includes any interest in land;"

The Capital Gains Tax Acts is defined in s. 1(2) of the 1997 Act as the enactments relating to capital gains tax in this 1997 Act. On this basis, the Revenue says the term 'land' is not confined to interests in land. The Revenue also relies on the terms of the Interpretation Act, 2005, which defines land in the following terms:-

> "'land' includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land"

For its part, Cintra argues, *inter alia*, that where there is a definition in a Statute, as they say there is of 'land' in the 1997 Act, then the Interpretation Act, 2005 has no application. Cintra also argues that the Interpretation Act, 2005 could not, since it was not introduced in the Oireachtas as a money bill, extend the charge to capital gains tax on the sale of shares which derive their value from proprietary interests in land to the sale of shares which derive their value from non-proprietary interests in land.

12. What is not in dispute between the parties is that the effect of foregoing sections of the 1997 Act is that a non-resident company, such as Cintra, is liable to capital gains tax in Ireland for a disposal of shares which derive their value or the greater part of their value from land in the State. What Cintra disputes is that the sale of its shares in Eurolink is subject to capital gains tax. Cintra claims that the shares in Eurolink do not derive their value from land in the State, on the grounds that while Eurolink had rights of access to the Motorway it did not have a proprietary interest in the Motorway and so did not have an 'interest in land'.

Chronology of interaction between Cintra and Revenue

13. The first letter from William Fry, in this case, to the Revenue was sent on the 25th August, 2015, and it states:-

> "We are writing to you on behalf of our clients who are disposing of shares in the above mentioned companies. The purchaser has insisted that Cinsac Limited and Cintra Infrastructures International SL ("our clients") produce a Form CG50A in advance of each sale closing. The sale of the shares is currently at a negotiating stage and therefore, we are not in a position to provide you with the contracts for sale at this point in time.
>
> Given the set of circumstances applicable we believe that it is inappropriate to request a Form CG50A on the basis that we are of the view that the shares, which are the subject matter of the sale, do not derive their value from Irish land or buildings and, accordingly, the transaction does not fall within the scope of Section 980 TCA 1997. We are therefore requesting confirmation from the Revenue Commissioners, in lieu of a Form CG50A, that Irish withholding tax as provided under Section 980 TCA 1997 does not apply and therefore a CG50A is not required.
>
> […]
>
> We are of the view that the disposal of the shares in Eurolink N4/N6 by a non Irish tax resident company does not come within the charge to Irish capital gains tax as it would not be regarded as a specified asset in accordance with Section 29 (3) TCA 1997."
>
> It is clear therefore that from a very early stage in this process, even before it had any engagement with the Revenue on the issue, William Fry had come to the conclusion that, based on their interpretation of the word 'land' as used in the 1997 Act, the shares in Eurolink did not derive their value from land and so were not subject to capital gains tax and as such Cintra decided not to apply for a Form CG50A.

14. The Revenue responded by letter dated the 15th September, 2015. It is this letter which is the subject of these *certiorari* proceedings. Insofar as relevant it states:-

> "While it is accepted that the companies do not have a propriety interest in the above Motorways, I do not see that the operation of section 980(2)(d) TCA 1997 requires that there be a proprietary interest in land for the functioning of the provision. While Eurolink M4/M6 […] may not have proprietary rights over the respective Motorways, it would certainly seem that the companies have legal rights over the Motorways, which were given to them in the PPP contracts. It is through the implementation of those legal rights (constructing and operating the Motorways) that the values in the shares would appear to lie, which are inextricably linked to the Motorways.
>
> In this regard, I cannot provide confirmation that the shares in Eurolink M4/M6 [….] do not derive their value or the greater part of their value from land in the State and I am therefore of the view that the disposal of the shares in these companies by your clients comes within the provisions of section 980(2)(d) TCA 1997."

15. This letter led to a response from William Fry emphasising*, inter alia*, that Eurolink was in essence a service company, which provided services such as toll collection and maintenance to TII and that the sale of shares in that company did not, in their view, amount to the sale of shares which derived their value from any interest in land. It was asserted that the Motorway simply provided the location of the trade in question, rather than the subject of the trade. This letter led to a meeting between William Fry and the Revenue Commissioners on the 9th October, 2015, and the second letter, the subject of these proceedings, issued on the 19th October, 2015. This letter was a follow-on and summary of that meeting. The relevant section of the letter reads as follows:-

> "I refer to the meeting in the Stamping Building on Friday 9 October and to your prior correspondence and discussions with Tom James and Sarah Stevenson of Large Cases Division.
>
> At the conclusion of the meeting, I undertook to write to you setting out what I see as the principal differences between the parties, and also to advise in relation to various letters issued by Revenue that had been mentioned during the course of the meeting.

I think that the principal arguments advanced on behalf of the operating companies can be set out as follows:

> 1. That the operation of section 980 TCA 1997 requires that there be a proprietary interest in land.
>
> 2. The shares of the operating companies derive their value from the underlying trades under the PPP contracts and the earnings potential therefrom and not from land in the State.

3. The operating companies are service companies, and the road provides the location rather than the subject of the trades.

In regard to paragraph 1, it is accepted that the companies do not have a proprietary interest in the roads. The Revenue view is that the operation of section 980 does not require a proprietary interest in land. In line with the definition of "land" in the Interpretation Act 2005 and in section 5(1) TCA 1997, all that is required is an interest in or right over land. And in this regard, the PPP contract confers an interest in or right over land.

At this stage of the PPP contracts, the operating companies have the right to charge tolls and they have the obligation to maintain the roads. And of course, they have access rights, which are granted in Clause 9.1 of the PPP contract.

The fact that the access rights are given by way of licence is not seen to be of any significance. The fact is that the operating companies are carrying out their functions under the terms of the PPP contracts. And the contracts could not be implemented in the absence of access to the relevant lands, which, as mentioned, is conveyed in Clause 9.1 of the contracts. Clause 9.3(a) provides that the access is given by way of licence. It seems that the only effect of this is to delineate the legal aspects of the access in terms of the ownership of the lands. The reality is that the licence is just an ingredient in the mix of the contract, with the critical point being that the overall terms of the PPP contracts are what matter.

The Revenue view is strongly to the effect that the operating companies do, under the terms of the contracts, hold interests in or rights over the roads for the contract periods. And that this is sufficient for the purposes of section 980."

Are the letters justiciable?
16. An important issue for this Court to consider is whether the two Revenue letters in this case are justiciable, so as to be subject to the current judicial review proceedings. The actions which are impugned in this case are letters which refuse to give confirmation to Cintra that their shares in Eurolink do not derive the greater part of their value from land. The net question which this Court has to consider is whether the refusal by the Revenue Commissioners to give the confirmations sought, which were sought by Cintra on the basis of Cintra's interpretation of *'land'*, and with which the Revenue disagreed, amounts to a decision or determination which is subject to judicial review by this Court.

Background to the issue of the letters
17. There is no specific provision in the 1997 Act which deals with the issue of Revenue opinions such as those contained in the two letters in this case. There is a Tax Briefing document from May 2014 *entitled "Large Cases Division: Opinions/Confirmations on Tax/Duty Consequences of a Proposed Course of Action"* which sets out the purpose and approach of the Revenue to issuing confirmations or opinions such as those that issued in this case. The relevant sections of the Tax Briefing are:-

" 1. Introduction

Large cases division (LCD) has for some time promoted and operated a Cooperative Compliance Framework as a mutually beneficial mechanism for managing the relationship between large businesses and Revenue. Under this Framework both parties work together to achieve the highest possible level of voluntary compliance across all the taxes/duties which a large business has to pay. The Framework recognises the mutual interest both parties have in being as certain as possible about tax/duty liabilities and tax/duty positions and in ensuring that there are no surprises in any later review of these liabilities or positions by Revenue. The most important feature of the relationship is the common understanding between the parties on the action that both the business and Revenue need to take to ensure that high levels of compliance are achieved and maintained.

The Cooperative Compliance Framework offers each participating business a regular dialogue with Revenue to provide long-term certainty to the business in relation to its tax/duty exposures, together with the ability to predict with reasonable confidence what Revenue's position will be in relation to particular tax/duty issues of interest to the business.

Separately from the cooperative compliance framework, taxpayers and their agents may sometimes need to contact LCD to seek an opinion/confirmation from Revenue that the taxpayer's/agent's analysis of the tax/duty consequences of a proposed course of action or in respect of a specific transaction is acceptable to Revenue.

[…]

8. Pre-Transaction Opinions/Confirmations

The purpose of providing opinions/confirmations is to provide clarity and certainty in relation to the applicable tax/duty rules so that a taxpayer can file a correct tax return and comply fully with its tax/duty obligations. <u>While opinions/confirmations are not binding on Revenue, and it is open to Revenue officials to review the position when a transaction has been completed and all the facts are known</u> (*emphasis added*), generally Revenue will follow an opinion/confirmation once it can be shown that-

• all relevant information was disclosed either at the time the application was made or following a request from Revenue for further clarification, and

• the transaction as actually implemented did not diverge or deviate from that which was outlined in the information provided in relation to the request for the opinion/confirmation.

[…]

<u>Where, following a review or further consideration, Revenue revises its position, the taxpayer will be given notice of the revised position</u> (*emphasis added*). In such a case, Revenue will not seek to retrospectively apply a tax/duty charged once it can be shown that all relevant information was disclosed either at the time the application was made or following a request from Revenue for clarification and that the information as then disclosed does not diverge from the actual facts.

<u>It is also open to a taxpayer to form a different opinion or to take a different position to an opinion/confirmation provided by Revenue</u> (*emphasis added*) and file a tax return under the self-assessment system based on such opinion/position."

The wording of the letters
18. Against this background, and in particular the express reference to the non-binding nature of the correspondence in the Tax Briefing, the Revenue issued its two letters in this case. The wording and tone of the letters themselves are consistent with what is stated in the Tax Briefing regarding the non-binding nature of the opinions expressed therein. In the letter of the 15th September, 2015, the writer states *that "I am therefore of the view that the disposal of the shares in these companies by your clients come within the provisions of section 980(2)(d) TCA 1997"*. This is not stated to be a determination or decision, but rather a view, which according to the Tax Briefing was non-binding and one which the taxpayer was entitled to ignore and instead form a different view. In many ways, this is the key letter, since the letter of the 19th October, 2015, is primarily a summary of the meeting between the parties which was held to discuss the letter of the 15th September, 2015. It would also appear to be Cintra's view that the first letter is the key letter, since they concluded that the three month time-limit, for the purpose of instituting judicial review proceedings, began from the date of the first letter on the 15th September, 2015, as evidenced by the fact that they brought their *ex parte* motion for leave to bring judicial review proceedings on the 14th December, 2015, just within three months of the first letter. However, the second letter of the 19th October, 2015, is also being challenged in this judicial review and so it is relevant to note that it is also couched in similar language since it is not stated to be the last word on the issue or to be a determination or decision, but rather is expressed in the following manner:-

> "The Revenue view is strongly to the effect that the operating companies do, under the terms of the contracts, hold interests in or rights over the roads for the contract periods. And that is sufficient for the purposes of section 980.
>
> […]
>
> In conclusion, I have to say that, on the basis of the facts as I understand them, the purchaser that you refer to at the bottom of page 2 of your letter of 25 August will have withholding tax obligations under section 980 TCA in respect of the proposed purchase of shares."
>
> It is clear from the foregoing that the Revenue Commissioners are expressing simply a 'view' and that they base this view only on the information to hand. Thus, the Revenue Commissioners are implicitly open to receiving other information which might change their mind.

The timing of the letters
19. It is also relevant that the first letter from William Fry was sent to the Revenue on the 25th August, 2015, which was prior to there even being a signed contract for the sale of the shares, as the contract was not executed until the 14th September, 2015. The response to this letter was issued by the Revenue on the 15th September, 2015, which by coincidence was the day after the signing of the contract, but there was no evidence that when sending this letter the Revenue were aware that the contract had been signed the previous day. As such, the key Revenue letter expressing its opinion on the transaction was based on the letter from William Fry of the 25th August, 2015, and so was an opinion based on a prospective transaction, whose terms (from the Revenue's perspective) could change once the parties became aware of the Revenue view.

20. As well as the first Revenue letter being based on the terms of a prospective transaction, it is also relevant that the actual transfer of the shares under the contract was subject to several conditions precedent, including the requirement to procure the permission of TII to the sale of the shares and the requirement to obtain the necessary consent from the lenders to the project for the sale of the shares. It was not until the 25th February, 2016, some four months after the signing of the contract (on the 14th September, 2015), that the actual sale of the shares took place.

21. Notwithstanding the apparent non-binding nature of such letters from the Revenue (as explicitly stated in the Tax Briefing), the conditional wording contained in the letters themselves, the fact that the key letter was given in the context of a transaction which had not even been signed and the fact that the second letter was issued before there was any guarantee that the transaction would complete (as third party consents had to be obtained), Cintra nonetheless argues that the Revenue letters amount to determinations or decisions which are subject to judicial review in this Court on the grounds that:-

> A. Legally sterile actions can be judicially reviewed in certain circumstances;
>
> B. Actions which do not affect a legally enforceable right can be judicially reviewed if a probable or inevitable next step is that a legally enforceable right will be infringed.

A. Could the letters be subject to judicial review even if legally sterile?
22. In making their case that an action of a public body such as the Revenue can be subject to judicial review, even where the action in question is non-binding or legally sterile, the applicants rely on the case of *Maguire v. Ardagh* [2002] 1 IR 385 where the Supreme Court quashed the actions of members of the Oireachtas in seeking to enquire into the shooting dead by the Gardaí of a man in Abbeylara, County Longford, on the grounds, *inter alia*, that it would amount to a breach of fair procedures and a breach of the right of a person to their good name. Of importance for present purposes is the fact that the findings of unlawful killing which could have resulted from the enquiry were simply opinions and would have been 'legally sterile' in the sense that they would not have had enforceable legal consequences, in contrast to the findings of unlawful killing by a court. Nonetheless, the Supreme Court granted the necessary orders to prevent such findings issuing and Hardiman J. observed at page 668:-

> "If, in relation to the applicants, it was found as a fact by this parliamentary group that he or she had unlawfully killed the deceased man, I do not believe that the alleged technical status of such finding as being (contrary to its obvious natural meaning) merely an opinion would at all avail him or her in the eyes of the ordinary reasonable members of the community. It would strike such persons as a quibble".

23. It is argued on the part of Cintra, that just as the legally sterile actions in *Maguire v. Ardagh* were subject to judicial review, so too the legally sterile/non-binding interpretation in this case should be subject to judicial review. However, the circumstances of *Maguire v. Ardagh* are very far removed from this case. In that case, the 'mere opinion' in question was a possible finding of unlawful killing by Gardaí arising from a parliamentary enquiry (which enquiry was not requested by the Gardaí) which findings were likely to be publicised widely in Ireland, and which involved a clear breach of the important constitutional right of those Gardaí to their good name and their rights to fair procedures.

24. In contrast, the current case involves the issue of non-binding opinions by Revenue in private correspondence to a taxpayer, which is only being issued at the request of the taxpayer and in order to assist that taxpayer as it contemplates a transaction. The *ratio* in *Maguire v. Ardagh* is that in certain rare circumstances (since clearly the enquiry in that case by parliament, rather than a court, into the alleged unlawful killing of man was a most exceptional circumstance), an action of a public body, even though it is legally sterile, may be subject to judicial review.

Do exceptional circumstances exist for this legally sterile action to be justiciable?
25. It is difficult to imagine circumstances which are further away from the exceptional circumstances of *Maguire v. Ardagh* than the current case. In this case the act of the public body in question is a non-binding interpretation issued by the Revenue regarding an interpretation of the Taxes Consolidation Act 1997, where there is no allegation of breaches of constitutional rights or rights to fair procedures, but rather an allegation that the Revenue interpretation is incorrect and the injustice caused is that the taxpayer is deprived of the use of its money until its appeal is successful (which it believes will happen), when on its interpretation of the legislation, the money should never have been deducted in the first place.

26. This Court sees nothing exceptional in the foregoing circumstances of Cintra's case for it to fall within the circumstances in *Maguire v. Ardagh* where a legally sterile act of a public body was subjected to judicial review. In addition, the reasons for the issue of the Revenue opinion in the first place would, in this Court's view, militate against a finding that there are exceptional circumstances in Cintra's case which might justify this legally sterile decision being justiciable. This is because the issue of these non-binding opinions is a privilege that it is granted by Revenue to certain taxpayers who make up the Large Cases Division in the sense that is not a facility that is available to all taxpayers. Furthermore, as is clear from the Tax Briefing, the whole purpose of this procedure, whereby the Revenue issue non-binding interpretations to taxpayers in the Large Cases Division, is to assist taxpayers get a Revenue view in advance of a transaction. If that Revenue view is favourable then the taxpayer may decide to proceed with the transaction as planned. If the Revenue view is unfavourable to the taxpayer, he may decide to alter the terms or indeed the consideration for the transaction to take account of same. Even if the Revenue view is unfavourable, the taxpayer may, with the benefit of having received the reasons for the Revenue's interpretation, become more emboldened in its view (if it believes these reasons are unsustainable) and decide to ignore the Revenue view and challenge that view at a later stage, when the formal decision or determination of the Revenue issues (assuming that the Revenue maintains that view). The reasons and background to the issue to Cintra of the opinion by the Large Cases Division of the Revenue Commissioners, which opinion is of considerable benefit to the taxpayer, militates against a finding that these circumstances are so exceptional as to justify the non-binding opinion of the Revenue being justiciable.

27. Finally, also of relevance in determining whether there were exceptional circumstances present justifying a finding of justiciability is a consideration of what happens in the absence of judicial review being granted. In Cintra's case, by the time of the hearing before this Court, the sale of the shares had completed and so the withholding tax had been paid to the Revenue. Accordingly, if Cintra had not instituted these judicial review proceedings, it is likely that the non-binding interpretation of the Revenue would have been followed by a request by Cintra for the refund of its withholding tax, which is likely to have been refused by Revenue and thus the non-binding interpretation of Revenue (as represented by the two letters) would have been replaced with a binding decision not to refund the withholding tax. As noted below, this would then lead to Cintra being entitled to challenge that decision of the Revenue under the taxation appeals procedure. This Court does not believe that there is anything exceptional or prejudicial to Cintra in it having it seek its refund as many other taxpayers have to do, and so this also supports a finding that there is nothing exceptional about the circumstances of Cintra's case which would require this Court to find that the legally sterile/non-binding opinion of the Revenue should be subject to judicial review.

B. Subject to judicial review if probable next step is infringement of legal right?
28. It was also argued by Cintra, that based on Ryanair v. Flynn [2000] I.R. 240, even though the letters in this case do not affect some legally enforceable right (and so are legally sterile at the time of their being sent to Cintra), they are nonetheless subject to judicial review since a probable, if not inevitable, consequence of these letters is that a decision will be taken by Revenue to assess Cintra for capital gains tax on the sale of the shares in this case.

29. In *Ryanair v. Flynn* judicial review was sought of a report, ordered by the Minister for Enterprise, Trade and Employment under s. 38(2) of the Industrial Relations Act, 1990, into a dispute between Ryanair and a trade union. It was held by Kearns J. that the report was not justiciable, on the grounds that it was a mere fact-finding report and so the legal rights of Ryanair were not affected. At page 264 of his judgment Kearns J. states:-

> "It follows from the foregoing that there are, quite apart from the public law dimension [….] two other requirements which must be fulfilled before the court can intervene by way of judicial review, namely there must be a decision, act or determination and it must affect some legally enforceable right of the applicant. If the right is not a "legally enforceable right", it must be a right so close to it as to be a probable, if not inevitable, next step that some legal right will, in fact, be infringed."
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> As part of the consideration of whether the probable next step of the letters is that a legally enforceable right will be infringed, it is relevant to consider the actual effect of the letters themselves, the legal position of Cintra after the letters had issued and the likely next steps if this judicial review had not been instituted.

The actual effect of the letters
30. This Court is of the view that there is nothing in the letters that changes the legal position of Cintra. All these letters have done is to grant to Cintra the privilege of having a preliminary non-binding view of the Revenue on its transaction, in advance of a decision being taken by the Revenue, which will only occur after the transaction completes, if it does complete. The transaction did in fact complete on the 25th February, 2016, some four months after the second and final letter issued by the Revenue. Before the issue of the letters, and after the issue of the letters, Cintra's legal position is exactly the same in this Court's view. This is because Cintra's position is legally affected by ss. 29 and 980 of the 1997 Act, not by the two letters. There is absolutely no change to their legal position as a result of those two letters. Since these letters have no legal effect, their true effect is that, after the issue of the letters, Cintra is more aware, than it was before the issue of the letters, that the Revenue is likely to make a decision that Cintra will be liable for capital gains tax on the sale of the shares, if and when the transaction closes. However, this increased awareness of Cintra of the likelihood of a negative decision is not a legal consequence which is justiciable, in this Court's view.

Legal position of Cintra after the issue of the letters
31. It is also relevant to consider the legal position of Cintra at the time that it applied for leave to make this judicial review application, when it must have felt that its legal rights were about to be infringed. Leave for judicial review was sought in December

2015, yet at that stage the transaction might never even have completed e.g. because conditions precedent (such as obtaining the approval of the TII to the sale of the shares) might never have been satisfied. If TII had failed to approve the sale, then there would be absolutely no legal consequence for Cintra from those letters, since there would have been no sale of the shares and thus no gain to be taxed. It was therefore impossible for those letters to impose legal consequences at the stage when the judicial review was sought, as there was no guarantee the shares would be sold. This illustrates the true nature of those letters at the time of the application for judicial review, as non-binding views on something that might never occur.

Likely next steps if no judicial review instituted?
32. It is relevant to bear in mind that it was only certain that there would be a decision made by the Revenue Commissioners that capital gains was or was not payable by Cintra once it was clear that the sale of the shares had completed, which occurred on the 25th February, 2016. Prior to that date, there could have been no liability to tax and thus no decision by the Revenue Commissioners which had legal consequences. On that date, the purchaser of the shares was obliged to remit the withholding tax to the Revenue. Hence, if the judicial review had not been instituted, the likely next step where there was a difference of interpretation between the Revenue and the taxpayer would have been a request by Cintra for a refund of the tax. If the Revenue Commissioners had refused to refund the withholding tax, then this refusal would have resulted in the non-binding interpretation (as set out in the two letters) of the Revenue crystallising into a binding determination by the Revenue Commissioners on the liability of Cintra to capital gains tax.

33. If the Revenue refused to refund the withholding tax, it is clear that Cintra would then have a justiciable dispute. It would then have been entitled to appeal that decision of the Revenue under s. 949 of the 1997 Act which states:-

> "(1) Any person aggrieved by any determination by the Revenue Commissioners, or such officer of the Revenue Commissioners (including an inspector) as they may have authorised in that behalf, and any claim, matter or question referred to in *section 864* may appeal […] to the Appeal Commissioners".
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> If the decision of the Appeals Commissioners was not to Cintra's liking, it could appeal their decision to the High Court and if the High Court's decision was not in its favour, it could appeal that decision to the Court of Appeal and possibly the Supreme Court.

34. This Court needs to deal, at this juncture, with an objection that was made by Cintra to this appeal process in its case. At the hearing before this Court, in the context of whether there was an appeal or alternative remedy available to it (which would deprive it of judicial review), Cintra objected to seeking the refund of withholding tax and then appealing through the appeals procedure the (likely) refusal by the Revenue Commissioners to refund the tax. Cinta said that this was not a genuine appeal or alternative remedy (and so it did not have to pursue it and could instead invoke this judicial review), since it involved Cintra having to pay over tax, which it disputed was payable in the first place. For this reason, Cintra argued it should be entitled to judicially review the letters of the Revenue, before tax was deducted, which tax they say should not be deducted.

35. In this Court's view, this is not a sustainable objection to paying withholding tax. The very nature of withholding tax is that in many cases the taxpayer will not have any liability to tax e.g. because of tax free allowances of the taxpayer, and so the taxpayer will have to claim a refund of tax that was never due in the first place. Indeed, the very *raison d'être* of withholding tax is to catch all transactions and not just those transactions where there is a tax liability and in this way puts the onus on the taxpayer to show that he is entitled to a refund. This is even more important in the case of foreign taxpayers, such as Cintra, since it will be more difficult for the Revenue Commissioners to recover capital gains tax from foreign residents, than it is from Irish residents.

36. Another difficulty this Court has with Cintra's objection is that implicit in it is the view that it should be the taxpayer's interpretation which determines whether a tax is payable and therefore whether judicial review or the normal tax appeals procedures is to be used by Cintra in challenging the Revenue. If this were correct, it would mean that the tax appeals procedure would only be the correct route for a taxpayer when he does *not* dispute that the tax is payable, which would mean of course he would never need to use the tax appeals procedure. This Court does not believe that this is a correct proposition. If a taxpayer's objection to paying a particular tax were sufficient reason to be entitled to judicial review (rather than paying the tax and seeking a refund in the normal way), these Courts would be full of cases where taxpayers (who could afford to do so) were judicially reviewing the Revenue, rather than paying taxes which the Revenue allege are due.

37. For this reason, this Court does not see any merit in Cintra's objection to pursuing a refund of the withholding tax in this manner and so it concludes that the probable next step in this case, if there had not been these judicial review proceedings, would have been a claim of a refund by Cintra followed by an appeal to the Appeal Commissioners of the Revenue's (expected) refusal to make the refund.

38. Having considered the actual effect of the letters themselves, the legal position of Cintra after the issue of the letters and the likely next step in the absence of this judicial review, this Court must now consider whether Cintra's legally enforceable rights were about to be infringed as a result of the issue of the letters, so as to justify an order of *certiorari* quashing the letters.

Is the probable next step a breach of an enforceable right?
39. To consider this next step, it is relevant to bear in mind the nature of the letters. As previously noted, no legal consequences flow from these letters, since as is clear from the Tax Briefing and the terms of the letters themselves, they are non-binding. For this reason, it is relevant to note that before the issue of the letters and after the issue of the letters, the legal position of Cintra is the same and is governed by the 1997 Act. It is not the letters which visit legal consequences upon Cintra, but rather the provisions of the 1997 Act, which provide that a sale of shares by a non-resident is subject to withholding tax if the greater part of their value derives from land. This is a crucial factor in this Court's assessment of whether the letters are justiciable. There is nothing in the terms of the two letters which alters this fact. Cintra may disagree with the non-binding interpretation by Revenue of the expression 'land' in the 1997 Act, and it is perfectly entitled to do so, but this non-binding interpretation of the term 'land' is not a decision or determination that is justiciable.

40. It is this Court's view that the probable next step after the issue of the letters is that Cintra will request the refund of the withholding tax and that a decision will issue by the Revenue to refuse to refund the tax on the grounds that Cintra is liable for capital gains tax. Such a decision by the Revenue is likely to be a decision with which Cintra will disagree. However, it is this Court's view that this does not amount to there being a probable next step that Cintra's rights will be infringed, as suggested by Cintra in its reliance on *Ryanair v. Flynn*. This is because, the likelihood (as revealed to Cintra by these letters) of the Revenue refusing to refund the withholding tax based on its interpretation of the tax legislation, is not an infringement of a right, it is simply an interpretation with which Cintra will disagree – it may well be that this difference of interpretation goes the whole way to the Supreme Court, but that is what it is: a difference of interpretation between the Revenue and a taxpayer. When the letters issued, this did not amount to an infringement of a right. It will only become an infringement of a right if, after the Revenue refuses to refund the capital gains tax,

first the issue is appealed by the taxpayer and second the final appellate body to hear the matter, whether that be the Revenue Appeal Commissioners or the Supreme Court or an appellate court in between, agrees with Cintra's interpretation. If after the appeal process has been so exhausted, the interpretation of the Revenue is found to be incorrect then one can say at that stage that a taxpayer's right was infringed. On the other hand, if after the appeal process has been exhausted, the interpretation of the Revenue is found to be correct, then the taxpayer's rights will not have been infringed. The final appellate body may or may not agree with Cintra, but the fact that there are two possible interpretations of a tax statute, does not amount, in this Court's view, to an infringement of a taxpayer's right.

41. This Court's view, that a taxpayer's rights were not about to be infringed in this case, since there was a statutory appeal process pursuant to s. 949 of the 1997 Act available to the taxpayer, is supported by the decision of the Supreme Court case in *EMI v. Data Protection Commissioner* [2013] 2 I.R. 669. This is because that case is authority for the principle that, save in rare cases, the appropriate avenue for challenge to decisions of governmental and statutory bodies is by means of the statutory appeals procedure that is set down under legislation, as is clear from the judgment of Clarke J. at p. 728:

> "Thus the overall approach is clear. The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 , (Unreported, High Court, Hogan J., 1st November, 2010), that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned."

42. It is this Court's view that it would defeat the underlying principle of the Supreme Court's judgment in *EMI v. Data Protection Commissioner*, if there were to be finding in this case that a taxpayer's enforceable legal rights were about to be infringed, where the taxpayer had chosen not to undertake that statutory appeal process.

43. For all of these reasons, this Court is of the view that it was not the probable next step of the issue of the letters that Cintra's enforceable legal rights would be breached

Conclusion

44. For the reasons aforesaid, primarily the fact that the non-binding letters in question do not amount to a decision or determination of a public body which imposes legal consequences so as to be justiciable, the relief in this case is refused.

45. Although not determinative of this issue (since this decision has been reached on the grounds set out earlier in this judgment), this Court would add that what this Court has considerable difficulty with in the current case is that, if the relief were granted it could lead to a situation where, if a taxpayer disagrees with a non-binding interpretation by the Revenue designed to assist taxpayers, the result of that disagreement (which disagreement, in the case of large corporations with specialist tax advisers, will no doubt be a regular occurrence) is that this alleged disagreement (or error of interpretation, as the tax advisers see it) would be sufficient for the Revenue's non-binding interpretation to be subject to challenge in the High Court.

46. If this were correct, this could lead to a situation where the Revenue, in order to avoid a situation where its non-binding interpretations are subject to review by the High Court, would quite naturally simply cease to issue such letters which are designed to help taxpayers plan their transactions. While it is not the concern of Cintra or its legal advisers to consider such wider implications, this Court cannot ignore the wider implications of the case being made by the applicant.