Neutral Citation [2015] IEHC 529

THE HIGH COURT

[2013 No. 533 R]

REVENUE

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 941 OF THE TAXES CONSOLIDATION ACT, 1997 (AS AMENDED)

BETWEEN

THE REVENUE COMMISSIONERS

APPELLANTS

AND

LIAM LACEY

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of July, 2015.

1. This matter comes before the Court by way of case stated from Mr. John O'Callaghan, Appeal Commissioner, pursuant to section 941 of the Taxes Consolidation Act, 1997. The appeal relates to an assessment to income tax for the year 1994/95 which was raised by the appellants on 26th July, 2005. The Appeal Commissioner held that the assessment was precluded by statute and the appellants appeal this finding.

Background

2. There is no dispute about the background facts giving rise to the assessment and appeal. These may be taken directly from the case as stated and are as follows:-

a. At all material times the respondent was a "chargeable person" for the purpose of chapter II of the Finance Act, 1988, (now part 41 of the Taxes Consolidation Act, 1997 (hereinafter referred to as the "TCA")).

b. In or about 4th April, 1995, the respondent invested the total sum of IR£25,000.00 in the "qualifying companies" Derima Ltd., Vernill Ltd., Cherlan Ltd., Atelina Ltd. and Lenama Ltd. collectively known as the "First Merlin Film Fund".

c. The respondent received five Film 3 certificates issued in January 1996, for the year of assessment 1994/95 by the said "qualifying companies". Each of the certificates contained a statement that "the conditions for the relief so far as they apply to the company and the film are satisfied in relation to this investment".

d. In his return of income tax for the year 1994/95 the respondent claimed relief under section 35 of the Finance Act 1987, which the inspector allowed on the basis of the aforesaid Film 3 certificates.

e. A tax audit of the "qualifying companies" was carried out in or about 28th August, 2002 as a result of which the inspector concluded that the conditions governing the relief had not in fact been satisfied by the "qualifying companies" and/or in respect of the films concerned.

f. The relevant conditions in the legislation and the certificate of the Minister for Arts, Heritage, Gaeltacht and the Islands are:

(i) the relevant investment is used within two years in the production of a qualifying film;

(ii) the sum raised in respect of which relief is claimed under section 481 of the TCA does not exceed a percentage of the actual cost of production of the film, and

(iii) a specified sum must be expended on direct expenditure in the employment of Irish personnel and the purchase of Irish goods and services.

If it subsequently transpires that these conditions have not been satisfied, provision is made for the withdrawal of the relief already given.

g. The inspector found that the amounts invested were part of a fund intended to be used to produce a number of films. The fund was distributed among the five companies. A substantial part of the fund was paid to a Galway company, Concorde Anois Teo.

h. From the records and the accounts available to the inspector, he took the view that part of the money had been used in the production of the various films and part had been transferred to Transpacific Corporation A.V.V. Aruba.

i. The inspector was not satisfied that the money transferred to Transpacific Corporation A.V.V. Aruba had been expended on the production of the films.

j. Accordingly the respondent and all other taxpayers in the same fund (The First Merlin Film Fund) were notified that the inspector intended to withdraw the relief claimed by him and them pursuant to section 481 of the TCA. The said relief was withdrawn by notices of assessment dated 26th July, 2005 issued pursuant to section 481(19) of the TCA relating to the

years 1994/95. Notices of assessment dated 26th July, 2005 and 20th September, 2005 issued pursuant to section 481(19) of the TCA and relating to the years 1994/95 and 1995/96 were sent to the taxpayers in the other funds.

k. The respondent, by notice of appeal dated 8th August, 2005, appealed against the said assessment on the grounds set out therein including the ground that "this assessment is out of time" and "that the time limit for making the assessment is passed".

l. It is agreed that no issue of fraud or neglect arises on the part of the respondent.

m. The appellants and 964 other taxpayers who have appealed similar assessments withdrawing relief granted to them in respect of six film funds have agreed that the outcome of this appeal shall govern each of their appeals at least insofar as the time limit element is concerned and a significant number of the other taxpayers have agreed with the appellants that all matters relating to their appeals (the time limit element and the element dealing with whether the conditions for relief under section 481 of the TCA have been satisfied) shall be governed by the outcome of the respondent's case.

Statutory Background

3. The relief claimed by the respondent was claimed under section 35 of the Finance Act, 1987, which is a very comprehensive section setting out the terms upon which the relief maybe claimed. Section 35(4) of the that act provided:

> "A claim to relief under this section may be allowed at any time after the payment of a sum to a qualifying company, which, if it is used within two years of it being paid by the qualifying company for the production of a qualifying film, will be a relevant investment, if the inspector is satisfied that all the conditions for relief are, or will be, satisfied, but the relief shall be withdrawn if, by reason of the happening of any subsequent event or the failure of an event to happen which at the time the relief was given was expected to happen, it appears that the company making the claim was not entitled to the relief allowed."

4. Section 35(6) of the 1987 Act provided:-

> "Where any relief has been given under this section which is subsequently found not to have been due, it shall be withdrawn by making an assessment to corporation tax or income tax, as the case may be, under Case IV of Schedule D for the accounting period or accounting periods, or the year of assessment or years of assessment as the case may be, in which relief was given and, notwithstanding anything in the Tax Acts such an assessment may be made at any time".

Section 35(4) of the Finance Act, 1987 was replaced by section 481(11) of the TCA 1997 and section 35(6) of the 1987 Act was replaced verbatim by section 481(19) of the TCA.

5. Part 41 of the TCA introduced the concept of self assessment of chargeable persons to income tax, corporation tax and capital gains tax. It sets out, *inter alia*, the procedures and time limits for the filing of returns, the payment of tax including preliminary tax, the making and amendment of assessments by an inspector on foot of (or in default of) a return, the inspector's right to make inquiries and amend assessments and appeals against assessments. Section 950(2) of the TCA provides that:-

> "Except insofar as otherwise expressly provided, this Part shall apply notwithstanding any other provisions of the Tax Acts or the Capital Gains Tax Acts."

6. Section 954(1) of the TCA provides that:-

> "An assessment shall not be made on a chargeable person for a chargeable period at any time before the specified return date for the chargeable period unless at that time the chargeable person has delivered a return for the chargeable period, and an assessment shall not be made at a time when the making of the assessment is precluded under section 955(2)."

7. Section 955(1) of the TCA provides that:-

> "Subject to subsection (2) and to section 1048, an inspector may at any time amend an assessment made on a chargeable person for a chargeable period by making such alterations in or additions to the assessment as he or she considers necessary, notwithstanding that the tax may have been paid or repaid in respect of the assessment and notwithstanding that he or she may have amended the assessment on a previous occasion or on previous occasions, and the inspector shall give notice to the chargeable person of the assessment as so amended."

8. Section 955(2) of the TCA, as amended by section 17(1)(g) of the Finance Act 2003 provides:

> (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of the period of 4 years commencing at the end of the chargeable period in which the return is delivered and –
>
> (i) no additional tax shall be payable by the chargeable person after the end of the period of 4 years, and
>
> (ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,
>
> by reason of any matter contained in the return.
>
> (b) nothing in this subsection shall prevent the amendment of an assessment -
>
> (i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),
>
> (ii) to give effect to a determination on any appeal against an assessment,

(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(iv) to correct an error in calculation, or

(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3)."

9. Section 955(3) of the TCA provides for a right of appeal on the grounds that the inspector was precluded from making an assessment or amendment by reason of subsection (2) as follows:-

"A chargeable person who is aggrieved by an assessment or the amendment of an assessment on the grounds that the chargeable person considers that the inspector was precluded from making the assessment or the amendment, as the case may be, by reason of subsection (2) may appeal against the assessment or amended assessment on those grounds and, if on the hearing of the appeal the Appeal Commissioners determine—

(a) that the inspector was so precluded, the Tax Acts shall apply as if the assessment or the amendment, as the case may be, had not been made, and the assessment or the amendment of the assessment as appropriate shall be void, or

(b) that the inspector was not so precluded, the assessment or the assessment as amended shall stand, except to the extent that any amount or matter in that assessment is the subject of a valid appeal on any other grounds."

10. Section 956 of the TCA, as amended by section 17(1)(h) of the Finance Act, 2003 provides that:-

"(1)(a) For the purpose of making an assessment on a chargeable person for a chargeable period or for the purpose of amending such an assessment, the inspector –

(i) may accept either in whole or in part any statement or other particular contained in a return delivered by the chargeable person for that chargeable period, and

(ii) may assess any amount of income, profits or gains or, as respects capital gains tax, chargeable gains, or allow any deduction, allowance or relief by reference to such statement or particular.

(b) The making of an assessment or the amendment of an assessment by reference to any statement or particular referred to in paragraph (a)(i) shall not preclude the inspector –

(i) from making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and

(ii) subject to section 955(2) from amending or further amending an assessment in such manner as he or she considers appropriate.

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

The Assessment

11. The respondent claimed and was allowed relief under section 35 of the Finance Act, 1987 on the basis of the Film 3 certificates submitted. On 26th July, 2005, the appellants withdrew the relief by Notice of Assessment issued pursuant to section 481(19) of the TCA and assessed the respondent for a liability to tax in the sum of €15,235.12. It is important to note, that this is an assessment and not an amendment of an assessment and therefore, such of the provisions as I referred to above and as relate to an amendment of an assessment are not of any relevance.

12. The respondent contends that the appellants are precluded from raising any such assessment after the end of four years commencing at the end of the chargeable period in which the return is delivered (which period would have expired some time in 1999) by reason of the time limits prescribed by section 955(2) of the TCA. The appellants contend that section 955(2) of the TCA has no application for two reasons:-

(1) firstly, section 955(2) is governed by the concluding text which restricts its application to an assessment made "by reason of any matter contained in the return." The appellants contend that the assessment was not raised by reason of any matter contained in the return, but was raised arising out of information otherwise obtained by the appellants to the effect that the investment made by the respondent, through no fault of the respondent, was not invested in such a manner as to comply with the requirements of section 481 of the TCA (formerly section 35 of the Finance Act, 1987); and

(2) in any event section 481(19) of the TCA (previously section 35(6) of the Finance Act, 1987) provides that where relief has been given under the section which is subsequently found not to have been due, it shall be withdrawn by making an assessment (in this case to Income Tax) and "notwithstanding anything in the Tax Acts, such an assessment may be made at any time" (emphasis added).

13. The net question to be resolved by these proceedings therefore is whether or not it was open to the appellants to raise an assessment in relation to the relief claimed at any time, or whether the raising of such an assessment was subject to the time limit prescribed by section 955(2) of the TCA.

Submissions of the Appellants

14. It is submitted by Mr. Aston SC on behalf of the appellants that section 950(2) of the TCA makes it clear that part 41 of the TCA applies "except insofar as otherwise expressly provided". It is submitted that section 481(19) of the TCA contains just such an express provision in providing that relief may be withdrawn at any time where it is subsequently found not to have been due "notwithstanding anything in the Tax Acts". The appellants submits that the Oxford English Dictionary defines "expressly" as meaning "in direct or plain terms; clearly explicitly, definitely"; that the word "expressly" is the opposite of "impliedly". It is further submitted that there is no requirement for an express reference to the provisions of section 950(2) nor to section 955(2), and that it is sufficient, in order to overcome a time limit, that there is a provision expressly providing that there should be no time limit simply by using the words "notwithstanding anything in the Tax Acts".

15. It is further submitted on behalf of the appellants that the provisions dealing with the machinery of assessment and collection of tax are to be interpreted in accordance with normal principles of statutory construction. Counsel for the appellants referred to section 5(1) of the Interpretation Act, 2005 which provides:-

> "In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) —
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of —
>
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

16. It is submitted that section 5(1) applies to the instant case because it is not concerned with a penal or other sanction. Furthermore it is submitted that section 481(19) is neither absurd nor ambiguous. Counsel referred to the decision of *The Revenue Commissioners v. O'Flynn Construction Ltd.* [2011] IESC 47 wherein O'Donnell J. stated at paragraph 70, that tax legislation is to be interpreted in the same way as other non-criminal statutes, and that a purposive approach is permissible:-

> "In *Barclays Mercantile v Mawson* [2004] 3 WLR 1383 the House of Lords emphatically reaffirmed that the same principles of statutory interpretation applied to taxation statutes as to other non criminal statutes. Indeed, it was the realisation in Lord Steyn's words in *IRC v. McGuckian* [1997] 1 WLR 991 at page 999, that *"those two features - literal interpretation of tax statutes and the formalistic insistence of examining steps in a composite scheme separately - … [which] allowed tax avoidance schemes to flourish,* which led the UK Courts to insist that the same principles of statutory interpretation applied to tax statutes as to other legislation. In Ireland, however, this was something that was acknowledged at least implicitly in *McGrath*, and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes. Accordingly, the Appeal Commissioners' conclusion that the principles set out in *McGrath* prohibited the adoption of a purposive approach is incorrect on a number of levels."

17. In the submission of the appellants, there is no ambiguity or absurdity about the interpretation contended on behalf of the appellants that section 481(19) of the TCA is an express provision within the meaning of section 950(2) of the TCA that has the effect of disapplying part 41 of the TCA to the raising of an assessment pursuant to section 481(19) of the TCA. It was further submitted that this is consistent with a purposive interpretation of section 481, which is a self contained scheme enabling a qualifying individual to obtain relief from tax having invested money in a qualifying company, and having produced a Film 3 certificate provided by the company with the approval of an authorised revenue officer, but which also contains provisions for claw back of that relief in the event that it is subsequently determined by the appellants that the conditions for relief have not been satisfied.

18. It is further submitted for the appellants that the absence of a time limit for assessment under section 481 is entirely logical given that the relief may be withdrawn retrospectively in a wide range of circumstances, including (as in this case) the failure of the qualifying company to comply with the conditions in the Ministers' certificate. The withdrawal of the relief is the result of an act of default of a third party, namely the qualifying company.

19. This latter point is of particular significance (in the submission of the appellants) because the time limits contained in section 955(2) of the TCA, which states that an assessment shall not be made on a chargeable person after the end of the period of four years commencing at the end of the chargeable period in which the return is delivered, are governed by the words at the concluding part of that section i.e. "by reason of any matter contained in the return." It is submitted on behalf of the appellants that since the withdrawal of the relief granted arises from the failure by the qualifying company to satisfy the requirements contained in the Ministers' certificate, the withdrawal of the relief and consequent assessment did not therefore arise by reason of any matter contained in the return.

20. Counsel for the appellants submits that in making his determination, the Appeals Commissioner erred in the interpretation of sections 481(19), 950(2) and 955(2) of the TCA and therefore erred in accepting the argument of the respondent that section 950(2) of the TCA operated in priority to the provisions of section 481(19) of the TCA. In relation to section 956 of the TCA, which permits the making of enquiries or the taking of actions by an inspector of taxes, subject to a time limit of four years commencing at the end of the chargeable period in which the chargeable person has delivered a return, it is submitted on behalf of the appellants that that section is not relevant to this case as the assessment is not based on any actions or enquiries undertaken by the inspector in relation to the respondents tax return, but rather is based on an enquiry into the affairs of the film company in which the appellants invested.

21. The appellants rely on the decision of O'Neill J. in *Fortune v. The Revenue Commissioners* [2009] IEHC 28 in which O'Neill J. stated:-

> "Under section 955 of the Act of 1997 the statutory time limit for raising an assessment is six years. This was also the statutory time limit that applied when the applicant made his investment. Since the Finance Act 2003 (Commencement of Section 17) Order 2003 (S.I. 508 of 2003) the statutory limitation period for raising fresh assessments is now four years.

There can be little doubt however, from the terms of section 35(6) of the Act of 1987 that the legislature did envisage the withdrawal of tax relief by the raising of an assessment at any time and it expressly included the phase "*notwithstanding anything in the Tax Acts, such an assessment may be made at any time*", which necessarily implies the above statutory time limits do not apply to the withdrawal of relief granted under section 35. Here, the meaning of section 35(6) of the Act of 1987 is so clear that another interpretation does not arise. It was the clear intention of the legislator to confer the power on the respondents to withdraw tax relief at any time. Hence, no statutory limitation period inhibited the raising of the 2005 assessment."

Submissions of the Respondent

22. Mr. Ramsay SC submitted on behalf of the respondent that :-

> "If part 41 of the TCA is not to apply then it must be expressly provided in the section relied upon and the exclusion of its application cannot be done in a general way. Counsel draws attention to section 895(6) of the TCA, section 730I of the TCA (as inserted by section 67(1)) of the Finance Act 2001 and section 747C of the TCA (as inserted by section 72(1)) of the TCA in all three of which sections the following words are used: "notwithstanding anything to the contrary in section 950".

23. Counsel also relies in this regard of the decision of this Court in the case of *Revenue Commissioners v. Droog* [2011] IEHC 142. In that case Laffoy J. was required to consider whether or not the general anti-avoidance provision contained in section 811 of the TCA took priority over part 41 of the TCA, and very similar considerations arose in that case as arise here. In relation to the express disapplication of part 41 of the Act Laffoy J. had this to say:

> "The primacy quality which the expression "notwithstanding any other provision of the Acts" in section 811(5)(a) is intended to have, in my view, is nugatory in effect when set up against the primacy quality attached to the provisions of Part 41 by virtue of section 950(2), which the Oireachtas intended should subsist unless expressly disapplied. To put it another way, in my view, the expression "notwithstanding any other provision of the Acts" in section 811(5)(a) does not neutralise the corresponding provision in section 950(2) which can only be neutralised by an express statutory provision. Similarly, in my view, the words "at any time" in section 811(4) do not have the affect of displacing the primacy given by section 950(2) to the provisions of Part 41 in relation to self-assessed taxpayers and, in particular, the time bar on making assessments and imposing additional tax provided for in s. 955 or the time bar in relation to making an enquiry or taking an action provided for in section 956".

24. Laffoy J. went on to note in the same paragraph of her judgment in *Droog* that there was a lack of express disapplication of part 41 in section 811 and thus part 41 prevailed. After the *Droog* case, further disapplication of part 41 was introduced in section 811A(1A) which provides:-

> "…sections 955(2)(a) and 956(1)(c) as construed together with section 950(2), shall not be construed as preventing an officer of the Revenue Commissioners from …"

and

> "section 811(5A) provides:-
>
> "…for the purpose of giving effect to this section, any time limit provided by Part 41, or by any other provision of the Acts, on the making or the amendment of an assessment or on the requirement or liability of a person to pay tax or to pay additional tax –
>
> (i) shall not apply."

25. Laffoy J. was also required to interpret the meaning of the words "by reason of any matter contained in the return" contained in section 955(2)(a) in almost the same context as the question arises for consideration in these proceedings. One of the sections under consideration by Laffoy J. in that case was section 811(4) of the TCA which provides:-

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

26. Section 811(5) of the TCA provides as follows at paragraph 5(a):-

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

27. So it can be seen that there is a difference between the sections at issue in this case and the sections at issue in *Droog* to the extent that in *Droog*, the phrase "at any time" appears in one section – section 811(4) in relation to the formation of an opinion and the phrase "notwithstanding any provision of the Tax Acts" appears in another section (section 811(5) in relation to the withdrawal of a tax advantage). The appellants argue that this case may be distinguished from *Droog* because the section relied upon in that case to enable the Revenue Commissioners to form an opinion at any time that the transaction is a tax avoidance transaction, did not contain the words "notwithstanding any provision of the Tax Acts", whereas both phrases are to be found in the same sentence of

section 481(19) of the TCA.

28. In relation to the expression "by reason of any matter contained in the return", the respondent relies upon the decision of Laffoy J. in *Droog*, arguing that the withdrawal of tax relief in that case had the same effect as the raising of an assessment in this case and about which Laffoy J. held:-

> "it seems to me that on any comparative analysis of the return made by the respondent on 30th January, 1998 and the Notice of Opinion dated 22nd February, 2007, the only reasonable inference which can be drawn is that the intended outcome of the opinion was to claw back the loss relief on the partnership losses of which the respondent got the benefit on the original assessment by reason of the claim for that relief in the return, by imposing an additional charge for tax in the sum of £24,022 on the respondent. That being the case, the additional tax would arise "by reason of a matter contained in the return". While there is no reference to the return in the opinion, on any realistic evaluation of it, its purpose is to impose a liability for additional tax on the respondent by reason of the fact that he claimed relief in the return on the basis of a transaction which the nominated officer in 2007 opined was a tax avoidance transaction in respect of which he proposed to withdraw the relief."

29. On the basis of that argument, it is submitted on behalf of the respondent that in this case the respondent obtained relief pursuant to section 35 of the Finance Act, 1987 having complied with the provisions of the section. The claim for relief was contained in the return and was accompanied by a certificate issued by the company in the form required by the Revenue Commissioners. The relief was granted by reason of the return made and the documentation submitted with the return. Accordingly, the respondent submits that the same rationale that was applied by Laffoy J. in *Droog* applies in this case i.e. that the effect of the assessment is to impose a liability for additional tax on the respondent by reason of the fact that he claimed relief in his return in connection with an investment which has been found by the appellants, some ten years later, not to have complied with the requirements of section 35 of the Finance Act, 1987 and the certificate accompanying the return.

30. The respondent further submits that this exercise could only have been concluded by the appellant having made enquiries into the matter outside of the time limits permitted by section 956. Section 956(1)(c) provides for a time limit of four years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless the inspector has grounds for believing the return is insufficient owing to its having been completed in a fraudulent or negligent manner. It is common case that there was no fraud or neglect on the part of the respondent in this case.

31. The appellants submit in relation to this aspect of the case that there is no evidence that any enquiries or actions within section 956 were undertaken in relation to the respondent or his 1994/1995 return. The appellants further submit that this is another distinction between this case and *Droog* and a further reason while the Court should not follow *Droog* in determining these proceedings.

32. In relation to the submission by the appellants that section 481(19) permits the raising of an assessment (in the circumstances provided for therein) "at any time," counsel for the respondent submits that those words are in contrast to the very clear time limits prescribed by part 41, and that if the Oireachtas had intended that section 481(19) was to override the provisions of the self-assessment time limits contained in part 41 of the TCA, it would have done so expressly rather than relying on a vague and unclear phrase such as "at any time". Counsel refers to the decision of the Supreme Court in the case of *Twil Ltd. v. Kearney* [2001] 4 IR 476 in which case the Supreme Court, dealing with the same phrase in the context of landlord and tenant legislation referred to the "vagueness of the expression" and refused to give the phrase a literal interpretation on the grounds that it would have created a anomaly. In *Droog*, Laffoy J. held that the words "at any time" in section 811(4) of the TCA must be read as meaning at any time within the limitation period stipulated in section 955 and 956 of the TCA. She said:-

> "Such construction is entirely consistent with the plain meaning with the words used in s. 811, which are clear and unambiguous. It gives rise to no absurdity. On the contrary it is entirely consistent with the use of the expression "at any time" in s. 955, where it is used in section 955(1), albeit with the express saver for subs. (2) at the commencement of section 955(1)."

33. Insofar as there may be any ambiguity as between the words used in sections 950(2), 955 and 956 on the one hand and section 481(19) on the other, counsel for the respondents submitted that such ambiguity must be resolved in favour of the taxpayer. Counsel cited the decision of the Supreme Court in *Harris v. Quigley* [2006] 1 I.R. 165 where Geoghegan J. said:-

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

34. In more general terms, counsel for the respondent submitted that part 41 of the TCA introduced a code of self-assessment, together with binding time limits and certainty for taxpayers, similar to those introduced in Canada, New Zealand, the United States and Australia. It was submitted that the scheme is a balanced scheme imposing time limits both on the raising of returns by the Revenue Commissioners, and on the claims for refunds by taxpayers. Counsel drew attention to the notes for guidance of the appellants on the TCA which state the following in relation to section 950(2):-

> "except where expressly provided, the provisions of this part have primacy over any other provisions of the Tax Acts or Capital Gains Tax Acts. Generally, therefore the self-assessment provisions are not to be overruled by any other provision."

35. Counsel also drew attention to the statement of the Minister for Finance in the Dáil when introducing the four year time limit:-

> "Section 17, together with various other sections in the Bill provides for a general right of repayment of tax in relation to valid claims made within a four year period. These replace existing provisions on repayments where they exist. This will apply across all tax heads except custom duties which are a direct EU tax. The right of the Revenue to make assessments to tax and to pursue enquiries will also be limited to four years unless Revenue has grounds to suspect fraud or negligence for earlier years."

36. Finally, in relation to the submissions of the respondent, it is submitted that insofar as the appellants may rely upon the judgment of this Court in the case of *Fortune v. Revenue Commissioners* [2009] IEHC 28, that section 950(2) and consequently what counsel describes as the "overriding primacy" of self-assessment time limits, was not drawn to the attention of the Court in that case. Counsel submitted that "a point argued is a point not decided" and referred to the decision of *Laurentiu v. Minister for Justice* [1999]

4 I.R. 26 in this regard.

Decision of Appeal Commissioner
37. The appeal commissioner accepted the arguments put forward on behalf of the respondent, and did so in reliance on the decision of Laffoy J. in *Droog*. In his case stated he says:-

> "I further was of opinion that in any case the assessment had been raised by reason of a matter contained in the return since it had been raised by reason of the claim for relief contained in the return and the appellants' desire to withdraw the benefit of that relief in circumstances were they had deemed that the film company had not made the requisite investment for the purposes of section 35 of the Finance Act 1987/Section 481 of the TCA."

Accordingly, he allowed the appeal and determined that the assessment was void by reason of it having been made out of time.

Conclusion
38. There can be no doubt at all but that when, in 1987, the Oireachtas passed into law section 35(6) of the Finance Act of that year, that it intended that it would be open to the appellants to withdraw relief claimed under that section at any time, without being subject to any time limit in that regard, in the event that it is subsequently found (after relief has been given) that the taxpayer was not entitled to that relief. Similarly, there can be no doubt that in introducing the self-assessment code in part 41 of TCA 1997, the Oireachtas also intended to introduce time limits for the raising of tax assessments and claims for overpayment of tax. Taken by itself, section 35(6) of the 1997 Act (section 481(19) of the TCA) is indeed self explanatory and the interpretation of the section gives rise to no difficulty, as indeed O'Neill J. found in Fortune. It only gives rise to a difficulty or ambiguity when set against section 950(2) and the time limits provided for in sections 955(2) and 956(1)(c). The effect of these sections is to create a conflict between the words "notwithstanding anything in the Tax Acts" in section 481(19) and the words "except insofar as otherwise expressly provided" in section 950(2), and it is that conflict that gives rise to ambiguity not either of the sections read on a stand alone basis. The resolution to this case is to be found in the answers to two questions the first of which is: do the words "notwithstanding anything in the Tax Acts" contained in section 481(19) constitute an express disapplication of part 41 of the TCA, as provided for in section 950(2) of the TCA? This precise question was addressed by Laffoy J. in *Droog* in the passage referred to at paragraph 23 above. In short, in order to disapply part 41 of TCA or any of the provisions within part 41, it is necessary to do so by express reference to the sections and not using general language "notwithstanding any other provision of the Acts".

39. Having answered that question, the second question to be addressed is whether or not the time limit of four years prescribed by section 955(2) of the TCA applies i.e. does the assessment arise out of any matter contained in the return? Here again, I think the same rationale applied by Laffoy J. in *Droog* applies (para 28 supra). As in *Droog*, the only reasonable inference to be drawn in this case is that the intended outcome of the assessment (the equivalent of the opinion in *Droog*) was to claw back the relief claimed and obtained by the appellants in the return made by him in 1994/1995.

40. Laffoy J., in *Droog*, also found that there must have been enquiries made by the appellants outside the four year period stipulated by section 956, in that case she said:-

> "As counsel for the respondents submitted, the opinion could hardly have materialised on its own, without being preceded by enquiries into the claim for loss relief in the return."

I think the same must be the case here; it is difficult to see how the appellants would come by the information required to form the conclusion that the relief should not have been granted or that the conditions set out in the Film 3 Certificate had not been met, without making enquiries which must have been made outside the four year period prescribed by section 956. Indeed it is clear that the assessment arose out of a tax audit of the qualifying company to determine whether or not they met the criteria governing the relief granted. That audit must have been conducted by the Inspector for the purpose of satisfying himself as to the accuracy of a particular contained in the return (i.e. the accuracy of the Film 3 Certificate) as referred to in section 956(1)(b)(i) of the TCA.

41. Insofar as the decision in *Fortune* is concerned, the arguments made on behalf of the appellants in that case centred around:

> (1) the powers of the Revenue Commissioners to the supervise and decide if there was compliance with conditions outlined in the Ministers' certificate,
>
> (2) an argument that after eight years, the applicant in that case had a legitimate expectation that the relief accorded to him would not be withdrawn, and
>
> (3) an argument that there had been an inordinate and inexcusable delay on the part of the respondents in raising an assessment almost ten years after relief had been granted.

In deciding upon this last argument, O'Neill J. did make reference to the statutory time limits applicable under section 955 of the TCA, which for the purposes of that case was six years rather than four years. However, he makes no reference at all to section 950(2) and accordingly the case appears to have been decided without reference to the question as to whether or not section 481(19) of the TCA constituted an express disapplication of part 41 of the TCA. Laffoy J. makes no reference to *Fortune* in *Droog*, and so it appears that the only decision in relation to the priorities as between section 950(2) and section 481(19) of the TCA is that of Laffoy J. in *Droog.*

42. Accordingly I find that the Appeal Commissioner was correct in law in allowing the appeal and in determining that the assessment under appeal was void by reason of it having been made out of time.

Counsel for the appellants:

Anthony Aston SC

Aoife Goodman BL, instructed by Revenue Solicitors

Counsel for the respondents:

Ciaran Ramsay SC.