

**THE HIGH COURT  
BRENDAN O'ROURKE**

**2009 1254 JR**

**AND**

**APPLICANT**

**THE APPEAL COMMISSIONERS**

**AND**

**RESPONDENT**

**THE REVENUE COMMISSIONERS**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice John Hedigan delivered on the 1st day of July 2010**

**1. Introduction**

The applicant, Mr Brendan O'Rourke ("Mr O'Rourke") is seeking, among other reliefs, a declaration that he has a right of appeal against the Appeal Commissioners' ruling in relation to tax assessments pending the hearing of other grounds of appeal.

**2. Background and Facts**

On 1st February, 2006, the Notice Party, the Revenue Commissioners, issued income tax assessments against Mr. O'Rourke in respect of the tax years 1985-2001 and in the total sum of €15 million. Mr O'Rourke appealed on various grounds to the Respondent, the Appeal Commissioners, on foot of the assessments. Mr O'Rourke argued that a number of the assessments were issued outside the statutory time limit of 4 years, as under Sc. 924(2)(b) of the Taxes Consolidation Act 1997 (the "Act of 1997").

Having heard evidence and submissions, the Appeal Commissioners decided that for each of the years of assessment, 1985/86, 1986/86, 1987/88 (the pre self- assessment years), and 1988/89 to 2000/2001 (the self assessment years), the inspector of taxes was not precluded from making the relevant assessments.

It was immediately indicated on behalf of Mr. O'Rourke that he wished to appeal the decision of the Appeal Commissioners that the assessments were valid to the Circuit Court. On 28th October, 2009, the Appeal Commissioners ruled that they had made an interim ruling only and not a determination and that therefore Mr O'Rourke did not have a right of appeal to the Circuit Court.

Mr. O'Rourke contends that he has a right to appeal to the Circuit Court on the decision of the Appeal Commissioners in relation to the issue of whether the assessments were validly made. There is currently one appeal before the Appeal Commissioners in respect of each year of assessment, which appeals are pending before the Appeal Commissioners.

These proceedings concern the issue of whether Mr. O'Rourke may appeal to the Circuit Court a decision by the Appeal Commissioners on a preliminary issue while there are ongoing appeals in respect of which the Appeal Commissioners have made no determination. In other words the Court has been asked to consider whether the decision of the Appeal Commissioners that each assessment was valid can properly be the subject of an immediate right of appeal or whether any right of appeal arises only on determination by the Appeal Commissioners of the appeal against each assessment.

**3. The Relevant Statutory Provisions**

The proceedings are based on the provisions of the 1997 Act and specifically on Section 955(3) and 942 of the Act of 1997. Section 955 (3) of the 1997 Act provides as follows:-

"(3) 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."

Section 942 of the 1997 Act in relation to appeals to the Circuit Court provides as follows:-

"(1) Any person aggrieved by the determination of the Appeal Commissioners in any appeal against an assessment made on that person may...within 10 days after such determination, require that the appeal shall be reheard by the judge of the Circuit Court."

Determination of an appeal is defined in S. 950 of the Act of 1997 as "a determination by the Appeal Commissioners under section 933 (4), and includes an agreement referred to in section 933 (3) and an assessment becoming final and conclusive by virtue of section 933(6)". S. 933 (4) of the Act of 1997 provides:-

"All appeals against assessments to income tax or corporation tax shall be heard and determined by the Appeal Commissioners, and their determination on any such appeal shall be final and conclusive, unless the person assessed

requires that that person's appeal shall be reheard under section 942 or unless under the Tax Acts a case is required to be stated for the opinion of the High Court."

#### 4. The Applicant's Submissions

Mr. O'Rourke's argument may be broadly summarised as being that he has two distinct and separate rights of appeal regarding the assessments; first, he may challenge the validity of the assessment, as a discrete / interim appeal, under Sc. 955(3) (b) and/ or secondly he may appeal any amount or matter in the assessments and therefore its quantum under Sc. 933 of the Act of 1997.

In respect of both statutory rights of appeal, it was submitted that Mr O'Rourke is entitled to a rehearing before the Circuit Court under Sc. 942 of the Act of 1997. It was submitted on behalf of Mr. O'Rourke that in determining the issue that the assessments under appeal were valid, the Appeal Commissioners were making a determination under Sc. 933(4).

In addition to that argument, Counsel on behalf of Mr. O'Rourke suggested that any alleged right to appeal under Sc. 955 (3) (b) is separate and distinct from his right to appeal the quantum of the assessments and that he is entitled to an interim appeal. It was submitted that, based on the inclusion of Sc. 933(4) in the definition of "determination" of Sc. 950, the Oireachtas intended that a determination of the Appeal Commissioners on the grounds under Sc. 955(3) alone may be appealed to the Circuit Court.

#### 5. The Respondent's Submissions

The Appeal Commissioners argued that they did not make a final and conclusive determination of an appeal under Sc. 933 (4) of the Act of 1997 in determining that the inspector of taxes was not precluded from making the assessments. It was further submitted that in any event Mr. O'Rourke is not entitled to make an interim appeal on the determination on the validity of the assessments pending the hearing of other grounds of appeal.

It was submitted by the Appeal Commissioners that Mr. O'Rourke had not identified any statutory basis on which he might appeal a decision under Sc. 955(3) (b) of the 1997 Act. The Appeal Commissioners submitted that it is only when, and not before, the Appeal Commissioners give their determination on the assessments under appeal, that a right of appeal to the Circuit Court arises.

The Appeal Commissioners argued that an appeal before the Appeal Commissioners is not determined until the Appeal Commissioners either confirm or amend the assessment. It was submitted that it is only on determination of the appeal that a right of appeal to the Circuit Court arises. Counsel for the Appeal Commissioners refer the Court to the case of *State (Whelan) v Smidic* [1938] 1 I.R. 627. In finding in favour of the Revenue Commissioners in relation to the relevant statutory provision on determinations of the Special Commissioners, the predecessors to the Appeal Commissioners, Hanna J stated:-

"On the strict reading of the statute, an appeal by way of Case Stated can, in my opinion, only arise after a final determination of the appeal by the Commissioners. It may be that in some instances a Case has been stated on a matter of principle where the parties consented and the Special Commissioner acquiesced as a matter of convenience; but under sect. 149 of the Act of 1918 the option of the dissatisfied party to declare his dissatisfaction is "immediately after the determination of the appeal," and then within twenty-one days he can serve a notice asking for a Case Stated. The words of the section, in my opinion, preclude an application for a Case Stated as a matter of right on an intermediate ruling or decision which is not the determination of the appeal. This view is supported by the terms of sub-sect. 4 of sect. 149, which enacts that, notwithstanding that the Case has been stated or is pending, tax shall be paid in accordance with the assessment of the Commissioners. It shows that even if, after an interim determination of a matter of principle, there only remains a final computation, an assessment must be arrived at before it can be said that the Special Commissioner is functus officio. In my opinion, so long as the Special Commissioner is not functus officio he has control of the matter to revise or reopen any point, even where it is not a matter of discovering evidence that was not before him previously, but is merely a matter of a change of his own previous opinion upon fuller consideration."(Emphasis added)

Counsel for the Appeal Commissioners argued that on the authority of *Smidic*, the determination of the Appeal Commissioners is the determination to confirm, reduce or increase the assessment and that the position under *Smidic* is the same for appeals to the Circuit Court.

It was further submitted there are two possible outcomes from Sc.955 (3). If the Appeal Commissioners determine that the inspector was precluded from raising the assessment, the assessment is void. If the Appeal Commissioners conclude that the inspector was not so precluded, the assessment shall stand save to the extent that any amount or matter in that assessment is the subject of a valid appeal upon any other grounds. In other words, Sc. 955(3) simply provided an express ground on which a tax payer might appeal an assessment and that there can, at one time, only be one valid appeal in respect of an assessment.

In relation to the argument that there is a separate appeal on the determination of quantum, it was submitted that as the function of the Appeal Commissioners is to confirm or amend an assessment, to that extent all appeals against assessment are concerned with quantum, and as such there can be no appeal separate to an appeal in relation to quantum. In relation to the pre-self assessment years, it was submitted that the position is equally clear and unambiguous. Sc. 924 (2) (e) provides:

"An objection to the making of an assessment or additional first assessment on the ground that the time limited for the making of that assessment has expired shall only be made on appeal against the assessment."

#### 6. The Court's Analysis

The wording of Sc. 942 is clear: it speaks of the appeal against an assessment and there is only one appeal. Mr. O'Rourke's contention that Sc.955(3)and/or Sc. 924 confers on him a right of appeal that is separate and distinct from the usual form of appeal is not supported by the provisions of either of those sections. In relation to the provisions of Sc.955 (3), that section provide the taxpayer with an express ground of appeal, while drawing a distinction between the grounds of appeal and the appeal itself. The section expressly recognises that an appeal against an assessment may be made on many grounds and simply confers an express right to challenge an assessment that had been raised under Sc. 955 on the grounds specified in Sc. 955(3) that is that the chargeable person considers that the inspector was precluded from making the assessment. Sc. 955(3) plainly provides that if the Appeal Commissioners determine that the assessment was validly made than the assessment stands save to the extent that any amount or matter in that assessment is the subject of a valid appeal on any other grounds.

Therefore there is a single appeal only and this lies upon determination of the appeal.

To summarise, tax appeals are a creature of statute and the jurisdiction and general powers of the Appeal Commissioners are conferred by statute. An analysis of the provisions governing those appeals confirms that in respect of any individual assessment there is a single appeal, which appeal is determined (and can only be determined) by the Appeal Commissioners.

It is clear that the legislative intention favours the efficient administration of tax appeals; there should be a single right of appeal at the end of the hearing before the Appeals Commissioners. For the reasons as outlined by the Appeal Commissioners, there is only one appeal, though there maybe a number of grounds of appeal. The implication of Mr. O'Rourke's submissions that a tax payer has a right of appeal on a preliminary issue is that in a complex case, where there might be multiple preliminary issues to be decided, an issue could be subject to appeal during the course of the hearing before the Appeal Commissioners resulting in multiple appeals arising in the same case. The consequent delay and loss that would result would be unfair, oppressive and highly inefficient.

## **7. Conclusion**

It is clear from the above analysis that Section 942 precludes interim appeals on decisions of the Appeal Commissioners. The contention that any preliminary issue might be the subject of an interim ruling pending a determination of the Appeal Commissioners is not supported by the statutory provisions on appeal and would lead if allowed to a high level of inefficiency in the operation of the appeal process to the great prejudice of all the parties involved. For these reasons, the applicant is not entitled to the relief sought.