THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number: [2021] IECA 115
Appeal Number: 2019/369

Whelan J.
Ní Raifeartaigh J.
Power J.

BETWEEN/

MICHAEL GLADNEY

RESPONDENT

- AND –

THOMAS COLOE

APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 23rd day of April 2021

Introduction

1. This is an appeal from the *ex tempore* decision and consequent order of Cross J. made in the High Court on 8 July 2019 granting summary judgment against the appellant in the sum of €104,147.82 (in respect of outstanding capital gains tax ("CGT"), income tax and VAT together with interest). The said order was perfected on 8 July 2019.

Background

2. The summary summons issued on 24 June 2016 – over three years prior to the hearing. It sought payment of sums totalling over €105,000. It was pleaded that full particulars of the sums claimed had already been furnished to the appellant in writing and that the said sums had been duly demanded prior to the institution of the proceedings. The particulars pleaded included a CGT

return for the year 2013 totalling, with interest, over €26,000. Two income tax returns were referred to for the years 2012 and 2013, amounting, with interest, to over €44,000. The balance of the claim pertained to VAT returns for the period from 1 January 2012 to 30 April 2015, inclusive. It is apparent that following the raising of the said assessments the appellant never sought to appeal any of them within the time allowed by the relevant tax statutes. As of the date of institution of the summary proceedings the appellant had taken no step to appeal any of the estimates in the assessments and he was clearly out of time for doing so pursuant to the relevant tax statutes.

3. The notice of motion seeking summary judgment issued on 19 July 2016 and was grounded on the affidavit of James Deery of the Office of the Revenue Commissioners. This affidavit deposed that the sum claimed was less than the sum originally claimed by reason of payments which had been credited to the appellant since the institution of the proceedings. The deponent set out the sums then due and his belief that there was no defence to the claim.

4. In his replying affidavit, sworn on 17 October 2016, the appellant deposed at para. 3, "I would like to appeal many of the factors of the final estimate and bill forwarded to me recently under the following listed categories" and he outlined details in regard to the CGT assessment, income tax assessments and VAT assessments. At para. 4 he deposed, "I say that this audit is not treating me fairly and I need time to appeal."

5. With regard to the CGT assessment, the appellant asserted that same related to a property in Dublin which he was legally advised to sign over to a relative in the context of other legal proceedings. He claimed that the said property was valued at £29,000 when he purchased it in 1990 and that he made no profit in relation to same. He asserted that the only profit that will be made was when it would be sold in the future and he would not gain financially from such a sale. He claimed not to have resided in the property since 1996 and that a third party had a right of residence for life over same.

6. He deposed that, in the context of a Revenue audit, almost 90% of the expenses he submitted on the advice of his accountant had been disallowed. He asserted that the expenses claimed were legitimate and directly connected with his business:-

> "I am a self-employed man with legitimate expenses to trade and the fact that I am being denied the right [*sic*] enter these expenses is being appealed".

He looked for time to have this independently audited at his own expense.

7. Regarding the claim for unpaid VAT in the period 2012/2013, he deposed that Revenue had failed to take payments he had made to the County Sheriff's Office during these periods into consideration and withdrew many legitimate expenses used to conduct his business at the time. Again he wished to have this looked at independently by an accountant. He referred to himself as "a self-employed business man".

8. He also referred to having suffered a brain injury consequent upon a fall since the audit and having gone deaf in one ear with substantial deafness in the other ear.

9. An affidavit was sworn on 12 December 2016 by Conor Robinson, solicitor with CB Robinson & Co. Solicitors, who was then on record for the appellant. He had examined the appellant's books and a report which had been obtained from Doyle Murtagh & Co. Chartered Certified Accountants and Registered Auditors for the benefit of the appellant. He exhibited the report of the auditors.

10. Mr. Robinson averred that it was accepted that the appellant failed to return any self-assessment CGT for the disposal of his home. This failure was characterised as arising in consequence of his misunderstanding about the availability to him of statutory exemptions. The appellant had been informed that he was required to make a self-assessment return and made a return showing the value of the property as €138,000. Revenue appears to have initially raised an assessment based on this market value with 42 months of occupation as a principal private residence attributed to the appellant. Revenue corresponded further on 11 July 2016, setting out a

revised computation showing a market value of €170,000 less €17,000 attributable to a right of residence for life, with allowance for 72 months of occupation by the appellant as his principal private residence. The revised CGT liability was for €26,002.68. Mr. Robinson deposed that the revised market value appears to have been taken from a valuation arranged for certain court proceedings and not for the purposes of CGT. It was contended that if Revenue intended to rely on this increased valuation, there could be no finality to the proceedings as it would likely later issue another summons for the additional liability due on the increased revised computation of CGT. Revenue had only provided for 42 months of occupation in the summary summons and not 72 months which is shown on its revised computation, it was contended.

11. At para. 9 Mr. Robinson contended that the appellant was:-

> "…a self-employed contractor providing music/DJ services to the entertainment industry in Dublin and around the country. As part of his trade [he] incurs expenses which he states are commonly allowed to other contractors such as him as deductible expenses against profits."

It was contended that Revenue had not informed the appellant or his agent "as to what expenses were disallowed and why." It was asserted that the appellant had informed the relevant Revenue inspector that he wanted to appeal and he was advised not to and that as a consequence of this he failed to lodge his appeal within 30 days of the assessment. He exhibited in this regard an email dated 23 September 2016 from Brian Bradshaw of Salus Financial (the appellant's agent at the time) summarising what a Revenue officer had apparently said to him concerning an appeal, namely "[h]e maintains that there are no grounds for an appeal, as to put in an appeal you would have to be arguing on a point of law and the law is very much with him in relation to the taxes" and that "[a]ll he needs to do is put forward that you were paying estimates and that 'nil' returns were submitted, and you would be shot down from the start".

12. In my view that comment is nothing more than an expression by the Revenue official in question to the appellant's financial adviser of a point of view as to the prospects of such an appeal succeeding. There is absolutely no basis for asserting that the comment (assuming that it was correctly recalled and related accurately in the email) could be fairly characterised as advice not to appeal. No official of the Revenue Commissioners was engaged in providing advice to the appellant on the evidence before this court. The advice was being supplied to the appellant at various times throughout the proceedings by Conor Robinson, solicitor, Doyle Murtagh & Co. Chartered Certified Accountants and Registered Auditors, Brian Bradshaw of Salus Financial and Michael O'Reilly, accountant.

13. An issue was also raised asserting discrepancies in figures and cheques that had been sent to Revenue. Mr. Robinson sought to be provided with a statement by Revenue setting out all liabilities and payments received by them so as to ensure that all the payments made by the appellant had been properly allocated.

14. An affidavit was sworn by Alice McGreal, officer of the Revenue Commissioners, on 1 February 2017. She went through the various figures and exhibited notes of telephone calls and of a meeting on 6 October 2016 with the appellant. Brian Bradshaw, agent of the appellant, was present as well as Eric Gregory from the Revenue Commissioners. The note records that the liabilities were outlined together with interest and penalties. In response to a suggestion that the appellant was going to appeal the figures, it was opined that he would have to submit an application for late appeal and provide an explanation for why he did not make the appeal within the time limits. It was explained to the appellant that travel to and from work was not an allowable expense, neither were meals, house insurance or satellite TV – all of which had been claimed by the appellant as expenses.

15. The appellant filed his second affidavit on 12 October 2018. He alleged that Revenue had failed to comply with High Court Practice Direction HC54. He claimed to have retained a chartered accountant to engage with Revenue "on foot of findings that could reduce my tax liabilities to nil".

16. The appellant deposed at para. 3: -

> "…On the 12th September 2018, the notice of late appeal was completed as directed by the Appeal Commissioners. The matter will be forthwith listed for hearing."

An argument was advanced at para. 4 of the said affidavit that Michael Gladney was no longer an officer of the Revenue Commissioners and therefore not "the appropriate person to pursue the claim as indorsed in the summary summons". An order was sought striking out the proceedings and refusing final judgment or, in the alternative, an order directing the proceedings be remitted to plenary hearing if they were not to be struck out. Additionally, the appellant sought an order for "the sum of €1,000,000 by way of a counterclaim on the part of the defendant against the plaintiff on foot of a compensatory amount and to include damages and aggravated damages" together with costs.

17. Subsequent to their institution, the summary proceedings were adjourned either in the Master's Court or by the High Court on about sixteen separate occasions. In Michaelmas Term 2018 the appellant sought an adjournment from the High Court so that the application to the Tax Appeals Commission for a late appeal could be determined. That adjournment was granted. The respondent did not oppose the application. This in my view represents reasonable conduct on Revenue's part and does not give rise to any acquiescence to the filing of a late appeal as was suggested by the appellant in the course of the appeal hearing.

Refusal of Tax Appeals Commission to accept the appeal

18. By letter dated 12 June 2019 addressed to the appellant's current tax adviser, Mr. Michael O'Reilly of Rathfarnham, the application to accept a late appeal was refused by the Tax Appeals Commission. The letter stated:-

> "The appeal is not a valid appeal as it does not relate to an appealable matter – in accordance with section 949P, enforcement action must be complete before the Tax Appeals Commission can accept a valid appeal. You may reengage with the Tax Appeals Commission once enforcement action is complete, in accordance with section 949O".

The matter came back before the High Court and the relief sought in the summary summons was granted.

The hearing

19. The appellant was self-represented at the hearing before the High Court on 8 July 2019. The appellant does not appear to have disputed the position advanced that on about sixteen separate occasions adjournments had been sought on two separate bases by him; firstly, that he wished to engage a personal insolvency practitioner and, secondly, that he wished to appeal some of the tax assessments made.

20. In the course of the hearing the appellant denied awareness of or receipt of the aforesaid letter dated 12 June 2019 from the Tax Appeals Commission communicating their decision to refuse to accept his late appeal. He asserted he had not been told that the appeal was refused. Page 2 of the transcript records:-

> "Mr. Coloe: Judge, I didn't receive a letter from the appeals, and that's why I came here myself expecting for it to be adjourned…
>
> …
>
> Mr. Coloe: Judge, I didn't receive the letter to get advice on what to do, I didn't receive the letter saying that the appeal was refused. I still haven't received it, not my accountant or nobody.
>
> …
>
> Mr. Coloe: Judge, I wasn't told the appeal was refused. We had no knowledge of this…" (lines 9 to 24)

Page 4 of the transcript records the following:-

> "Judge: …your representative was written to on the 12th of June to tell you the appeal –
>
> Mr. Coloe: He never got it either, Judge. He hasn't had – not on notice of that letter either, neither of us have.
>
> Judge: I must assume that he was [written to]…
>
> …
>
> Mr Coloe: …we didn't get that letter.
>
> …
>
> Mr Coloe: He didn't receive it, Judge." (lines 8 to 29)

It is unclear whether Mr. O'Reilly was present in court and, if not, how Mr. Coloe was in a position to confidently assert when the issue arose during the course of the hearing that the letter of 12 June 2019 from the Tax Appeals Commission refusing to accept the application for a late appeal had not been received by Mr. O'Reilly as of 8 July 2019. The letter was addressed to his tax adviser, Mr. Michael O'Reilly, rather than to Mr. Coloe directly.

21. The appellant further asserted that he was engaging with the Workplace Relations Commission. No details of that engagement or of any relevant decision were divulged either in the High Court or during the course of the appeal hearing in this court.

22. The judge read out the key terms of the letter of 12 June 2019 at pp. 4 and 5 of the transcript:-

> "The appeal is not valid as it doesn't relate to an appealable matter. In accordance with section 949P, enforcement must be completed before the Tax Appeals Commissioner can accept a valid appeal. You may re-engage with [the] Appeals Commissioner once the enforcement action is completed in accordance with section – in other words…– that once I make a decision, you can re-engage with the Commissioner…" (page 4, line 30 to page 5, line 1)

23. It was clarified on behalf of the respondent that post-judgment engagement with the Tax Appeals Commission would be confined to how the payments in respect of the liability would be structured. The trial judge determined: –

> "…I don't see any answer here in relation to the judgment and I am going to mark a judgment of €104,857.41 and costs against you…" (page 5, lines 7 to 8).

Following a clarification that the sum sought, taking into account payments made by the appellant, was €104,147.82, the trial judge further reiterated the position at p. 6, lines 4 to 8: -

> "…they have rejected the appeal that you've made, and I must accept that to be the case, and I'm giving judgment in the sum of €104,147.82. And your accountant should now see if there's anything that can be done in relation to structuring of the payments…I'm giving you time to pay in the circumstances because I don't see any defence as being postulated by you in relation to the matter."

The appeal

24. The key grounds of appeal argued by the appellant were the following:

i. Michael Gladney is the incorrect plaintiff since he ceased to be the Collector General after the institution of the proceedings and prior to the hearing;

ii. it was denied that the appellant was "a self-employed person" from 27 January 2004 to 19 January 2019;

iii. it was contended that the appellant "did de-register as a self-employed taxpayer effective from the 1st January 2004 to the 31st December, 2018";

iv. it was argued that a Revenue audit is still ongoing and has not concluded such that judgment against the appellant was precluded; that "[w]here conclusions are determined by the Revenue Commissioners, the applicant has a legal right of appeal against the conclusions reached or parts of such conclusions as the applicant so determines"; and,

v. it was contended that there had been non-compliance by the respondent with practice direction HC54.

25. In a submission dated 2 March 2021, the appellant set out in detail arguments concerning his employment status, contending that he was an employee of certain named companies "and never a self-employed individual as per wording in the Revenue Code of Practice".

26. The Revenue Commissioners opposed the appeal in a written respondent's notice and in a written submission dated 5 March 2021.

27. The respondent contended that the continuance of pending proceedings brought in the name of the Collector General by a successor Collector General is fully addressed by s. 960N of the Taxes Consolidation Act 1997, on which provision he relied.

28. With regard to the contention that the appellant is not to be treated as "a self-employed person" and that he had "de-registered" as such, it was argued by the respondent that the appellant was attempting to appeal the assessment raised by the Revenue Commissioners and that to do so is impermissible.

Discussion

The role of the court in tax cases

29. The extent of the issues that may be appropriately raised by a taxpayer outside the statutory revenue appeals process was substantially clarified by the Supreme Court decision in *Deighan v. Hearne* [1990] 1 I.R. 499. In that case the taxpayer had been the subject of assessments and had failed to appeal same in time in accordance with the relevant statutory provisions. As such, the said assessments had become "final and conclusive" pursuant to statute. As part of his claim the appellant had challenged the constitutionality of the relevant statutory provisions, contending that the legislation vested in the Inspector of Taxes functions which constituted the administration of justice contrary to Article 34 of the Constitution and further that the powers vested in the Inspector of Taxes were "harsh and unnecessarily stringent powers which constitute a failure, in breach of

Article 40 of the Constitution, of the State to protect the individual citizen's right of property" (p. 504). Finlay C.J. focused firstly on the constitutional challenge and thereafter on the non-constitutional issues raised in the appeal.

30. In the High Court Murphy J. had concluded that the powers vested in the Inspector of Taxes to make an assessment in default of a return by the taxpayer did not impose any binding liability on anybody unless and until it became final and conclusive by reason of a failure to appeal. On appeal, the Supreme Court concurred with that view.

31. The Supreme Court recalled that, in its earlier decision in *Kennedy v. Hearne* [1988] I.R. 481, it had rejected a challenge to the constitutional validity of a provision of the Finance Act 1968 which entitled the Revenue Commissioners to issue to the Sheriff a certificate of default in payment. Finlay C.J. then observed: -

> "This Court in its decision in [*Kennedy*] rejected that challenge on the following grounds:-
>
> 1. There was not, at the date of the issue of the certificate to the Sheriff a justiciable controversy about whether any tax had been paid in which the Collector General decided in favour of one contender against another.
>
> 2. The decision of the Collector General to issue a certificate did not impose a liability on the taxpayer nor affect any of his rights, those being affected by his default in payment of a levied tax.
>
> 3. The issue of the certificate did not invade or oust any of the functions vested in the judges by Article 34 of the Constitution since even if a certificate were issued to the sheriff, as it was in that case, in error, the courts were empowered to intervene immediately, as they did, to resolve the issue between the taxpayer and the Collector General." (p. 505)

32. At p. 504 Finlay C.J. had observed: -

> "There being no justiciable controversy between the taxpayer and the Revenue Commissioners, the exercise by the Inspector of Taxes of these powers is not an administration of justice."

He noted also that the decision in *Kennedy v. Hearne* had set out the principles to be applied in determining what is and is not, in the context of a Revenue claim, the administration of justice. It is noteworthy that the Chief Justice further attached significant weight to the right of the taxpayer to appeal, observing at p. 504: –

> "The Court is satisfied that, having regard to the right of the taxpayer to appeal against an assessment and his right, if an assessment were made *ultra vires* the powers vested in the Inspector or upon the basis of an arbitrary or capricious premise, to challenge that by way of judicial review, the power vested in the Inspector to make an assessment and, if no appeal is brought against that, the subsequent provisions that it should then become final and conclusive do not vest in the Inspector powers which can be considered unjustly harsh nor does it constitute any failure to protect the rights of the taxpayer."

33. The Chief Justice further observed that in the previous decision of *McLoughlin v. Tuite* [1989] I.R. 82 the Supreme Court had: -

> "…indicated the importance within the constitutional framework of the revenues of the State and that has bearing upon the powers properly and necessarily vested in the Inspector of Taxes in this context."

34. In *Deighan v. Hearne* the taxpayer had also appealed the decision of the High Court judge wherein he declined to try as an issue of fact whether, during the periods in respect of which the assessments were made in relation to him, the plaintiff was carrying on business as was contended by the Revenue Commissioners. In the High Court Murphy J. had held that, having regard to the provisions of the income tax legislation and the procedure established thereunder for the assessment in default of the making of returns, which he had outlined in the judgment, the court

could only intervene to set aside or to vary an assessment otherwise than under the procedure provided by the Income Tax Acts if it were established by the taxpayer either that the procedure carried out was *ultra vires* the statutory provisions or that one or other of those statutory provisions was invalid having regard to the provisions of the Constitution. The Supreme Court held that the decision of Murphy J. was correct.

35. As in the instant appeal, the taxpayer in *Deighan v. Hearne* had never sought to challenge any alleged *ultra vires* determination or step on the part of the Revenue Commissioners by seeking judicial review which would have been the appropriate legal step.

36. The Supreme Court decision makes clear that the process whereby a taxpayer may contest an assessment carried out by the Revenue Commissioners outside of the statutory code is very narrowly confined.

37. Gilligan J. in *T.J. v. The Criminal Assets Bureau* [2008] IEHC 168, in following that approach, noted that:-

> "50. The whole basis of the Irish taxation system is developed on the premise of self assessment. …The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person…"

38. I glean from that decision the following factors of relevance to this appeal:

i. the Irish taxation system is based on the premise of self-assessment;

ii. a taxpayer is best placed to prepare a computation required for self-assessment on the basis of any income and/or gains that arose in the relevant tax period;

iii. the basis of self-assessment would be undermined if, having made a return which was not accepted, a taxpayer was entitled to access all relevant information that was available to the Revenue Commissioners;

iv. a taxpayer has the right of appeal to the Tax Appeals Commission;

v. judicial review or a constitutional challenge are available where it is asserted that a measure is *ultra vires* or a provision unconstitutional;

vi. this ensures that a taxpayer has adequate fair procedures and safeguards in position in the event of any prejudice arising; and,

vii. the Customer Service Charter of the Revenue Commissioners provides that a taxpayer will be given all necessary information and all reasonable assistance to enable him to understand his tax obligations. The Charter does not require the tax authorities to advise a taxpayer of the entire nature and background information available to them.

In the present case, there is no suggestion that Mr. Coloe did not understand his tax obligations.

39. In *Gladney v. Di Murro* [2017] IEHC 100, a case where the taxpayer disputed assessments in respect of income tax, Hunt J. considered the scope of matters that might appropriately be raised by a taxpayer in response to an application for summary judgment, noting a sharp distinction between the court's approach in ordinary summary judgment proceedings on the one hand and those brought by Revenue on the other, observing at para. 22: -

> "In my view, the defendant in this case is attempting to do precisely that which was found to be impermissible by the Supreme Court. The points of defence raised by the defendant pertain to the form of the assessment, the timing thereof, together with the correctness of the sum claimed and the availability of double tax relief in respect of payments made to the Italian tax authorities. Determination of each of these matters would require findings of fact relating the assessment raised by the Inspector, and therefore they lie squarely within the limitation identified by the Supreme Court and may only be raised on appeal to the specialist tribunal constituted for that purpose, or to the courts where available. …It is also of considerable significance in this case that before attempting to raise such matters by way

> of defence to a claim for summary judgment, the defendant made no effort to avail of any of the statutory appeal procedures available to him…"

Hunt J. considered that:-

> "…nobody is better placed than the taxpayer himself to know what income was received or what gains were made…" (para. 24)

Hunt J. continued:-

> "The Oireachtas has determined that such factual disputes ought to be determined through the extensive appellate procedure described by Gilligan J. [in *T.J. v. The Criminal Assets Bureau*], and in my view it is not in the public interest that disgruntled recipients of assessments should be permitted to delay contesting matters of dispute pertaining to either the existence or extent of a liability to tax until the point where the Revenue has moved to enforcement procedures…" (para. 25)

Hunt J. also expressed the view that the ambit of matters that might be properly raised by a taxpayer in an application for summary judgment had been "conclusively determined" by the Supreme Court in *Deighan v. Hearne*. Whether that view is correct does not have to be determined in this appeal.

40. In the High Court decision in *Gladney v. McGregor* [2020] IEHC 496 Hyland J., having considered the above authorities, also considered a further decision relevant to VAT assessments and made the following observations:-

> "30. …the court was dealing in each case with income tax statutes although the statements of principle identified above clearly go well beyond income tax and extend to tax collection generally. However, in *Gladney v. Daly* [2017] IEHC 317, Eager J. was considering an application for summary judgment in respect of a VAT assessment. In reviewing the case law and referencing s. 111 of the Value Added Tax Consolidation Act 2010 (the same version as is at issue here), the court held as follows:

> ‘The Court accepts and is bound by the principle of the Supreme Court in *Michael Deighan v. Hearne and Others* [1990] 1 I.R. 499 in that the Inspector of Taxes has a power vested in him to make an assessment, and if the Inspector raises an assessment and the applicant does not appeal within time, the only way that the court could intervene to set aside or vary the assessment otherwise than under the procedure provided by the Income Tax Acts would be if it were established that either the procedure carried out was *ultra vires* to the statutory provisions, or that one or other of those statutory provisions was invalid, having regard to the provisions of the Constitution.’
>
> 31. That line of case law (not contested by the defendant) makes it clear that defences to notices of assessment must be made exclusively within the statutory mechanism provided…”

I agree with that analysis which correctly identifies the core statements of principle to be derived from the relevant jurisprudence. Those principles apply to tax collection generally.

Title of plaintiff/respondent

41. At the date of institution of the within proceedings on 24 June 2016, the named plaintiff Michael Gladney was the Collector General of the Revenue Commissioners. His tenure thereafter ceased prior to the date of the hearing and he was replaced as Collector General by Joseph Howley on 5 March 2018.

42. The provisions of s. 960N(1) and (2) of the Taxes Consolidation Act 1997 comprehensively address such an eventuality, providing: -

> “960N Continuance of pending proceedings and evidence in proceedings
>
> (1) Where the Collector-General has instituted proceedings under section 960I(1) or 960M(1) for the recovery of tax or any balance of tax and, while such proceedings are pending, such Collector-General ceases for any reason to hold that office,

> the proceedings may be continued in the name of that Collector-General by any person (in this section referred to as the 'successor') duly appointed to collect such tax in succession to that Collector-General or any subsequent Collector-General.
>
> (2) In any case where subsection (1) applies, the successor shall inform the person or persons against whom the proceedings concerned are pending that those proceedings are being so continued and, on service of such notice, notwithstanding any rule of court, it shall not be necessary for the successor to obtain an order of court substituting him or her for the person who has instituted or continued proceedings."

The relevant notice was served pursuant to s. 960N(2) on 8 May 2018 under cover of letter of 8 May 2018 on the appellant's then solicitor and, further, same was delivered to the Registrar of the High Court for their attention.

43. In his notice of appeal, the appellant argued that the plaintiff named in the summary summons, Michael Gladney, was no longer an officer of the Revenue Commissioners and that he "was not legally entitled to represent the plaintiff further in the matter"; that no application had been brought by the respondent to amend the title to the proceedings, and that Michael Gladney could not be called upon by the plaintiff in the High Court proceedings or the respondent in the Court of Appeal proceedings to give evidence as he no longer has access to the files of the Revenue Commissioners.

44. The said point is wholly unmeritorious and does not constitute a good ground of appeal. Once the newly appointed Collector General as successor to Michael Gladney expressly invoked the provisions of s. 960N of the Taxes Consolidation Act 1997, as Mr. Joseph Howley demonstrably did on 8 May 2018, and furnished the said information to the appellant against whom the proceedings were pending at the time, Mr. Joseph Howley was, without more, entitled to continue the proceedings in the name of Michael Gladney.

45. The tax legislation including the Taxes Consolidation Act 1997, as amended, in many material respects constitutes a self-contained code. That includes in relation to the procedures governing the continuance of pending proceedings where an incumbent Collector General ceases to hold office. In that regard the statute demonstrably operates wholly separately from or *dehors* and takes precedence over the Rules of the Superior Courts such that procedural applications that might otherwise conventionally be required to be brought by a party where an event occurs after the commencement of proceedings causing a change or transmission of interest or liability, such as pursuant to O. 17 of the Rules of the Superior Courts, simply do not arise.

Assertion that Revenue audit is "ongoing"

46. It appears clear that strictly speaking the audit investigation has not closed and remains continuing. However that needs to be considered in its context. It was argued by counsel on behalf of the respondent that the appellant's contention disregards how audits commenced by the Revenue Commissioners are generally brought to a conclusion. Normally, at the conclusion of the audit process the taxpayer is requested to sign a document which states the outstanding tax together with any interest or penalties determined to be due. Insofar as the Revenue Commissioners are concerned at the conclusion of the audit, they were clear as to the sums due and owing by the appellant in respect of taxes.

47. The sole outstanding step was that the appellant had not signed off on Revenue's determination. The appellant has declined to sign the document. On behalf of Revenue, it was contended that a taxpayer cannot use his own failure to sign a form to maintain a position that the audit is incomplete and that no tax is due and owing. I am satisfied that view is correct.

48. I adopt the extract from *Gladney v. Forte* [2019] IECA 228 where Birmingham P. observed:-

> "14. …The fact that the Revenue Commissioners kept their investigation open until the conclusion of proceedings in the High Court does not, in my view, affect the validity of the Notices of Assessment in any way."

The decision of the appellant not to sign the audit is not a basis in all the circumstances of this case which affords him a good ground of appeal. In such circumstances I am satisfied that there is not a pending audit being actively engaged with or requiring active consideration on the part of the respondent, the outcome of which could materially alter the liability of the appellant and accordingly this ground of appeal must fail.

Decision of Tax Appeals Commission to refuse to accept a late appeal

49. The Tax Appeals Commission was established pursuant to the Finance (Tax Appeals) Act 2015 on 21 March 2016. It is not a party to these proceedings. Section 10 of the said Act provides:-

> "Independence
>
> Subject to this Act, the Commission and its members shall be independent in the performance of their functions."

50. As was observed by Murray J. in the judgment of this court in *Lee v. The Revenue Commissioners* [2021] IECA 18:-

> "20. …The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the [Taxes Consolidation Act 1997], and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the [Taxes Consolidation Act 1997] or must arise by necessary implication from the terms of that legislation."

He also noted:-

> "22. As explained by Lord Dunedin in *Whitney v. Inland Revenue Commissioners* [1926] A.C. 37, at p. 52 there are three stages in the imposition of a tax – the declaration of liability, the assessment and the methods of recovery. The liability is declared by statute, which determines what persons are liable in respect of which property. The assessment

particularises the exact sum which a person has to pay in the light of the applicable statutory charge.

23. That essential structure is maintained in the [Taxes Consolidation Act 1997]. For chargeable periods prior to 2013, Part 39 of the Act provides for the issuing, by the Inspector, of assessments either on foot of returns made by a taxpayer or in default thereof. These are directed to the sums the Inspector determines 'ought to be charged'. The 'charge' together with the Inspector's opinion thus described define the assessment. Section 12 declares that income tax shall, subject to the provisions of the Income Tax Acts, 'be charged in respect of all property, profits or gains' described or comprised in the Schedules contained in the sections identified in the provision and in accordance with the provisions of the Income Tax Acts applicable to those Schedules. Section 15 uses similar language to specify the rate of tax, providing that the tax 'shall be charged for each year of assessment at the rate of tax specified' in the Table to the Act.

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

> '(a) each **amount or matter in the assessment** or amended assessment with which the chargeable person is aggrieved, and
>
> (b) the grounds in detail of the chargeable person's appeal as respects **each such amount or matter**.'" (emphasis in original)

51. It is clear that subsequent to the institution of the within proceedings in 2016 and long out of time the appellant was afforded an opportunity to appeal the assessments on the part of the

Revenue Commissioners. That process came to a conclusion on 12 June 2019 when the Tax Appeals Commission notified the appellant's tax adviser in writing that his appeal was rejected for the reasons stated in the said communication. Neither the High Court nor this court has any function now in compelling the Tax Appeals Commission to accept such a late appeal. The remedy of judicial review was available to Mr. Coloe if the facts had warranted availing of it. No credible reason was identified by the appellant for his failure to appeal any of the various assessments in a timely manner as provided for under the relevant statutory regime.

52. As the Supreme Court has frequently reiterated, a public law decision maker is obliged to give reasons for decisions made. With regard to the Tax Appeals Commission's duty to provide reasons, I note that s. 949AJ of the Taxes Consolidation Act 1997, as inserted by the Finance (Tax Appeals) Act 2015, provides:-

> "…
>
> (6) For the purpose of the notification referred to in subsection (5), a determination shall comprise—
>
> (a) the determination,
>
> (b) a statement of the Appeal Commissioners' material findings of fact,
>
> (c) **a statement of the reasons for the determination**,
>
> (d) the name of the appellant, and
>
> (e) the date on which the determination was made." (emphasis added)

The letter that issued placed reliance on s. 949P of the Taxes Consolidation Act 1997, as inserted by s. 34 of the Finance (Tax Appeals) Act 2015, as the basis for its decision. Section 949P(1) provides:-

> "(1) Where action for the recovery of any tax has been taken by means of the institution of proceedings in any court or the issue of a certificate under section 960L, as the case may

be, the Appeal Commissioners shall not accept a late appeal in relation to the tax until such action has been completed."

The terms of this subsection are clear and there can be no doubt as to the reason for the Tax Appeals Commission's rejection of the appellant's application to accept a late appeal.

53. The Tax Appeals Commission is not a party to these proceedings. Had the appellant been dissatisfied with any aspect of the decision, including the quality of reasoning provided by the Tax Appeals Commission in its determination, as embodied in the letter of 12 June 2019, which he demonstrably knew about at the latest on 8 July 2019, then he could have availed of judicial review to challenge the validity of same. He did not do so.

54. The appellant's primary grievance was that the Tax Appeals Commission did not embark on an assessment of the merits of his appeal. As a result, he contended, his tax affairs are void of a tangible, or any, reply to his inquiries, which he contended constitutes a denial of "his basic constitutional rights as set out by the Oireachtas of this country" and a "gross and serious injustice". He sought declarations of unconstitutionality and incompatibility with the European Convention on Human Rights, although he did not identify any specific provisions of either which he suggests might be infringed. I am satisfied as a matter of law that, in circumstances such as obtain in the instant case, a challenge to a revenue assessment was only available (a) in the context of a constitutional challenge to a particular provision of the tax code or (b) by way of judicial review – neither of which were sought by the appellant pursuant to the Rules of the Superior Courts.

55. Although the appellant complains that the Tax Appeals Commission did not assess the merits of his late appeal application, in circumstances where the appellant has not challenged the constitutionality of s. 949P of the Taxes Consolidation Act 1997, I do not see any legitimate basis to impugn the refusal of the Tax Appeals Commission to accept the appellant's application for a late appeal in the within proceedings.

The status of the appellant as a self-employed person

56. The appellant is a litigant in person. As explained above, issues of fact fall to be determined within the tax appeal mechanisms which have been laid down by statute. The appellant contended that in truth he ought to have been assessed as an employee and not as a self-employed person. This is not an issue which could ever have been appropriately litigated in the within proceedings. It could offer no defence to the claim in the circumstances and was not a valid ground of appeal for the reasons stated above.

57. Having said that, and for what it is worth, it has to be observed that there was significant material put before the court by the appellant that wholly undermined the very stateability of that proposition. In a submission dated 2 March 2021 to this court he contended that he was initially employed in 1993. It appears that the appellant's work concerned that of a DJ at an establishment known as Lillie's Bordello. This agreement continued up until December 2005. Thereafter the premises was sold to Noyfield Limited:-

> "No discussions took place in relation to any transfer of undertakings and for a period I continued to receive payslips from Noyfield Limited.
>
> I was informed in February 2005 by a Noyfield Limited employee that going forward I would have to submit invoices to receive any payments.
>
> Again, no discussions on employment status changes occurred and no contract documents were produced.
>
> After receiving no payment for a couple of weeks I started to submit invoices to Noyfield Limited and received a payment from a company called Fabola Limited.
>
> I continued to do the same duties, in the same premises at the direction of Mr. David Morrissey.
>
> This practice continued up to the closure of the premises on January 19th 2019."

58. In an affidavit of 17 October 2016 filed in these proceedings the appellant deposed: -

> "I say that during the process of the audit almost 90% of the expenses that I submitted on advice of my [accountant] have been withdrawn by the Revenue audit. I am open to advice from Revenue on these expenses but many of them were very legitimate expenses directly connected with my business…I am a self-employed man with legitimate expenses to trade and the fact that I am being denied the right enter [*sic*] these expenses is being appealed."

In the same affidavit at Part C, concerning VAT liabilities, he deposed: –

> "With regard to the VAT payments during the period 2012/2013 I believe that the Revenue did not take payments I had made to the County Sheriff office during these periods into consideration. Also they withdrew many legitimate expenses used to conduct my business at the time. …As a self-employed businessman I will have to incur the costs of the independent examination and audit and this will take time."

Thus the appellant on oath characterised himself as self-employed, conducting a business, incurring expenses in that behalf and repeatedly makes reference to "my business". The position was reiterated by his own solicitor in an affidavit of 12 December 2016 where at para. 9 it was deposed:-

> "The defendant is a self-employed contractor providing music/DJ services to the entertainment industry in Dublin and around the country. As part of his trade the defendant incurs expenses which he states are commonly allowed to other contractors such as him…"

59. In a note exhibited in the affidavit of Alice McGreal recording the engagement of the appellant and his advisors with the Revenue Commissioners in September 2016 and October 2016, it was contended that: -

> "Mr. Coloe thinks some of the expenses he claimed should be allowed *e.g.* motor and travel. I explained travel to and from work was not allowable and Mr. Coloe was travelling from his home to the same place of work each day and therefore not allowable."

In a meeting on 6 October 2016 Revenue recorded: –

> "[The appellant] stated the expenses he claimed were actual expenses he incurred. I explained travel to and from work was not allowable. Neither were meals, house insurance, satellite TV."

The arguments made at that stage did not suggest that the appellant considered himself to be a person who was employed or who was bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability but rather the reverse.

60. In his notice of late appeal to the Tax Appeals Commission the appellant contended at part 10.1 by reference to a letter sent to Revenue on 25 May 2018: -

> "In simple terms, that correspondence questions the action of the employer, Ardclose Taverns Limited, terminating the schedule E employment of the taxpayer and transferring the terms of employment/engagement into a sole trader provision of services. The arguments concerning same are set out in document 004."

He contended that he had not filled out the VAT registration form and same had been filled out "by his employer or his former employer's professional accountants". However, from early 2005 to about January 2019 he raised invoices and charged VAT for services.

61. It is clear from the submission made by Michael O'Reilly, Chartered Accountant, dated 25 May 2018 that "[o]n the 29th January 2005, Mr. Coloe's employment of some 9 years was terminated. On foot of same he was provided with a [form] P45, number…" At para. 4 of that employment history it states: -

> "On an unknown date, Mr. Coloe was handed a form of contract which set out his duties, times, hours and rates of pay and the location he would work in. The contract was created by the Porterhouse Group."

62. The appellant knew of the changed arrangements from early 2005 - over eleven years prior to the institution of the proceedings. He actively acquiesced in same and went along with his

registration for VAT, submitting invoices on that basis thereafter. It is no defence to liability for unpaid VAT that he did not personally apply for registration for VAT in the first place. He knew of the registration and acted in accordance with same.

63. The appellant's stance both at the hearing before the High Court and on appeal that he ought to be treated as an employee is fundamentally inconsistent with the position maintained by him from 2005 onwards. In affidavits sworn by him and on his behalf in the course of the proceedings before the High Court it was expressly asserted that he was a businessman and that sundry expenses were so incurred in the course of conducting "my business". He further characterised himself as a "self-employed businessman".

64. There was ample probative evidence available to Revenue from early 2005 onwards on which they were entitled to rely demonstrating that the appellant was a self-employed contractor providing music/DJ services during the relevant years the subject matter of the assessment and the subject matter of the within proceedings.

65. If Mr. Coloe disagreed, his remedy was to judicially review the disputed assessments in a timely manner which he did not do. The belated re-casting by Mr. Coloe of his status to that of employee is wholly unstateable. I reiterate that I merely set out these observations given that the appellant is self-represented notwithstanding the determination herein that the employment status of the appellant taxpayer is not an issue to be determined by the court in the manner sought by the appellant.

Alleged non-compliance with High Court Practice Direction HC54

66. In his affidavit of 12 October 2018, the appellant alleged that the respondent "throughout these proceedings has failed and neglected to comply with High Court Practice Direction HC54". He asserted that, in that regard, he had been "severely prejudiced" in his attempts to defend these proceedings. He contended that, had the respondent complied fully with the requirements of HC54,

the High Court would have "had the benefit of the knowledge of matters regarding my taxation affairs…".

67. The appellant raised non-compliance with HC54 as an issue again in his notice of appeal. He did not address such alleged non-compliance further in his written submissions dated 2 March 2021.

68. In considering the appropriate approach to be taken where non-compliance with a relevant Practice Direction is established it is appropriate to have regard to the Rules of the Superior Courts in relation to procedural irregularities in O. 124:-

> "1. Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.
>
> 2. No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.
>
> 3. Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion."

69. The court enjoys considerable latitude and has a wide discretion in approaching non-compliance with a relevant Practice Direction or the Rules of the Superior Courts. This discretion must be exercised with due regard to the overriding obligation of advancing the interests of justice and ensuring that the constitutional right of access to the courts as enjoyed by all litigants is properly respected.

70. The factors to be taken into account and weighed in the balance will vary from case to case in the due exercise of this discretion but include having appropriate regard to:

i. the nature and extent of the breach of the Practice Direction or Rules of the Superior Courts that is established;

ii. whether such breach has visited tangible prejudice or hardship to the other party to the proceedings;

iii. the nature and extent of such prejudice or hardship;

iv. the objective of the Direction or Rule which has been breached;

v. the extent to which the purpose of the Direction or Rule has been irredeemably defeated or whether its objective was otherwise achieved; and,

vi. where the balance of justice lies in all the circumstances of the case.

71. With regard to the appropriate consequences for non-compliance with Practice Direction HC54, I note that para. 7 thereof provides:-

> "Failure to comply with any of the requirements of this direction may expose the party in default to liability for costs."

72. Mr. Coloe did have a solicitor representing him for at least part of the period during which this litigation was before the High Court. The affidavit of Mr. Robinson sworn 12 December 2016 confirms as much:-

> "2. I am the solicitor on record for the defendant…"

73. The respondent prepared the booklets of appeal – a task normally undertaken by the appellant.

74. The appellant has failed to particularise any alleged non-compliance with HC54 and, further, has crucially failed to identify any prejudice that arises therefrom. This ground of appeal is unmeritorious and does not avail him.

Non-receipt of letters and communications

75. The appellant asserted non-receipt of various communications including:

i. the letter of 12 June 2019 addressed to his accountant, Mr. Michael O'Reilly;

ii. the bound and indexed appeals booklets prepared by the respondent and posted to him on 9 March 2021, were stated not to have been received as of Tuesday 16 March 2021. This particular assertion resulted in the hearing of this appeal having to be adjourned while Ms Jacci Fox of Holmes O'Malley Sexton Solicitors emailed and couriered the booklets once more to the appellant; and,

iii. he further maintained that he did not receive the statutory notice pursuant to s. 960N of the Taxes Consolidation Act 1997. Same had been sent to his solicitor on 8 May 2018.

76. In the absence of an affidavit from either Michael O'Reilly or Conor Robinson deposing as to the non-receipt by them of the said respective communications I am satisfied that it is appropriate to proceed on the bases that they were in fact received by the said individuals. Regarding proof of sending of communications in general by Revenue, the statement of Finlay C.J. at p. 507 of *Deighan v. Hearne* is noteworthy as he rejected calls for proof that a letter had been posted.

Conclusions

77. The established position is that the entire structure of the tax system has evolved in this jurisdiction on the basis of self-assessment, and a court application challenging a revenue assessment is generally only available in the context of a constitutional challenge or where judicial review is sought by the taxpayer. Generally speaking issues of fact arising between a taxpayer and the Revenue Commissioners are decided in accordance with the framework and appeals process established under the statutory scheme. The taxpayer is entitled where appropriate to impugn the constitutionality of relevant legislation and to challenge any alleged *ultra vires* determination or step on the part of the Revenue Commissioners by way of judicial review, but such proceedings must be brought in accordance with the procedures set out in the Rules of the Superior Courts and cannot be determined within the proceedings of the present kind, even if they were to arise.

78. The appellant has been accorded significant latitude by the respondent over several years in the instant case, including by not opposing adjournments of the within proceedings on many occasions to facilitate an application to the Tax Appeals Commission requesting acceptance of an appeal sought to be brought years out of time by the appellant.

79. This court is bound by the principles adumbrated by the Supreme Court in *Deighan v. Hearne*. The Inspector of Taxes had vested in him the power to make an assessment in respect of the income tax, CGT and VAT liabilities of the appellant. Upon raising the said assessments, it was open to the appellant to appeal within time. Generally, in light of the statutory framework, the courts do not intervene to set aside or vary an assessment in a manner that supplants the appeals procedures specified by the relevant legislation. As the Supreme Court has made clear, such intervention could only be contemplated if the taxpayer demonstrates that the procedure conducted by the Inspector of Taxes was *ultra vires* the relevant statutory provision such as to render it invalid or where a measure is impugned pursuant to the provisions of the Constitution.

80. Thus it is clear it was not open to the High Court judge nor is it open to this court to engage in a review of the tax assessment and liabilities of the appellant in contradistinction to the administrative tribunal established under statute for this very purpose. In the circumstances, no basis has been identified which would warrant a trenching by the High Court or this court on the exercise by the Tax Appeals Commission of its statutory powers. The assessment of the various tax liabilities was demonstrably an administrative function and not a judicial one.

81. I am satisfied that the jurisprudence of the Superior Courts points inexorably to the conclusion that the tax code in its operation is in effect a self-contained system with its own clearly established appeals process and statutorily defined time limits. It was open to the appellant throughout, had he seen fit to do so, to challenge in a timely manner by way of judicial review any discrete element of the determination of the Revenue Commissioners in regard to the issues involved.

82. The Revenue Commissioners have long since concluded that the appellant, in light of all the evidence, was a self-employed person for the purposes of the tax code. This accorded with the evidence and the stance of the appellant and his advisers from 2005 until long after the institution of the summary proceedings before the High Court. It is not open to the appellant to seek to challenge that determination in this court for all the reasons identified by the Supreme Court in *Deighan v. Hearne*. The tax legislation operates and is intended to operate as a self-contained procedure for carrying out a determination of the tax liability of an individual and in general, absent judicial review where it is warranted, decisions of the Revenue Commissioners (and upon appeal, the Tax Appeals Commission) are final and conclusive. It is not now open to the appellant to seek to agitate afresh an issue which he did not raise during the initial process. This is particularly so in circumstances where his own affidavits deposed to a diametrically opposite position; namely, that he was a businessman and that he was self-employed. Such averments are fundamentally inconsistent with the stance adopted in this appeal and undermine that stance.

83. I am of the view that this was a case where the High Court was entirely correct in deciding to grant judgment.

84. No arguable grounds of appeal have been raised and, accordingly, I would dismiss the appeal and affirm the decision of the High Court.

85. As the respondent has been entirely successful in this appeal, it is my provisional view that he is entitled to the costs thereof against the appellant. Should the appellant wish to dispute any aspect of the order as to costs I thus suggest he should deliver a short submission (of no longer than 1,000 words) explaining why. That submission should be delivered within ten days of the date of this judgment, whereupon the respondent shall have ten days within which to respond to same in a submission of the same length. In default of delivery of the said submission the proposed order for costs shall take effect.

86. Ní Raifeartaigh J. and Power J. are in agreement with this judgment and the orders I propose.