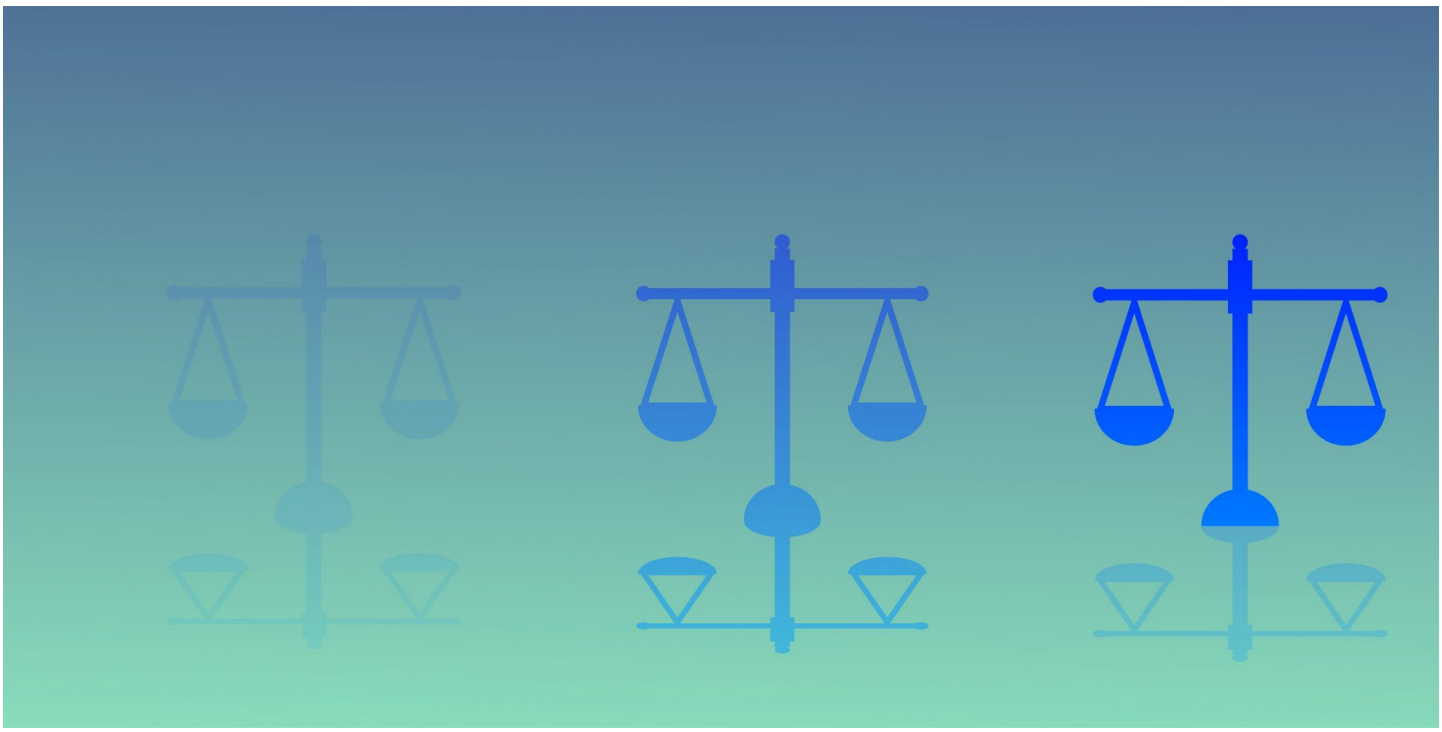
Issue 2, 2021



Lee v Revenue Commissioners: Mapping the TAC's Jurisdiction

Published June 15, 2021 in Issue 2, 2021

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Article Content

Introduction

The recent decision of the Court of Appeal (CofA) in *Lee v Revenue Commissioners*[1] clarifies the principles that are applicable in determining the jurisdictional scope of the Tax Appeals Commission (TAC). Although the jurisdiction of the TAC's predecessor, the Appeal Commissioners (ACs), was at issue in this case, the principles promulgated by the CofA are relevant to the TAC's jurisdiction.

Overview of the TAC

The TAC was established in 2016 pursuant to s3 of the Finance (Tax Appeals) Act 2015 ("the 2015 Act") to replace the Office of the ACs as the independent statutory body responsible for the administration and determination of tax appeals. The TAC's functions are broadly stipulated in s6 of the 2015 Act as including:

*"doing **all such other things** as they consider **conducive to the resolution of disputes** between appellants and the Revenue Commissioners **and the establishment of the correct liability to tax of appellants*** [emphasis added]*".*

The TAC's procedural autonomy is reflected in Part 40A of the Taxes Consolidation Act 1997 (TCA 1997), which prescribes the appeals process.[2] In addition to determining the validity of an appeal and the steps to be taken by the parties to resolve the dispute, the TAC is entitled to determine an appeal without a hearing where appropriate.[3]

The Decision

Overview

In *Lee v Revenue Commissioners* the taxpayer claimed that Revenue had accepted a payment he made as settlement of a tax liability and was bound by the agreement. The case concerned whether the ACs had jurisdiction to determine whether a contract had been concluded between the taxpayer and Revenue in the circumstances. The High Court held that the ACs had such jurisdiction, emphasising the elaborate procedures enacted by the Oireachtas for determining a taxpayer's liability and the need to avoid an artificially narrow construction of the powers and authority conferred on the ACs.

Almost exactly three years from the date of the High Court decision the CofA delivered its judgment, on 28 January 2021. At the very outset, the CofA framed the appeal as presenting a "net issue as to the scope of the jurisdiction of the Appeal Commissioners…when hearing appeals against assessments to income tax". Ultimately, the CofA overturned the High Court's decision, concluding that the ACs' jurisdiction extended to determining whether an assessment properly reflects the statutory charge to tax, having regard to the relevant provisions of the taxing Act and any incidental questions of fact and law. The CofA held that the ACs' jurisdiction did not extend to findings otherwise relevant to dealings between taxpayers and Revenue and, therefore, that the ACs were not entitled to adjudicate on whether a liability to tax had been contractually settled.

Jurisdiction mapped by statute

The CofA applied the well-established "trite and historical principle of law that a creature of statute must live by the statute",[4] highlighting that the ACs' functions are limited to those expressly conferred by the TCA and that the ACs do not otherwise enjoy any inherent or general jurisdiction.

In light of the foregoing, the CofA proceeded to analyse carefully the provisions of Part 40 of TCA 1997[5] to determine the scope of the ACs' jurisdiction. The CofA noted the following four key features in this context:

- the definition of the appellate jurisdiction of the ACs,
- the parameters of the permissible grounds of appeal,
- the orders that the ACs may make and
- the powers conferred on the ACs to enable the appeal to be heard.

The CofA concluded that the statutory scheme prescribed by TCA 1997 limited the ACs' jurisdiction to determining whether Revenue had correctly reflected the statutory charge to tax in the relevant assessment in accordance with the applicable charging provision and in light of the relevant facts and law.

Existing case law on jurisdiction of tax tribunals

After its review of the statutory scheme prescribed by TCA 1997, the CofA proceeded to consider case law on the jurisdiction of tax adjudicative bodies in Ireland and the UK. The CofA divided the precedents into two categories:

- older cases concerning the jurisdiction of the appellate tribunal established under the Income Tax Act 1918[6] and
- more modern cases concerning the extent to which the ACs had jurisdiction to determine challenges to Revenue assessments based on public law.[7]

In relation to the first category, the CofA noted that although the extent of jurisdiction was not directly at issue, it was generally described in narrow terms and by reference to the concept of "assessment". The CofA was, however, careful to point out that the focus on "assessment" did not detract from the important function of the ACs in interpreting and applying questions of fact or law incidental to assessment, as follows:

"the appellate tribunal may have to determine issues of fact or law in order to decide if there is a liability to tax in the first place and may in that context have to decide questions of fact or law incidental to that issue or to questions of quantum. ***The questions of law thus arising before the Commissioners may sometimes be complex, and indeed may on occasion (and in particular when issues of European law arise) stray outside the direct interpretation of the tax code.*** *However, they are always issues that come back to the question of whether there is a charge to tax properly applied in accordance with the relevant statutory provisions and, if so, its amount. That liability, and those questions, all arise from the assessment to tax which defines the appellate body's jurisdiction [emphasis added]."*

The CofA noted that the second category of cases presented similar issues to the facts under consideration in *Lee v Revenue Commissioners* in that they concerned the question of whether the ACs have jurisdiction to determine matters not relevant to the assessment to tax and charging provisions but relevant to whether Revenue has by its actions disabled itself from enforcing a tax liability. Based on its review of the cases in this category, the CofA made the following findings on the jurisdiction of the ACs:

- The ACs do not have jurisdiction to grant any form of declaratory relief.
- The ACs have jurisdiction to determine that no tax is due in a particular tax dispute. Although the reduction of an assessment to nil could be portrayed as being similar to declaratory relief, the CofA confirmed that the ACs' ability to determine quantum must include nil quantum and the ability to determine that no tax was properly due in accordance with the relevant charging provisions.
- Irish law does not support the UK position, which entitles tribunals to determine certain public law questions (including settlements between the revenue authority and the taxpayer) without such jurisdiction being expressly conferred on the tribunal by statute.

Determination of the appeal

Acknowledging that the High Court's decision was "one of practicality and convenience", the CofA ultimately found that it was not supported by the provisions of TCA 1997 and could not, therefore, be upheld. The CofA summarised the jurisdiction of the ACs as follows:

"their jurisdiction is focussed on the assessment and the charge. The 'incidental questions' which the case law acknowledges as falling within the Commissioners' jurisdiction are questions that are 'incidental' to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment."

In this case, the taxpayer's claim was one of contract law (i.e. the existence and enforceability of a settlement agreement with Revenue), the determination of which was not within the jurisdiction specifically conferred on the ACs by TCA 1997. Reiterating the importance of the statutory framework in this context, the CofA stated that if the legislature had intended to confer additional functions on ACs, it would have been "expressly noticed in the legislation, and lucidly identified and delineated".

Scope of EU law and constitutional obligations

Having determined the case in Revenue's favour, the CofA proceeded to provide further detail on the scope of the ACs' jurisdiction by confirming that, in exercising its functions, as detailed above, the ACs are subject to the following obligations:

- to uphold the supremacy of EU law when dealing with any matters within their remit and
- to afford parties constitutional fair procedures in matters before them.

Although *obiter*, this passage of the judgment provides a very useful insight into the CofA's view of the relevant jurisprudence, confirming that although the jurisdiction of the ACs is directed towards the statutory charge to tax, that jurisdiction cannot be exercised in a vacuum divorced from these fundamental, overarching principles.

Supremacy of EU law

The CofA upheld the long-standing principle of EU law that national courts and tribunals are obliged to give full effect to EU law by disapplying, where necessary, national law that conflicts with or infringes a provision of EU law. The CofA noted that this obligation to disapply, and its application to domestic tribunals, had recently been reaffirmed by the Court of Justice of the European Union (CJEU) in *Minister for Justice, Equality and Law Reform v The Workplace Relations Commission C-378/17*, highlighting that:

"The Workplace Relations Commission decision applies a principle of European law operative where a national tribunal is seized with a dispute, requiring that it give effect to the supremacy of European law in the course of determining that dispute. If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners ***must address that contention if it is relevant to the matter with which they are seized and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated*** *[emphasis added]."*

The CofA clearly recognised that the ACs' obligation to uphold the supremacy of EU law in this context meant that the ACs must have the power to give full effect to EU law in matters falling within their jurisdiction. The established mechanisms to achieve this objective include direct effect, which involves the disapplication of a domestic law that is inconsistent with EU law, and indirect effect or conforming interpretation, which involves interpreting the domestic provision in a manner that ensures that it does not infringe the relevant EU law.[8] Indeed, the obligation to disapply and the duty of conforming interpretation were recently upheld and applied by the TAC to set aside an assessment to stamp duty by reference to the Capital Duties Directive.[9]

Constitutional fair procedures

The CofA also acknowledged that the ACs are under an inherent obligation to discharge their statutory role in a manner that adheres to the principles of procedural fairness, in line with the High Court's decision in *CG v The Appeal Commissioners*, where it was stated that:

"If the applicant's claim that to proceed with the appeal hearing is in breach of his constitutional right to a fair trial or his privilege against self-incrimination is well founded then the Appeal Commissioner would be acting contrary

to the presumed intention of the Oireachtas that the appeal procedure prescribed by the Taxes Consolidation Act 1997 be conducted in accordance with the principles of constitutional justice if it were to proceed."[10]

In the same way as EU law necessarily overlays the jurisdiction of the ACs, the CofA recognises that the ACs must exercise that jurisdiction in a manner that does not offend relevant constitutional principles.

Comment

The CofA's decision in *Lee v Revenue Commissioners* assists in delineating the TAC's jurisdiction, clarifying that the scope of its remit is to be determined based on the express wording of the 2015 Act and Part 40A TCA 1997. The TAC does not have an inherent or general jurisdiction beyond these legislative provisions. As noted above, the 2015 Act and Part 40A TCA 1997 cast the TAC's functions and procedural autonomy quite broadly. As the CofA's decision was based on the pre-TAC legislative framework, it would be interesting to see whether the CofA would have been influenced by the additional obligations and autonomy conferred on the TAC when compared with its predecessor and, in particular, how the CofA would have construed s6(2) of the 2015 Act, which, as noted, describes the TAC's functions as including doing anything that the TAC considers conducive to the resolution of a dispute between a taxpayer and Revenue and the establishment of the correct liability to tax. Although these additional features do not relate directly to the question of jurisdiction, the four key features highlighted by the CofA when assessing the scope of the ACs' jurisdiction in light of Part 40 TCA 1997 suggest that a more holistic approach to the construction of the relevant statutory provisions is required. It remains to be seen whether the changes introduced by the 2015 Act and Part 40A TCA 1997 would impact on the question of jurisdiction in a similar dispute under the TAC system.

The CofA clearly viewed EU law as being within the remit of the ACs' jurisdiction by virtue of the principle of supremacy, notwithstanding that it may involve straying "outside the direct interpretation of the tax code". The CofA also helpfully, but perhaps unsurprisingly in light of the jurisprudence of the CJEU, confirmed that the ACs are obliged to give full effect to EU law where relevant due to "the mandates of European law". By extension, this effectively requires the TAC to resolve an infringement of EU law by a provision of domestic tax law in one of the following ways:

- It could give indirect effect to the relevant EU law by adopting, insofar as is possible, an interpretation of the infringing domestic provision that conforms with the relevant EU law. Although the TAC is not bound by the confines of domestic rules of statutory interpretation in this context,[11] a conforming interpretation is not permissible where it produces a result that is *contra legem* (i.e. contrary to the clear meaning of the domestic legislation).[12]
- Where a conforming interpretation is not available in the circumstances, it could give direct effect to the relevant EU law by disapplying the relevant domestic provision in the circumstances.[13]

Although, as noted, the TAC recently exercised its powers in this context in light of CJEU jurisprudence,[14] the CofA's articulation of the relevant principles provide additional clarity to this evolving area of law.

Footnotes

[1] [2021] IECA 18.

[2] Part 40A of TCA 1997 replaced Part 40, which dealt with appeals to the ACs before the introduction of the TAC by the Finance (Tax Appeals) Act 2015.

[3] In 2020 59% of the TAC's determinations were issued without a hearing.

[4] *County Louth Vocational Educational Committee: (now known as Louth and Meath Education and Training Board) v The Equality Tribunal* [2016] IESC 40 at 35.

[5] As noted, Part 40 of TCA 1997 prescribed the appeals process under the AC system before the introduction of the TAC by the Finance (Tax Appeals) Act 2015. Part 40 was replaced by Part 40A for appeals under the TAC system.

[6] See, for example, *IRC v Sneath* [1932] 2 KB 362; *R v Income Tax Special Commissioners ex parte Elmhirst* [1936] 1 K.B. 487.

[7] See, for example, *Aspin v Estill* [1987] STC 723; *Menolly Homes Ltd v The Appeal Commissioners* [2010] IEHC 49; *Stanley v Revenue Commissioners* [2019] 2 IR 218.

[8] The doctrine of indirect effect requires national courts and tribunals to adopt a conforming interpretation of national law in the light of the wording and purpose of EU law in order to achieve the result required by the relevant EU law provision where possible (see *Von Colson* C-14/83). The doctrine of indirect effect has been applied on numerous occasions by the UK First-tier Tribunal to give full effect to EU law (see, for example, *Baillie Gifford v HMRC* [2019] UKFTT 410 (TC)).

[9] Determination 08TACD2021. The TAC has been requested to state and sign a case for the opinion of the High Court in respect of this determination.

[10] *CG v The Appeal Commissioners* [2005] 2 IR 472 at 477, 478.

[11] See *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60; *Murphy v Bord Telecom Eireann* [1989] ILRM 53. The doctrine of indirect effect has been applied by the UK courts in a number of cases, including *Lister v Forth Dry Dock* and *Engineering Co Ltd* [1990] 1 AC 546, *Revenue and Customs Commissioners v IDT Card Services Ireland Ltd* [2006] STC 1252 and *Vodafone 2 v HMRC* [2009] STC 1480, and by the UK First-tier Tribunal in a number of cases, including *Ampleaward Ltd v Revenue and Customs Commissioners* [2020] STC 2054, *BAV-TMW-Globaler-Immobilien Spezialfonds v Revenue and Customs Commissioners* [2019] UKFTT 129 (TC) and *Trustees of the P Panayi Accumulation and Maintenance Trusts Nos 1–4 v Revenue and Customs Commissioners* [2020] SFTD 209.

[12] See *Environmental Protection Agency v Neiphin Trading Limited* [2011] 2 IR 575; *The Minister for Justice, Equality and Law Reform v Ciaran Tobin* [2008] 4 IR 42; *Albatros Feeds Limited v Minister for Agriculture* [2007] IR 221.

[13] The ability of the TAC and other statutory bodies to disapply domestic law that infringes EU law was also highlighted by the Supreme Court in *An Taisce v An Bord Pleanála* [2020] IESC 39 and, more recently, in *Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24.

[14] TAC determination 08TACD2021.