THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 244

[Record No: 2022/186 JR]

BETWEEN:

MICHAEL QUIGLEY

APPLICANT

AND

REVENUE COMMISSIONERS AND THE TAX APPEAL COMMISSION

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 10th day of May, 2023.

INTRODUCTION

1. Marked gas oil (sometimes also referred to as marked mineral oil, green diesel, agricultural diesel or MMO) [hereinafter "MGO"] is diesel that is intended for use for heating or in agricultural machinery, and, because of that, it is chargeable at a lower rate of excise duty and subject to a lower rate of valued added tax ("VAT"). The sale of marked gas is governed by s. 99(1) of the Finance Act, 2001 [hereinafter "the 2001 Act"] which provides that a rebated rate of excise applies for MGO once certain specified conditions are complied with.

2. Persons engaged in illegal fuel-laundering operations are known to use "*bleaching agents*" to remove the dye from MGO. This enables the oil to be passed-off as regular diesel, but without payment of the higher excise duties and VAT which apply to regular diesel. Proper record-keeping is required for the Revenue Commissioners [hereinafter "Revenue"] to verify that a sale of MGO complies with statute and that the fuel has not been 'laundered'. Where a trader cannot show that his sales of MGO comply with these requirements, a suspicion arises that the fuel has been laundered. The fuel laundering/illicit fuel industry typically requires a customer base, a supply of MGO and a distribution network through which to bring the laundered fuel to the end user, who may be an unsuspecting retail customer.

3. In order to ensure traceability of sales and to enable Revenue to verify that the MGO is being used for a permitted purpose and in compliance with the statutory scheme, a fuel trader dealing in MGO is required to hold a licence issued by Revenue, and to abide by any conditions specified in the licence. The trader is also required to keep records of MGO sales in accordance with the Regulations. The Applicant, who was a licensed fuel trader, was required to comply with these regulatory controls as to record keeping in respect of his trade in MGO.

4. Assessments to both VAT and excise duty (in the total amount of €1,012,33 7.85 in respect of excise duty for the period between 2009 and 2016 and the cumulative sum of €636,842.00 in respect of a VAT liability for a similar period) were raised by Revenue against the Applicant following an investigation involving 700 of the Applicant's accounts in circumstances where alleged inadequacies in the Applicant's record keeping meant some 300 customers could not be identified by Revenue. In addition, interviews by Revenue with a proportion of the remaining 400 customers who could be identified caused Revenue to question the accuracy of records relating to the sale of MGO in many of those cases. In consequence, Revenue was not satisfied that conditions of eligibility were met with a resulting liability to both excise duty and VAT.

5. The Applicant has appealed against these assessments to the Tax Appeals Commission. During the course of the appeal process Revenue provided the Applicant with a schedule of the names of the 300 customers in respect of whom it is said records are inadequate to permit proper identification of the customer (e.g. typically names without full address) but has refused to provide the Applicant with information regarding those customers (some 44 of the remaining 400 customers who were identifiable) who Revenue not only identified but interviewed, many of whom are alleged to deny buying MGO from the Applicant.

6. These proceedings concern the refusals of the Revenue and the Tax Appeal Commission respectively to furnish and/or to direct the furnishing of the names, details and particulars of the 44 customers the Revenue had interviewed in the course of its investigation in relation to sale of MGO by the Applicant. Revenue maintain that the records sought are not relevant where on the Applicant's appeal it is a matter for him to establish that he has complied with regulatory controls as to record keeping which condition the entitlement to the tax rebate on the sale of MGO and to demonstrate to the Tax Appeals Commission of an entitlement to

relief from excise duty. The issue for determination in these proceedings is whether the information sought by the Applicant in relation to the interviews with customers who deny buying MGO from the Applicant is required to vindicate his right to fair procedures in the appeal process before the Tax Appeals Commissioner.

BACKGROUND

7. The Applicant operated a fuel trader's business pursuant to a Marked Fuels Trader's License ("MFTL") and an Auto Fuel Trader's License ("AFTL") issued by Revenue. He underwent an audit by Revenue in or about May, 2015. On the 28th of May, 2015 Revenue wrote to the Applicant. An Appendix to that letter contained details (copy invoices/delivery dockets) of 66 supplies which the Applicant purported to make in August 2013, as drawn from his own records/invoices. He was asked to provide full information in respect of the persons supplied, as required by the Mineral Oil Tax Regulations, 2012 [hereinafter "the 2012 Regulations"]. In a reply of the 9th of June, 2015 the Applicant contended that the invoices contained all the necessary details. The Applicant was subsequently refused a renewal of his MFTL and AFTL on the 2nd of December, 2016. He has appealed that refusal decision to the Tax Appeals Commission and this appeal has not yet been determined or scheduled for hearing.

8. Revenue raised 7 separate assessments to excise duty on the 15th of May, 2017. These assessments are for separate chargeable periods dating from 2009 until 2016 and are in a total sum of €1,012,337.85 17. The letter from Revenue to the Applicant in relation to the excise assessments states:

> *"Based on a Revenue site visit to your address at Castleroche on 28 May 2014, a number of records were removed and analysed over subsequent months. Revenue has contacted a number of purported marked mineral oil customers, over several tranches in a phased period of time corroborating purported sales recorded in your mineral ail business.*
>
> *It was established in the course of the license review and Revenue enquiries, that in all, Revenue estimate 2,700,729 litres of Marked Oil purchased by you has not been used for the purpose or specific manner as allowed for under section 99 Finance Act 2001. Section 99(10) 0f the Finance Act 2001 (as substituted by section 93(I)(d) of the*

Finance Act 2010) provides that where a person has received excisable products on which excise duty has been relieved, rebated, repaid or charged at a rate lower than the appropriate standard rate, subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and where such requirements has not been satisfied, or any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown to the satisfaction of the Revenue Commissioners that the excisable products have been used, or are held for use, for such purpose or in such manner then:

The person who has received such excisable products or who holds them for sale or delivery is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of any relief, rebate or lower rate.

It is clear from the above that where any person has received Marked Mineral Oil in the course of trading, and has contravened any requirements of excise law; is unable to show to the satisfaction of the Revenue Commissioners, that the Marked Mineral oil in question was used for a specific purpose or in a specific manner, that person is liable for excise duty: in respect of the product in question, at the standard rate of excise duty.

It is clear from the matter set out in this letter that: (i) you received excisable products (Marked Mineral Oil), on which excise duty has been charged at a rate lower than the appropriate standard rate, subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and (ii) requirements of excise law in relation to the holding or delivery of such excisable products have not been complied with, and (iii) it has not been shown to the satisfaction of the Revenue Commissioners that the excisable products have been used, for such purpose or in such manner.

Accordingly, you are liable for payment of the excise duty on the mineral oil in question, at the rate appropriate to it, without the benefit of any relief, rebate or lower rate".

9. Revenue further raised VAT assessments on the 2nd of August, 2017. These assessments are for chargeable periods dating from 2009 until 2016 in the total amount of €636,842.00. In a letter dated the 27th of July, 2017 from Revenue to the Appellant in relation to the VAT Assessments it is stated:

"It is clear from the matters set out in attached letter 15.05.2017 that:

(i) you received excisable products (Marked Mineral Oil), on which excise duty has been charged at a rate lower than the appropriate standard rate, subject to a requirements that such excisable products are used for a specific purpose or in a specific manner, and

(ii) requirements of excise law in relation to the holding or delivery of such excisable products have not been complied with, and

(iii) it has not been shown to the satisfaction of the Revenue Commissioners that the excisable products have been used, for such purpose or in such manner.

The above matters have now been reviewed, in relation to Value Added Tax. You have failed, despite numerous requests, to supply full details of the persons, entities to whom the marked mineral oil was supplied. I have concluded, having regard to all the circumstances, and to the incorrect records and information submitted that the product in question was supplied by you as diesel.

A. the selling price of diesel is considerably higher than that of marked mineral oil,

B. the rate of VAT applicable to diesel is at the standard rate prevailing at each period assessed , and not 13.5% as shown in the VAT return for the periods Jan-Feb 2016 inclusive".

10. It appears from the foregoing that the excise and VAT assessments arise from the fact that between January, 2009 and December, 2016 the Applicant purported to sell large quantities of MGO to numerous small customers, many of whom Revenue contend could not be traced due to the alleged inadequacy of the records maintained or provided by the Applicant. It is Revenue's position that the Applicant failed to demonstrate to their satisfaction that he had complied with the conditions governing applicability of a reduced rate with the result that he was assessed as liable to pay excise duty at the standard rate. Furthermore, under s. 46 (l) (a) of the VAT Consolidated Act 2010 [hereinafter "the VAT Act"], VAT is chargeable at the standard rate of 23% except in the case of the supply of hydrocarbon oil of a kind used for domestic or industrial heating mineral oil or which is diesel supplied as MGO (under paragraph 17(4) of Schedule 3 of the VAT Act). Since the requirements for its being supplied as MGO were not demonstrated to Revenue's satisfaction, the fuel supplied by the Applicant is treated by Revenue for VAT purposes as having been supplied as road diesel. In consequence Revenue

consider that the Applicant is not entitled, nor has he demonstrated himself to be entitled, to the exceptional benefit of a reduced rate of VAT.

11. The Applicant appealed ("the tax appeals") the foregoing assessments by way of Notices of Appeal to the Tax Appeals Commission and thereafter submitted his statement of case to the Revenue and to the Tax Appeals Commission for the tax appeals on the 18th of December, 2018. In their subsequent submissions (April, 2019) to the Tax Appeals Commission, Revenue stated that the Applicant was assessed pursuant to s. 99A of the 2001 Act in circumstances where the MGO purchased by him had not been used for the purpose or the specific manner as allowed for under s. 99 of the 2001 Act. It was contended that of itself this was a proper underlying basis for the pre-January 2010 assessments. Furthermore, it was contended that as a mineral oil trader, who did not comply with a requirement of excise law in relation to the holding or delivery of such excisable products, and where it was not shown, to the satisfaction of the Revenue that the MGO in issue had been used, or held for use, for a specific purpose other than as a propellant, there was ample lawful justification for all of the assessments. Revenue submitted its statement of case for the VAT appeal and the Excise Appeal on the 23rd of July, 2019.

12. This was followed by an exchange of outline arguments with the Applicant submitting his outline arguments in writing on the 6th of April 2021 and the Revenue delivering its outline arguments on the 8th of April, 2021. In his outline arguments the Applicant raised concerns (at paragraphs 95-100 thereof) that Revenue's case as against the Applicant had not been pleaded or set out with any level of particularity. Hearing dates were fixed by the Tax Appeals Commission from the 27th of September, 2021 for five days to hear the tax appeals and the appeal concerning the Applicant's MFTL and AFTL. On receipt of Revenue's outline argument, however, the solicitors for the Applicant had ongoing concerns as to the absence of detail in the outline arguments. The Applicant's solicitor wrote to Revenue on the 12th of April, 2021 seeking:

(i) the details of the customers and the transactions which comprised the sales at the core of the assessments; and

(ii) the details and documents related to the purported verifying enquiries carried out by Revenue Officers which resulted in the raising of the assessments.

13. Various forms of communication (by letter and telephone call) took place between the Applicant's solicitor and the Revenue in relation to the request seeking additional information between the 29th of April, 2021 and the 21st of June, 2021 including an affirmation of the part of Revenue at one point that it was expected the information would be provided within a period of two weeks. On the 25th of June, 2021 the Revenue solicitor emailed a document entitled "*Supplemental Information*" which purported to serve as a particularization of the Revenue's case for how it was the assessments had been raised and an expansion of the Revenue's statement of case and its outline argument. The Applicant was still not satisfied with the level of information provided and contended that the Revenue merely set out the purported methodology of the basis for the assessment.

14. In the "*Supplemental Information*" document Revenue adopts as its point of departure that the Applicant was obliged to keep a record (names and addresses) of all persons to whom sales of MGO were made. He was also required to make Returns of Oil Movements ["ROMs"] to include the names of all customers to whom individual sales above 2,000 litres were made and a monthly-list of all sales below 2,000 litres. From an analysis of the Applicant's ROMS, as verified with fuel importers, it is set out that it had been established by Revenue that he purchased 4,725,861 litres of MGO between the 1st of January, 2009 and the 28th of February, 2016.

15. It is further outlined that in a Revenue operation in May, 2014 a quantity of sales/delivery dockets covering the period October, 2012 to May, 2014 were seized from the Applicant's premises. These purported to account for the sale of 2,100,000 of MGO/ULSMGO for the period October, 2012 to May, 2014. Of those sales, approximately 1,300,000 litres purported to represent sales of MGO/ULSMGO to customers in amounts of less than 2,000 litres.

16. It is asserted in the '*Supplemental Information*' document that Revenue had endeavoured to trace the persons on the Applicant's list and made a number of site visits. This was followed up by an analysis of its findings which it is said was done "*to ensure that an appropriate representative sample*" was achieved and also "*to reduce the possibility of statistical distortion*". It is asserted by Revenue that:

"only approximately 400 of the 700 recorded customers (57.1%) could be located, i.e. persons who were the closest match to the details contained in the delivery dockets. Over 300 of the 700 (42.9%) could not be located because it was claimed there was insufficient information recorded on the delivery dockets. 44 of the 400 persons who were located (a representative sample of 11%) were contacted and 33 of these (75% of the representative sample) confirmed that they had never purchased MGO either from Castle Oils or from Michael Quigley. 5 of these persons indicated that whereas they were either previous or current customers of Castle Oils, they were not customers for MGO."

17. Revenue further state in the "*Supplemental Information*" provided:

"Because 75% of those contacted, although recorded by the Appellant as his customers for MGO/ULSMGO, had never purchased MGO, Revenue discounted 75% of his traceable purported customers on the basis that they were not his customers for MGO. Revenue further discounted 100% of his untraceable customers as follows:

Untraceable 300/700 = 42.9%,

Traceable 400/700 = 57.1 x 0.75% = 42.9%,

Total 85.5%"

18. It appears from the foregoing that Revenue used the information obtained to create a formula upon which they would rely to determine its assessment. Revenue state, at paragraph 10 of its "*Supplemental Information*" document as follows:

"From an extrapolation of these findings, the same discounted percentage was applied across the entire investigation period: 1.1.2009 and 28.2.2016".

19. Revenue, finally state that:

"The Appellant's records suggest that 62% of his purported customers purchased MGO from him in quantities of less than 2,000 litres and because Revenue has established that 85% of this cohort did not purchase any MGO from him, a 52.7%

discount was applied to all of the Appellant's purported customers for sales of MGO below 2,000 Iitres:- 0.85 x 0.62 = 52.7% discounted percentage."

20. According to the "*Supplemental Information*" document, arising from Revenue's investigations, Revenue extrapolated a discounted percentage of 52.7% which was applied to the Applicant's customers for its sales of Marked Gas Oil, otherwise known as Green Diesel, "MGO" below 2,000 litres for the assessable period 2009- 2016. This essentially caused the raising of the assessments. The findings by Revenue in respect of that window of time, and the percentage of sales it claims it could and could not verify were then taken as a representative sample, extrapolated out, and grafted on to the Applicant's sales for less than 2,000 litres for the rest of the assessable period 2009-2016. As such, as pointed out on behalf of the Applicant, no specific investigation of the Applicant's affairs for the period prior to October, 2012 and after May, 2014 has taken place albeit he was assessed for VAT and excise in respect of these periods on the basis for the findings made in respect of the period October 2012-2014.

21. While the 44 customers contacted were not identified in the "*Supplemental Information*" document, the Revenue also included in the assessments sums attributable to sales for one named customer. Particulars of the information pertaining to this one customer were provided in the "*Supplemental Information*" and Revenue have freely shared information in relation to this individual. The said named customer purportedly purchased 251,371 litres of MGO between September 2013 and April 2014 inclusive and while purportedly purchasing deliveries of up to 14,000 litres of MGO from the Applicant, he paid for these in cash. In one 16-day period, this same customer is purported to have purchased 49,000 litres of MGO from the Applicant, however, Revenue maintained that it had established that this customer did not have the capacity to either store or to utilise such large quantities of MGO. This particular customer is said to have refused to engage with the Revenue investigation. I note that he has not, to date, been identified as a witness.

22. By way of conclusion, it was stated in the "*Supplemental Information*" document that in circumstances including the keeping of incomplete records and submitting incorrect information and returns, the investigation had concluded that the product the Applicant supplied was diesel (which has a higher selling price as well as a higher rate of VAT).

23. On the basis of what is contained in the "*Supplemental Information*", it was made clear to the Applicant that Revenue maintains that 300 of 700 persons named in delivery dockets as being the Applicant's customers between October, 2012 and May, 2014, could not be located/ Out of the 44 customers whom Revenue contacted, 33 of them denied purchasing MGO from the Applicant, although some assert that they purchases other oil products. Revenue contends therefore that the Applicant has not shown to its satisfaction that he used or held the MGO for use for a specific purpose or in a specific manner, as allowed for under s. 99(1) of the 2001 Act.

24. Following receipt of the "*Supplemental Information*" document, the Applicant's solicitor again wrote to Revenue on the 28th of June, 2021 outlining his concerns with the level of information provided and seeking a commitment that the information requested would be provided, failing which it would be necessary to seek a directions' hearing from the Tax Appeal Commission. Subsequently, on the 5th of July, 2021, the Applicant's solicitor wrote to the Tax Appeal Commission seeking a directions' hearing to address the issues raised and compel the Revenue to provide the information sought. In his letter the Applicant's solicitor stated with reference to the details disclosed in the "*Supplemental Information*" document:

> *"One would suspect that for a verification investigation on this scale, carried out by the Revenue Commissioners, that there would be a working file comprising extensive contemporaneous notes, field and desktop reports, correspondence, and a suite of other documentation. The Appellant states with respect that it is normal for the Revenue in appeals of this type, wherein the Revenue do not deem the Appellant's commercial activity to be licit, to prepare and submit a detailed booklet of documentation which vouches how it is and why Revenue have come to such a conclusion and why it is the Assessments under appeal ought to stand. By the Revenue's own admission its enquiries for the sales which took place between October 2012-May 2014 are the basis for the entirety of the Assessments under appeal. For there to be a fair and proper hearing of this appeal the documentation vouching that these enquiries took place must be disclosed for the Appellant's consideration and for that of the presiding Tax Appeal Commissioner."*

25. On the 15th of July. 2021 the Tax Appeal Commission scheduling unit contacted Revenue to request their comments on the Applicant's request. Revenue responded on the 16th

of July, 2021 with a holding letter indicating that they hoped to respond within a matter of days. Revenue subsequently provided a response on the 20th of July, 2021 but without providing the information sought as per the letter of the Applicant's solicitor on the 12th of April, 2021.

26. The Applicant's solicitor replied to this letter by return outlining again the issues which had been raised on the Applicant's behalf and referring to the failure of Revenue to deal with the issues raised and information sought. A further request to Revenue was made seeking the following:

a. the identity of the 300 customers who could not be traced;

b. the efforts made to trace these customers;

c. the way in which Revenue deemed the records incomplete;

d. the identities of the 44 customers visited;

e. the identities of the 44 customers who denied purchasing marked gas oil from the Appellant;

f. All vouching and investigative documentation.

27. The Applicant's solicitor further stated that Revenue's refusal to provide the information deprived the Applicant of his right to call as witnesses any of the 44 parties whom the Revenue purport to have interviewed. It was asserted that the Applicant must be given the opportunity to independently verify if these persons said what they Revenue claim they said. Revenue was again requested by the Tax Appeal Commission scheduling unit to respond to the Applicant's correspondence. Revenue replied on the 9th of August, 2021 advising that they were seeking Senior Counsel's advice because of the issues raised by the Applicant in the correspondence and would not be in a position to respond to the Tax Appeal Commission's request until September, 2021.

28. The Applicant's solicitor wrote a further letter on the 10th of August 2021 drawing the Tax Appeals Commission's attention to what the Applicant believed was the fundamental procedural unfairness resulting from Revenue's unwillingness to make the disclosures sought, and also requesting a reply at the earliest opportunity. Following on from this, the Tax Appeal Commission Scheduling unit, on the 16th of August, 2021 requested the Respondent to provide

a written response at the earliest opportunity in relation to the issues-raised in relation to the assessments as set out in the correspondence.

29. In replying correspondence from the Revenue Solicitor dated the 13th of September, 2021 it was stated:

> *"The Respondent does not accept that the Appellant is entitled to records or other details of its site visits to the Appellant's purported customers. These are covered by public interest privilege and/or informer privilege. Any statements made to the Respondent's officers by the 44 'customers' interviewed were made in confidence. Were those statements and the identities of the individuals in question to be disclosed to the Appellant, the individuals would clearly consider that their trust had been betrayed, and might well apprehend a risk to their own safety. Such disclosure would clearly make it more difficult for the Respondent to conduct similar enquiries in future and would prejudice the proper working of the VAT and excise duty regimes."*

30. By letter dated the 15th of September, 2021, the Applicant's solicitor responded in respect of the letter of the 13th of September, 2021 and the Revenue response to the data request made and observed:

> *"In the first Instance the Appellant takes exception to the inference that he would ever engage in the intimidation of a witness or threaten their safety. There is no basis whatsoever for such assertions. Secondly, it is irrelevant what commitment Revenue officials may have given to the Appellant's 44 customers that the said conversations were confidential or to what extent a disclosure may sunder trust. The Appellant is entitled to know what Revenue perceives as defective in his records (which might it be said are not covered by broad and non-specific assertions that they are defective) and so have the opportunity to meet any difficulties. Moreover, the Appellant has a constitutional right to be allowed to carry out a worthwhile cross-examination of a witness who was willing to give evidence against him. If it is the case that the Revenue intended to rely upon the statements of third parties to condemn the Appellant then Revenue officials ought to have explained clearly to these persons at the time that the statements must be given by way of a signed statement, on the record, and that there*

was a possibility they would be called to give evidence at a tax appeal. The fact of the matter is that it is the purported statements of those customers that the Revenue's assessments are based upon. If the purported statements were not made then the assessments would not have been raised, or would be fundamentally different in nature. The purported statements are so fundamental to the tax appeals that, as stated above, the percentage of interviewees whom the Revenue claim denied purchasing marked gas oil from the Appellant (75%) is used as a variable in the calculation of the tax assessments themselves. A clear distinction can be made between the following 2 circumstances; (a) where an arm of the state with investigative powers gathers intelligence from confidential sources in order to establish an intelligence platform to assist an ongoing investigation, and; (b) where it is the very testimony of third parties that is itself the triggering event for the charges (as is the case with this Tax Appeal)."

31. A remote case management conference ("CMC") in accordance with s. 949 TCA 1997 was fixed for Friday, the 17th of September, 2021. The Applicant also made a data access request on the 29th of July, 2021 seeking a:

"complete copy of any information you keep about me, on computer or in manual form related to or concerning the Revenue Commissioners audit and/or investigation of me which resulted in assessments for Value Added Tax and Excise for the years 2009-2016 inclusive".

32. This request was responded to on the 6th of September, 2021 by Revenue's data protection unit, but the said reply granted and released a limited set of documents. A large number of the scheduled documents in Revenue's reply were withheld by Revenue, with Revenue citing various statutory grounds for refusing to release the information and documentation. In particular, the Revenue's reply to the Applicant's data access request did not disclose the information and documentation sought by the Applicant in respect of the pending tax appeals but did confirm that such information and documentation was extant and was in the possession of the Revenue particularly insofar as the schedule listed notes of interviews conducted and the dates of interview, without further detail.

33. Revenue responded to the Tax Appeal Commission on the 13th of September, 2021 stating that the statement of case and outline argument clearly set out the basis for the

assessment and that the Applicant's sales records were unreliable and did not conform with the Mineral Oil Tax Regulations 2012. It was further maintained that it would, if required, provide a list of the 300 purported customers whom it was unable to trace. Revenue stated that the Applicant was not entitled to the records or other details of site visits to the Applicant's customers and interviews of those customers in circumstances where these interviews were covered by public interest privilege and/or informer privilege. It was further maintained that "*Any statements made to the Respondent's officers by the 44 'customers' interviewed were made in confidence."* It was stated that if this information was disclosed this would be considered a betrayal of the interviewees and create difficulties for Revenue in future unrelated enquiries.

34. In response to the Revenue's refusal to provide the information sought the Applicant's solicitor then wrote to the Tax Appeal Commission and the Revenue on the 15th of September, 2021 advising the Tax Appeals Commission of the Applicant's data request and the Revenue's response thereto with the apparent purpose of notifying the Tax Appeals Commission that the relevant documentation was extant and in the possession of the Revenue and had been refused both in correspondence directed to the solicitor and in response to the data request.

35. Ultimately the case management hearing took place on the 17th of September 2021 and was chaired by the presiding Appeals Commissioner (hereinafter referred to as "the Commissioner"). Oral submissions were made by both parties. At this hearing the Applicant sought the disclosure of:

(i) the details of the customers and the transactions which comprised the sales at the core of the assessments; and

(ii) the details and documents verifying enquiries carried out by Revenue Officers pertaining to the raising of the assessments. Submissions were made by both parties in fine with the correspondence between the parties.

36. A decision on this application was reserved by the Commissioner. Following the case management hearing, Revenue delivered the names of the 300 persons that it claims it was not able to identify. In reply, on the 17th of September, 2021, the Applicant's solicitor confirmed receipt of the said list-of 300 persons but also advised the Revenue that:

"For the avoidance of doubt the Appellant requires all the documentation and information in the Revenue's possession which speaks to what efforts were made to contact these individuals"

37. In view of the outstanding information issues which awaited ruling, the hearing date of the 27th of September was vacated on the 25th of September, 2021.

DECISION OF COMMISSIONER

38. The Commissioner delivered her decision on the 1st of December, 2021. In her decision the Commissioner addressed the matter in two categories.

39. Category 1 was the request to identify the names of the 300 customers which could not be identified or located. The Commissioner found that the:

"Appellant had been on notice since 2015 of the need for him to identify the (approximately) 300 customers whom the Respondent was unable to trace."

40. The Commissioner notes that the Respondent delivered the list of the 300 names to the Applicant after the case management hearing on the 17th of September, 2021 and, although the application for directions had been made on behalf of the Applicant, directed the Applicant to furnish the names of the 300 customers that Revenue were unable to identify. The Applicant was given 28 days to provide the said information.

41. The Commissioner then dealt with Category ll, the Category at the heart of these proceedings, which she phrased as:

"the names, details, and particulars of 44 of his own customers who were interviewed by the Respondents together with documentation in relation to those interviews."

42. The Commissioner noted (at paragraph 16 of her decision) that the onus of proof in appeals before the Tax Appeal Commission was on the taxpayer. At paragraph 17, the

Commissioner asserted that the information being sought originated from the Applicant's own documents. She stated:

> *"The information which is sought from the Respondents, originated from the Appellant's own documents and records furnished to the Respondents and from the identities of his own customers, as contained in that information. The Appellant knows who his customers are and he knows the persons to whom he has supplied marked mineral oil. As such, the information is to this extent within the Appellant's own knowledge, possession and procurement."*

43. The Commissioner refused the request to furnish the names, details and particulars of the 44 customers interviewed by the Respondent together with the documentation in relation to the interviews.

44. On the 3rd of December, 2021 the Applicant submitted an application to amend and withdraw the Commissioner's direction within the requisite 14 days. It was submitted that the framing of the direction in respect of Category 1 served to predetermine the issue between the parties as to whether the Applicant's records were satisfactory. It was further submitted that the direction in respect of Category ll was flawed on the grounds that it: (i) misunderstood the Applicant's application; (ii) was wrong in law; (iii) took an unduly narrow approach to the powers and functions of the TAC; (iv) took an unduly narrow approach to the burden of proof; (v) failed to recognise the significance of the documents sought for the proper adjudication of the appeals; (vi) failed to recognise the 'significance of the documents sought in respect of their relation to the tax charging provisions for excise invoked by the Revenue; (vii) wrongly grounded the declinature and refusal of the Applicant's application for the document sought solely based upon the documents' relevance to the excise appeal and ignores their relevance to the VAT appeal; and (viii) was prejudicial to the Applicant's constitutional rights to fair procedures. It was further reiterated that the documents sought were not in the knowledge, possession or procurement of the Applicant.

45. The Revenue responded on the 22nd of December, 2021 supporting the decision of the Commissioner and asking that she stand by her determination.

46. The Commissioner largely reaffirmed her directions on the 25th of January, 2022 save that the timeline for compliance with the direction to supply the names and addresses of the Applicant's 300 customers (Category I) was extended by 21 days from the 25th of January, 2022. The direction prescribed that if the Applicant failed to comply with the direction within the time specified, then the Commissioner would deal with any application the Revenue may wish to make in respect of such default at the substantive hearing of the case.

47. The Applicant seeks relief by way of Judicial Review of the decisions of the Revenue to refuse to provide the information sought and the Tax Appeal Commissioner to refuse to direct its provisions. Complaint is also made that the Tax Appeals Commissioner directed the Applicant to provide further information.

PROCEEDINGS

48. In proceedings commenced by way of judicial review in March 2022, the Applicant seeks the following relief:

I. An Order of *certiorari* by way of judicial review of first respondent on the 13th of September, 2021;
II. An Order of *certiorari* by way of judicial review quashing the decisions of the second respondent on the 1st of December, 2021 and the 25th of January, 2022;
III. Declarations that the first respondent breached the principles of fair procedures and natural and constitutional justice in failing and refusing to provide the Applicant with the information sought in its letters of the 12th of April, 2021 and the 20th of July, 2022;
IV. Declarations that the second respondent breached the principles of fair procedures and natural and constitutional justice in failing and refusing to direct the first respondent to provide the information sought in the letters of the 12th of April, 2021 and the 20th of July, 2021 to the Applicant;
V. Declarations that the second respondents breached the Applicant's Article 6 rights of the European Convention of Human Rights In failing to direct the first respondent to provide the information sought in the letters dated 12th of April, 2021 and the 20th of July, 2021;

VI. Declarations that the first respondent and second respondent erred in law in making their respective decisions.

49. The thrust of the Applicant's case is that he is entitled as a matter of constitutional justice and/or pursuant to Article 6 of the European Convention on Human Rights to fair procedures and a fair hearing on appeal before the Tax Appeal Commission which includes fair notice of matters being proffered against him and an opportunity to comment on those matters as a particular incident of the principle of *audi alteram partem*. It is contended that the information obtained from the investigations conducted by Revenue formed the basis of the assessments. It is claimed that the material sought by the Applicant and refused by both of the Respondents is necessary for a fair hearing because this information is intended to be relied upon by Revenue at the hearing to justify an application for an extension of the period of the assessments raised and to challenge any evidence put forward by the Applicant in his appeal as to the accuracy of his records. The Applicant refers to the fact that the Tax Appeal Hearing is governed by the rules of the Provisions of the Finance (Tax Appeals) Act 2015 under which the Tax Appeal Commission is entitled to admit evidence, whether it would be admissible in proceedings in a court or not and can exclude evidence where it would be considered unfair to admit such evidence (s. 949AC TCA 1997).

50. The Applicant posits that for the hearing process to be fair to all parties they must be allowed to present the best case possible. Notice of the proposed evidence is required both to avoid an ambush or an imbalanced or unfair hearing. As there is no right of appeal save for an appeal by way of case stated, it is contended that the hearing before the Tax Appeals Commission is the only fact finding/establishing forum and therefore the parties are entitled to know the case being made and have possession of the relevant material. While the purpose of an appeal is to ascertain the tax due, it is contended on behalf of the Applicant that in this instance, it is not simply an issue of record keeping because the records are being questioned and challenged; hence it is the Applicant's case that the basis for challenging the records and information supplied ought to be provided to the Applicant.

51. It is acknowledged on behalf of the Applicant that the burden of proof normally rests with the Applicant to demonstrate that the tax assessment was wrong, but it is contended that because Revenue seeks to look past the four-year period, the onus switches to Revenue to demonstrate that there was neglect or fraud present. It is the Applicant's case that this factor

increases the relevance and importance of the information being sought. The Applicants contend that there is no suggestion that Revenue do not intend to rely on the information elicited from the 33 individuals interviewed and as it is the basis for the assessment, the Applicant maintains that it will be produced and relied upon in the forum of the hearing in any event. Consequently, it should be made available to the Applicant to ensure a fair hearing.

52. Separate opposition papers were filed on behalf of each Respondent. For its part the Revenue opposes the within proceedings on the basis, *inter alia,* that its refusal to furnish the names of the 44 customers contacted and the records of meetings with the said customers is not a 'decision' which is amenable to judicial review and even if it were, the challenge is out of time in circumstances where the final correspondence from the Revenue in this regard dates to the 13th of September 2021 but proceedings were only commenced in March, 2022, outside the time limits ordained by Order 84, rule 21 of the Rules of the Superior Courts 1986. It is contended that the matters in dispute between the Applicant and the Revenue are matters solely for the Tax Appeals Commission and are not properly within the jurisdiction of the High Court by way of judicial review. The Revenue further contends that the refusal was lawful and does not breach the principle of fair procedures. The Revenue reiterates its position that the details pertaining to the customers whom the Applicant supplied are within his knowledge and if he calls evidence that he supplied MGO to the customers whom his records suggest, this will largely provide an answer to the assessments. It is contended that as it is the Applicant's appeal against Revenue assessments, it is for him to furnish evidence to satisfy the Tax Appeals Commission that the assessments should be reduced or dismissed. The Revenue denies any breach of the principle of *audi alteram partem* and contends that the Tax Appeal Commissioner's rulings in December, 2021 and January, 2022 are correct.

53. The Tax Appeals Commissioner stands over her decision to refuse the request for information and contends that the refusal was properly made on the basis that:

(i) the Revenue obtained the names of the 44 customers from the Applicant's own books and records;

(ii) the Applicant knows who his customers are and to whom he supplied marked mineral oil;

(iii) the burden of proof is on the Applicant to establish that the relevant tax is not payable; and

(iv) the burden of proof is on the Applicant to establish compliance with s. 99(10) of the Finance Act 2001 to avail of the reduced rate of excise duty.

54. It is contended that the Commissioner lawfully determined that the requested documentation was not necessary to prepare and make the case in respect of s. 99(10)(b) of the Finance Act 2001. It is denied that the refusal of the direction resulted in any breach of the Applicant's rights to fair procedures, the principle of *audi alteram partem,* rights of constitutional justice and/or rights otherwise protected pursuant to Article 6 of the European Convention on Human Rights.

55. It should be recorded that in submissions made the Applicant has argued that his right to be heard and his right of defence protected under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union require the disclosure of the information he seeks but the Respondents object on the basis that leave has not been obtained to make this case and no argument was advanced before the Tax Appeals Commissioner based on EU law.

STATUTORY FRAMEWORK

56. Chapter 1 of Part 2 of the Finance Act, 2001 (as amended), comprising ss. 96 to 153, relates to all excisable products including mineral oil. Section 99 of the 2001 Act (as amended), deals with the liability of persons. In this regard, a charge to excise duty arises when mineral oil is released for consumption in the State. That charge will be at the standard rate unless the conditions for the application of a reduced rate are satisfied.

57. Central to this case is the question of compliance with Mineral Oil Tax Regulations. The Revenue have a general power to make regulations related to the holding and sale of mineral oil pursuant to s. 104 of the Finance Act 1999 which states:

> *"104-(1) The Commissioners may, for the purposes of managing, securing and collecting mineral oil tax or for the protection of the revenue derived from that tax, make regulations.".*

58. Flowing from s. 104 as aforesaid the Revenue introduced the Mineral Oils Tax Regulations 2001 (SI N0. 442 of 2001) [hereinafter "the 2001 Regulations"] and the Mineral Oil Tax Regulations 2012 (SI No. 231 of 2012)[hereinafter "the 2012 Regulations"]. These Regulations prescribe the recording of details with regard to mineral oil. Pursuant to the 2001 Regulations when a trader in oil delivered oil to a customer they were obliged pursuant to Regulation 31 thereof to generate and retain a document defined therein as a "*Movement Document*". Notably Regulation 31[4] prescribed the contents of a movement document. Regulation 31 of the 2001 Regulations stands revoked by Regulation 3(2) of the 2012 Regulations from the 1st of January, 2013.

59. The 2012 Regulations provide for a more expansive regulatory obligation on an oil trader delivering oil products in respect of the procedure and documentation required. In correspondence with the Applicant the Revenue has placed the most emphasis on the record keeping requirements of Regulations 18 and 24. Regulation 18(2)(c) of the Regulations 2012 requires records to be kept, as follows:

> *"for all supplies and deliveries made by the mineral oil trader; the name and, where applicable, the Value-Added Tax registration number and mineral all trader's licence number of the person to whom the mineral oil was supplied or delivered, and the address of every premises or place concerned."*

60. The 2012 Regulations oblige a trader pursuant to Regulation 23 thereof to generate and retain a document defined as a "*Delivery Document".* Regulation 23 provides as follows:

> *"23. (1) In this Regulation "consigning mineral oil trader" means a mineral oil trader who supplies mineral oil and who consigns it for delivery from a premises or place in the State, whether that delivery is carried out by that mineral oil trader or by another person on that mineral oil trader's behalf.*
>
> *(2) Subject to paragraphs (3) and (7), a consigning mineral oil trader shall, for each delivery of mineral oil and before the mineral oil concerned is consigned for delivery from the premises or place concerned, complete an approved document (referred to in these Regulations as a "delivery document") in three copies (referred to in this*

Regulation as "copy one", "copy two" and "copy three") and numbered in a consecutive series."

61. Regulation 23(4) describes what the contents of a delivery document must be:

"(4) A delivery document shall include—

(a) the name, address, Value-Added Tax registration number and the mineral oil trader's licence number of the consigning mineral oil trader,

(b) the address of the premises or place from which the mineral oil is to be consigned for delivery,

(c) the name, address and, where applicable, the Value-Added Tax registration number and mineral oil trader's licence number of each person to whom the mineral oil is to be delivered,

(d) the address of every premises or place to which a delivery is to be made,

(e) the date on which the delivery is dispatched,

(f) the quantity and specified description of mineral oil to be delivered,

(g) the registration number of the vehicle used for the delivery,

(h) in the case of deliveries of marked gas oil or marked kerosene, or any other mineral oil supplied at a reduced rate of tax or subject to a relief from tax, the following statement,

"This mineral oil product is delivered at a reduced rate of tax and must not be used as a propellant or kept in the fuel tank of a motor vehicle.",

and

(i) such other particulars as may be required by any Regulation in Part 8 in relation to any specified description of mineral oil."

62. Regulation 23(5), (6) & (8) elaborate with regard to record keeping and retention of documentation in relation to deliveries made as follows:

"(5) The consigning mineral oil trader shall retain copy one and, before the mineral oil concerned is consigned for delivery, give copy two and copy three to the person in charge of the delivery vehicle.

(6) The person in charge of the delivery vehicle shall—

(a) retain copies two and three during the course of the delivery and, except where paragraph (7)(a) applies, give copy three to the person receiving the delivery,

(b) following the delivery, endorse copy two with details of—

(i) the quantity actually delivered, and

(ii) the date and time when that delivery was made,

and return that copy so endorsed to the consigning mineral oil trader.

…

(8) Without prejudice to any other requirement under these Regulations for the keeping of records—

(a) any mineral oil trader who is required by paragraph (5) to retain copy one, or to whom, in accordance with paragraph (6)(b), copy two is returned, and

(b) any person to whom, in accordance with paragraph (6)(a), copy three is given,

shall keep such copy as a record."

63. It is important to note, however, that Regulation 23(7) relieves the supplier of some of the foregoing requirements in respect of deliveries under 2,000 litres as follows:

"(7) For deliveries not exceeding 2,000 litres of marked gas oil or marked kerosene, to a person other than a mineral oil trader—

(a) a single delivery document may be used where several such deliveries are made in the course of a single journey by the delivery vehicle,

(b) the person in charge of the delivery vehicle may, instead of a copy of the delivery document, provide the person concerned with any other record that includes the information set out in paragraph (4) that is relevant to that person,

(c) an additional delivery that is not included in the delivery document at the time the marked gas oil or marked kerosene is consigned for delivery may be made where—

(i) the details of the delivery are not known at the time the marked gas oil or marked kerosene is removed for delivery, and

(ii) those details are entered on the copy of the delivery document to be returned to the consigning mineral oil trader under paragraph (6)(b).”

64. While much of Regulation 23 has no application to deliveries below 2,000 litres, Regulation 24(1) of the 2012 Regulations provides that where a mineral oil trader supplies marked gas oil or marked kerosene at the premises or place of that mineral oil trader or to a person other than a mineral oil trader, in a quantity not exceeding 2,000 litres and not for delivery to any other person, the supplying mineral oil trader shall keep a record, showing all the information relevant to that supply that is required under Regulation 23(4).

65. Regulation 28 of the Mineral Oil Tax Regulations deals with the ‘*Application of a reduced rate*’ of excise duty and provides that the reduced rate ‘*shall only be allowed*’ in accordance with Regulation 28(1) where the Respondent is ‘*satisfied*’ that such fuel; (a) is intended for use other than as a propellant, (b) has been marked in accordance with Regulation 29, (c) is at all times kept for sale, sold, kept for delivery and delivered, in accordance with the requirements of the Regulations that apply to the keeping for sale, selling, keeping for delivery, supply or delivery of marked gas oil and marked kerosene, (d) where it has been consigned to the State from another Member State or from outside the territory of the European Union, has been declared in writing to a proper officer as being for use other than as a propellant, and marked in accordance with Regulation 29.

66. Where the requirements of s. 99(10) of the 2001 Act (as substituted by s. 93(1)(d) of the Finance Act 2010) and the Mineral Oil Tax Regulations 2012, are not satisfied, mineral oil falls to have been supplied as road diesel, and excise duty at the standard rate applies. Section 99(10) of the 2001 Act provides:

"(10) Where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and where—

(a) such requirement has not been satisfied, or

(b) any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown, to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner,

then the person who has received such excisable products, or who holds them for sale or delivery, is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of any such relief, rebate, repayment or lower rate.."

67. In this case excise assessment have been raised pursuant to the Revenue's general power to raise such assessments against a taxpayer pursuant to s. 99A of the Finance Act 2001 (as inserted by s. 46 Finance (No. 2) Act 2008). Section 99A(2) of the 2001 Act provides for such assessment as follows:

"(2) Where an authorised officer has reason to believe that a person is liable for payment of excise duty, then such officer may make an assessment of the amount that, in the opinion of such officer, such person is liable to pay."

68. In the conduct of appeals the Tax Appeal Commissioner has powers pursuant to s. 949E of the Taxes Consolidation Act 1997 (hereinafter "the 1997 Act") to make a number of directions in relation to the hearing of an appeal. This is the power invoked by the Applicant in seeking directed disclosure from the Revenue of information in this case. Section 949 E of 1997 Act states, in relevant part, as follows:

"(1) The Appeal Commissioners may, on their own initiative or on the application of a party, give a direction at any time to a party in relation to the conduct or disposal of

an appeal, including a direction amending an earlier direction or suspending or setting aside its operation.

(2) Without prejudice to the generality of subsection (1), the matters in relation to which the Appeal Commissioners may give a direction include—

(a) requiring a party to provide, to the Appeal Commissioners or to another party, documents, statements, accounts, returns, computations, explanations, particulars, records, certificates, declarations, schedules and such other items or information as they consider relevant to the adjudication of the matter under appeal,

....

(6) A party who asserts that a direction ought not to have been given by the Appeal Commissioners or that a direction given by them should be amended shall apply to the Commissioners for a direction setting aside or suspending its operation or, as appropriate, amending it.

(7) That application shall be made not later than 14 days after the date on which the party was notified of the first-mentioned direction in subsection (6).”

69. Section 99AB of the Finance Act 2001 (as inserted by s. 70 of the Finance Act 2012) in respect of excise provides for time limits in consequence of which the Revenue is not entitled to look past 4 years of a taxpayer's excise assessments, save for where there are reasonable grounds for believing there was fraud or neglect. In this case, the Revenue has raised assessments for periods exceeding four years and will therefore need to call evidence of reasonable grounds for believing that there was fraud or neglect on the part of the Applicant unless conceding that these assessments are statute barred.

70. The legal basis for raising assessments in respect of VAT is provided under s. 111 of the Value-Added Tax Consolidation Act 2010 as amended (“the VAT Act”) which provides for the raising of an assessment where an officer of the Revenue has reason to believe that an amount of tax is due and payable to the Revenue Commissioners by a person in prescribed circumstances including where the total amount of tax payable by the person was greater than the total amount of tax (if any) paid by that person. The assessment is based on the officer’s opinion of the tax that should have been paid. Section 111 also provides for a right of appeal on the part of a person aggrieved by an assessment made on that person as aforesaid.

71. Section 113 of the VAT Act provides, in like fashion to the limitation period under s. 99AB, that Revenue is not entitled to look back past 4 years of a taxpayer's excise assessments save for where there are reasonable grounds for believing there was fraud or neglect.

72. The tax appeal hearing is governed by the rules of the provisions of the Finance (Tax Appeals) Act 2015 under which the Tax Appeal Commissioner is entitled to admit evidence, whether it would be admissible in court proceedings or not, and can exclude evidence where it would be considered unfair to admit such evidence (s. 949AC TCA 1997).

DISCUSSION AND DECISION

73. Although a number of preliminary issues were raised on behalf of the Revenue, they can be addressed in relatively short order. I agree that the refusal of the Revenue is not a "*decision*" which might be challenged in these judicial review proceedings by way of an application for *certiorari* where that "*decision*" has been the subject of direction by the Tax Appeals Commissioner. Consequently, it would not be proper for me to make the order of *certiorari* sought in the pleadings as regards a decision by Revenue. However, in the face of the Revenue's ongoing objection to the disclosure of the information sought, it seems to me that the Revenue may properly be subjected to my jurisdiction to grant declaratory relief in respect of the information sought, should I otherwise be persuaded that such relief is warranted. It is quite clear that the Revenue are a necessary party to these proceedings, have advocated for the position adopted by the Tax Appeals Commissioner, stand over that position and maintain an objection to providing the information sought. It seems to me that the Revenue is a *legitimus contradictor* on the issues which arise in these proceedings in much the same way as the Director of Public Prosecutions is in a criminal prosecution. There is no doubt in my mind, therefore, that the Revenue were properly joined in these proceedings albeit that, issues of time apart, I would not consider it a proper exercise of my jurisdiction to quash their refusal dating to September, 2021 to provide the information sought in circumstances where the matter has properly progressed to a ruling before the Tax Appeals Commissioner. Ultimately, the fact that certiorari does not lie in respect of Revenue's refusal to give information may not be a matter of great consequence where other relief is claimed which potentially affects Revenue's interests.

74. As we have seen above, under s. 99(10) of the 2001 Act the charge to excise duty arises where there is a failure to comply with the requirements of excise law in relation to the holding or delivery of MGO and it has not been shown that the product has been used or held for use for a rebated purpose. In cases involving tax reliefs or exemptions, it is incumbent on the taxpayer to demonstrate that the taxpayer falls within the relief (see *Revenue Commissioners v Doorley* [1933] 1 IR 750 and *McGarry v Revenue Commissioners* [2009] ITR 131). The primary legal question which frames the Tax Appeals Commissioner's jurisdiction therefore is whether the Applicant can establish, on the balance of probabilities, his compliance with the requirements of excise law in relation to the holding or delivery of MGO and that the product has been used or held for use for a rebated purpose. The relatively net substantive issue in these proceedings then is whether, in the context of the question to be decided by the Tax Appeals Commissioner, the Applicant is entitled as a matter of fair procedures to information in relation to the identity of the persons interviewed and specifically, those who denied the supply of MGO by the Applicant to them together with records of the statements they provided to the Revenue to ensure a fair determination of this question. A further issue arises in this regard, however, as to the parameters of the legal grounds identified in the Statement of Grounds and for which leave has been obtained which it is appropriate that I address first before turning to the net issue in the case.

75. In submissions made for the purpose of these proceedings the Applicant has argued that his right to be heard and his right of defence protected under Articles 41, 47 and 48 of the Charter of Fundamental Rights of the European Union require the disclosure of the information he seeks. The Respondents object to these arguments both on the basis that leave has not been obtained to argue a breach of these provisions and because this argument was not advanced before the Tax Appeal Commission. As no argument was advanced before the Tax Appeals Commissioner based on EU law, no such argument was considered by her before ruling on the application before her.

76. It is true that the pleadings, by reference to which the leave order was framed, identify the requirements of fair procedures, constitutional justice and Article 6 of the Convention without express reliance on EU law. In this way the pleadings squarely identify fair procedures and constitutional justice as the legal ground of challenge in this case. The requirements of fair procedures and constitutional justice are not static concepts fixed in time. They embrace within their ambit the requirements of fairness, deriving from national law across member

states, which underpin and are given expression in Articles 41, 47 and 48 of the Charter. Further, the requirements of fair procedures and constitutional justice evolve to keep pace with the requirements of EU law within the field of application of EU law. These requirements fall to be interpreted and applied in view of the circumstances which prevail when a decision is made. As McKechnie J. observed in *Dunnes Stores v. Revenue Commissioners* [2020] 3 I.R. 480 (at para. 90):

> *"…it is not necessary for Dunnes to rely upon ECHR to raise this fair procedures point. That issue arises in the context of an administrative decision, albeit one authorised by express statutory provision. It cannot in my view be doubted but that the Revenue Commissioners, when carrying out their statutory powers and duties, are bound in principle to apply procedural fairness. Therefore, the argument on this aspect is well covered and can be dealt with at this level as distinct from having to rely on the ECHR."*

77. Irish law on VAT implements and is governed by EU law (Directive 2006/112/EC). Excise duties are also the subject of regulation at EU level. As confirmed by the Revenue in their Statement of Case filed with the Tax Appeals Commissioner in July, 2019, the assessments which the Applicant is challenging are based on the State's obligations under EU law to ensure, that save where the conditions for the exceptional application of the reduced rate of excise duty are satisfied, excise duty at the standard rate is applied. Express reference is made in this context by Revenue to Council Directive 2003/96/EC of 27 October 2003 and Council Directive 2008/118 of 16 December 2008 concerning the general arrangements for excise duty. Accordingly, it is clear that Revenue's powers are being exercised within the field of EU law. I am therefore satisfied that the protection of the Applicant's rights to fair procedures and constitutional justice may properly be informed by the jurisprudence of the CJEU with regard to the requirements of EU law. The CJEU has made clear that a duty exists on bodies dealing with disputes falling within the area of application of EU law, such as the Tax Appeals Commissioner, to apply EU law (*Commissioner of An Garda Siochana v. Workplace Relations Commission* case C-397/17).

78. Furthermore, the rights protected under Articles 47 and 48 of the Charter mirror to a very large extent the rights safeguarded under Article 6 of the European Convention on Human Rights, expressly invoked by the Applicant in his proceedings for which leave has been

obtained, albeit that in Union law, the right to a fair hearing is not confined to disputes relating to civil rights and obligations in the same way as under Article 6 of the Convention. In all respects other than their scope, the guarantees afforded by the European Convention of Human Rights apply in a similar way. The most material difference between rights under the Charter, not expressly pleaded, and rights under the Convention, expressly pleaded, is as to their field of application. This distinction is not without some potential significance in this context and in *Fortune v. Revenue Commissioners* [2009] IEHC 28, Hedigan J. ruled that Articles 6 of the Convention had no application to tax matters. This is a view which the Supreme Court expressly declined to specifically endorse in *Dunnes Stores v. Revenue Commissions* [2020] IR 480 (McKechnie J. para. 89) in view of the dynamic nature of Article 6 in its operation.

79. Whatever about the applicability of Article 6 of the Convention, there is now a body of caselaw from the CJEU touching on the requirements of fairness in revenue proceedings from which it is manifestly clear that the provisions of the Charter have application within the field of EU law. In *C-298/16 Teodor Ispas and Anduța Ispas vs. D.G.F.P. Cluj,* the CJEU held that under EU law on the rights of the defence, the addressees of decisions that significantly affect their interests must be placed in a position in which they can effectively make known their views on the information on which the authorities intend to base their decision. However, at para. 32, the CJEU endorsed the Opinion of the Advocate General that the national tax authorities are not under a general obligation to provide full access to the file or to communicate of their own motion the documents and information that support the intended decision, and, at para. *35* the CJEU noted it to be settled case-law that respect for the rights of the defence is not an unfettered prerogative but may be restricted, provided that the restrictions correspond to objectives of public interest pursued by the measure in question and do not constitute a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed. The CJEU ruled as follows:

> *"36. In that regard, in a procedure of tax inspection and establishment of the basis for VAT assessment, such restrictions, enshrined in national law, may, in particular, be designed to protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents.*
>
> *38. […] as to the extent of the review of the lawfulness of an administrative VAT decision, that court has sole jurisdiction to make the necessary findings and, if need be,*

to request a preliminary ruling from the Court on the requirements of EU law relating to that review.

39. [...] the general principle of EU law of respect for the rights of the defence must be interpreted as a requirement that, in national administrative procedures of inspection and establishment of the basis for VAT assessment, an individual is to have the opportunity to have communicated to him, at his request, the information and documents in the administrative file and considered by the public authority when it adopted its decision, unless objectives of public interest warrant restricting access to that information and those documents."

80. In *Kamino International Logistics and Datema Hellmann Worldwide Logistics v Staatssecretaris van Financiën* Joined Cases C-129/13 and C-130/13 ("*Kamino*"), a case relating to the specification of custom goods, the tax inspector, following an inspection of the goods, sent a demand for payment in order to effect recovery of the additional custom duties owed. *Kamino* and *Datema* were not afforded the opportunity to be heard before the demands for payment were issued. The matter was referred to the CJEU, and the court noted at paragraph 28 of its judgment that:

"it should be noted that observance of the rights of the defence is a fundamental principle of European Union law, in which the right to be heard in all proceedings is inherent ...".

81. The CJEU further stated at paras. 29 and 30 the following:

"29. The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken…

30. In accordance with that principle, which applies where the authorities are minded to adopt a measure which will adversely affect an individual…the addressees of decisions which significantly affect their interests must be placed in a position in which

they can effectively make known their views as regards the information on which the authorities intend to base their decision…"

82. In a subsequent decision from the CJEU, *WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* Case C-419/14 ("*WebMindLicenses*"), the CJEU considered whether evidence obtained by the tax authorities, without the knowledge of WebMindLicenses and used in parallel criminal proceedings but, which was not available to WebMindLicences, was an observance of WebMindLicenses right of the defence and principle of good administration. The CJEU noted the following:

"*… It is incumbent upon that court, furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the national court finds that the taxable person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter of Fundamental Rights of the European Union, it must disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an inter partes procedure, that it was obtained in accordance with EU law."*

83. Similarly, in *Glencore Agriculture Hungary Kft v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* Case C-189/18 ("*Glencore")* C-189/18 it was maintained that the tax authorities had breached the right to a fair hearing, to equality of arms and rights of the defence in that Glencore did not have access to the file relating to criminal proceedings brought against the suppliers (and to which Glencore was not a party) and the tax authorities did not make available to *Glencore* either the file relating to the inspections carried out with respect to those suppliers, in particular the documents on which the tax authorities' findings were based, or its report, or the administrative provisions which it adopted, but merely communicated a part of them, which it selected according to its own criteria.

84. In its judgment in *Glencore*, the CJEU stated, *inter alia*, that the rights of the defence is a general principle of EU law which applies where the authorities adopt a measure which would have the effect of adversely affecting an individual. In such circumstances the said individual must be placed in a position that would facilitate their views being given in relation to the information that the authority intends to base their decision on. Considered integral to the rights of the defence is the right to be heard. Affected persons required to be afforded the opportunity to *"make known their view effectively during an administrative procedure"* and prior to the adoption of any decision which would affect the individual adversely. The Court continued (at para 43) to state that the rights of the defence is not an unfettered prerogative but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question and do not constitute, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights thus guaranteed. The Court considered (at para. 51) that the principle of respect for the rights of the defence has as a corollary the right of access to the file.

85. It is noted that in the decision of the Court of Appeal in *Lee v. Revenue Commissioners*, Murray J. acknowledged a jurisdiction deriving from the requirements of EU law in his judgment (see paras. 74 and 76) when he found that the Appeal Commissioners may entertain claims based, for example, upon the doctrine of abuse of rights in European law but that applying principles deriving from the mandates of EU law does not expand the jurisdiction of the Tax Appeals Commission as a matter of national law. Indeed, while the implications of EU law for this case were not explored in submissions before the Tax Appeals Commissioner in terms of the requirements of procedural fairness and the application for access to the documents on behalf of the Applicant was not informed by such submissions. It has been accepted by the Tax Appeals Commission it has jurisdiction to apply EU law as appropriate (see Determination 31TACD2023 provided to me in redacted form and relied upon in argument before me). Indeed, in Determination 31TACD2023, the Tax Appeals Commissioner disregarded the evidence introduced by the Revenue in circumstances where the Revenue had not complied with the principles of fair procedures pursuant to European Law. The Tax Appeals Commissioner held as follows, (at paras 48 and 49):

> "*Therefore, it follows that the Commissioner is satisfied that, in failing to provide the Appellant with its file of evidence and in failing to allow it to comment on the Respondent's concerns prior to the raising of the notice of assessment, the Respondent*

breached the Appellant's right to defence under EU law as derived from the Charter, and in particular Article 41(2) thereof. There is no doubt but that the Appellant has been provided with the evidence upon which the Respondent relies, and has been afforded numerous opportunities to respond and put forward its own case, in the context of these proceedings……

….As the Commissioner has found that the Appellant was not given access to any evidence, or given an opportunity to be heard, prior to the Respondent deciding to raise an assessment against it, it follows that he is obliged to disregard all of the evidence proffered by the Respondent in this case."

86. I am satisfied that the principles of fair procedures protected under the common law concept of fair procedures and as a component of the requirements of constitutional justice reflect the requirements of EU law. As a means by which EU procedural rights are protected in the State these principles also fall to be interpreted in a manner which seeks to respect the requirements of EU law. They may therefore be informed as to their scope by the requirements of EU law as found by the CJEU. It is clear from the case-law of the CJEU as summarised above that while there is now a substantial body of case-law which may be drawn on to assist in decision making in relation to the requirements of fairness in taxation proceedings, it is also manifest that the right of access to documentation which is acknowledged through this case-law is not unfettered, just as there is no absolute right of access to documents as a matter of domestic law. Insofar as the right of access to information is conceived of as part of a right of defence under EU law it seems clear that it arises in circumstances where there is an imputation against the tax-payer of a nature that gives rise to an entitlement to such access in order to respond to and defend against that imputation. This is not a novel proposition. Such a requirement is aligned in my view with the requirements of fair procedures and constitutional justice as developed over decades in domestic jurisprudence. Like Irish law as interpreted and applied by domestic courts, EU law recognises that a right of access to information may be restricted where a public interest justification arises. Such interests potentially include public interest privilege and/or informer privilege invoked by the Revenue in their correspondence in September 2021. Without in any way deciding the issue (which would require to be fully and properly argued), it is therefore not immediately obvious to me that an argument supported by EU law before the Tax Appeals Commission would lead to any different outcome.

87. While I am satisfied that, as a matter of pleading, a plea that there has been a breach of fair procedures or the requirements of constitutional justice in a field where EU law applies permits argument to be advanced based on the requirements of EU law under relevant provisions of the Charter, this does not mean that it is appropriate for me to intervene to quash a decision of the Commissioner on the basis of a case which was not made to the Commissioner. To the extent that argument was advanced on the basis of EU law before me, it would be fair to record that the case made was quite different to that which had been determined by the Tax Appeals Commissioner. Reliance is placed by the Tax Appeals Commissioner on *N.V.U & Ors. v. Refugee Appeals Tribunal & Ors* [2019] IECA 183 in inviting me to decline to consider arguments of EU law which were not canvassed before her. In *N.V.U,* the Court of Appeal refused to intervene on appeal in respect of the *obiter* comments of the High Court judge (considered to be incorrect in law) in circumstances where that Court had also ruled that the matter had not been argued at first instance before the RAT. Baker J. on behalf of the Court of Appeal therefore ruled that it was inappropriate to express any further opinion pending a decision following full argument at first instance and a complete determination on the point.

88. In the absence of full argument based on a decision of the Tax Appeals Commissioner in which this extensive jurisprudence from the CJEU was considered, I do not consider that it would be appropriate for me to address further what bearing the requirements of EU law should have on the Applicant's application for a direction, if any. The implications of EU case-law concerning rights of defence require to be very carefully considered and, just as Baker J. concluded in *N.V.U & Ors.*, it seems to me that this should occur following full argument at first instance with a nuanced and complete determination of the point. I am not satisfied that the Applicants is entitled to advance substantive submissions as to the scope of protection afforded under the rights to fair procedures and constitutional justice as informed by the jurisprudence of the CJEU for the first time in judicial review proceedings, having not first presented those arguments at first instance to the Tax Appeals Commissioner. The opportunity to do so remains open to the Applicant in circumstances where the Applicants appeals remain pending before the Tax Appeals Commissioner and where the potential to rely on rights of defence even during the hearing is demonstrated by cases such as Determination 31TACD2023.

89. The Revenue and the Tax Appeals Commission squarely join issue with the Applicant in respect of the case which was urged on the direction application determined by the Tax

Appeals Commissioner. The Revenue oppose the relief sought on the fundamental basis that the default position is that the standard rate of excise applies. Where a trader is unable to show compliance with the Mineral Oil Tax Regulations and is unable to satisfy the Commissioners that he complied with the conditions applicable to the reduced rate, the Revenue contends that he loses the benefit of the reduced rate and is liable to pay excise duty at the standard rate for those supplies. The Revenue says that based on the deficiencies of information and on the interview notes, they had reason to believe in this case that excise duty was due and raised assessments on the basis that the reduced rate of excise duty was withdrawn. The Revenue raised excise and VAT assessments on the Applicant which reflect the difference between the normal standard rates and the lower rates applicable to MGO. The Revenue maintain that the Applicant is on notice of the basis for the assessments. It is contended that in order to substantiate his appeal he only needs to demonstrate the *bona fides* of his recorded sales by providing the names and addresses of his "*customers*" (whom he claims he can readily identify).

90. It seems to me that the Revenue's contention is only partially true in circumstances where it appears from the Revenue's own Statement of Case that even in those instances where names and addresses of customers were provided such that customers were identifiable, the Revenue was not satisfied as to the *bona fides* of the sales based, *inter alia*, on interviews conducted with unidentified customers. Accordingly, the Revenue's contention as to what is required for the Applicant to substantiate his appeal is only true if the Revenue do not seek to challenge the Applicant as to the *bona fides* of his recorded sales as demonstrated in his evidence on grounds other than a failure to provide names and addresses. Certainly, the Applicant knows or should know who his customers are but he does not know which of some 400 customers purportedly denied purchasing MGO from him when they were interviewed by the Revenue. The Revenue seek to minimise the significance of this fact on the basis that it has not alleged before the Tax Appeals Commission that the Applicant has committed any form of fraud. They contend that the assessments in this case are ordinary assessments which have issued because of inadequacies in the Applicant's own records and fraud is not therefore an essential ingredient of the assessments raised. While, in addition to documentary deficiencies, the Revenue also had information gleaned in interviews with purported customers, it is contended that this information does not necessarily come into play at all in this appeal. The Revenue resist signalling a clear position as to what evidence, if any, it is intended to call. I understood it to be accepted in argument before me, however, that a challenge to the bona fides

of the records, were such a challenge made, would have to be grounded in evidence and would require to be made in a manner which respects the requirements of fair procedures. Fundamentally, Revenue maintains the position that this is an appeal which may be determined on the basis of the Applicant's own records and without the need for any third-party witness evidence.

91. There is no clear bright line as to what is required to ensure observance of the requirements of fair procedures and constitutional justice. These requirements vary from case to case and depend on the context, both factual and legal. A separate jurisprudence has developed regarding revenue proceedings which means that the dicta enunciated in seminal cases such as *J&E Davy* [2010] 3 IR 324; *East Donegal Co-Operative v. Attorney General* [1970] IR 317*; Glover v. BLN Ltd.* [1973] IR 388*, In re Haughey* [1971] IR 217*; McCormack v. Garda Siochana Complaints Board* [1997] 2 IR 489 and *Dellway Investments Ltd. v NAMA* [2011] 4 IR 1 are not always readily applicable in a tax case. Principally, this is because where a claim for relief is made by a taxpayer, an entitlement to the said relief is not assumed but falls to be established by the taxpayer. An imputation of wrongdoing which underlines the requirements of fair procedures identified in the cases cited in this paragraph does not arise merely by requiring the taxpayer to establish an entitlement to relief in accordance with statutory conditions. However, if for example records ostensibly establish an entitlement to relief but the Revenue challenge the bona fides of the records by means other than material already in the tax-payer's possession or available to him or her in a manner which imputes dishonesty, then such a challenge signals a red-flag for the decision maker to be alert to ensure fair procedures in the process which may lead to any adverse determination. Indeed, it has been readily accepted by both the Revenue and the Tax Appeals Commissioner that there is a duty to ensure that fair procedures are observed in the conduct of taxation proceedings, albeit what exactly this would entail in a particular case is not always precisely clear. In *Keogh v. Criminal Assets Bureau* [2004] 2 I.R. 159 Keane C.J. (at p. 174) stated:

> *"It is beyond argument that the second respondents and their agents, as public authorities, are bound to observe fair procedures in the exercise of the powers conferred on them by the tax code and, where an actionable breach of those requirements has been established, that does not mean that the statute has been in any way amended as a result of a decision to that effect by a court. That view would be impossible to reconcile, in my judgment, with the obligation of the courts to ensure that*

public authorities perform the functions entrusted to them by statute in accordance with the Constitution and the law."

92. More recently, in *Dunne Stores v. Revenue Commissioners* [2020] IR 480, the Supreme Court found that the Revenue and the Appeal Commissioners, when exercising their statutory powers, were bound in principle to apply procedural fairness, and since the Appeal Commissioners had expert knowledge in dealing with taxation appeals they were the most appropriate body before which to pursue the fairness issue, if it remained an issue. McKechnie J. put it thus (at para. 93):

"There is no doubt but that the appeal body has to apply fair procedures from the inception of the process right throughout the hearing, up to and including finality. Whilst this will become a matter for the parties and the Appeal Commissioners, nonetheless it seems reasonable to assume that if after this judgment there remain any issues to be determined on the "liability side", then that exercise would be conducted first. Thereafter, the question of quantum would arise and in such context it would be open to Dunnes Stores to make any submission it thought prudent and worthwhile to the effect that by reason of procedural unfairness, it has been disadvantaged in pursuing its appeal in a just and fair manner. As the Appeal Commissioners are a body with expert knowledge in dealing with taxation appeals, it seems to me that the most appropriate forum in which to pursue the fairness issue, if it should remain alive, is before that body. Accordingly, I would not grant any relief under this heading of claim."

93. A particular approach to tax proceedings is warranted because of the structure of the self-assessment system and the fact that the onus of proof on an appeal against an assessment lies on the appellant. This is clear from decisions such as *T.J. -v- Criminal Assets Bureau* [2008] IEHC 168; *Menolly Homes Ltd -v- Appeal Commissioners* [2010] IEHC 49 and *Lee v. Revenue Commissioners* [2021] IECA 18. It is fundamental to a proper understanding of this case-law and its application that the self-assessment system operates on the basis that tax-payers are subject to audit and are required to establish, primarily from their books and records, that they are compliant with their revenue obligations. Requiring a taxpayer to establish

compliance does not amount to imputing dishonesty or fraud against that taxpayer. It is simply a feature of how the system operates.

94. The *dicta* of Gilligan J. at paras 50 and 51 of *T.J. v. Criminal Assets Bureau* [2008] IEHC 168 is cited on behalf of the Respondents as providing a ready answer to the Applicant's complaint where he says:

> *"50. The whole basis of the Irish taxation system is developed on the premise of self-assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self-assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self-assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self-assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents. 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 […]*
>
> *[…] There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event, it has to be borne in mind that since an assessment can only relate to the applicant's own income and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant.*
>
> *51. I do not accept that the applicant has been put in an impossible situation and effectively cannot deal with bare and unexplained assessments. Furthermore, I do not accept there is any substance to the reference by [counsel] on the applicant's behalf to allegations of criminal wrongdoing being made against the applicant of which he will have no notice. The allegations being made against the applicant by way of the assessments as raised are that he earned income and made gains which he has not*

previously declared to the respondent pursuant to the basic self-assessment system that pertains in this country. Nobody is better placed to know what income he received or what gains were made than the applicant himself."

95. In *T.J.*, Gilligan J. was concerned with an appeal against an assessment to income tax where the basis for the assessment to income tax was not identified. Gilligan J. pointed out that the applicant's tax appeal to the Appeal Commissioners was a civil matter and there was no question of the applicant facing any criminal charge that might require the constitutional protections that are afforded in criminal trials. He pointed out that the applicant has not laid out any grounds of prejudice other than the hypothetical proposition that he might suffer some form of prejudice at the hearing of his appeal before the Appeal Commissioners and that if, in such circumstances, an adjournment was necessary, he would incur additional legal costs. While the Respondents equally contend in this case that the Applicant is best placed to demonstrate an entitlement to tax rebate by reference to his own records and do not need further information, a difference between this case and the *T.J.* case appears to me to be that in this case the Revenue have not relied exclusively on the records in raising assessments but have openly explained that assessments have been raised based on the denial of 33 of the 44 people interviewed that they were supplied with MGO by the Applicant as his records would otherwise suggest. Whereas in *T.J.*, it appears that no particular rationale was advanced to justify the assessment raised, that is not the position in this case. The question which arises is as to whether this distinguishing feature affects the application of the principle established in *T.J.*

96. The dicta in *T.J.* was revisited in *Menolly Homes Ltd -v- Appeal Commissioners* [2010] IEHC 49, a case involving a claimed right to cross-examine a tax inspector on a V.A.T appeal, with particular emphasis on the burden of proof in taxation appeals. The appellant in *Menolly* proposed to call the tax inspector who raised the assessment in evidence on the appeal before the Appeal Commissioners and to cross-examine him as to his state of mind five years previously when he had raised the assessment. This was seemingly with a view to demonstrating a lack of good faith or that his view was not factually sustainable or that his view was unreasonable. The Revenue protested the calling of the tax inspector for the purpose of cross-examination by the applicant and would not tender him in evidence. They said there was no jurisdiction and, in any event, no issue requiring him to be heard arose. The Appeal

Commissioners ruled in the favour of the Revenue. Charleton J. distinguished the taxation regime from other areas as follows (at para. 12 of his judgment):

> *"Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute. To import into taxation legislation any notion of general obligation is to return from the modern concept of precise obligation pursuant to defined legal rules into an era when feudal ties governed the relationship of those who served a monarch or lord and were in turn entitled to protection. How tax becomes payable, what exceptions avoid general liability as and when these genuinely arise, when payment is due, what records have to be maintained by taxpayers, which levels of taxation are applicable to what transactions or events and how the power of the tax collector is both defined and circumscribed are all precisely defined by modern legislation. In a similar way, what remedy that taxpayer has against a taxation demand is not general but specific. It is cut from the cloth whereby the precise liability is set by statute law and tailored individually by the legislature in the way that suits their perception of how an income tax, a corporation tax, a capital gains or acquisitions tax or a value added tax appeal should be set up as to the scope of appeal, the procedure on that appeal and the remedies available to the appellate body."*

97. Having reviewed the statutory appeal jurisdiction of the Appeal Commissioners, Charleton J. observed (para. 20) with regard to the burden of proof as follows:

> *"20. Under the Value Added Tax Act, 1972 the burden of proof "that the amount due is excessive" rests on the taxpayer. This reversal of the burden of proof onto the taxpayer is common to all forms of taxation appeals in Ireland. Powers are given to the inspector to be present, to produce evidence and to give reasons in support of the assessment. The Appeal Commissioners, if the taxpayer proves over-charging, must abate or reduce the assessment accordingly, but otherwise an order must be made that the assessment shall stand."*

98. Next, Charleton J. quoted from Lord Heward L.C.J. in *Sneath's case* 17 T.C. 149 at 493 to the effect that the jurisdiction of the Appeal Commissioner in a tax appeal is not to decide a

case *inter parties*, but rather to assess or estimate the amount on which in the interests of the country at large, the taxpayer ought to be taxed. Charleton J. then noted (at para. 22)*:*

> *"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable. The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J. in T.J. v. Criminal Assets Bureau, [2008] IEHC 168. While the appeal in question there concerned income tax, the observations made in the course of the judgment as to the nature of a tax appeal are germane to deciding this issue."*

99. The Superior Courts have remained consistent in maintaining that the absence of discovery as to the basis for an assessment does not provide a defence against the enforcement of same. In *Gladney v. Di Munro* [2017] IEHC 100, Hunt J. observed in finding no arguable defence in respect of an application on behalf of the Revenue for summary judgment that (paras. 23 and 24):

> *"23. Likewise, the desire of the defendant to ascertain the precise basis of the assessment through use of the discovery process does not give rise to a permissible ground of defence in a case of this kind. The observations of Gilligan J. in T.J. v. The Criminal Assets Bureau [2008] IEHC 168 are relevant in this respect. He noted that the whole basis of the Irish taxation system is developed on the premise of self-assessment, and that the whole basis of self-assessment would be undermined if, having made a return which is not accepted by the Revenue, a taxpayer was entitled to access all relevant information that was available to the Revenue. He noted that the Revenue were 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. A person subject to such an assessment has the right of an appeal to the Appeal Commissioners, the right to a further appeal to the Circuit Court, the right to a further appeal on a point of law to the High Court, and from there to the Supreme Court. To this list may be added the availability of judicial review against any actions of the Revenue or the Appeal Commissioners which are capable of engaging that remedy, and*

the ability of the Appeal Commissioners to state a case to deal with any legal complexities that may arise.

24. The observation of Gilligan J. to the effect that nobody is better placed than the taxpayer himself to know what income was received or what gains were made is particularly applicable to the position of the defendant in this case. I can see no practical reason why the defendant could not attempt to discharge the burden of proving that the assessed tax is not payable in a hearing before the Appeal Commissioners. I do not believe that a discovery order would be required to assist in that process. No doubt the Revenue or the Appeal Commissioners would have to give due consideration to any requests for information made by an appellant in the context of the appeal procedure. In this case, I can see nothing to displace the ordinary position that the taxpayer is best placed to marshal the facts and information relevant to the issue of his liability or otherwise to the tax claimed. In this case, the defendant knew well why he was being pursued by the Revenue, and in my view singularly failed to engage with important matters of substance communicated to him by the Revenue prior to the assessment being raised. As previously noted, he has also offered contradictory explanations at different times for the source of the funds held in his offshore account. In these circumstances, it is for him to adduce material to persuade the appropriate tribunal that the tax assessed is not payable."

100. The nature the jurisdiction of the Tax Appeal Commission was given more recent consideration in several decisions of the Court of Appeal. In his judgment for the Court of Appeal in *Lee v. Revenue Commissioners* [2021] IECA 18 already referred to above, Murray J. stated (paras. 20-21):

"20. The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, 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 TCA or must arise by necessary implication from the terms of that legislation.

21. In defining the functions of the Appeal Commissioners in hearing an appeal brought pursuant to s. 933 TCA or the Circuit Court in hearing an appeal under s. 942, the

scope of that jurisdiction is determined by four features of the Act – the definition of the appellate jurisdiction of the Commissioners, the parameters of the permissible grounds of appeal, the orders the Appeal Commissioners may make at the conclusion of that process and the powers conferred upon those Commissioners to enable that appeal to be effectively heard. Each of these points to a jurisdiction directed to the assessments raised by Revenue and the charging provisions pursuant to which the liabilities reflected in those assessments are imposed. They strongly suggest that the function of the Appeal Commissioners at first instance and of the Circuit Court on appeal is to determine if an assessment to tax is properly made having regard to those charging provisions, and no more."

101. Consistently therefore with the dicta of Charleton J. in *Menolly*, the Court of Appeal has endorsed the established position that in taking an appeal, the taxpayer undertakes the burden of appeal, within the relevant statutory formula, as to the relief which he might be granted if successful. It is for the tax payer to establish an entitlement to the relief and thereby upset the assessment raised by the Revenue. Murray J. restates this proposition throughout his judgment in *Lee* reiterating with regard to the jurisdiction of the Tax Appeals Commission to determine issues arising (at para. 39):

"... 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."

102. Regarding the requirements of fair procedures in this context, Murray J. observed (at para. 75):

"75. For much the same reason, the reliance by the plaintiff on decisions confirming the obligations of the Commissioners to afford those before them fair procedures (CG v. The Appeal Commissioners [2005] IEHC 121, [2005] 2 IR 472) do not affect the matter. The Appeal Commissioners in conducting any proceeding are required to adhere to principles of procedural fairness. However, this is a requirement imposed

upon them in connection with the discharge of their statutory remit. It does not change that remit."

103. Murray J. concluded (para. 76):

"The jurisdiction of the Appeal Commissioners and of the Circuit Court under those provisions of the TCA in force at the time of the events giving rise to these proceedings and relevant to this appeal (ss. 933,934 and 942) is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA. That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and see if the assessment has been properly prepared in accordance with those statutes. They may make findings of fact and law that are incidental to that inquiry."

104. In another recent decision of the Court of Appeal, Whelan J. delivered judgment for the Court (Ní Raifeartaigh and Power JJ. in agreement) in *Gladney v. Coloe* [2021] IECA 115, in the context of an appeal against the grant of summary judgment in circumstances where no appeal had been taken within time against the assessment to the Tax Appeals Commission. In her judgment Whelan J. reviewed the decision in *T.J.* and identified factors relevant to the appeal before her from that decision as follows (at para. 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."*

105. It seems to me that these authorities each in turn recognise that the taxpayer against whom an assessment has been raised is entitled to fair procedures during the revenue process but issues of law and fact arising in that process are matters for the Tax Appeals Commission in the first instance. The Tax Appeals Commission is entitled to have regard to the fact that the system is based on self-assessment and the obligation to demonstrate an entitlement to relief lies on the taxpayer, subject to the requirements of fair procedures which the Tax Appeal Commission is mandated to ensure are observed and the supervisory jurisdiction of the Superior Courts. In *Lee*, the Court of Appeal did not tease out what implications an application of EU principles might have for the applicability of decisions such as *TJ* and *Menolly* but it clearly found that the Tax Appeals Commission has jurisdiction to apply EU law as appropriate in the discharge of prescribed statutory functions and may do so to preclude reliance on evidence or information in hearings where there has not been compliance with the requirements of fair procedures or constitutional justice to safeguard the fairness of the process before the Tax Appeals Commission.

106. In view of the authorities cited above and recalling that the question which frames the Commissioner's jurisdiction on appeal is whether the Tax Appeals Commission is satisfied that there has been compliance with the requirements of excise law in relation to the holding or delivery of MGO and it is shown that the product has been used or held for use for a rebated purpose, the Applicant is required to meet the s. 99(10) test with reference to his own books, records and customer base and any witness evidence he may wish to call. It is for the Applicant and his advisers to prepare and present that case and to the extent that the Applicant claims that his records do not contain deficiencies or omissions, the Tax Appeals Commissioner has confirmed through the terms of her ruling under challenge in these proceedings, that the Applicant will have an opportunity at hearing to fully make that case. The extent and manner in which this evidence is challenged is then a matter for Revenue, subject to ruling from the Tax Appeals Commissioner whose function it is, at least in the first instance, to ensure that the requirements of fairness are met in the process.

107. In the absence of the Applicant's evidence being challenged by the Revenue, it is the evidence of the sales themselves rather than evidence gleaned in the Revenue's verification investigations that are important. This is in circumstances where the Applicant knows his customer base and he and his former employees will be able to speak to the names, addresses and general identities of the customers to whom MGO was sold. For so long as this is the case, then it seems to me that the *ratio* of the decision of Gilligan J. in *T.J.* holds good as the matters for determination by the Tax Appeals Commissioner will depend on whether the Applicant can demonstrate compliance with regulatory conditions governing entitlement to rebate, an issue which turns on information which is within the Applicant's own knowledge unless and until that information and the evidence he offers is challenged. It follows that the documentation requested in relation to the identity of the 44 individuals is not necessary for the Applicant to prepare and make his case to meet the requirements of s. 99(10)(b) of the Finance Act, 2001, provided his evidence is not called into question in reliance on information garnered during interviews absent information sufficient to enable the Applicant to defend himself in relation to the information gained in the said interviews being provided. Furthermore, requiring the Applicant by direction to provide further information in relation to the 300 customers which Revenue say they have been unable to identify does no more than affording the Applicant the opportunity to demonstrate, as he must do during the hearing in any event, that he is in a position to identify those customers from his records. This is surely in the Applicant's ease because he is doing no more than proving his case. The appeal hearing will proceed whether further information is provided by the Applicant in advance or not and it will be for the Tax Appeals Commissioner to decide, on the basis of the evidence at hearing, whether there has been compliance with regulatory record keeping requirements. It is foreseeable, however, that should additional information be given at hearing on behalf of the Applicant to demonstrate that he is in a position to identify the customers which Revenue contend they could not, then Revenue may well seek to verify the Applicant's account. Self-evidently this could result in wasted resources and delay if an adjournment were to be thereby necessitated. In the interests of the orderly and fair conduct of the hearing, therefore, it seems to me that the direction that further information be provided is entirely appropriate. Such direction is not tainted by unlawfulness and does not, in the circumstances of this case and the manner in which it is couched in the Tax Appeal Commissioner's decision, amount to a pre-determination of any issue in the tax appeal.

108. I was assured by counsel instructed on behalf of the Respondents that it was not disputed that the Applicant was entitled to fair procedures. It was maintained that when the appeal recommences there is nothing to suggest that the Applicant will not be afforded same. It was contended that all that has occurred at this juncture is that the Applicant has been required to provide information which he claims to have. It was further acknowledged on behalf of Revenue that any challenge to the Applicant's bona fides would have to be based on evidence and if Revenue call witnesses at the hearing before the Tax Appeal Commission, the Applicant will be entitled to cross-examine those witnesses. It almost goes without saying that in such an instance, at least as a matter of principle, the Tax Appeal Commissioner is required to ensure that evidence given will only be allowed where the Applicant's right to fair procedures and constitutional justice can be vindicated including by affording him access to such information as is necessary to ensure an effective cross-examination.

109. As there is no certainty that any reliance will be placed on evidence challenging the accuracy of the Applicant's records based on third party information and the appeal may be disposed of on the basis of the Applicant's records alone, it seems to me that it was open to the Tax Appeals Commissioner to conclude that the identity of the interviewees and records of interviewees are not relevant and may never become relevant. The Revenue may indeed be content to deal with the appeal on the basis of the Applicant's own evidence. Where no assertion of wrongdoing in reliance on the claims of purported customers is advanced to challenge the Applicant's evidence, then the question of his entitlement to rebate stands or falls on the Applicant's evidence. If an attempt is made to challenge the Applicant's records or evidence adduced by reference to third party evidence that they did not buy MGO, however, it seems to me that the question is no longer one of the adequacy of records evidencing an entitlement to rebate but becomes one of honesty and character of the taxpayer.

110. Should the Revenue seek to challenge the Applicant's entitlement on the basis of evidence of alleged wrongdoing in reliance on information obtained during interviews with third parties, an issue then arises for the Tax Appeals Commissioner in the first instance as to how then the fairness of the process falls to be safeguarded. In such a scenario the Tax Appeals Commissioner may need to consider, with the benefit of submissions of the parties (including as to the requirements of EU law) whether fair procedures and the requirements of constitutional justice mandate the taking of additional measures by way of rulings. A range of rulings would be open to the Tax Appeals Commissioner depending on the circumstances

including the direction of the provision of further information and/or adjournment of the hearing or indeed, a direction excluding reliance on certain information if this is considered necessary in the interests of fair process. It stands to reason that a relevant factor in such circumstances may be the fact that Revenue refused to disclose information earlier despite application for same on the Applicant's behalf on the basis that it was not necessary or relevant.

111. While the Applicant might reasonably be concerned as to the power of the Tax Appeal Commissioner to receive hearsay evidence, I am satisfied that such a power falls to be exercised in accordance with the requirements of fair procedures and constitutional justice as informed by submissions from the parties when the question of the exercise of such a power arises. Should an imputation of dishonesty be made on the basis that MGO was not sold, contrary to what records confirm, I am satisfied that the Applicant's right of *audi alterem partem* can be vindicated in the procedures adopted and rulings made where such an eventuality arises.

112. It bears some note that it does not appear to have been previously stated in the context of submissions to the Tax Appeals Commission that further application might be made where reliance is sought to be placed on third party information in a manner which it is apprehended imperils fairness. The Opposition papers did not encompass a plea of prematurity, although I understood a submission to be advanced to this effect in oral argument. Furthermore, the decision of the Tax Appeals Commissioner did not serve to appease the Applicant, as it might have, as to the fairness of the process by specifically addressing that in the event that the accuracy of the Applicant's records and in consequence the Applicant's honesty and good character is sought to be impugned in reliance on evidence from purported customers denying that they ever purchased MGO from the Applicant as documented by him, then the directions application could be revisited or further application made, as then appropriate. Although there was no signal that the position could be reviewed and a fresh application made to the Tax Appeals Commissioner in the impugned decision, however, I cannot lose sight of the fact that the Applicant was legally represented. As the Applicant was legally represented, he might be assumed to understand that the Tax Appeals Commissioner remains under an obligation to safeguard the fairness of the process. In view of the basis for the determination of the Tax Appeals Commissioner, it was therefore open to the Applicant to seek to reserve his position until it became clear whether reliance is to be placed on the information allegedly obtained from unidentified third parties or not.

CONCLUSION

113. In taking the appeal to the Tax Appeals Commission, the Applicant has undertaken the burden, within the relevant statutory formula as to the relief, of establishing an entitlement to a rebate from excise duty on the basis that the requirements of excise law in relation to the holding or delivery of such excisable products have been complied with and a lower rate of VAT therefore applies. It may be, despite what has been signalled as being part of the basis upon which tax was assessed as due, that the Revenue will not seek to look behind the Applicant's records and his evidence on appeal establishing an entitlement to rebate. Where the appeal falls to be determined on the strength or otherwise of the Applicant's evidence as to his entitlement to rebate without any challenge being maintained on the basis of third-party information, then issues of disclosure in relation to this information fall away.

114. If, however, the Applicant's records are impugned as to their veracity and his honesty is called into question during the course of the hearing before the Tax Appeals Commissioner, it will be a matter for the Tax Appeals Commissioner then seized of the appeal to vindicate his right to fair procedures and constitutional justice. This may entail refusing to allow a line of questioning or refusing to admit hearsay evidence. Alternatively, it may entail affording the Applicant an opportunity to challenge through cross-examination evidence called to impute the veracity of his records with such disclosure as fairness and effective cross-examination requires, even if this means the adjournment of proceedings so that records may be disclosed. A range of rulings designed to ensure fairness may arise for consideration and are available to the Tax Appeals Commissioner hearing the appeal. Should it become relevant and necessary to do so, it is open to the Applicant to make such further submission as may be considered appropriate including submissions in reliance on the line of authority from the CJEU.

115. For the reasons set out above, I refuse the relief sought and dismiss the within proceedings. I will hear the parties in relation to consequential matters.