

APPROVED

THE HIGH COURT

[2024] IEHC 258

Record No.: 2023/7R

BETWEEN

COLUM BROWNE

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

Judgment of Mr Justice Oisín Quinn delivered on the 3rd day of May 2024

Introduction

1. This is an appeal by way of a Case Stated against a Determination of the Tax Appeals Commissioner (“TAC”) of 6 October 2022. The Case Stated seeks the opinion of the High Court on questions pursuant to s949AQ of the Taxes Consolidation Act 1997 as amended (“TCA 1997”).

Background

2. The Appellant taxpayer (“the Appellant”) was a fisherman who was engaged in the mackerel fishing business until sometime in 2010. For this he possessed “capacity” which allowed him to carry out his business. Capacity is made up of tonnage and kilowattage and is a privately tradable asset.
3. In 2015, Bank of Ireland, who had a charge over the capacity as security for the Appellants other borrowings appointed a Receiver to sell the capacity. The capacity was sold for €817,000.00. The Receiver did not charge VAT on the sale as he did not consider it a taxable supply.
4. During the sale of the capacity, the Receiver acquired supplies in the form of solicitors, consultants, and receiver’s fees. The VAT charged and paid for those services was €27,472.00. Following this, the Receiver supplied the VAT invoices relating to these supplies to the Appellant, shortly after which the Appellant re-registered as an accountable person for VAT.
5. The Appellant then submitted a VAT 3 return in respect of which he sought the repayment of the full amount of VAT paid in respect of the supplies procured during the sale of the capacity.
6. A compliance check was then carried out by the Respondent (the ‘Revenue’) where it was decided that the Appellant was not entitled to repayment on the grounds that the VAT receipts in question were addressed to the Receiver, which it viewed as the relevant accountable person.

7. The Appellant appealed this decision to the TAC on 27 July 2020.
8. While the Appellant made complaints of alleged perjury, bias and other procedural irregularities, the TAC's focus was on, what was described as the 'central issue', namely whether the Appellant was entitled to repayment of the VAT paid on the acquisition of the professional services supplied in connection with the sale by the Receiver of the fishing 'capacity'.
9. Ultimately, the TAC determined (in her Determination of 6 October 2002) that the Revenue were correct to refuse the repayment of the VAT. The reasons, in summary, were as follows:-
 - i. If the sale of the 'capacity' was a taxable supply, then no refund of the VAT paid on the services was permissible in circumstances where no VAT had been charged on the sale of the capacity;
 - ii. If the sale of the 'capacity' was not a taxable supply, then there was no other taxable supplies during the relevant periods from which the Appellant could seek to deduct/claim a refund of the VAT paid on the professional services;
 - iii. The Appellant was not registered for VAT until after the period of the invoices in respect of the professional services.
10. The Appellant, in a number of letters, complained about this decision and sought to appeal. The TAC accordingly has stated a case to the High Court and, in view of the multiplicity of matters raised, has adopted a broad permissive approach ('so there is full transparency') as to the questions contained in the Case Stated.

Amendment

11. During the hearing of this matter on 15 December 2023, it emerged that there was an error with question two. Upon discovering this, the Court gave the Revenue liberty to apply to amend the question to reflect what was clearly intended.
12. The matter was adjourned to facilitate this at the request of the Appellant, who did not have legal representation. On 19 December 2023, the Revenue wrote to the Appellant with the proposed amended question 2.
13. On 23 January 2024 the matter came back before the Court, and I considered it appropriate to grant the amendment sought. Accordingly, I made the amendment, being satisfied that it came within the type of amendments that can properly be made by the Court pursuant to its inherent jurisdiction; see Sanfey J. in *O'Sullivan v Revenue Commissioners* [2021] IEHC 118 at para. 25.
14. The parties were then given liberty to deliver additional Submissions (which they did) and the hearing resumed and concluded on 12 April 2024.

The Case Stated as Amended

15. The Case Stated contains the following ten questions for the opinion of the High Court (the amendments to question 2 are underlined):-

- I. Did the Commissioner err in finding, if the sale of the capacity was a taxable supply, no deduction of the VAT paid on the services acquired can be allowed in circumstances where the sale of the capacity was untaxed?
- II. Did the Commissioner err in finding that section 59 if the VATCA 2010 required the appellant to have a taxable supply during the periods applicable to the invoices of 30 July 2015, 21 December 2015, 21 December 2016, 2 January 2018, 29 June 2018, 21 December 2018, 30 July 2019 and 4 September 2019 from which the Appellant could seek to deduct if the sale of the capacity was within the scope of section 20 or 26 of the VATCA 2010?
- III. Did the Commissioner err in finding the Appellant was not registered for VAT until after the period of the invoices in question and hence that was an additional challenge for the Appellant in a repayment of VAT claim?
- IV. Did the Commissioner err in her application of VATCA 2010 to the particular circumstances of the Appellant in finding that VAT was not payable to the Appellant and did this amount to a form of discrimination?
- V. Did the Commissioner err in finding that the Commissioner has no jurisdiction to determine whether the Respondent's application of the VATCA 2010 is ultra vires to the Constitution, fair procedures, and the Charter of Human Rights?
- VI. Did the Commissioner err in finding that the Appellant had failed to discharge the onus of proof required to show that the Appellant had any taxable economic activity between 30 July 2015 and 4 September 2019 from which the Appellant could seek to deduct?
- VII. Did the Commissioner err in not finding that the Appellant had economic taxable activity pre 2020 as the vessel had to be maintained, and if the vessel was not generating money, it was costing money in maintenance and daily care and harbour dues and creating economic activity connected as a cost to the business?
- VIII. Did the Commissioner err in allowing the Respondent to alter their submissions to the Commission following the initial hearing and on foot of the Appellant confirming that he would not attend a rescheduled hearing?
- IX. Did the Commissioner err in not finding that the Respondent's officer had committed perjury in not being able to refer to EU legislative provision at the hearing in circumstances whereby the technical audio difficulties pertained as referred to in paragraph 59 of the Determination and following the request for the legislative provisions the Respondent's legal advisors took over carriage of the appeal and the submissions altered in any event?

- X. Did the Commissioner err in adjudicating on this appeal in circumstances whereby no conflict of interest relating to the Commissioner’s previous employment was raised by the Appellant either before the hearing, either at the hearing or following the hearing but only after the Determination issued?

Applicable Legal Principles

16. There was no disagreement as to the legal principles applicable to a Case Stated pursuant to the VATCA 2010. These principles are well established and are helpfully summarised in the decision of the Supreme Court in *Mara v Hummingbird* [1982] ILRM 421 at page 426 where Kenny J states as follows:-

“A case stated consists in part of findings on questions of primary fact... These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw.”

Relevant Statutory & Legal Provisions

17. The following are the statutory and legal provisions most relevant to the issues in this Case Stated. The statutory provisions set out below are in the form they were in at the material time:

Value Added Tax Consolidation Act 2010 (‘VATCA 2010)

Section 2 VATCA 2010 – Interpretation

“taxable goods”, in relation to any supply, intra-Community acquisition or importation, means goods the supply of which is not an exempted activity;

“taxable period” means a period of 2 months beginning on 1 January, 1 March, 1 May, 1 July, 1 September or 1 November;

“taxable person” means a person who independently carries on a business in the Community or elsewhere;

Section 5 VATCA 2010 – Persons who are, or who may become, accountable persons.

(1)(a) Subject to paragraph (c), a taxable person who engages in the supply, within the State, of taxable goods or services shall be –

- (i) an accountable person, and*

- (ii) *accountable for and liable to pay the tax charged in respect of such supply.*

Section 6 VATCA 2010 – Persons not accountable unless they so elect.

6(1) *... the following persons shall not, unless they otherwise elect and then only during the period for which such election has effect, be accountable persons:*

...

- (b) *a person whose supplies of taxable goods or services consist exclusively of –*
(i) *supplies, to accountable persons... of fish... which he or she has caught in the course of a sea fishing business, ...*

Section 26 VATCA 2010 – Transfer of intangible business assets deemed not to be supply of services.

26(2) *The transfer of goodwill or other intangible assets of a business, in connection with the transfer of the business or part thereof (even if that business or that part thereof had ceased trading), or in connection with a transfer of ownership of goods in accordance with section 20(2)(c), by -*

- (a) *an accountable person to a taxable person who carries on a business in the State,*
or
(b) *a person who is not an accountable person to another person,*
shall be deemed, for the purposes of this Act, not to be a supply of services.

Section 59 VATCA 2010 – Deduction for tax borne or paid.

59(2) *Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods and services are used by him or her for the purposes of his or her taxable supplies or any of the qualifying activities, deduct -*

- (a) *the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her;*

59(5) *Where, in relation to any taxable period, the total amount deductible under this Chapter exceeds the amount which, but for this Chapter, would be payable in respect of such period, the excess shall be refunded to the accountable person in accordance with section 99(1), but subject to section 100.*

Directive 2006/112/EC Value Added Tax Directive

Article 168

In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

- (a) *The VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;*

Article 179

The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.

Overview of the issues raised in this Case Stated

18. The core question that arises for consideration is whether or not the TAC correctly decided as a matter of law that the Appellant was not entitled to be refunded the sum of €27,472.00 paid in VAT by the Receiver in relation to professional services paid for by the Receiver in connection with the sale of the Appellant's 'capacity'.
19. Some of the questions raised in the Case Stated concern how the TAC dealt with various procedural complaints, allegations of perjury and bias. These issues are more in the nature of issues that can only be considered in a judicial review proceeding; see the well-established principles discussed in *Lee v The Revenue Commissioners* [2021] IECA 18 where the Court of Appeal considered the scope of the jurisdiction of the TAC and the scope of the Circuit Court when hearing appeals against assessments to income tax pursuant to respectively sections 933 and 942(1) of the TCA 1997. At paragraphs [33] to [39] Murray J. in *Lee* considers what are called the older cases, he then turns to consider the newer cases and in particular *Aspin v Estill* [1987] STC 732, *Menolly Homes Limited v Appeals Commissioner and Another* [2010] IEHC 49 and *Stanley v Revenue Commissioners* [2017] IECA 279; [2018] 1 ILRM 397 and states at para 76:-

“[T]he 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. Noting the possibility that other provisions of the TCA may confer a broader jurisdiction and the requirements that may arise under European Law in a particular case, they do not in an appeal of the kind in issue in this case enjoy the jurisdiction to make findings in relation to matters that are not directly relevant to that remit, and do not accordingly have the power to adjudicate upon whether a liability the subject of an assessment has been compromised, or whether Revenue are precluded by legitimate expectation or estoppel from enforcing such a liability by assessment, or whether Revenue have acted in connection with the issuing or formulation of the assessment in a manner that would, if adjudicated upon by the High Court in proceedings seeking Judicial Review of that assessment, render it invalid.”

20. In other words, this jurisprudence explains how the function of the Appeal Commissioners is essentially restricted to enquiring into and making findings as to issues of fact and law relevant to the statutory charge to tax and they do not have any *quasi* inherent powers to declare any aspect of the process or outcome of the Revenue Commissioners void or invalid, akin to the powers the High Court might have in a judicial review hearing.
21. In truth, the Appellant did not in substance pursue any of these points at the hearing and he largely and helpfully, focussed his submissions on the core issue.

Summary of the Appellant's Submissions on the Core Issue

22. The Appellant submits that fishermen do not have to be registered for VAT, although they can elect to be so registered. He says that in effect when the Receiver incurred these costs, this

should be treated by the Revenue as if he had incurred these costs, because legally the Receiver was his 'agent'.

23. He submitted that the sale of fish by fishermen (where the only thing done by the fisherman is to catch, gut, clean and store the fish in ice) attracts zero rate VAT. In practise this means that a fisherman can claim in effect a full refund of any VAT paid by him in connection with the expenses of his business; for example, VAT on diesel, supplies of equipment or nets, or costs associated with the maintenance or repair of his equipment or boat. Therefore, in practise, while a fisherman does not receive VAT on his sales (because the sale of the fish by him is zero rated) he can claim a full refund of the VAT component of any costs incurred by him associated with his business.
24. Accordingly, as far as he is concerned, the same should apply to the VAT paid by the Receiver for the professional services associated with the sale of his capacity. It does not matter that he was not catching or selling any fish at the time or did not have any VAT receipts because in reality he receives no VAT on sales of fish in any event.
25. Alternatively, he should be viewed at the relevant time as still having been 'in business' because there were some ongoing costs being incurred by him in the nature, for example, of harbour dues and occasional boat maintenance.
26. As indicated above, the Appellant did not in truth press to any substantial extent the variety of other points made at earlier stages by him to the effect that there had been procedural irregularities, perjury or bias.

Summary of the Respondent's Submissions on the Core Issue

27. The Respondent submits that the TAC's decision was correct in law. The entitlement to a VAT refund stems from section 59 of the VATCA 2010 and subsections (2) and (5) in particular. These provide that the Revenue will refund to the taxpayer any excess of VAT paid, over any VAT received in the relevant period. However, the terms of the relevant statutory provisions mean, it is submitted, that this does not entitle the Appellant in this case to the refund of the VAT paid by the Receiver.
28. Firstly, section 59(2) means that the taxpayer has to be an 'accountable person' to be able to claim the refund. An 'accountable person' is defined by section 5(1) of the VATCA 2010. This provision means the taxpayers has to be a person 'who engages in the supply ... of taxable goods' or, as it was otherwise described during submissions, has a 'taxable supply'. A 'taxable person' is defined in section 2 of the VATCA 2010 as a person who 'carries on a business'.
29. In this case, the Revenue submits that the Appellant was not carrying on a business at the relevant time and was not engaged in any 'taxable supply'. He was not catching and selling any fish during the relevant period, so he had no taxable supply. The fact that any such sales would have been zero rated for VAT is irrelevant. Sales that are zero rated are still 'taxable supply'.
30. Accordingly, Revenue submits that at the relevant time the Appellant could not be an 'accountable person' and had no 'taxable supplies' against which to make a claim for a VAT refund. The rationale of this analysis applies, it is submitted, irrespective of whether the

Appellant is correct that the Receiver is his agent and irrespective of whether or not the Receiver should have charged VAT on the sale of the capacity, which he did not.

31. In that regard, it was submitted that if the sale of the capacity should be considered a 'taxable supply' (which incidentally the Appellant contends it is not) then no VAT was actually charged on it so accordingly no deduction of the VAT paid in connection with it can be claimed.
32. Alternatively, if the sale of the capacity is not a taxable supply (this is the position of the Appellant), then as there was no taxable supply during the relevant period when the VAT was invoiced, there is no taxable supplies from which the Appellant could claim a refund.

Decision

33. I am satisfied that the submissions on behalf of the Revenue and the decision and reasoning of the TAC in relation to this matter are correct.
34. The Appellant was not catching or selling any fish during the relevant period when the VAT which he seeks to claim was invoiced. He had no 'taxable supply'. He was not registered for VAT at the time and, separately, he was not an 'accountable person'.
35. Section 59 of the VATCA 2010 is the key provision in this case. It sets out the overarching provisions that create the entitlement to claim a VAT refund. Section 59(2) provides for the ability to deduct VAT charged to a taxpayer from VAT received and it is based on certain requirements. It is this ability to 'deduct' VAT charged that triggers the entitlement to what might be colloquially called a 'refund'. Section 59(5) provides that where the VAT paid out 'exceeds' the VAT received that 'the excess shall be refunded' to the taxpayer.
36. This entitlement in section 59(2) applies to an 'accountable person' in respect 'of a taxable period'.
37. An 'accountable person' is defined in section 5 of the VATCA 2010 as 'a taxable person who engages in the supply ... of taxable goods'. The Appellant had ceased fishing since 2010. He was not capable of being considered at the relevant time therefore as an 'accountable person'.
38. In any event he was not registered for VAT. Section 6(1) of the VATCA 2010 provides in respect of a fisherman, defined in section 6(2) as "a person whose supply of taxable goods consist exclusively of supplies ... of fish", that such a person "shall not, unless they otherwise elect and then only during the period for which such election has effect, be accountable persons".
39. The Appellant had elected in the past to register for VAT and then he had de-registered and was not registered at the material time of the invoices in respect of which the VAT refund is claimed. In passing, it is the case that in respect of certain expenses and in certain circumstances involving boats below a certain size, a fisherman can claim refunds of VAT without being registered for VAT.
40. Therefore, the decision that the Appellant was not an 'accountable person' within the meaning of section 59 was legally correct. He had not elected to be registered and he was not, in any event, engaged at the material time in the supply of any taxable goods.

41. The taxable period is also defined as two monthly periods as set about above, i.e., 1 January, 1 March and so on. The entitlement to make the deduction (or claim the excess by way of a refund) applies to tax charged to the taxpayer “during the period by other accountable persons”, in this case, on the Appellant’s argument, the professionals who supplied the services to the Receiver. This scheme is in keeping with what is set out in the VAT Directive; see above and Article 177 in particular. In that regard it is worth observing that VAT is essentially an EU tax that is governed by EU Directives.
42. Accordingly, the Appellant was not an accountable person at the relevant time. He had no taxable supplies at the relevant time. He was not trading. He had not elected to be an accountable person at the relevant time. Even if the sale of the capacity by the Receiver was a taxable supply (which the Appellant claims it was not) then no VAT was actually charged on that sale and accordingly no VAT was received against which any deduction could be made.
43. In relation to the non-core issues, as indicated above, the jurisprudence is clear that there is no inherent jurisdiction on the part of the TAC to entertain complaints of a judicial review nature. Accordingly, there was no error on the part of the TAC in refusing to entertain those matters.
44. Next, in relation to the issue of the burden of proof raised in question (vi), in a tax appeal this rests with the taxpayer; see Charleton J. at paras 20-22 of *Menolly Homes v Appeal Commissioners* [2010] IEHC 49 and Sanfey J. in *O’Sullivan v Revenue Commissioners* [2021] IEHC 118 at para. 63. Secondly, there was no evidence adduced by the Appellant of taxable economic activity during the relevant period of 30 July 2015 and 4 September 2019.
45. In relation to the issue raised by question (vii), any costs such as boat maintenance or harbour dues did not amount to taxable economic activity; see Article 168 of the EU VAT Directive above which makes plain that the deduction is only available in so far as goods or services are used for producing taxable supplies - in the Appellant’s case: catching and selling fish. This is reflected in the wording of section 59(2) which states a deduction may be claimed “... in so far as the goods or services are used by him or her for the purposes of his or her taxable supplies...”.

Answers to the Questions raised in the Case Stated

46. Accordingly, for the foregoing reasons each of the questions raised in the Case Stated is answered in the negative. The TAC did not err in any of those respects.