

Taking cases before the Appeal Commissioners

CASE A

My first experience of dealing with what were then known as “argument appeals” was back in the early eighties. Having acquired the client with about 30 cases listed for appeal we narrowed the technical issues down to three and agreed with Revenue to submit 2 sample cases of each issue to the Appeal Commissioners. We had three hearings over a twelve month period during which one each of the 2 sample cases were heard. The decisions were given on all three 6 months after the last hearing. While all went against the client the Commissioners gave their judgments on the three cases they hadn’t heard!

The lawyers immediately applied to the High Court for orders of Mandamus Certiorari and Prohibition.

A settlement was reached with the Commissioners on the steps of the court. The basis of this was that the three cases could be re heard before new commissioners but at the time the only Commissioners were the two that heard the case and no new hearings ever took place as by the time new Commissioners were appointed the client no longer existed.



BY MARIE BARR

In this article Marie summarises her experience as a tax practitioner appearing before the Appeal Commissioners over the last thirty years. It is not intended to be technical but more to outline her practical experience and time (and therefore costs) involved. Also for reasons of confidentiality limited background information on each case is given.

CASE B

Next up was a case arising out of a Revenue VAT audit. This one I had to handle on my own. From speaking to colleagues I realised a written submission was expected from both the taxpayer and the Revenue. I prepared a one page summary of the issues from our side the day before the hearing.

I arrived in 14 St. Stephens Green with my client at 11 o’clock the following morning. I opened the case by explaining the points at issue and handed in my submission which the Commissioner read. He then asked for the Revenue case. This was put to him in one sentence with nothing in writing. The Commissioner then expressed the view that there were complicated technical issues involved and adjourned the case for “full” written submissions to be made by both sides. We were in the Shelbourne having coffee at 11.15!

Sometime later and without doing the additional submission I had a call from the Inspector to say Revenue were now prepared to close the case if the client paid IR£3,000! This was small change compared to the original sum at stake so naturally it was accepted.

After the above cases things became more formal and protracted.

CASE C

The next case arose out of Investigation Branch’s enquiries into the residence position of an individual who thought he was non-resident in the years into which

enquiries were being made and which ultimately proved to be the case. I first got involved in 1999 by replying to a Revenue letter written to the client. Revenue replied nearly 4 years later disagreeing with our contention that there were no outstanding tax liabilities. Ultimately Revenue issued an amended assessment for 1994/1995 seeking additional tax against which we appealed in April 1995. Both sides were requested to make full written submissions which were done and exchanged by October 2005.

The hearing was originally scheduled to take place in November 2005 but was adjourned at the request of Revenue. It finally took place in January 2006. Following a morning's hearing the Appeal Commissioner decided he wished to have further submissions from both sides on a number of technical issues. These were submitted one month later and the hearing resumed in May. The Appeal Commissioner then adjourned the case again to consider the evidence. It resumed about a month later to be given the Commissioner's decision.

There were two technical issues to be decided

- a) Was the person resident in Ireland in 1991/1992 in which case the 1994 Finance Act changes would not apply until 1995/1996 rather than 1994/1995 as we argued
- b) If not, under which Article of the UK/Ireland treaty was the person's Irish source income to be dealt with? (to see whether Ireland had taxing rights)

Revenue only introduced (b) above at the final hearing.

The decision on residence was that the place of abode test (upon which Revenue were relying) had never been endorsed by the higher courts in Ireland or the UK. Therefore it was up to the Appeal Commissioner to find, based on all the evidence, whether as fact a person was or was not resident here. He found that the client was not resident here in 1991/1992.

Unfortunately he found that the Irish source income in question was to be dealt with under Article 16 rather than Article 8. Article 16 gave Ireland taxing rights.

While both sides expressed dissatisfaction, neither requested a case be stated for the High Court. It took a further 3 years to agree the liabilities and the interest due. Penalties did not arise as the case arose due to technical issues. Overall it took nearly 10 years and significant costs to resolve the issues and that was only going to the first stage of appeal.

CASE D

A further case going on at the same time as case C involved an appeal against a capital gains tax assessment on a disposal of land in 1997 when CGT was 40%. The client had done his own calculation of the tax due in a letter to the Revenue separate from his tax return for the year of assessment in question and paid the tax due based on this. About 4 years later Revenue decided to audit the CGT return. The client's solicitor suggested he talk to me.

There were 4 issues involved:

- (i) the market value of the land at 6 April 1974;
- (ii) the current use value of the land at the same time;
- (iii) a claim for retirement relief; and
- (iv) whether the client's letter explaining how he arrived at the 1974 valuations constituted an "expression of doubt" so that if extra tax was found to be due in relation to the valuations no interest or penalties would arise.

The retirement relief was not due as the consideration for the sale of the land was well in excess of the maximum consideration over which retirement relief was not given so even if we won on the other 2 issues this tax was going to have to be paid.

The appeal against the assessment was made in March 2003, advance submissions in July 2003 and after three trips to Wilton House the Commissioner gave his decision in October 2004. He decided in the clients favour on the expression of doubt point but compromised on the land valuations. Following the changes to the expression of doubt rules in the 2013 Finance Act for 2013 and following years this decision would no longer stand up.

CASE E

Subsequent to the above, I was involved in two cases both involving VAT. These settled after varying stages of hearings as the tax involved compared to the costs already

incurred and those potentially to be incurred outweighed the potential benefits of winning the appeals. One case involved what the Revenue viewed as anti-avoidance and the point at issue is now the subject of an appeal to the Supreme Court. In my case the tax involved was less than the cost of an appeal to the High Court. The other case involved a timing issue only at the end of the day and again the costs were making pursuing the appeal untenable.

CONCLUSIONS

My experience suggests that:

1. Unless there is significant tax involved it is too expensive to take an issue to appeal. For instance I would estimate the minimum cost of taking a case to appeal is €20,000. This assumes no need for Counsel. These potential costs can lead to a client settling a case where it appears the Revenue are clearly wrong but the cost of the appeal could be more than the tax at issue.

2. From a review of the above 6 sets of cases over 30 years I would summarise the results as good in comparison with the overall outcome before the Appeal Commissioners in that of those cases that didn't settle resulted in:

- (a) Revenue didn't win because of a procedural mistake by the Commissioners
- (b) There was no issue in the first place and we should never had to go to appeal
- (c) The residence case was worth taking because even though the tax savings weren't great when you add on interest and penalties that would otherwise have been payable it was well worth the expense and effort involved. In this case interest alone would have been €245,000 but because of the way Revenue brought up their arguments we managed to reduce this to around

€8,000. Penalties weren't an issue.

- (d) Again the saving in this case was c.€500,000 even though we lost to some extent on valuations but it did prove the usefulness of an "expression of doubt" being made by a client

3. We really need published decisions of all cases heard by the Appeal Commissioners. This is because the Revenue has access to all of these (as it is one organisation) whereas the client's representative is a person who is a member of an independent practice who has no access to other practices experience.

Marie Barr Tax Partner with Barr Pomeroy

Tele: 00353 1 676 1166

Email: mariebarr@barrpomeroy.ie

W: www.barrpomeroy.ie

(The CCAB-I response to the Department of Finance consultation on reform of the Appeals Process, including the role of the Appeal Commissioners, will feature in next months issue of tax.point)