AN ARD-CHÚIRT
THE HIGH COURT

[2023 No. 179 JR]

[2024] IEHC 565

BETWEEN:

J. S. S., J. S. J., T. S., D. S. AND P. S.

APPLICANTS

-AND-

A TAX APPEAL COMMISSIONER

RESPONDENT

CRIMINAL ASSETS BUREAU

NOTICE PARTY

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 30th day of July 2024

1. This application for judicial review challenges the validity of a step taken by an Appeal Commissioner in an effort to comply with guidance from the Court of Appeal in *JSS and others v. Tax Appeal Commission* [2020] IECA 73. She decided that the applicants must establish in evidence that they were not "chargeable persons" to enable her to determine whether their appeals against tax assessments are admissible.

2. In March 2016, a Criminal Assets Bureau Revenue officer issued income tax assessments against each of the applicants in respect of tax years between 2008 and 2014. These assessments estimated income tax due under Schedule D. Some of these assessments were revisions of assessments which related to tax returns which the applicants had made in respect of those tax years. All were based on a view that the applicants had failed to comply with self-assessment requirements relating to Schedule D income.

3. The applicants claim that they were not tax-resident in the State between 2008 and 2014. They say that they were working abroad as nomadic tarmac contractors and that any income earned by them from trade within the State during that period was not taxable in their hands because they had no agent within the State during that period. They say that because they were not tax-resident in Ireland, they are not chargeable for tax on profits earned from trading abroad during those years.

4. They assert that the issue of whether they were chargeable persons by reference to whether or not they were tax-resident "goes to jurisdiction." They assert that Revenue authorities are obliged to prove to the Appeals Commissioners that they were resident in the State during the relevant tax years "to show that they have jurisdiction to raise an assessment on that person" before the Appeals Commissioners can decide whether or not to assume jurisdiction to deal with their appeals.

5. If this contention is correct, it will follow that when any person who has been assessed for income tax asserts in an appeal from that assessment that he or she was not a "chargeable person" during the tax year covered by that assessment, the Revenue authorities must, as a preliminary step in that appeal process, prove that the person concerned was a "chargeable person."

6. Appellants against income tax assessments might make a case that they are not chargeable for tax because they did not engage in any trading activity during the tax years covered by assessments. If the applicants are correct, all of the points which they make in this litigation would also apply to that circumstance.

7. This would drive "*a coach and four*" through the tax assessment and appeals provisions of the Taxes Consolidation Act 1997 (the TCA).

8. The applicants claim that the Appeal Commissioners do not have power to require them to establish by evidence their non-resident tax status during the years covered by these tax assessments.

9. This application for judicial review is misconceived. The jurisdiction of the Appeals Commissioners to hear and determine income tax appeals proceeds on a statutory assumption that the tax assessment being appealed is valid as to amount of tax and the basis on which that tax is payable in all respects and that the tax so assessed is due.

10. An appellant bears the onus of displacing that assessment and of proving facts necessary to support any contention that tax assessed is either not due or that less

tax is due. Proof that a person was not tax-resident is not required as a condition precedent to hearing of a tax appeal. Any issue of whether or not a person was tax-resident does not "go to jurisdiction" and must be decided on evidence given in the course of the appeal hearing.

11. Assuming that an Appeals Commissioner has power to engage in a preliminary evidential hearing relating to whether to accept a tax appeal, the same rule relating to proof must apply to that proceeding.

12. The legislative evolution of the assessment and appeals system for income tax and corporation tax is relevant to correct understanding of the intention and effect of currently applicable provisions of the TCA. The Oireachtas has built on a well-understood legislative framework which has developed over decades and has much in common with the UK system.

13. The TCA provides an appeals procedure which enables any person who has received an income tax assessment to challenge that assessment and prove it to be incorrect. Issues relating to whether or not a person assessed for income tax was tax resident are dealt with in the same way as any other issue which may arise during a tax appeal.

14. Paras. [22] to [34] of the judgment of Murray J. in *Lee v. The Revenue Commissioners* [2022] 1 I.R. 388 ([2021] IECA 18) provide a lucid explanation of the tax assessment and appeals system.

15. That judgment was given by reference to the content of ss.933 and 934 of the TCA. Murray J. explained the core features of these sections. These features are retained within the provisions of Part 40A of the TCA which introduced revised tax appeals procedures.

16. Prior to 1988, tax inspectors issued assessments of income tax. Generally, these were based on information provided by taxpayers. If a person omitted to provide information or provided information that was perceived to be incorrect, tax inspectors were empowered to issue estimated tax assessments in exercise of judgment of what ought to be charged, based on such information as was available to the inspector: see now ss.918 and 922 of the TCA.

17. Income tax self-assessment provisions were first introduced by Chapter II of the Finance Act (FA) 1988. The Oireachtas defined those who were obliged to adhere to new statutory obligations to file and pay.

18. These obligations were applied to "chargeable persons." "Chargeable person" means "as respects a chargeable period, a person who is chargeable to tax for that period, whether on his own account or on account of some other person…": see s.9(1) of the FA 1988; ss.950 and 959A of the TCA. The statutory provisions use the term "chargeable person" in this context. That term "as respects income tax, does not include a person to whom subsection (1) of section 959B relates."

19. This definition goes on to exclude persons whose income in a year consists either solely of emoluments or of emoluments together with income of less than the specified amount from other sources or persons exempted from the requirements of Chapter 3 or whose sole chargeable income derives from annuities within ss 237, 238 or 239 of the TCA: see s.959A and 959B of the TCA.

20. This did not alter the position prior which applied prior to 1988. Those who were not tax-resident were not chargeable for income tax on trading profits made outside Ireland: see ss. 52 and 53 of the Income Tax Act 1967 (the ITA). Those who did not engage in any trade had therefore had no trading income were not chargeable under Case 1 of Schedule D either.

21. This remains the position under the TCA: see now s.18(1) 1 (a)(i) and s.18(2) of the TCA.

22. Verification by proof to a statutory adjudicator that a person was "chargeable" to income tax on profits of trade is not and never was a statutory pre-condition to issue of a tax assessment.

23. Tax inspectors could lawfully issue estimated assessments on those who might claim not to be chargeable to income tax for such reasons or for any other reason. They were not bound to accept explanations for non-payment of tax or failure to make returns. A tax inspector might be unaware at time of making of a tax assessment that any such explanations would be advanced for non-payment of tax.

24. The jurisdiction of the Appeals Commissioners to take up and decide appeals from income tax assessments has never depended on it being established to them by Revenue authorities that a person was tax-resident or had taxable earnings. These issues must be raised and decided on in course of the tax appeal. The Appeals Commissioners have not been conferred with a general jurisdiction to investigate alleged invalidity of tax assessments appealed to them: see para. [22] of *Lee* at [2022] I.R. 398.

25. Provisions in the FA 1988 and the TCA were without prejudice ("…nothing shall prevent…") to existing powers of a tax inspector to raise estimated assessments which now applied in case of default of delivery of a return under the self-assessment rules where that official is "not satisfied with the return which has been delivered, or has received any information as to its insufficiency": see s.13(3)(b) of the FA 1988; s.954(3) of the TCA.

26. One of these powers was originally provided by s. 184 of the ITA. This was re-enacted in s.922 of the TCA which provides that: "[w]here-(a) a person makes default in the delivery of a statement in respect of any income tax under Schedule D or F, or (b) the inspector is not satisfied with a statement which has been delivered, or has received information as to its insufficiency, the inspector shall 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." By s.922(1): "In this section, 'information' includes information received from a member of the Garda Síochána." This provision continues to apply to years of assessment of prior to 2013.

27. For years of assessment prior to 2013, s.957(2)(a) of the TCA provides as follows: "[w]here (i) a chargeable person makes default in the delivery of a return, or (ii) the inspector is not satisfied with the return which has been delivered by a chargeable person, or has received any information as to its insufficiency, and the inspector makes an assessment in accordance with section…922, no appeal shall lie against that assessment until such time as- (I) in a case to which subparagraph (i) applies, the chargeable person delivers the return, and (II) in a case to which either subparagraph (i) or (ii) applies, the chargeable person pays or has paid an amount of tax on foot of the assessment which is not less than the tax which would be payable on foot of the assessment if the assessment were made in all respects by reference to the statements and particulars contained in the return delivered by the chargeable person and the time for bringing an appeal against the assessment shall be treated as commencing at the earliest date on which both the return has been delivered and that amount of tax has been paid…": see also s.17(2)(a) of the FA 1988.

28. For years of assessment from 2013 the tax assessing rules for a number of taxes, including rules for self-assessment of income tax, are contained in Part 41A (ss.959A to 959AV) of the 1997 Act. By s.959C of the TCA, assessments, other than self-assessments, are "Revenue assessments" and must be made by an officer of the Revenue Commissioners (Revenue officer).

29. By s.959AC(2) of the TCA: "[n]otwithstanding section 959AA, where in relation to a chargeable person - (a) the person fails to deliver a return for a chargeable period, (b) a Revenue officer is not satisfied with the sufficiency of a return delivered by the

person having regard to any information received in that regard, or (c) a Revenue officer has reasonable grounds for believing that a return delivered by the person does not contain a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, then a Revenue officer may at any time make a Revenue assessment on the chargeable person for the chargeable period in such sum as, according to the best of the officer's judgment, ought to be charged on that person."

30. By s.959AF(1) of the TCA): "a person aggrieved by an assessment or an amended assessment, as the case may be, made on that person may appeal the assessment or the amended assessment to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of assessment. By s.959AF(3) of the TCA: "In default of an appeal, in accordance with section 949I, being made by a person to whom a notice of assessment has been given, the assessment made on the person shall be final and conclusive." This provision applies to the applicants as their appeals post-date commencement of the Finance (Tax Appeals) Act 2015 (the 2015 Act).

31. By s.959Y(1) of the TCA: "[s]ubject to the provisions of this Chapter, a Revenue officer may at any time- (a) make a Revenue assessment on a person for a chargeable period in such amount as, according to the officer's best judgment, ought to be charged on the person, (b) amend a Revenue assessment on, or a self-assessment in relation to, a person for a chargeable period in such manner as he or she considers necessary, notwithstanding that - (i) tax may have been paid or repaid in respect of the assessment, or (ii) the assessment may have been amended on a previous occasion or on previous occasions."

32. By s.959Z(1) of the TCA: "[a] Revenue officer may, subject to this section, make such enquiries or take such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to- (a) whether a person is chargeable to tax for a chargeable period, (b) whether a person is a chargeable person as respects a chargeable period, (c) the amount of income, profit or gains or, as the case may be, chargeable gains in relation to which a person is chargeable to tax for a chargeable period, or (d) the entitlement of a person to any allowance, deduction, relief or tax credit for a chargeable period."

33. By s.959AH(1) of the TCA: "[w]here a Revenue officer makes a Revenue assessment, no appeal lies against the assessment until such time as- (a) where the assessment was made in default of delivery of a return, the chargeable person delivers the return, and (b) in all cases, the chargeable person pays or has paid an amount of tax on foot of the assessment which is not less than the tax which- (i) is payable by reference to any self-assessment included in the chargeable person's

return, or (ii) where no self-assessment is included, would be payable on foot of a self-assessment if the assessment were made in all respects by reference to the statements and particulars contained in the return delivered by the chargeable person."

34. Sections 957(2)(a) and 959AH(1) of the TCA provide that those who wish to appeal a revenue assessment are obliged to pay an amount of tax equivalent to that which would be assessed by reference to the statements and other information contained in the return required to be delivered as a condition of being permitted to appeal.

35. Appeals against income tax assessments were governed by the provisions Part 40 of the TCA. The appeal procedure under s.933 of the TCA included a right of appeal from a decision of a revenue officer not to admit an appeal on grounds that the person who gave the notice of appeal was not entitled to do so. Section 933(1)(d)(iii) empowered the Appeal Commissioners to hold a hearing "to enable them [to] determine whether or not to allow an application for an appeal."

36. That type of hearing might be necessary in a suitable case. For instance, an issue might arise as to whether a revenue officer acted properly in refusing an extension of time to bring a late appeal under s.933(7)(b) of the TCA.

37. However, s.933(1)(d)(iii) of the TCA could not give the Appeals Commissioners discretion to entertain or receive evidence relating to any point which the law did not permit them to consider when they were determining whether or not to admit an appeal.

38. Section 934 of the TCA provides for procedure on tax such appeals. By s.934(3): "[w]here on an appeal it appears to the Appeal Commissioners by whom the appeal is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand."

39. Part 40 of the TCA has been replaced by Part 40A of the TCA. Part 3 of the 2015 Act inserts Part 40A into the TCA. Part 40A of the TCA comprises ss. 949A to 949AT.

40. The 2015 Act was commenced on 21 March 2016: see the Finance (Tax Appeals) Act 2015 (Commencement) Order 2016 (S.I. No. 110 of 2016). Section 22(3) of the 2015 Act provides that in Part 3 of that Act the term "commencement date" means "the date on which section 34 (which inserts Part 40A in the Act of 1997) comes into

operation". Section 23 of the 2015 Act provides that: "Part 40 shall not apply to an appeal made on or after the commencement date."

41. The applicants' appeals relate to assessments which were made after 21 March 2016. Their tax appeals post-date the "the commencement date" for the purposes of Part 3 of the 2015 Act. It follows that the provisions of Part 40 of the TCA do not apply to these tax appeals.

42. By s.949I(3) of the TCA: "[w]here the provisions of the Acts relevant to the appeal concerned require conditions specified in those provisions to be satisfied before an appeal may be made, a notice of appeal shall state whether those conditions have been satisfied."

43. s.949J(1) of the TCA: "[f]or the purposes of this Part, an appeal shall be a valid appeal if- (a) it is made in relation to an appealable matter, and (b) any conditions that are required (by the provisions of the Acts relevant to the appeal concerned) to be satisfied, before an appeal may be made, are satisfied before it is made."

44. By s.949J(2) of TCA, the Appeal Commissioners are empowered, in accepting an appeal, to determine "…that, for the time being (on the facts and information available to them)- (a) the appeal is a valid appeal…and, accordingly, that they should proceed to deal with the appeal."

45. By s.949J(3) of the TCA, a decision that an appeal is valid may be reversed by the Appeals Commissioners "as and when facts and information become available to them that, in their opinion, warrant that course of action."

46. By s.949L(1) of the TCA: "[w]here the Revenue Commissioners consider that- (a) an appeal is not a valid appeal, or (b) the appellant has not complied with the requirements of section 949O [which makes provision for late appeals] they may send the Appeals Commissioners a written notice of objection to the making of the appeal and that notice shall state the reason for their objection."

47. By s.949O of the TCA, one of the requirements which must be complied with for a late appeal against an assessment to be admissible, that "…any tax charged by the assessment has been paid together with any interest on that tax chargeable under – (i) section 1080". Section 1080 of the TCA provides for the charging of interest on overdue income tax and incorporates the definition of "chargeable person" in Part 41A of the TCA.

48. By s.949L(2) of the TCA, where the Revenue Commissioners do not send a notice of objection within 30 days after the date when the Appeals Commissioners send notice of an appeal to them, the Appeal Commissioners shall not be required to have regard to the objection in deciding whether to accept an appeal. By s.949L(3) where the Revenue Commissioners sent a notice of objection in accordance with s.949L(1) the Appeals commissioners must notify the appellant.

49. By s.949N(1) of the TCA: "[w]here the Appeals Commissioners- (a) are satisfied that an appeal is not a valid appeal, (b) become aware, having previously formed a view that an appeal was a valid appeal, that it is not a valid appeal, or (c) are satisfied that an appeal is without substance or foundation, they shall refuse to accept the appeal."

50. By s.949N(2): "[w]here the Appeal Commissioners refuse to accept an appeal, they shall notify the parties in writing accordingly stating the reason for the refusal." By s.949N(3) "Where, in respect of a refusal on their part to accept an appeal, the Appeal Commissioners declare that their decision in that regard is final, then that decision shall be final and conclusive."

51. By s.949N(4) of the TCA: "[f]or the avoidance of doubt- (a) references in the preceding subsections to the Appeal Commissioners' refusing to accept an appeal include references to a member or members of staff of the Commission, pursuant to an authority granted under section 5(2) of the Finance (Tax Appeals) Act 2015, refusing to accept an appeal, and (b) the Appeals Commissioners may make a declaration under subsection (3) in respect of a foregoing refusal by a member or members of staff to accept an appeal as they may make such a declaration in respect of a refusal on their part."

52. The effect of s.5(2) and s.6(1)(a) of the 2015 Act is that decisions on whether or not to accept appeals in cases within s.949N of the TCA may be delegated to staff of the Tax Appeals Commission. These are administrative decisions.

53. Section 949O of the TCA deals with late appeals. It sets out the circumstances in which the Appeals Commissioners may accept a late appeal. These are that the appeal be made within 12 months after the date specified by statute for making an appeal and that the appellant was prevented by absence, sickness or other reasonable cause from making an appeal within the period allowed by legislation. They may also accept an appeal after the 12-month period where the appellant was prevented by absence, sickness or other reasonable cause from bringing an appeal.

54. The terms on which late appeal will be permitted include compliance with the requirement that "any return that was required to be delivered to the Revenue Commissioners under the Acts has been so delivered" and, if the Appeal Commissioners consider that the return "is insufficient to enable the appeal to be determined," provision of "such other information as, in the opinion of the Appeals Commissioners, would enable the appeal to be determined by them without undue delay".

55. By s.949O(4) of the TCA: "[f]or the purpose of deciding whether to accept a late appeal, the Appeal Commissioners may make such enquiries as they consider necessary or appropriate and may do so by holding a hearing." By s.949O(5): "[n]othing in this section derogates from the functions of the Appeals Commissioners under section 949N."

56. By s.949AK "[i]n relation to an appeal against an assessment, the Appeals Commissioners shall, if they consider that- (a) the appellant has, by reason of the assessment been overcharged, determine that the assessment be reduced accordingly, (b) an appellant has, by reason of the assessment, been undercharged, determine that the assessment be increased accordingly, or (c) neither paragraph (a) nor (b) applies, determine that the assessment stand."

57. These applicants claimed that the Appeal Commissioners should admit some their appeals against the tax assessments without requiring them to make returns or pay any tax based on those returns as a pre-condition of entertaining those appeals. They claimed that they were not "chargeable persons" because they were not tax-resident in the State during the tax years covered by those assessments. They claimed that, because statutory provisions which impose these obligations refer to "a chargeable person," they were not obliged to file returns or make payments based on those returns.

58. An Appeal Commissioner rejected this and held that their appeals were inadmissible. The applicants challenged this decision in judicial review proceedings.

59. The Court of Appeal decided that the Appeals Commissioner's decision was incorrect because he appeared to ignore their legal submissions and presume without factual basis that the applicants were tax-resident in Ireland: see para.[57] of the judgment in *JSS and Others v. Tax Appeal Commission* [2020] IECA 73.

60. The issue of whether the TCA assessment and appeals structure permitted the Appeals Commissioners to investigate issues having a bearing on whether the any of

the appellants was a "chargeable person" at that stage in the appeal process does not appear to have been raised before the Court of Appeal.

61. The Court of Appeal focused on whether the Appeal Commissioner had considered the meaning of the term "chargeable person" in the relevant statutory provisions: see paras. [54] and [55] of the judgment. That Court concluded that the Appeals Commissioner was obliged to interpret relevant statutory provisions, including the term "chargeable person."

62. "This is a case in which it is impossible to know why the Commissioner rejected the appellant's core argument that a 'chargeable person' does not include a non-resident person and to know why he had come to that view.": see para. [59] of the judgment.

63. The Court stated that: "Far from being 'left in no doubt as to why they had lost' (see Flannery L.J. in *Flannery v. Halifax Estate Agencies Limited*) the applicants are left in a position that, as the losing party, they do not know why the Commissioner has decided that they are in fact, chargeable persons and that they thus come within the terms of the impugned provisions.": see para. [55].

64. The Court of Appeal then gave the following guidance to the Appeals Commissioners:

> "[56] It is not uncommon for courts to be called upon to rule on a legal submission as to the meaning of a statutory provision and only, thereafter, to hear evidence in a given case. This was a case calling for (i) a legal interpretation of the term 'chargeable person' and (ii) the application of that legal interpretation to the factual situation of the appellants. Having regard to the substantial arguments raised as to the correct interpretation of the relevant statutory provisions and to the principle that requires a strict interpretation of a taxing statute (see Harris v Quigley) it was not open to the Commissioner, or to the trial judge, to fail to consider those arguments."

65. This matter was remitted for further consideration in light of that judgment. The issue of whether or not the applicants were tax-resident in the State during the years covered by the disputed assessments has yet to be determined.

66. The Appeals Commissioner applied her understanding of the reasoning process suggested in para. [56] of the judgement of the Court of Appeal. She decided that persons who generate income from trading in the State during tax years when they are not tax-resident are not chargeable to tax in respect of profits because any tax assessment may only be raised in the name of their agent within the State. This conclusion was based on her interpretation of the effect of s.1034 of the TCA.

67. She determined that in order to decide the issue of whether the appeals were admissible without requiring the applicant to make tax returns it would be necessary for the applicants to demonstrate that they were not tax-resident during the tax years specified in the assessments. This was "*step 2*" of the process envisaged by the Court of Appeal. She thought that if the applicants showed that they were not tax-resident during those years, the question of admission of their appeals without a requirement that they file tax returns and pay tax in accordance with those filings would fall to be considered under s.933 of the TCA.

68. She gave this decision on 29 June 2022.

69. A further hearing took place on 10 October 2022. The evidence relating to "*step 2*" was due to be heard on that date. The applicants tried to reopen her determination that it was for the applicants to demonstrate that they were not tax-resident. She rejected this submission in a written decision which she gave on 13 October 2022.

70. The applicants sought to reopen this decision. She allowed them to make further submissions. They relied on the decision of the United Kingdom Special Commissioners in *Untelrab Ltd v. McGregor (Inspector of Taxes)* [1996] STC (SDC) 1. They did not succeed in persuading the Appeals Commissioner to change her mind. She decided that they must prove their non-resident tax status. She gave this decision on 1 December 2022.

71. The upshot of this is that the Appeals Commissioner will hear evidence relevant to whether the applicants were or were or were not "chargeable persons" in the context of a preliminary determination on whether the appeal should be admitted for hearing.

72. She will decide one of the main issues of fact which would normally be decided in the course of substantive appeals in order to determine whether she can entertain those appeals.

73. The applicants applied for judicial review of her decision in February 2013. They contend that the issue of whether they were tax-resident in the State during the relevant tax years "goes to jurisdiction." They assert that where an issue of tax residency is raised before the Appeals Commissioners, the onus is on Revenue to prove that the person who has been assessed was tax-resident.

74. The applicants did not exhibit the decision of the Appeals Commissioner dated 29 June 2022 in their application for leave to obtain judicial review. It was not exhibited

in their application for judicial review either. However, the parties agreed that I should receive it during the hearing of this application.

75. The ground on which the applicants have obtained leave to challenge the decision of the Appeal Commissioner relating to onus of proof is in fact a challenge to validity of the income tax assessments which relates to a matter which the Appeals Commissioners have jurisdiction to decide on in the course of hearing of their tax appeals.

76. Liability to pay tax, other than preliminary tax, arises when a person is assessed to tax. A tax assessment may be made by a taxpayer under the self-assessment regime or it may be issued by a Revenue officer in exercise of statutory powers.

77. An income tax assessment has statutory force. It is presumed to be correct and lawful in all aspects which touch on liability to tax and amount of tax payable unless and until it is displaced on appeal: see ss.949AK(1)(c), 949AR and 949AS of the TCA.

78. A tax assessment be displaced as to amount where facts proved to the Appeals Commissioners show that for some reason the tax assessed was either not due at all or was less or more than the amount assessed: see s.949AK of the TCA. The evidence in an appeal may establish that the tax assessed may not be due for many reasons. These include lack of taxable receipts, offset of losses and cases where an appellant can demonstrate that he or she was not tax resident.

79. The Appeals Commissioners have power to make factual determinations relevant to whether a person was "chargeable" to income tax which has been assessed as payable by that person for a tax year. In general, this power may only be exercised as part of the hearing of a tax appeal.

80. Except where otherwise allowed by the TCA, challenges to the validity of tax assessments may only be made in judicial review proceedings. The grounds on which such challenges can succeed are limited: see *Deighan v Hearne* [1990] 1 I.R. 499 at 504; *Lee v Revenue Commissioners* [2022] 1 I.R. 388 at paras. [42] to [63].

81. A challenge to the validity of an assessment can be entertained by the Appeals Commissioners where the TCA permits an appellant to make such a challenge in that forum. For example, statutory pre-conditions to the re-opening of an assessment must be satisfied. The Revenue must prove during the course of a tax appeal that these statutory pre-conditions have been satisfied: see s.949AK(3) of the TCA.

82. A tax assessment, even where mistaken, may become final and conclusive: see *Deighan v. Hearne* [1986] I.R. 603 at 613. A tax assessment is a purely administrative act: see *Deighan v. Hearne* [1986] I.R. 603 at 613.

83. It follows that a person who has been assessed for income tax on Schedule D Case 1 income is treated by the law as a "chargeable person" until it is proved to the satisfaction of an Appeals Commissioner that the tax assessed is, for whatever reason, not due. This flows from the statutory effect of the tax assessment.

84. A tax appeal against an income tax assessment is not an appeal against exercise of judgment by a Revenue official who issued that assessment. It is solely an appeal by the person aggrieved against the amount of tax assessed. Save as provided for by the TCA, the Appeals Commissioners have no power to conduct preliminary hearings for the purpose of deciding whether or not to assume jurisdiction.

85. At the end of the appeal process an appellant may be found not to be liable in respect of tax assessed or to have a reduced or greater tax liability. If the reason for a successful appeal relates to lack of chargeable profits because none were earned or is because the appellant establishes to the satisfaction of the Appeals Commissioners that he or she was not tax-resident, this does not retroactively invalidate either the estimated assessment or the jurisdiction of an Appeal Commissioner to hear and determine that appeal.

86. The Appeals Commissioners "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": see para [22] of the judgment of Murray J in *Lee* at page 398.

87. Part 40A of the TCA, which replaces Part 40 pf the TCA, does not include a provision equivalent to s.934(3) of the TCA. In my view the law on onus of proof in appeals of tax assessments has not altered as a result of this change.

88. This onus of proof applies also to most of the other issues which the Appeals Commissioners are empowered to determine. In my view the law on this is set out correctly in Para.708 at pp. 566 and 567 of Vol 99 of the 5th Edition (2023) of *Halsbury's Laws of England*.

89. In the present case, assuming that the process of determination which the Appeals Commissioner is currently engaged in is mandated by powers conferred on her by Part 40A of the TCA, she has adopted the correct approach to the issue of proof.

90. The income, assets, presence within the State and business affairs of any person are matters which are peculiarly within the knowledge of that person. It follows that any person who wishes to displace a tax assessment must prove to the Appeals Commissioners that the tax assessed is not due or that a lesser amount of tax than that assessed is due.

91. This may be done by proof that the was not tax-resident as defined in s.819 of the TCA during a tax year or by proving that no trading income was earned or that chargeable gains were not made or that losses should be set off against income or that tax liability does not arise for a myriad of other reasons.

92. I now turn to the decision of the United Kingdom Special Commissioners in *Untelrab v. McGregor*. The relevant part of the ruling of the Special Commissioners is to be found in paras. [66], [67] and [68] of that decision at pages 20-21 of [1996] STC. The Special Commissioners concluded that s.50(6) of The Taxes Management Act 1970 (which is identical terms to s.934(3) of the TCA) "…is not relevant in the context of the present appeal because this is not a case where the appellants are saying that they have been overcharged by an assessment but where they are saying that the Revenue has no authority to assess them at all. On the authority of *Cesena* we therefore conclude that the burden of proving residence lies on the Crown."

93. The first point to note about this decision is that no argument was advanced in *Untelrab* that the Special Commissioners were obliged to determine an issue as to whether the appellant was or was not tax-resident as a preliminary issue in the tax appeal.

94. The appellant in *Untelrab* engaged in the merits of the appeal and provided evidence relating to its tax-residence. The issue relating to onus of proof, while described in the ruling of the Special Commissioners as going to authority of the Revenue to make an assessment, was in fact one of whether tax authorities showed, when the law was applied to the facts proved during the course that tax appeal, that the appellant was tax-resident.

95. This points to a fallacy in the argument advanced by the applicants in this case. Their claim that that because they dispute tax- residence, the Revenue authorities

must prove to the Appeals Commissioners that they were tax resident in order to found jurisdiction to raise a tax assessment.

96. What will the status of the tax assessments which they are challenging be if matters continue along the course which they have taken to date? The answer to this question is that these tax assessments remain fully valid as to taxability of the applicants for the amounts assessed unless they are displaced by a decision by an Appeals Commissioner following a full appeal hearing.

97. The applicants have not challenged the validity of these tax assessments in judicial review proceedings. If, instead of their current challenge, they sought prohibition of enforcement of the tax assessments on grounds that those assessments were made in excess of jurisdiction the weakness of their position would be exposed. They would have been obliged to make an untenable case that a Revenue officer could never validly make an estimated assessment under Schedule D in any case where it could be subsequently proved that the subject of that assessment was not tax-resident or did not engage in trade activity in a tax year.

98. The applicants cannot succeed in shifting their obligation to displace the assessments by establishing in their appeals that they were not tax resident by means of a collateral attack based on what they term "jurisdictional grounds."

99. The Bureau contends that *Untelrab* was incorrectly decided. The Bureau also contends that the effect of the decision of the Court of Appeal in *Lee v. The Revenue Commissioners* is that the appellants must be treated as "chargeable persons" until the appellants prove otherwise because the tax assessments have not been set aside by the High Court in exercise of judicial review powers.

100. I agree with the Bureau's contention that the comments of the Special Commissioners on "authority to assess" para. [68] of their decision in *Untelrab* are mistaken. The Appeals Commissioners must assume that the Revenue officer who has issued the tax assessment has acted within authority because the assessment is binding on issues touching on liability to income tax unless it is upset by the Appeal Commissioners on appeal.

101. I also agree with the Bureau's submission that the statement of Huddleston B. in the case of *Cesena Sulphur Co Ltd v. Nicholson (Inspector of Taxes)* (1876) 1 L.R Exch 428 at 453 which the Special Commissioners relied on in *Untelrab* is weak authority for the proposition advanced. This suggestion that a Revenue officer bears the onus of proof of residence within the State of a company in tax cases is an obiter dictum.

102. Whatever about the question of who bears the obligation to establish that location of the seat of control of a corporate entity where all of the evidence on that issue is made available by the parties to the fact-finding tribunal, there is no reason why the onus of proof should be placed on a Revenue officer where an individual seeks to displace an assessment on grounds of absence from the State on more than the specified number of days in any tax year.

103. The issue in *Cesena* was whether the businesses of two companies were carried on in England so as to establish that they were resident there for taxation purposes. Evidence adduced to the Court of Exchequer established that their businesses were carried on in England.

104. It followed that it was not necessary to consider what the position would be if the Court of Exchequer were left without evidence which persuaded it that those companies had their seat of operations outside England.

105. In *Cesena,* Huddleston B relied on the judgment by Cleasby B. in *Attorney General v. Alexander* (1874) L.R. 10 Ex. 20 at pages 31 to 33 in making was he categorised as an "*admission*" that the onus of proving residence of those companies was on the Crown which was seeking to levy tax on the basis of residence.

106. Cleasby B. decided in *Alexander* that "it was not made out that the Imperial Ottoman Bank is resident in England, or is even carrying on its business here, although some of its business is carried on here." The evidence presented to the Court of Exchequer was insufficient enable Revenue to show that the Imperial Ottoman Bank had its seat of operations in England. In that sense, HM Revenue had not established that this bank was resident in the UK.

107. It is a feature of both of these authorities that the companies who claimed exemption from UK taxation based on non-residency provided evidence relating to their seat of operations. They did not claim a right to sit on their hands. They had to put whatever evidence they had on the issue of residence before the Court of Exchequer to enable it to make a decision.

108. An allegation of tax-residence elsewhere does not become a live issue in a tax appeal merely because it is made. Some evidence must be adduced to support it. The material presented in support this application for judicial review consists of an affidavit by the applicants' tax adviser which repeats their assertions. The Appeals Commissioners were also given letters from the applicants' previous tax agents which made these assertions.

109. Any party to litigation who wishes to make a positive case on an issue carries the burden of proving that case. For example, where a person who is sued for assault wishes to make the case that he or she acted in self-defence, that person must prove that he or she so acted. This rule holds good in respect of issues raised in proceedings before the Appeals Commissioners: see *Burgess and another v. Commissioners for HM Revenue and Customs* [2015] UKUT 0578 (TCC).

110. Where statute throws on a person an obligation to prove something, as is the case in an appeal against a tax assessment under Part 40A of the TCA, it is impossible to suggest that the onus should be the other way. The applicants have pointed to no provision in the TCA which could support their contention that individuals who claim not to be tax resident are entitled to this special treatment.

111. Counsel for the Bureau was unable to point to any authority which specifically over-ruled *Untelrab*. However, it is clear that the approach of the Special Commissioners in *Untelrab* was incorrect. They failed to appreciate that the statutory assessment and appeals structure assumes that a tax assessment is valid in all respects which touch on tax liability. This includes an assumption that a person assessed for tax for any year of assessment was tax-resident in any case where that issue may become relevant.

112. While *Untelrab* was cited at page 994 of the 4th Edition of Tiley's *Revenue Law* as authority for the proposition that the burden of proof is on Revenue to establish that a taxpayer is resident in the UK, this view does not appear to represent the current UK thinking on that issue: see for example the decisions of the First-tier Tribunal (Tax Chamber) in *Chapman v. Commissioners for HM Revenue and Customs* [2018] WLUK 536 and *Development Securities (No 9) Ltd and others v. Commissioners for HM Revenue and Customs* [2017] UKFTT 565 (TC).

113. In this case the applicants want to make a positive case that they have no liability to tax by reason of their non-residence for tax purposes. They have all the information which may support their contention that in any of the tax years covered by these assessments they were not present in Ireland for 183 days or more or for more than 280 days or more in that tax year and the preceding tax year taken together: see s.819(1) of the TCA.

114. The statutory assessment and appeals structure in the TCC draws no distinction between validity of an income tax assessment on the basis of tax residence and validity on any other basis relating to taxation, such as absence of trade or disputed interpretation of a taxation provisions. The onus is always on a party appealing or otherwise challenging a tax assessment to adduce evidence on any disputed issue of fact relevant to any case being made as to why that tax assessment should be

disturbed. The Appeals Commissioners determine what facts are proved then apply the law to the facts proved or admitted.

115. It follows that this application for judicial review must be dismissed. My provisional view is that the costs of these proceedings, including any reserved costs and costs in the cause, should be awarded to the Criminal Assets Bureau. If either party wishes to make oral representations on costs, appropriate arrangements can be made through the Chief Registrar of the Central Office.

116. One final comment is appropriate. This is not a matter on which I may express any binding view.

117. This application for judicial review challenges a decision which is premised on the Appeals Commissioners being empowered to conduct a hearing relating to whether the applicants are "chargeable person[s]" and make a decision on that issue for the purposes of deciding whether their tax appeals are admissible. That premise may be incorrect.

118. A question arises as to whether the Appeals Commissioners have power to carry out the exercise envisaged by the judgment of the Court of Appeal in this case. It may well be that this exercise is "[n]either rooted in the express language of the TCA [n]or must arise by necessary implication from the terms of that legislation.": see Murray J in *Lee* at [2022] 1 I.R. 388 at page 398.

119. *Lee* requires the Appeals Commissioner to determine whether ss.957(2)(a) and 959AH(1) of the TCA or any other provisions of the TCA require or empower her to hold a hearing or make a finding that the applicants were not "chargeable persons" for the purpose of determining whether to admit their appeals.

120. Absent express or implied power conferred by the Oireachtas, the Appeals Commissioners have no inherent power to enquire into whether a person assessed for tax is a "chargeable person" in deciding whether or not to admit an appeal.

121. It may be that correct interpretation of these provisions within the overall statutory scheme requires that it be taken as a "given" that applicants are "chargeable person[s]."

122. If an income tax assessment is assumed by the TCA to be valid in relation to all issues touching on liability to tax until displaced by an appeal decision of the Appeals Commissioners, it may follow that a person assessed to tax is statutorily deemed to be a "chargeable person" for the purposes of ss.957(2)(a) and 959AH(1) of the TCA.

123. There are no express provisions within the tax assessment and appeals system which exempt those who claim not to be tax-resident from requirements to pay income tax assessed and file returns as a condition of admissibility of appeals or which contemplate a mechanism for preliminary determination of such claims.

124. If the Appeals Commissioners cannot entertain submissions or hear evidence which questions validity of a tax assessment on grounds relating to tax-residence as a preliminary to hearing a tax appeal, it is difficult to see why they can engage in that process when deciding whether to admit that appeal. Part 40A of the TCA does not confer any power to hold an evidential hearing for the purposes of this type of determination. The same point would apply to appeals under s.933 of the TCA if the Appeals Commissioners have no power to adjudicate on whether the person assessed was a "chargeable person" prior to admission of an appeal.

125. The provisions of s.40A of the TCA envisage that decisions on admissibility of appeals, except in cases where time for leave to appeal may be extended, may be delegated to staff of the Commission. The TCA and the 2015 Act treat these decisions as purely administrative functions. The TCA does not envisage that staff of the Commission must consider whether any appellant is a "chargeable person" when deciding whether file and pay requirements imposed by ss.957(2)(a) and 959AH(1) of the TCA have been complied with.