MAPLES GROUP

UPDATE

Costs Risk in Appeals from the Irish Tax Appeals Commission

The Finance (Tax Appeals) Act, 2015 introduced a new architecture for the hearing and determination of tax appeals. Among other changes, the Tax Appeals Commission (the "TAC") replaced the Appeal Commissioners, with appeals directly to the High Court only on question(s) of law arising from the TAC's determination (a 'case stated'), rather than to the Circuit Court on the basis of a full rehearing of the tax appeal. A recent High Court judgment considered the question of costs awards in these cases stated.

Arguments on Costs

In *O'Sullivan v. Revenue Commissioners* [2021] IEHC 118, the High Court judge, Mr Justice Sanfey, dismissed the taxpayer's case stated and affirmed the TAC's determination in the matter. The Court was subsequently asked to rule on the Revenue Commissioners' application for its costs of the case stated. The taxpayer resisted the costs application on three grounds:

(a) The correct legal test for an award of costs in a case stated from the TAC was set out in the Taxes Consolidation Act 1997 (the "TCA"), rather than the test recorded in the Legal Services Regulation Act 2015 (the "LSRA"). As a result, rather than having to award costs to the successful party (the default position, absent any countervailing considerations set out in the legislation (e.g., the particular nature and circumstances of the case and the conduct of the proceedings by the parties)), the Court has full discretion as to any costs order;

(b) Under the old regime, in the full rehearing in the Circuit Court, typically the Court made no order as to costs (i.e each side bore their own costs), unless the appeal was unmeritorious, and that custom should continue and should inform the Court's discretion; and

(c) To instead adopt a default position of awarding costs to a successful party risked a 'chilling' effect, deterring aggrieved taxpayers from taking merited cases stated to the High Court.

Decision

In ruling on costs ([2021] IEHC 193), the Court rejected the taxpayer's arguments, stating that rather than risking a 'chilling' effect, if there was no costs sanction it may become routine for appellants to bring cases stated even where they have little chance of success. The Court applied the LSRA test on costs, rather than that in the TCA and, finding that the taxpayer was entirely unsuccessful in the case stated and that none of the countervailing considerations in the LSRA test applied, it awarded the Revenue Commissioners their costs. In doing so, the Court acknowledged that even where a party was unsuccessful, there may be circumstances where a costs award would not be justified, but it is clear that any former Circuit Court custom as to costs orders has not carried over:

"It goes without saying that the case stated procedure relates only to questions of law. It is

often the case that there will be a genuinely difficult point of legal interpretation in relation to the TCA which may warrant a case stated by the losing party to the High Court, so that a definitive interpretation of that provision may be obtained. In such a case, one can well see that a court might be of the view that the losing party in the case stated should not have to bear the other side's costs as well as its own."

"While there may well be cases in which the issues are finely balanced and require careful consideration as to their legal merits, I consider in the present case that the justice of the case does not require that the appellant be spared having a costs order made against him. I do not think that any of the factors set out at s.169(1) of the 2015 Act are engaged sufficiently to justify a departure from the principle set out in that section that costs follow the event. Indeed, in my view it would be unjust in the present case if the respondent were compelled to bear its own costs of the case stated."

Conclusion

Parties dissatisfied with a TAC determination and considering whether to take a case stated to the High Court need to factor in the risk of an order for costs being made against the unsuccessful party in the case stated.

That has a potential impact not only on whether an appeal ought to be pursued, but also on how that appeal is conducted, as well as creating a greater onus on taxpayers to ensure that their facts and arguments are well-marshalled when running their original appeal before the TAC.

Equally, parties can take heart that if they are successful in their appeal, they may recover a significant amount of their legal spend from their opponent.

For further information, please reach out to your usual Maples Group contact or any of the persons listed from our Tax Disputes Group.

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