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## Arderin Distillery: Legitimate Expectation and Judicial Review of Revenue



### Introduction

The recent decision of the High Court in *Arderin Distillery Limited v The Revenue Commissioners* [2022] IEHC 267 (“*Arderin*”) is the latest consideration by the Irish courts of a judicial review challenge against a decision by the Revenue Commissioners.

Most tax practitioners will look primarily to the tax legislation in determining the correct

answer to any tax issue for their clients. It is often said that Revenue’s guidance, and any representation that it may make on the application of the law, is not binding and cannot be relied on by the taxpayer. However, this position is not always strictly correct. As a public authority, Revenue is subject to various obligations as a matter of public law, including the requirement to act fairly towards taxpayers. In some cases, Revenue’s statements

or dealings can give rise to a legitimate expectation that Revenue will behave in a certain way, which is enforceable by a taxpayer in the courts.

In this article we consider when a legitimate expectation may arise, and how this can be enforced, in light of the recent judgment in *Arderin*. In *Arderin*, the High Court held that the taxpayer had a legitimate expectation that it was entitled to relief from excise duty when producing hand sanitiser from alcohol during the Covid-19 pandemic, even though as a matter of fact the court accepted that the required authorisation had not been granted by Revenue.

## Judicial Review and Legitimate Expectation

### Judicial review

Judicial review is an application made to court to challenge the legality of acts and decision-making processes of public and administrative bodies. It is not an appeal of the decision. Judicial review proceedings will scrutinise the decision-making process as opposed to the merits of the decision itself. In *Sweeney v District Judge Fahy* [2014] IESC 50 the Supreme Court (Clarke J) described the overall role of the High Court in judicial review and stated that “judicial review is concerned with the lawfulness rather than the correctness of the decision sought to be challenged”.

Judicial review applications are governed by Order 84 of the Rules of the Superior Courts 2011. A number of specific reliefs can be sought from the court, including (1) an order quashing the decision (*certiorari*), (2) an order compelling the performance of a duty (*mandamus*), (3) an order restraining action from being taken (prohibition), (4) a declaration on the rights of the parties and (5) an injunction preventing or compelling an action.

No application for judicial review can be made unless leave of the court is first obtained. An application for leave for judicial review must be brought within three months

from the date on which the grounds for the application first arose. The courts will strictly apply this time limit unless there is a good and sufficient reason to extend the time. The applicant must establish that there is an arguable case in law for the reliefs sought before leave will be granted. Once leave is granted, the substantive judicial review application will proceed. An application can be made to enter judicial review proceedings into the Commercial List of the High Court where there are commercial elements to the proceedings and provided the relevant thresholds are met. Commercial Court proceedings benefit from being actively case-managed and are likely to be dealt with more expeditiously than in the High Court Judicial Review List. Costs in judicial review proceedings usually follow the event, meaning that the successful party should be entitled to recover a significant proportion of its costs from the other party.

The relevant grounds for judicial review include irrationality/unreasonableness, procedural unfairness, illegality/acting *ultra vires*, bias, failure to be heard and, for present purposes, breach of legitimate expectation.

### Legitimate expectation

Legitimate expectation is a public law principle based on the assumption that if a public body represents that it will exercise its powers in a certain way, then the public body should not act inconsistently with that representation. In tax cases the principle is often relied on to try to establish a more favourable form of tax treatment, usually arising from the taxpayer’s engagements with the Revenue Commissioners.

In *Arderin*, Phelan J referred to the oft-quoted three principles enunciated by Fennelly J in *Glencar Exploration v Mayo County Council* [2002] 1 IR 84 to be established in a claim of legitimate expectation against a public body, namely:

- (1) The public authority must have made a statement or adopted a position

amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity (“the representation”);

- (2) The representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation;
- (3) It must be such as to create an expectation reasonably entertained by the person or group that the public body will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.

These criteria have been consistently applied in subsequent case law, including the Supreme Court decision in *Cromane Seafoods Ltd v. Minister for Agriculture, Fisheries and Food* [2017] 1 IR 119. The authorities also suggest there are negative factors that may weigh against the existence of a legitimate expectation even where the *Glencar* criteria are satisfied. In the High Court decision in *Lett & Co. Ltd v. Wexford Borough Council* [2012] 2 IR 198, Clarke J observed:



“The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in *Wiley v. The Revenue Commissioners* [1994] 2 IR 160, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in *Hempenstall v. Minister for Environment* [1994] 2 IR 20, legitimate changes in executive policy to take place.”

There has been some debate in the case law whether the Irish courts have yet gone so far as to recognise substantive – as opposed to procedural – legitimate expectation.

This issue was relevant in *Perrigo Pharma International DAC v McNamara* [2020] IEHC 552, where Perrigo sought to establish a legitimate expectation that a certain transaction should be taxed as part of its trade rather than as a capital transaction. However, the High Court in *Perrigo* considered it was unnecessary to resolve this issue, as it held that Perrigo had not established the existence of a clear representation by Revenue (the first of the *Glencar* criteria set out above).

In most claims the bar will be high to successfully establish a claim of legitimate expectation and much will turn on the specific facts of the case, and this is nowhere more evident than in *Arderin*.

## Arderin Distillery Limited v Revenue Commissioners

### Introduction

Arderin Distillery was involved in the distillation of spirits and was approved by Revenue as a tax warehouse keeper. Alcohol products are normally subject to excise duty in the form of Alcohol Products Tax (APT), although in certain circumstances relief may be obtained from APT under s77 Finance Act 2003 where it is shown to the satisfaction of Revenue that the alcohol is to be used in certain ways. To obtain this relief, a warehouse keeper must obtain approval from Revenue as an “authorised receiver” (under Regulations 35 and 40 of the Alcohol Products Tax Regulations 2004).

At the onset of the Covid-19 pandemic in March 2020, Arderin was approached by a hospital with a request that it supply hand sanitiser. Arderin’s dispute with Revenue concerned whether it had been granted due authorisation to release this hand sanitiser to the market without APT arising.

### Facts in detail

The detailed facts and timeline of events are important to the court's decision, so we set them out here.

On 18 March 2020 Arderin contacted Revenue by email to request approval to produce hand sanitiser from ethanol without liability to excise duty. A Revenue official spoke to Arderin and advised it to submit a Form APT1. This form was duly submitted on 20 March, requesting authorisation to process 80,000 litres of ethanol into hand sanitiser.

Arderin claimed that in a phone call on 24 March the Revenue official confirmed verbally that Arderin had approval to use ethanol to manufacture hand sanitiser, subject to the condition that approval was also obtained from the Department of Agriculture, Food and the Marine (DAFM).

Unfortunately for Arderin, Revenue denied that this conversation took place and categorically denied that any approval had been given. However, Revenue accepted that there was a telephone conversation on 25 March, during which the Revenue officer never suggested that there was any issue with Arderin's application.

Approval from the DAFM was received on 30 March, and Arderin then made and supplied to a HSE hospital an amount of hand sanitiser.

On 1 April 2020 Arderin submitted a fresh APT1 application seeking authorisation to process an annual quantity of 800,000 litres of ethanol. On 2 April Revenue reverted to Arderin with a number of queries, which were not raised on receipt of the first application. In the event, Arderin only produced hand sanitiser on the basis of its original application, understood by it to have been approved, for up to 80,000 litres. It did not reply to the queries raised by Revenue on 2 April because it no longer required the authorisation for the increased amount.

In June 2020 Revenue contacted Arderin ordering it to immediately cease manufacture

of hand sanitiser because it was not authorised to do so.

Arderin brought proceedings by way of judicial review in the High Court in August 2020. Revenue's position was that Arderin's entitlement to relief from APT remained under consideration, and no decision had yet been made at the time of the High Court hearing in 2022.

### Issues

Against this background, the court had to decide:

- whether Arderin had received verbal authorisation from Revenue that it was permitted to produce duty-relieved hand sanitiser; and
- even if no verbal authorisation was given, whether Arderin had, nonetheless, a legitimate expectation to an entitlement to relief from APT based on its course of dealing with Revenue and the wider circumstances.

### *Did Revenue authorise relief from excise duty?*

The High Court noted that this first issue was simply a dispute of fact. Given that the parties did not make an application to cross-examine the relevant witnesses, this fell to be determined on the strength of the affidavit evidence. A party who wishes to contradict affidavit evidence must serve notice of intention to cross-examine the relevant witness; otherwise, it will not be possible for the court to choose between the two conflicting versions of fact, and the issue will be resolved against the party that carries the onus of proof.

Accordingly, in the absence of cross-examination and because the onus of proof was on Arderin as the party bringing the judicial review proceedings, Phelan J held that she was bound to accept Revenue's categorical assertion that no verbal authorisation was given. If the Revenue officer had been called to give evidence, Arderin may have been able to challenge this version of events.

### Did Arderin have a legitimate expectation?

The High Court referred to the Supreme Court's decision in *Wiley v Revenue Commissioners* [1994] IR 160 as authority against any court intervention that might be considered tantamount to telling Revenue that a concession should be granted to which the taxpayer was not entitled. However, Phelan J noted that the APT legislation does not require a written authorisation or any particular formality, and that although Revenue has a power to impose conditions on any authorisation, it also has a power not to impose conditions. This meant that the finding of a legitimate expectation would not result in Arderin benefitting from a relief to which it was not entitled under the law.

Phelan J referred to the three requirements that must be established in a claim based on a failure of a public authority to respect legitimate expectations set out in *Glencar Exploration v Mayo County Council* (see above).

- (1) On the first requirement, Phelan J held that there was evidence of an implied representation, arising from the course of dealing, to the effect that Arderin's production of hand sanitiser in the smaller quantity set out in its first APT1 application would be relieved from APT without further condition. This was based on a number of factors:
  - Arderin was not counselled by the Revenue official during its contacts to wait for formal authorisation or told that there was any issue with its application, even though it was obvious that Arderin was urgently trying to respond to the national health crisis;
  - the fact Arderin's second APT1 application resulted in an enquiry from Revenue highlighted the lack of enquiry over the first application and supported the reasonableness of Arderin's belief that there was no issue with the first application; and

- the fact that other distillers received authorisation from Revenue and were producing hand sanitiser in response to the health crisis on condition only of approval from the DAFM appears to have been common knowledge in the industry.
- (2) This implied representation was conveyed to Arderin both directly (via its dealings with Revenue) and indirectly (based on what was known within the industry).
  - (3) On the final requirement, Phelan J's view of the reasonableness of Arderin's position was heavily influenced by the prevailing public health crisis:

“it must also be recalled [that] these events unfolded at a time of national health emergency and the requirement for an authorisation [in] writing is not prescribed by law in section 77. The reasonableness of the Applicant's belief has to be seen in this context. If ever there were a situation where there was a need for prompt decision making by the Revenue, this would appear to have been such an occasion...

Revenue practice is well established and the Applicant should not properly have proceeded without securing a formal commitment in writing from Revenue confirming authorisation with no special conditions. Were it not for the situation of a health emergency, the failure to do so would in my view be fatal to any claim to legitimate expectation. To my mind the existence of the health emergency is the single biggest factor in this case. It weighed in favour of the urgent grant of authorisation and a reduced need for formality.”

Arderin's belief that relief from APT would be applied without any formal authorisation in writing from Revenue was therefore a reasonable one; and so Arderin was entitled, as a matter of legitimate expectation, to relief from APT provided it could satisfy Revenue as to the production of hand sanitiser on an *ex post facto* basis.

## Implications for Judicial Review Claims Against Revenue

Undoubtedly, the context of the Covid-19 health crisis played an important part in the court's reasoning, and the urgency of Arderin's need for approval influenced the reasonableness of its belief that authorisation had been granted without formal written approval. However, this does not mean that a claim based on legitimate expectation should be seen as an exceptional remedy that depends on an emergency situation. The key factors remain the requirements set out in *Glencar*: that a representation is made by Revenue to a taxpayer, and that this creates a reasonable expectation that Revenue will abide by this representation.

Such a representation could arise from a taxpayer's engagement with Revenue whether generally, through guidance notices, guidelines and statements, or more specifically, through direct contact, advance rulings or (as in *Arderin*) a course of dealings. In any direct engagements the taxpayer should provide fulsome information to ensure that it can rely on any representations made on foot of the information. Any engagements with Revenue should be recorded in writing and should make clear that the taxpayer is relying on them. Taxpayers should also have regard to the tight timelines for bringing judicial review proceedings, namely, three months from the relevant decision.

The Supreme Court's decision in *Wiley* (see above) suggests that the courts will not make a finding of legitimate expectation where this would result in the taxpayer obtaining a relief to which it was not otherwise entitled or require Revenue to act in an unauthorised manner. If so, this suggests that a legitimate expectation claim is most likely to be relevant in cases where Revenue needs to apply some judgement or discretion in applying the tax legislation to the facts of a particular case, and represents that it will exercise its powers in a particular way. This could include cases where:

- Revenue must approve or authorise a taxpayer for certain purposes (e.g. as being approved as a tax warehouse keeper or "authorised receiver");
- certain matters must be demonstrated by the taxpayer to the satisfaction of Revenue (as under s77 Finance Act 2003 for relief from APT); and
- Revenue has the power to impose certain conditions on a relief or authorisation (e.g. the provision of security before approving a person as an "authorised receiver").

## UK Position and Potential Application in Ireland

Naturally, however, a taxpayer will also wish to rely on a representation from Revenue that suggests it may receive an entitlement that it is not entitled to as a matter of law, or suggests that Revenue may not enforce a liability that would otherwise be legally due. The UK courts have adopted a more nuanced approach to the question of whether a taxpayer can rely on a legitimate expectation that it will receive a more favourable tax treatment than afforded by the correct application of the law.

In general, as in Ireland, UK public law does not protect legitimate expectations that could be adhered to by a public authority only by contravening the law or acting inconsistently with its legal duties. However, legitimate expectation can sometimes be relied on by a taxpayer to protect its expectation of a particular form of tax treatment, even if this is more favourable than the outcome that would result from a correct application of the relevant tax legislation. A taxpayer seeking to rely on this must demonstrate not only that HMRC's conduct gave rise to a reasonable expectation that the taxpayer would be treated in a certain way but also that it would be unfair and an abuse of power for HMRC to act inconsistently with that legitimate expectation.

This recognises that HMRC has a managerial discretion in collecting taxes, and the efficient

collection of taxes is promoted by HMRC's providing guidance to taxpayers and acting consistently with that guidance, even if it is subsequently decided by the courts to have been based on a wrong interpretation of the law. Accordingly, in *R (Davies) v HMRC* [2011] UKSC 47 the UK Supreme Court accepted that a taxpayer could acquire a legitimate expectation that it would be treated in the manner provided for in HMRC's published guidance or based on its settled practice, even where this did not correctly reflect the law, provided the guidance was clear and unambiguous, and read as a whole.

In *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 the English High Court held that a taxpayer is entitled to rely on a ruling or other statement given by HMRC provided that, when seeking the ruling, the taxpayer "puts all its cards face upwards on the table" by giving HMRC full details of the relevant transaction and that HMRC's ruling is "clear, unambiguous and devoid of relevant qualification".

Significantly, Revenue adopts a similar position to HMRC on the binding nature of formal opinions issued by the Revenue Technical Service (RTS). In Part 37-00-00a of the Tax and Duty Manual, Revenue states (at paragraph 7.2):

“In addition, an opinion/confirmation will only remain valid for so long as the facts and circumstances on which the opinion/confirmation is based continue to exist and the relevant legislation and practice remains in place. An opinion/confirmation can be reviewed at any time by Revenue, with a view to amendment or withdrawal, in the light of relevant facts, circumstances or other information changing or where Revenue decides to reconsider its position. The amendment or withdrawal will have effect from the time when the facts, circumstances or other information changed, or the taxpayer is notified by Revenue that it has reconsidered, and changed, its position.

**Where Revenue has previously given an opinion to a taxpayer based on a full disclosure of all relevant facts, then Revenue will follow that opinion.**

However, if on reviewing the opinion Revenue believes that it is incorrect, it may be withdrawn prospectively [emphasis added].”

As noted above, the Irish courts have not yet fully explored whether it is possible to establish a substantive legitimate expectation to a particular tax treatment. However, in the authors' view, it is not wholly clear that the Irish Supreme Court's decision in *Wiley* entirely precludes the enforceability of a legitimate expectation that a person should benefit from a more favourable application of the law than would otherwise apply. This might be considered further by the Irish courts in a case where there is a clear and unambiguous statement by Revenue on which a taxpayer has relied, particularly where the taxpayer has complied with the requirements of the RTS.

## EU Law

EU law recognises a principle of protection of legitimate expectations, which is similar to the Irish domestic law principle of legitimate expectations but protects legitimate expectations even where affording a particular treatment would require a public authority to act contrary to legislation. This EU law principle could be relevant in certain cases involving EU-derived taxes (such as VAT and custom duty), although this is outside the scope of this article.

## Contrast with Tax Appeals Commission

A taxpayer's normal remedy when it receives a tax assessment or other adverse decision from Revenue will be to appeal to the Tax Appeals Commission (TAC). The TAC is a creature of statute, which has various statutory powers to hear appeals against assessments and decisions of Revenue. Appeal rights

against particular matters are given by various provisions of the Tax Acts.

A court may refuse judicial review relief to an applicant where there is an alternative remedy available. It is important, therefore, that taxpayers understand the basis of their complaint and whether or not an appeal to the TAC or judicial review is the appropriate remedy.

The Court of Appeal recently considered the remit of the TAC's predecessor, the Appeal Commissioners, in *Lee v Revenue Commissioners* [2021] IECA 18. The court found that the jurisdiction of the Appeal Commissioners was limited to determining whether an assessment to tax had been properly made having regard to the relevant charging provisions. This will extend to making findings of fact or law on the issues incidental to their inquiries. However, the Appeal Commissioners did not have jurisdiction to consider questions of public law such as whether a taxpayer could rely on a legitimate expectation, or whether Revenue had contractually agreed to compromise a tax liability.

Given the similar powers and statutory basis of the TAC, *Lee* is also likely to be relevant to the extent of the TAC's jurisdiction, although it remains to be seen if the courts will consider that the TAC has any greater jurisdiction than the Appeal Commissioners.

In some cases there may be both a dispute over the correct interpretation of tax legislation that is within the jurisdiction of the TAC and a legitimate expectation argument that can be heard only by the High Court. In light of the differing timelines involved, namely three months to bring judicial review proceedings and 30 days for the submission of an appeal to the TAC, both proceedings will have to be commenced in tandem. It would then normally be necessary to apply to stay the TAC appeal pending the outcome of the judicial review proceedings, as was the case in the *Perrigo* proceedings. However, there could be clear time, cost and merits considerations to bear in mind when deciding which proceedings to prioritise.

## Conclusion

When approaching a dispute with Revenue, taxpayers and their advisers should consider any potential legitimate expectation arguments alongside the technical tax arguments that they might raise. In appropriate cases a judicial review claim may give a remedy in circumstances where the tax legislation may not.

In *Arderin*, the court noted that it was particularly unfortunate that there was no pre-litigation correspondence between the parties, which may have crystallised the issues and avoided litigation. In our experience, where legitimate expectation issues are relevant, there is often advantage in raising these with Revenue at an early stage.