

# Caveat Consuasor

## Gaines Cooper case reminds advisers to take care

By Paul Brady



Earlier this year, the case of Mr Robert Gaines Cooper attracted much media attention in the UK and served as a stark reminder of the care which those providing tax advice must exercise, as Paul Brady explains.

*Gaines Cooper v HMRC*<sup>1</sup> concerned a claim by the taxpayer that he was not resident in the UK for tax purposes. He argued that Her Majesty's Revenue Commissioners were bound by a guidance note, IR20, which they had produced on the subject.

The UK's Court of Appeal held that HMRC could be bound to honour statements made to the public on how it would treat a taxpayer in particular circumstances. While IR20 stated that each case had to be decided on its particular facts, that did not detract from 'the utility and effect' of the guidance Revenue chose to promulgate. Revenue must honour assurances given subject to the proviso that it cannot grant an allowance which parliament had not provided for.<sup>2</sup>

However, for an assurance to be binding, it must be conclusive. IR20 stated how taxpayers who left the UK 'permanently' would be treated. That required Revenue to form a view of the facts. Consequently, subject to the standard of reasonableness, Revenue could not be compelled to act one way or another. It was reasonable for Revenue to conclude that Mr Gaines Cooper had not left the UK permanently. Mr Gaines Cooper has served notice of his intention to appeal the decision to the UK's Supreme Court.<sup>3</sup>

### The Irish Approach

Irish law would produce a similar result. A claim that the Revenue Commissioners should be compelled to comply with a guidance note would be based on the doctrine of legitimate expectation. This doctrine appeared in *Glencar Exploration plc v Mayo Co Co (No2)*<sup>4</sup> – a Supreme Court appeal concerned with planning laws. Fennelly J stated:

*"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive.*

*Firstly, 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. I will call this the representation.*

*Secondly, 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 and group and the public authority or that the person or group has acted on the faith of the representation.*

*Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.*

*Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."*

Notwithstanding that Fennelly J stated his comments were *obiter* (or non-binding), they have been adopted in a number of subsequent High Court cases.

In *Hagemeyer Ireland Plc v The Revenue Commissioners*,<sup>5</sup> Revenue wrote to the taxpayer expressing a view on VAT law to the effect that the taxpayer could claim an input credit. Some time later, Revenue wrote again, resiling from their previous position. The taxpayer claimed a legitimate expectation that it could rely upon the first letter. In the High Court, Charleton J cited EU case law and held that a representation which contradicted the terms of the Sixth VAT Directive could not give rise to a legitimate expectation in the mind of the taxpayer.



The concept was also considered in the High Court case of *Cork Opera House Plc v Revenue Commissioners*.<sup>6</sup> In that case, the Opera House claimed that since Revenue had not queried their licence to serve alcohol to date, they could not now change their position and insist that the Opera House apply to the District Court for a theatre licence. Hedigan J relied on an earlier decision of the Supreme Court, *Wylie v Revenue Commissioners* [1994] 2 IR 160, to hold that a taxpayer cannot pursue on the basis of their expectation a remedy which would require the Revenue Commissioners to act in a way unauthorised by statute.

In *Fortune v Revenue Commissioners*,<sup>7</sup> O'Neill J adopted Fennelly J's principles. The taxpayer invested in a film and obtained tax relief. Eight years later, Revenue withdrew the relief on the basis that the film did not comply with the conditions for the relief. The taxpayer claimed that, as the relief was granted and eight years had elapsed, he was entitled to maintain a legitimate expectation that the relief would not be withdrawn. O'Neill J pointed out that the relieving sections provided that the relief could be withdrawn "at any time" and, thus, there could not be said to have been a representation which the taxpayer relied upon.

## The implications

What can be gleaned from the above Irish decisions is that to establish and rely on the doctrine of legitimate expectation, a taxpayer must prove:

- ▶ the Revenue Commissioners made an unequivocal representation to the taxpayer that they would act in a particular way;
- ▶ the taxpayer relied upon the representation;
- ▶ it was reasonable for the taxpayer to expect Revenue to abide by the representation; and
- ▶ fulfilling the expectation would not require Revenue to act in breach of statute.

When summarised in this way, it is apparent that the Irish approach is very similar to that of the English Courts as articulated in *Gaines*

*Cooper*. Importantly, in *Gaines Cooper*, the Court of Appeal looked to the language of the representations and questioned whether HMRC unequivocally stated it would act in a particular way. A similar analysis may be adopted by the Irish Courts.

It should be borne in mind that, in an EU law context (e.g. VAT), the Irish Courts will have regard to decisions of the Court of Justice of the European Communities.<sup>8</sup> Also, the doctrine has been applied by the European Court of Human Rights and its decisions are of persuasive authority in Ireland.

## What does this mean for tax advisers?

Firstly, Revenue guidance and correspondence should be taken with a large pinch of salt. If Revenue set out criteria for availing of a particular tax relief or treatment, the language should be studied to see if there is any ambiguity which would undermine the definitive nature of the representation.

Secondly, even if the language appears clear, the underlying legislation and case law should be studied to ensure that Revenue's position is not at variance with it.

Often, tax legislation is ambiguous and open to several conflicting interpretations. In such circumstances, taxpayers may contact Revenue to confirm the position. It would seem unjust if a Court subsequently ruled that an interpretation agreed with Revenue was incorrect and the taxpayer must pay tax as a result. However, that appears to be the law as it currently stands.<sup>9</sup>

## Alternative Recourse

As an alternative to breach of legitimate expectation, a taxpayer might be able to claim negligence on the part of Revenue. In the *Glencar* case, Fennelly J admitted the possibility that, in certain circumstances, public bodies may be found negligent for failing to take adequate legal advice. The elements of a claim by a taxpayer might be as follows:

- ▶ the taxpayer sought Revenue's view;<sup>10</sup>
- ▶ Revenue knew the taxpayer would rely and act on their opinion;
- ▶ the matter was sufficiently ambiguous or complex to warrant Revenue taking legal advice;
- ▶ Revenue failed to obtain adequate legal advice;
- ▶ Revenue's opinion was incorrect; and
- ▶ the taxpayer relied on the opinion and suffered loss as a result.

As this area of law is undeveloped, there is no guarantee such a claim would succeed. However, it may provide a disgruntled taxpayer with an alternative avenue of recourse where a claim to enforce a legitimate expectation is destined to fail.

## Conclusion

When communicating Revenue's view to clients, it should be accompanied by standard health warnings: a) the position may be too ambiguous to be relied upon (as in *Gaines Cooper*), and b) that it is ultimately for the courts to interpret the law – Revenue's position could be incorrect (as in *Hagemeyer*).

Given the decisions in *Hagemeyer*, *Cork Opera House* and *Fortune*, it is important for tax advisers to look beyond Revenue's stated position and to confirm that it complies with the underlying legislation.

In cases where a taxpayer relies on Revenue's erroneous opinion to his or her detriment, it might be possible for the taxpayer to recover damages on the basis that Revenue neglected to obtain legal advice.

### Notes

- <sup>1</sup> [2010] All ER (D) 197
- <sup>2</sup> *R (Wilkinson) v IRC* 77 TC 78
- <sup>3</sup> See [www.robertgainescooper.com](http://www.robertgainescooper.com)
- <sup>4</sup> [2002] 1 IR 84
- <sup>5</sup> Unreported, High Court, 9 February 2007
- <sup>6</sup> Unreported, High Court, 21 November 2007
- <sup>7</sup> Unreported, High Court, 23 January 2009 – see *Frank Mitchell Fortune v Revenue Commissioners* ITR March 2009
- <sup>8</sup> See *Glencar* at paragraphs 165 et seq and *Hagemeyer* at paragraphs 54 & 55;
- <sup>9</sup> See *Frank Mitchell BL Fortune v Revenue Commissioners* ITR March 2009
- <sup>10</sup> For example, to determine an applicable VAT rate under Section 11(1B) of the VAT Acts 1972-2010.

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