



General Anti-Avoidance: Time for a Re-think?

Paul Brady BL BCL *Consultant, Astons*

Introduction

The purpose of this article is not to examine the intricate operation and application of section 811, which is dealt with elsewhere.¹ Instead, this article is intended to query the status of s811 in light of our Constitution. While the objective of preventing tax avoidance through artificial means is laudable, the present method employed to achieve that end may not be legally valid. Nor is the article an exhaustive review of all the

various arguments which may be made. The intention is to identify some of the central issues of the debate to illustrate the unsound basis for the section and to suggest an alternative.

McGrath v McDermott

Section 811 (introduced by s86 of the Finance Act 1989) was a legislative reaction to the Supreme Court decision in *McGrath v McDermott*.² The case involved a series of artificial transactions

with the sole purpose of avoiding tax. The Revenue Commissioners sought recognition for a general anti-avoidance principle which, they argued, should be included in the tax code. In his judgment, Chief Justice Finlay noted the absence of a specific anti-avoidance provision which applied to the facts before the court. He stated that the function of the courts is to interpret legislation and “not to add or delete from express statutory provisions so as to achieve

1. See Bohan, Brian & McCarthy, Fergus, *Capital Acquisitions Tax* (Tottel, 2nd Ed, 2004), para 20.18 et seq.
Ward, John, *Judge: Irish Income Tax* (Tottel, 2007), Chp 17.3.
Maguire, Tom, “Section 811 TCA 1997 and the Canadian Connection Revisited: ‘You want a GAAR; you got a GAAR!’”, *Irish Tax Review* 20/4 (2007), p.56.
Kenny, Kevin, “Anti Avoidance, S 86 FA 1989: Part II”, *Irish Tax Review*, May 1990

2. 3 ITR 683.

objectives which to the court appear desirable.”.

To imply a general anti-avoidance provision would be to legislate. Under the Constitution, that was a function reserved for the Oireachtas.

In his concluding remarks, Finlay CJ made the following statement:

“Not only am I quite satisfied that it is outside the functions of the courts to condemn tax avoidance schemes which have not been prohibited by statute law, but I would consider it probable that such a role would be undesirable even if it were permissible. It is the Revenue Commissioners (whose advice is available to the Oireachtas in enacting tax legislation) who have the practical expertise and experience to know the most likely of types of avoidance to be anticipated and prohibited, and most importantly of all, the predictable consequences and side-effects of the terms of any prohibiting enactment.”

Finlay CJ’s comments were a signal to the Oireachtas that legislation would assist the position. He suggested that the Oireachtas should consult the Revenue Commissioners when enacting provisions designed to counter tax avoidance.

However, as enacted, s811 appears to be a misinterpretation of Finlay CJ’s suggestion.

As its title suggests, the object of s811 is to prevent tax avoidance. However, it operates so that, where a taxpayer acts to minimise the tax he must pay, he may – notwithstanding that he has complied with the letter of the tax code – be deemed to be engaged in tax avoidance and be subjected to further taxes. This constitutes an interference with the taxpayer’s property rights.

It delegates the power to determine when tax avoidance has occurred to the Revenue Commissioners and permits them to disregard tax provisions enacted by the Oireachtas.

Two constitutional grounds for challenging the section are explored below: property rights and the delegation of legislative power. There may be other grounds. For example, it may also be argued that in applying the section the Revenue Commissioners are exercising judicial power, which is reserved for the courts under Article 34 of the Constitution.

Property Rights

Property rights appear in two places

in our Constitution. Article 43 prevents the State from abolishing the right to private property but permits the restriction of that right where the common good requires. Article 40.3.2 lists “property rights” among the personal rights of the citizen that the State must protect from

unjust attack and vindicate where injustice is done. These property rights may be restricted in the interest of the common good (e.g., the requirement to obtain planning permission).³

“The right to know where you stand”

In October 1982, James O’Reilly presented a paper entitled “Constitutional Implications of Recent Decisions affecting Property Rights”. The paper considered, *inter alia*, the English decision in *Ramsey v Inland Revenue*⁴ and whether it should apply in Ireland, given the property rights protected by our Constitution.⁵ In *Ramsey*, the House of Lords decided that a series of transactions (each of which was permitted by the tax code) could be looked at as a whole and, if it was found that the composite transaction produced neither a gain nor a loss, it could be treated as a nullity for tax purposes. That meant that any tax benefit accruing to the taxpayer would be withdrawn. O’Reilly expressed difficulty with the uncertainty this caused and questioned whether it ran contrary to the property rights which the Irish Supreme Court were breathing life into at that time.⁶ O’Reilly pondered:

“In arranging his property affairs, has not a citizen a right to know what the law is relative to his property transactions? If he has considered the lawful consequences of his action and complied with legal form, are not his actions entitled, prima facie, to respect in law?”

This “right to know where you stand” has been called the “Doctrine of Certainty in Taxation” in a recent article by Tom Maguire.⁷ Maguire traces its origin to Adam Smith’s *The Wealth of Nations*. The right was articulated in the frequently

3. See *Blake v Attorney General* [1982] IR 117 and *Brennan v Attorney General* [1984] ILRM 355.

4. [1981] 1 All E R 865.

5. Subsequently, in *McGrath*, the *Ramsey* reasoning was flatly rejected by the Supreme Court because it breached the separation of powers doctrine.

6. See Note 3 above.

7. “Section 811 TCA 1997 and the Canadian Connection Revisited: ‘You want a GAAR; you got a GAAR!’”, *Irish Tax Review*, 20/4 (2007) p 56.

quoted statement of Tomlin LJ in *IRC v Duke of Westminster*:⁸

“Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax gatherers may be of his ingenuity, he cannot be compelled to pay an increased tax...”

Whether the “right to know where you stand” forms part of the property rights protected by Article 40.3.2 is a matter for the courts. To this writer, it would seem to be an integral aspect of property rights.

Unjust Attack

The High Court decision in *Daly v Revenue Commissioners* sets out the current procedure to be employed in challenging a statute based on an infringement of one’s property rights.⁹ In his judgment, Costello J pointed out that legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved. However, a citizen can challenge a provision by establishing that his or her rights have been subject to “unjust attack”. This is done by showing that the law restricting the exercise of his or her rights has failed to pass a proportionality test:

“The law in question must:

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,*

- (b) impair the right as little as possible, and*

- (c) be such that their effects on rights are proportional to the objective.”*

Section 811: Proportionate?

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When the proportionality test is applied, s811 fails the first leg – the uncertainty it causes is unquestionably unfair. There is no way for the taxpayer who is trying to minimise his or her taxes to know in advance whether or not the Revenue Commissioners will conclude that he or she is engaged in tax avoidance.

If there is a constitutionally protected “right to know where you stand”, as discussed above, then s811 disregards that right. So, the section would fail the second and third legs of the test as well.

The introduction of s811A and protective notification does little to alleviate this problem. It is simply not possible in all circumstances to anticipate what Revenue’s view of a particular transaction will be. Logically, therefore, a protective notification should be delivered to the Revenue Commissioners in respect of all transactions.

Similarly, the possibility of appealing Revenue’s decision cannot render the section constitutional.

The taxpayer still faces the same uncertainty and his or her rights will have already been prejudiced. Furthermore, the section creates evidential presumptions in favour of the Revenue Commissioners so that the taxpayer will be required to establish his or her “tax innocence”.

Delegation of Legislative Power¹⁰

Article 15.2 of the Constitution vests the sole power to legislate in the Oireachtas.¹¹ However, it is accepted that the country could not function unless the Oireachtas could delegate to subordinate bodies or departments, not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the legislature, the power so delegated and the manner in which the statutory provisions shall be carried out.

Legislation is often challenged on the basis that the Oireachtas has delegated too much power. The line between what may and may not be delegated is sometimes unclear. In *Cityview Press Ltd v An Chomhairle Oiliuna*,¹² the Supreme Court set out the following test to be applied:

“... the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated

8. 19 TC 490 at 520, incorporated into Irish law in *O’Sullivan v P Ltd* 3 ITC 255.

9. [1996] 1 ILRM 122, endorsed by the Supreme Court in *Re Article 26 and the Planning and Development Bill 1999* [2000] IR 321.

10. See Appleby, Tony & O’Hanlon, Finola, *The Taxation of Capital Gains* (Dublin, Irish Taxation Institute, 2007), para 9.2.6.

11. For that reason, in *McGrath* the Supreme Court would not imply an anti-avoidance provision into the tax code.

12. [1980] 1 IR 381.

Minister or subordinate body – there is no unauthorised delegation of legislative power.”¹³

Section 811: A Permitted Delegation?

Section 811 permits the executive arm of Government (the Revenue Commissioners) to make a determination that is in direct contradiction to the provisions of the tax code as enacted by the Oireachtas. For example, the Taxes Consolidation Act may indicate that if certain conditions are fulfilled then a tax relieving provision will apply. Section 811 means it is possible for the Revenue Commissioners to determine that, notwithstanding that the conditions laid down by the Oireachtas have been fulfilled, the relief will not apply.

Section 811 is akin to what Justice Denham once described as a Henry VIII clause:¹⁴ “a statutory provision which gives authority to an administrative body to make delegated legislation which may amend legislation”. Such provisions are in clear breach of Article 15.2 and are prohibited.

Just as the Supreme Court could not step into the shoes of the Oireachtas in *McGrath*, the Revenue Commissioners cannot assume the role of the Oireachtas in determining tax law. The fact that the Oireachtas enacted s811 is no defence; the

Oireachtas cannot abdicate its constitutional power.

The constitutionality of s811 has never been decided upon by the courts. The thinking of the Supreme Court on constitutional issues is very hard to predict. However, the above arguments demonstrate that, were the section to be challenged, it may not survive judicial scrutiny.

avoidance law is evolving at a federal level at the Court of Justice of the European Communities and,¹⁵ perhaps, that should be used as a starting point.

The current ECJ position may be summarised as follows:¹⁶

- › Community Law rights cannot be relied upon where the person asserting them is engaged in an abusive practice. In relation to direct tax, an abusive practice would exist where the taxpayer is engaged in “wholly artificial arrangements” and relying on community law rights to gain a tax advantage.

Conclusion

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No one can deny the desirability of preventing convoluted tax avoidance. Perhaps a re-think of how we go about doing that is required. A body of anti-

- › National laws that restrict the exercise of community law rights may be permitted where they are designed to eliminate such wholly artificial arrangements but go no further than that. They must not undermine “genuine economic activity”. A finding that a taxpayer is engaged in genuine economic activity must be based on objective factors that are ascertainable by third parties. Presumably, a finding that a taxpayer is engaged in wholly artificial arrangements must be based on similar factors.
- › The “right to know where you stand” or “doctrine of certainty in taxation” has been acknowledged at an EU level. With reference to community legislation, the Court of Justice stated that “*it must be certain and its application foreseeable by those subject to it. ... That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them*”.¹⁷

The Irish Courts and the Oireachtas are obliged to adopt and apply these principles when dealing with EU rights. To achieve consistency, perhaps these principles should be applied when dealing with Irish Constitutional property rights as well. In that case, the Oireachtas would have to set out objective factors which would enable a taxpayer to determine in advance whether he is engaged in genuine economic activity or wholly artificial arrangements. As Finlay CJ suggested in *McGrath*, the Oireachtas could consult the Revenue Commissioners on what those objective factors should be.

13. Per O'Higgins CJ at p398-399 accepted and applied in *Laurentiu v Minister for Justice* [1999] 4 IR 26.

14. See *Laurentiu v Minister for Justice* [1999] 4 IR 26.

15. See Tom Maguire “The Cadbury Triangle – Anti-Avoidance and the ECJ”, *Irish Tax Review* 19/6 2006 p 63.

16. See C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v CIR* [2006] ECR I-7995.

17. C-255/02 *Halifax and Others* [2006] ECR I-1609 at para 72.