



THE COURT OF APPEAL

Appeal Number: 2017/603

Costello J.
Haughton J.
Binchy J.

Neutral Citation Number [2023] IECA 178

BETWEEN/

GERARD HARRAHILL

**PLAINTIFF/
RESPONDENT**

- AND -

THOMAS DOYLE

**DEFENDANT/
APPELLANT**

JUDGMENT of Mr. Justice Binchy delivered on the 12th day of July 2023

1. This is an appeal from a decision of the High Court (Ní Raifeartaigh J.) whereby she ordered that the plaintiff, the Collector General, (the respondent to this appeal and hereinafter the “respondent”) should recover from the defendant (the “appellant”) the sum of €70,789.36 together with the costs of the proceedings in respect of sums claimed by the respondent comprising liabilities of the appellant to the respondent in respect of VAT, PAYE, PRSI and statutory interest on the sums claimed. As is recorded in para. 5 of the judgment of the High Court, in broad terms the defence of the appellant to the sums claimed as being due is that he is entitled to offset against the principal sum claimed overpayments made by him to the respondent, the value of which exceeds the principal sum claimed and thereby eliminates the

debt entirely. By this appeal, the appellant claims that the trial judge erred in failing to offset the overpayments made by him against the sums that are otherwise due by him to the respondent. It follows from this that the appellant is not disputing the calculation of the sums claimed by the respondent, or that they are otherwise due but for his claim as to an entitlement to offset.

Background

2. Although precise details available to the Court are scant, the background to these proceedings, in very general terms, is as follows. It appears the appellant operated a sand and gravel business until the year 2010. During the period 2003-2010, he failed to file statutory returns for VAT, PAYE and PRSI. As a result, the Revenue Commissioners served estimates on the appellant in the years 2005 and 2006 in respect of PAYE and PRSI liabilities for the tax years ending 31st December 2003 and 31st December 2004. The appellant made payments - which it later transpired were overpayments - on foot of those estimates, but he still failed to bring his returns up to date. The appellant also made significant overpayments of his VAT liabilities in respect of VAT periods in the years 2005 and 2006. In 2007, the Revenue Commissioners/Collector General sent warrants to the revenue sheriff directing collection of certain taxes. The appellant made payments to the revenue sheriff, which resulted in a further overpayment, and the revenue sheriff accounted to the respondent for that surplus at the time, although the appellant did not become aware of this until sometime in 2013.

3. As will be seen in more detail below, the appellant claimed set off against his liabilities in respect of the various overpayments made by him, and while some set off was credited in his favour, the respondent refused to allow set off in respect of most of the sums in respect of which it was claimed, on the grounds that the claim to set off was advanced out of time and was precluded by statute. The appellant claims that he appealed the refusal of set off to

the Appeal Commissioners, and at the hearing of this appeal he placed some reliance on that purported appeal, which I will address in due course.

The Proceedings.

4. In circumstances where the appellant failed, over a protracted period, to bring his tax returns up to date, the respondent issued proceedings by way of summary summons dated 4th May 2010 claiming PAYE and PRSI for a period between 1st January 2005 and 31st December 2009, and VAT for a period between 1st January 2006 and 31st December 2009. The total sum claimed was €63,256.00 together with interest of €18,297.92, a total of €81,553.92. The appellant finally filed returns in respect of PAYE and PRSI on 14th December 2010, and VAT returns on 4th February 2011. On 10th February 2011, the respondent initiated an audit of the appellant's tax affairs, and while it is unclear as to when exactly this was concluded, it was clear that it had concluded by 28th February 2012, when the respondent's solicitors wrote to the appellant stating that the audit had concluded, and demanding payment of the sum of €18,515.44 in respect of PAYE and PRSI (for the years 2005-2009) as well as VAT for various periods between January 2006 and December 2009. However, somewhat confusingly, in the same letter it was also stated that the liabilities for some of the periods referred to in the schedule attached to the letter were in fact greater, and on the following day the solicitors for the respondent sent another letter demanding payment of the total sum of €42,262.00, which, apart from adjusting some of the figures referred to in the letter sent the day before, also included a claim for VAT for the years 2010 and 2011. In effect, it appears this letter superseded the letter sent the day previously.
5. On 14th March 2012 the respondent issued further proceedings claiming the total sum of €46,262.00 including interest. These proceedings followed the audit mentioned above

and related to PAYE and PRSI liabilities for the years 2005 – 2008 and VAT liabilities for various periods in each of the years 2008 - 2011. The amount claimed was broken down as to total tax arrears in the sum of €36,093.00, together with €10,169.00 in respect of statutory interest.

6. The 2010 proceedings and the 2012 proceedings were in due course consolidated, and a consolidated statement of claim was delivered by the respondent on 5th March 2013. The respondent claimed PAYE and PRSI for each of the years 2005 – 2008, and VAT for sixteen different periods in each of the years 2006 – 2011. The total amount claimed was €47,813.00 together with interest of €15,697.00, a total of €63,510.00.

7. The respondent applied for summary judgment, but this application was rejected and the proceedings were sent forward for plenary hearing on 4th February 2013. By the time the matter came on for hearing before the trial judge on 24th November 2016, there were further adjustments to the amount claimed. The total of the taxes claimed by the respondent was reduced to €39,973.00, but the total of interest now claimed had increased significantly. The interest claimed was referable to two interest periods, the first being the period up to 2013 in respect of which the sum of €14,485.00 was claimed, and the second being the period between 2013 and 2016, in respect of which the sum of €20,988.13 was claimed.

Defence and Reply

8. The defendant delivered a succinct defence on 27th November 2013. While the appellant's legal advisors came off record in July 2016, and he has been a litigant in person ever since, at the time of delivery of his defence, the appellant was legally represented, and his defence was drafted by counsel. I set out below the paragraphs most relevant to this appeal and, for convenience, I set out immediately after each paragraph the reply of the respondent to each plea in the defence as set out in a reply to the defence delivered on 7th May, 2015.

“4. The defendant has accepted by letter dated 29th June 2013 forwarded to the plaintiff’s Kildare Revenue District, VAT credits offered as offsets or repayments by the plaintiff to the defendant in notification letters dated 16th February 2012 in the total sum of €32,205, reduced to the sum of €21,151 by the defendant in his explanation of the VAT credit balances to the plaintiff as required by the said notifications. This VAT credit balance of €21,151 is claimed by the defendant as a set off.

Reply: The respondent denies offering VAT credits, offsets or repayments as claimed or that there is any agreement of the kind intimated by the appellant in this paragraph. Further, the respondent denies that the appellant is entitled to any credit or offset as pleaded by reason, *inter alia*, of the provisions of s.99(4) of the Value Added Tax Consolidation Act 2010 (as amended).

5. The defendant has signed VAT returns for leasing agreement VAT rentals as agreed by the plaintiff in its letter to the defendant dated 25th March 2013, for the VAT periods January 2009 to March 2010. The defendant claims a setoff in the sum of €4,524 arising from this.

Reply: There was no specific reply to this paragraph of the defence.

6. The defendant has filed VAT returns for the VAT periods May 2011 to December 2011 with nil balances for these periods. The defendant says that there is no liability for VAT for those periods.

Reply: The respondent accepts that the appellant filed a nil return for the VAT period May/August 2011 and that he also filed a return for the VAT period September/December 2011 showing a credit due to him in the sum of €368.00, and pleads that that sum was credited as an offset against the liability of the appellant for the VAT period March/April 2008.

7. The defendant refers to correspondence received from the Revenue Sheriff dated 12th April 2013, showing a balance due to him in the sum of €1,424.88, which said sum was returned to the plaintiff by the Revenue Sheriff as a residue of payments totalling €30,509.24 made by the defendant to the Revenue Sheriff.

Reply: The respondent says that this sum was credited to the appellant's liability to P.35 Tax for the year 2003.

8. The defendant has made two further claims for VAT credits to the plaintiff, for which he has not been allowed any or any proper credit, as follows:

(i) The sum of €840 in respect of leasing agreement VAT rentals for the VAT period November - December 2008 returns for which have been filed and which said returns were overlooked in error by the defendant's accountant in his submissions of VAT returns in April 2011.

(ii) The sum of €3,837 representing an overpayment of the VAT period September 2005 to October 2005 where a payment in the sum of €5,000 was allocated by the plaintiff to this VAT period where the VAT return filed for this period was in fact €1,163.

Reply: The respondent denies that any claim was made for credit and/or a refund for the sum of €840.00. Any such claim that might be made now is precluded by reason of, *inter alia*, the provisions of s.99(4) of the Act of 2010.

The respondent pleads that the return for the VAT period September/October 2005 was due on 19th November 2005, and that in the absence of any return an estimate was raised by the respondent in the sum of €5,000 on 4th April 2007. The respondent pleads that following enforcement, the appellant made payments of €2,695.35 on 3rd January 2008 and €2,304.65 on 28th January 2008 (a total of €5,000) and subsequently filed a return on 4th February 2011 disclosing a sum payable in the amount of €1,374 for the VAT period September/October 2005. However, it is pleaded that the resulting overpayment in the sum of €3,636.00 [this is clearly an error and should be €3626] has been allocated by the respondent against the appellant's liability in respect of the VAT period May/June 2008 (an amount of €2,955.32) and March/April 2008 (an amount of €670.68)

9. The defendant has been advised in recent communications with the Collector General's Office in Limerick that there are amounts of €7,199 and €7,200 totalling €14,399 standing as overpayments in respect of PAYE/PRSI for the tax years 2003 and 2004 respectively to the credit of the defendant's account since January 1st 2011 subsequent to the filing of nil balances for this tax for these periods by the defendant in December 2010.

Reply: The respondent pleads that the sums referred to in this paragraph of the defence were paid in circumstances where the respondent had raised a P.35 estimate for PAYE and PRSI for the years ending 31st December 2003 and 31st December 2004 in the sum

of €7,200 for each year. The appellant discharged these estimates. In the case of the estimate for the year ending 31st December 2003, the amount estimated was paid on dates between 3rd August 2006 and 26th October 2007. In respect of the estimate for the year ending 31st December 2004, the appellant discharged the same between 26th October 2007 and 3rd January 2008. It is pleaded that (as at the date of the reply to the defence) the appellant had not made any claim for a refund in respect of any claim as to overpayment to date, and that any such claim is now precluded by reason of the provisions of s. 865 of the Taxes Consolidation Act 1997 (the “1997 Act”).

10. The defendant is not liable for the sum sought or any sum.”

Reply: No specific reply was made to this paragraph.

Relevant legislation

9. The following statutory provisions dealing with repayment of tax and offset in cases of overpayment are relied upon by the parties.

Section 865 of the Taxes Consolidation Act 1997

865(2). Subject to the provisions of this section, where a person has, in respect of a chargeable period, paid, whether directly or by deduction, an amount of tax which is not due from that person or which, but for an error or mistake in a return or statement made by the person for the purposes of an assessment to tax, would not have been due from the person, the person shall be entitled to repayment of the tax so paid.

(3) A repayment of tax shall not be due under subsection (2) unless a valid claim has been made to the Revenue Commissioners for that purpose.

(4) Subject to subsection (5) a claim for repayment of tax under the Acts for any chargeable period shall not be allowed unless it is made –

(a) ...

(b)...

(c) in the case of claims made –

(i)

(ii) in relation to any chargeable period beginning on or after 1st January 2003 within four years,
after the end of the chargeable period to which the claim relates

(5) ...

(6) except as provided for by this section, section 865A or by any other provision of the Acts, the Revenue Commissioner shall not –

(a) repay an amount of tax paid to them, or

(b) pay interest in respect of an amount of tax paid to them.

[Section 865A addresses interest on repayments and is not relevant for present purposes].

Section 865(B) of the Taxes Consolidation Act 1997

No offset where repayment prohibited

865B (2) Subject to subsections (3) and (4), where a repayment of any tax cannot be made to a person by virtue of the operation of—

(a) section 865,

(b)...

(c) section 99 of the Value-Added Tax Consolidation Act 2010,

(d) – (f) ...

then, notwithstanding any other enactment or rule of law, that repayment shall not be set against any other amount of tax due and payable by, or from, that person.

(3) Where a repayment of tax cannot be made to a person in respect of a relevant period, it may be set against the amount of tax to which paragraph (a) of subsection (4) applies which is due and payable by the person in the circumstances set out in paragraph (b) of that subsection.

(4)(a) The amount of tax to which this paragraph applies is the amount, or so much of the amount, of tax that is due and payable by the person in respect of the relevant period as does not exceed the amount of the repayment that cannot be made to the person in respect of that relevant period.

(b) The circumstances set out in this paragraph are where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax, at a time that is 4 years or more after the end of the relevant period.

Section 960H – Offset between taxes

960H(1) In this section—

“*claim*” means a claim that gives rise to either or both a repayment of tax and a payment of interest payable in respect of such a repayment and includes part of such a claim;

“*liability*” means any tax due and payable which is unpaid and includes any tax estimated to be due and payable;

“*overpayment*” means a payment or remittance (including part of such a payment or remittance) which is in excess of the amount of the liability against which it is credited.

- a. Where the Collector General is satisfied that a person has not complied with the obligations imposed on the person in relation to either or both—

(a) the payment of tax that is due and payable, and

(b) the delivery of returns required to be made,

then the Collector General may, in a case where a repayment is due to the person in respect of a claim or overpayment—

- (i) where paragraph (a) applies, or where paragraphs (a) and (b) apply, instead of making the repayment, set the amount of the repayment against any liability, and
- (ii) where paragraph (b) only applies, withhold making the repayment until such time as the returns required to be delivered have been delivered.

Section 955, Taxes Consolidation Act, 1997

955.—(1) Subject to subsection (2) and to section 1048, an inspector may at any time amend an assessment made on a chargeable person for a chargeable period by making such alterations in or additions to the assessment as he or she considers necessary, notwithstanding that tax may have been paid or repaid in respect of the assessment and notwithstanding that he or she may have amended the assessment on a previous occasion or on previous occasions, and the inspector shall give notice to the chargeable person of the assessment as so amended.

(2) (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of the period of 6 years commencing at the end of the chargeable period in which the return is delivered and no additional tax shall be payable by the chargeable

person and no tax shall be repaid to the chargeable person after the end of the period of 6 years by reason of any matter contained in the return.

(b) Nothing in this subsection shall prevent the amendment of an assessment—

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),

(ii) to give effect to a determination on any appeal against an assessment,

(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(iv) to correct an error in calculation, or

(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3).

Section 99 Value Added Tax Consolidation Act 2010

99 (1) Subject to subsections (2) and (3), where in relation to a return lodged under Chapter 3 of Part 9 or a claim made in accordance with regulations, it is shown to the satisfaction of the Revenue Commissioners that, as respects any taxable period, the amount of tax (if any) actually paid to the Collector General in accordance with Chapter 3 of Part 9 together with the amount of tax (if any) which qualified for deduction under Chapter 1 of Part 8 exceeds the tax (if any) which would properly be payable if no deduction were made under Chapter 1 of Part 8, the Revenue Commissioners shall refund the amount of the excess less any sums previously refunded under this subsection or repaid under Chapter 1 of Part 8 and may include in the amount refunded any interest which has been paid under section 114.

(2)...

(3)...

(4) A claim for a refund under this Act may be made only within 4 years after the end of the taxable period to which it relates.

(5)...

(6) The Revenue Commissioners shall not refund any amount of tax except as provided for in this Act or any orders or regulations made under this Act.

Judgment of the High Court

10. At paras. 7 – 9 of her judgment, the trial judge addressed para. 4 of the defence, by which the appellant claimed a set off of €21,151 against his VAT liabilities. It is apparent from para. 4 that the appellant relies upon a letter issued to him by the respondent on 16th February 2012, in which letter it is stated: *“I enclose a summary statement of account for VAT for the periods 1/5/2006 to 30/6/2006 for your information”*. The letter states that there is a *“statement balance”* of zero and a *“credit balance”* of €27,076, and it goes on to state that *“this balance must be explained before it can be offset or repaid”*. It is the appellant’s contention that by this letter the respondent was offering him an offset or repayment of VAT in the sum of €27,076, subject only to his explaining the balance and accepting the offer. The trial judge did not agree, holding that the letter could not be interpreted as an offer on the part of the respondent to offset overpayments by the appellant against sums due by the appellant to the respondent. The trial judge reviewed the correspondence exchanged between the parties and noted that the respondent had clearly informed the appellant that sums which he sought to offset for the VAT periods of November/December 2005 and May/June 2006, in respect of which VAT returns had been lodged on 4th February 2011, fell

outside the four year time limit prescribed by s.99(4) of the VAT Consolidation Act 2010, as amended, and that the respondent had informed the appellant that “*there are no circumstances in which a refund/offset of VAT may be granted that is outside the [four year] time limit*”. Nonetheless, the trial judge observed, the appellant replied to the same revenue official on 29th June 2013 accepting credits which he claimed had been offered by the respondent. In this correspondence, the appellant adjusted, downwards, the figures in respect of which he was claiming credit, the net result being that he claimed a credit in the amount of €21,151 as an offset against VAT liabilities. At para. 9 of her judgment, the trial judge set out her conclusion on this issue as follows:

“9. It therefore appears from the above correspondence that the defendant submitted VAT returns on 4th February, 2011 for the VAT periods November/December 2005 and May/June 2006, which, since his claim for overpayment based upon this return fell outside the four-year time limit, could not be allowed. This situation was not, and in any event could not have been, altered by correspondence between the Revenue and the defendant, as the legislation has mandatory effect and the Revenue has no discretion in this regard.”

11. The trial judge then proceeded, at paras. 10 - 15 of her judgment, to consider the claim by the appellant at para. 5 of the defence that he was entitled to a set off of €4,524 in respect of liabilities to VAT between January 2009 to March 2010. Having reviewed the returns made by the appellant during that period, the trial judge concluded that, on the balance of probabilities, the claim for set off in this instance was made within the four year time period and accordingly she allowed this sum as a set off against the principal amount claimed by the respondent. There is no cross appeal by the respondent as regards the trial judge’s determination of this issue, and accordingly it requires no further consideration.

12. At paras. 16 – 19 of her judgment, the trial judge addressed the appellant’s claim to an entitlement to a credit of €1,424.88, arising out of a payment made by the Revenue Sheriff to the respondent from funds held to the credit of the appellant by the Revenue Sheriff. The period in respect of which the set off is claimed is not stated, but this is immaterial, because the dispute between the parties as regards this amount is not as regards the entitlement of the appellant to claim set off, but rather concerns whether or not the respondent in fact allowed the appellant the agreed set off, in circumstances where the respondent says that he did, and the appellant says that he did not. At para. 19 of her judgment, the trial judge addressed the issue as follows:

“19. By letter dated 19th October 2007, the Revenue acknowledged receipt of a payment of €1,424.88 with a receipt of payment of the 27th September 2007. This would suggest that the amount in question was remitted to the Revenue by the Sheriff around the 27th September, 2007 and received by the Revenue official, Mr. Harrahill, on or about the 19th October, 2007. By a letter dated 30th October, 2013, the Revenue included a summary of Mr. Doyle’s account for the PAYE/PRSI tax year 2003 and included the figure of €1,424.88 as a credit balance. On the basis of the last two letters, it would appear to me on the balance of probabilities that the sum in question was credited to Mr. Doyle sometime in October 2007 and this sum does not therefore fall to be offset against his liabilities.”

13. At paras. 20 – 24 of her judgment, the trial judge addressed the claim for credits due as a result of claimed overpayments of VAT in the sums of €840 and €3,837, as made in paragraph 8 of the defence. The trial judge noted that the respondent pleads that no claim was made for a credit and/or refund in the sum of €840, and, therefore, that any such claim made now would be precluded by reason of the lapse of time. The trial judge noted that the appellant had referred to this sum in a letter of 2nd July 2013 to the respondent. She noted

that the claim for set off in respect of this sum was disallowed on the basis that the claim fell outside the four year time period. The trial judge does not refer further to the claim for set off in respect of this sum, other than in a general way, at para. 24, in which she says that “*the sums in question*” do not fall to be offset against the amount claimed by the respondent. The reference to the “*sums in question*” necessarily includes the sum of €840 as the paragraph clearly refers to both the sum of €840 and the sum of €3,837 referred to in the title to this section of the judgment.

14. As regards the claim for credit in respect of the sum of €3,837¹, the trial judge considered the reply of the respondent. She noted that it was pleaded that, in the absence of any return having been filed for VAT by the appellant for the VAT period September/October 2005, the respondent raised an estimate in the sum of €5,000 on 4th April 2007. Following steps taken by the respondent to enforce payment, the appellant made payments totalling €5,000 on 3rd January 2008 (in the sum of €2,695.35) and 28th January 2008 (in the sum of €2,304.65), and subsequently filed a return on 4th February 2011. In this return, the respondent pleads, the appellant identified the amount of VAT actually payable for the period – being the period September/October 2005 – as being in the amount of €1,374 (although the appellant, at para. 8 of the defence pleads that the liability for the period was €1163, a difference of €211) The respondent pleaded that the resulting overpayment in the sum of €3,626 (the sum referred to in para.7 of the reply to defence is actually €3636, but

¹ There is a discrepancy between the amount referred to by the trial judge at para.23 of her judgment, in the sum of €3625.26 and the credit claimed by the appellant in the sum of €3837 at para.8 of his defence. It appears this may be reconciled as follows. The appellant, at para. 8 of his defence, pleads that the ultimate VAT liability for the period September-October 2005, as per his returns made on 4th February 2011, was €1163, whereas the actual figure in his returns for this period, according to the respondent (and the appellant took no issue with this at the hearing if this appeal) is €1374. The difference between these two amounts is €211. When this is taken subtracted from €3837, the corrected balance is €3626.

that is clearly an error) was allocated as against the liability of the appellant in respect of the VAT periods March/April 2008 and May/June 2008.

15. The trial judge reviewed the documents relating to those periods, noting that they showed amounts of €670 and €2,955.32 as being allocated to liabilities for those periods, arising out of the overpayments for September/October 2005. Accordingly the appellant received a credit in the total sum of €3,625.32, and the trial judge concluded that in the circumstances the sums claimed by the appellant did not fall to be set off against the sums now claimed by Revenue.

16. At paras. 25 – 27 of her judgment, the trial judge analysed the appellant's claim for set off in respect of payments totalling €14,399 made by the appellant to the respondent. The payments concerned amounting to €7,199 and €7,200 had been made by the appellant in discharge of estimates raised by the Revenue in respect his liabilities for PAYE and PRSI for the tax years 2003 and 2004. The first estimate was raised by the respondent on 25th June 2005, in the sum of €7,199, and was discharged by the appellant between 3rd October 2006 and 26th October 2007. The second estimate was raised by the respondent on 16th June 2006 and was discharged by the appellant between 26th October 2007 and 3rd January 2008. In each case, the appellant subsequently filed returns on 14th December 2010, disclosing no liability for either of the years in question i.e. the years ending 31st December 2003 and 31st December 2004. The trial judge referred to a letter of the respondent of 9th July 2013, stating that the P35 return for the period was received in October 2009, which appears at odds with the statement that it was made on 14th December 2010, but nothing turns on this inconsistency. In this letter, the respondent stated that the P35 returns for the years in question should have been filed by 15th February 2004 and 15th February 2005, and requests for refunds or offsets should have been made by 31st December 2007 for the 2003 tax year

and by 31st December 2008 for the 2004 tax year. Accordingly the claim for set off was now time barred.

17. The trial judge referred to correspondence exchanged between the appellant and a Mr. Wiley on behalf of the respondent in July 2013, in which Mr. Wiley explained the reason why the appellant was not entitled to the offset that he sought. The trial judge noted that the appellant wrote to the respondent on 3rd December 2013 stating that he accepted credit balances notified to him by the respondent by letters of 30th October 2013 in the sum of €14,399 in spite of the fact that the respondent had previously made it plain in an exchange of letters in July of the same year that this was not possible. The trial judge concluded: *“Thus, while it appears that he did make a claim in respect of this sum, it was not and could not be allowed by Revenue by reason of the claim having been made outside the four year time limit. Accordingly, this sum does not fall to be offset against the amount claimed.”*

Notice of Appeal and Respondent’s Notice

18. The notice of appeal of the appellant is broken down into two parts, the first relating to VAT, and the second relating to PAYE and PRSI.

19. In regard to VAT, the appellant claims that the trial judge erred in finding that the four year limitation period applicable to overpayments is of mandatory application. The appellant relies upon s.99(1) of the VAT Consolidation Act 2010 which provides that: *“... the Commissioners shall refund the amount of the excess (tax) less any sums previously refunded.”* The appellant also relies upon s.960H of the Taxes Consolidation Act, 1997, relating to offset between taxes. He further relies upon the exceptions to the four year time limit, which he pleads is relevant in the case of the period May/June 2006 in respect of which he claims, implicitly, an entitlement to offset in the sum of €15,969, and the period

November/December 2008 in respect of which he claims an entitlement to offset in the sum of €840, in each case by reason of the fact that, he alleges, the respondent took action for recovery of tax four years or more after the end of the relevant period. As will become apparent, the exception relied upon by the appellant, although not stated in the notice of appeal, is that referred to in s.865B(4)(b) of the 1997 Act.

20. The appellant claims that the trial judge erred in failing to allow the off sets claimed pursuant to s.960H of the 1997 Act in circumstance where the respondent had acknowledged the overpayments.

21. In relation to PAYE/PRSI, the appellant claims that the trial judge erred in not finding that a taxpayer has a statutory entitlement to repayment of an overpayment of tax pursuant to s.865(2) of the 1997 Act. He claims that he made a return in 2010 which amounted to a valid claim for a set off and which corrected any error in the calculation of his tax liabilities. He claims that the trial judge erred in law in finding that the claim in respect of overpayments of PAYE/PRSI made to the Revenue Sheriff was time barred. He asserts that *“by virtue of the fact that a reassessment or an amendment had to have been made by Revenue subsequent to the appeal [by the defendant] to the Appeal Commissioner in August 2013, this resulted in the issue of the notification to the defendant in October 2013 of the said overpayments to the Revenue”*. This is a reference to two letters sent by the Revenue Commissioners on 30th October 2013, informing the appellant that, in the case of the tax year ending 31st December 2003 there was a balance of €7,199 standing to the credit of the appellant, and, in the case of the tax year ending 31st December 2004 there was a balance of €7,200 standing to the credit of the appellant

22. The appellant relies upon s. 955 of the 1997 Act, which allows the Revenue Commissioners to amend an assessment for a chargeable period for a period of up to six years from the end of the chargeable period in which a return is delivered, or longer if the

chargeable person has failed to make full and true disclosure of all material facts in the return made. This section also provides that no additional tax shall be payable by and no tax shall be repaid to the chargeable person after the end of the period of six years by reason of any matter contained in the return. The appellant submits that he made his return in respect of PAYE/ PRSI in 2010, and, therefore, he can have no liability to pay any additional tax six years after the date of his return.

23. In the respondent's notice, the respondent claims that the trial judge correctly applied the four year limitation period on claims for refunds and offsets as provided for by s.99 of the VAT Consolidation Act 2010 and s.865B of the 1997 Act. The respondent says that the trial judge correctly found that the sum of €1,424.88 had been allocated as a credit against the PAYE/PRSI liability of the appellant for the tax year 2003. The trial judge was further correct in finding that the sum of €3,625 had been allocated by the respondent as a credit to the VAT liability of the appellant for the tax periods March/April 2008 and May/June 2008.

24. The respondent claims that the trial judge was correct to find that the claims of offset in respect of overpayments of PAYE/PRSI liabilities for the tax years 2003 and 2004 were precluded by virtue of the provisions of s.865 and s.865B of the 1997 Act, in circumstances where the overpayments arose by virtue of returns filed by the appellant in 2010 and are not as a consequence of any assessment made or amended by the Revenue Commissioners or other steps taken by them for the recovery of tax.

25. The respondent claims that the appellant does not come within the exception to the four year time limit that is prescribed by ss.865B (3) and (4)(b) of the 1997 Act because the liability of the appellant for VAT in respect of the tax periods May/June 2006 and November/December 2008 arose solely by virtue of VAT returns filed by him (or on his behalf) in 2011 and not by virtue of an assessment made or amended by the respondent or any other action taken by the respondent for the recovery of tax.

26. Without prejudice to the foregoing, the respondent submits that the appellant did not make any argument in the High Court to the effect that he came within the exception to the four year time limit prescribed by ss.865B(3) and (4)(b) of the 1997 Act, and cannot do so now on appeal.

27. The respondent says that the trial judge was correct in finding that s.99(6) of the VAT Consolidation Act 2010 precludes the Revenue Commissioners from refunding any amount of tax except as provided for by the Act, and that s.99 (4) provides that a claim for a refund under that Act may be made only within four years after the end of the taxable period to which the refund relates.

28. The respondent says the trial judge was correct in finding that in so far as the appellant has any statutory entitlement to the repayment of tax under s.865(2) of the 1997 Act, it is subject to the provisions of subsection (4) thereof which precludes a repayment in respect of any chargeable period unless the claim for repayment has been made within four years of the end of the chargeable period.

29. The respondent says that the appellant's liability for PAYE and PRSI for the tax years 2005 – 2008 arose by virtue of returns filed by him or on his behalf and not by virtue of any assessment (or "reassessment") made or amended by the Revenue Commissioners or any other action taken by the Revenue Commissioners for the recovery of tax.

30. The respondent says that the trial judge was correct in finding that the appellant is liable to the respondent in respect of unpaid taxes in the sum of €35,449 together with interest, resulting in a total due by the appellant to the respondent of €70,789.36.

Submissions of the Appellant

31. The appellant submits that the trial judge erred in failing to distinguish the difference between repayment or a refund of overpayment of tax on the one hand and credit and/or setoff in respect of such overpayments as against the appellant's tax liabilities on the other. He submits that he never made any claim for repayment, only for credit/setoff.

32. The appellant claims that he is entitled to such setoff in accordance with the exception (hereinafter the "Exception") to the four year rule as provided for in ss.865B(3) and (4) of the 1997 Act. Sections 865B(3) and (4) of the 1997 Act provide:

"(3) Where a repayment of tax cannot be made to a person in respect of a relevant period, it may be set against the amount of tax to which paragraph (a) of subsection (4) applies which is due and payable by the person in the circumstances set out in paragraph (b) of that subsection.

(4) (a) The amount of tax to which this paragraph applies is the amount, or so much of the amount, of tax that is due and payable by the person in respect of the relevant period as does not exceed the amount of the repayment that cannot be made to the person in respect of that relevant period.

(b) The circumstances set out in this paragraph are where a tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax, at a time that is four years or more after the end of the relevant period."

33. The appellant argues that his claims to offset come within the Exception. In the case of VAT, he claims this on the basis of these proceedings, contending that they constitute "other action that is taken for the recovery of tax". This argument, if accepted, would obviously also apply to PAYE/PRSI, in respect of which the appellant also submits that the

Exception applies. In the case of these taxes, however, the appellant further argues that the respondent must have made amendments to his tax assessments following his appeal to the Appeal commissioners in August 2013. He claims that the notification letters sent to him by the Revenue Commissioners on 30th October 2013 are evidence of such amendments (see para. 21 above and para. 37 below).

34. While the appellant in his written submissions claimed that the trial judge erred in law in denying him the benefit of the Exception, he did not disagree with the submission of the respondent that this issue was not argued before the trial judge.

35. The appellant also argues that he received notification letters from the respondent “from time to time” setting out statements of account with regard to credits/setoffs against his tax liabilities, by virtue of overpayments of tax. Specifically, he relies upon two letters of 16th February 2012, the first relating to VAT for the period November – December 2005 and the second relating to VAT for the period May - June 2006. In the former letter, it is stated that: *“There is a credit balance of €6,129. This balance must be explained before it can be offset or repaid.”* In the latter letter there is an identical statement, save only that the amount concerned in that case is €27,076.

36. The appellant submits that these letters were in the nature of offers made by the respondent to afford him an offset in relation to these amounts, subject only to an explanation being provided in regard to same. In this regard, he relies upon a letter that he wrote to the respondent on 29th June 2013 in which he stated that he accepted the offsets, and then purported to explain the amounts involved. In doing so he reduced the amount of the credits claimed in each case to €5,182 for the period November - December 2005 and €15,969 for the period May - June 2006, giving rise to a total claim (to set off) in the sum of €21,151 in respect of VAT for these periods. In his written submissions, the appellant claims that by reason of this correspondence, the respondent is estopped from denying him the entitlement

to offset the sum of €21,151 in respect of the VAT liabilities claimed by the respondent. He submits that the trial judge erred in refusing to allow him the offset claimed.

37. The appellant makes similar arguments in relation to overpayments of PAYE and PRSI totalling €14,400 in the years August 2006 to January 2008. He says that he received a notification letter dated 30th October 2013 whereby he was informed that for the year ended 31st December 2003 he had a credit balance of €7,199, and for the year ended 31st December 2004 he had a credit balance of €7,200. As in the case of the letters upon which the appellant relies in relation to VAT, this letter states that before the credit balances can be offset or repaid, they must be explained. The appellant then relies upon a letter that he sent to the respondent dated 3rd December 2013 whereby he “*accepted*” the said credit balances totalling €14,399. In this letter he states that the statements are true and accurate and that they arose on foot of Revenue estimates for PAYE and PRSI for the tax years 2003 and 2004, and he directed that these balances should be credited against his PAYE and PRSI liabilities for the tax years 2005 – 2008, in respect of which he said he had a liability of €11,768. He asked that the balance of €2,631 should be offset against VAT liabilities.

38. The appellant submits that he had appealed the determination of Mr. Wiley (see para. 17 above) that he was not entitled to an offset in respect of these overpayments, and it is his submission that the Appeal Commissioner must have amended the assessment of the respondent with regard to these liabilities of the appellant prior to the issue of the notification letter of 30th October 2013. Accordingly, he submits, he is entitled to credits or offsets by reason of s.960H of the 1997 Act, although he does not develop this argument or explain why s.960H, which makes provision for offset between taxes for the benefit of the Collector General, would give rise to such an offset.

39. The appellant further submits that the notification letter of October 2013 was issued three years after he had made his returns for the relevant period, and more than seven years

after the overpayment that he had made to the Sheriff on foot of warrants. He submits that he was entitled to be informed that he had overpaid in circumstances where, he claims, the respondent had actual knowledge of at least some of the overpayments. He also submits in regard to these payments that the respondent is estopped from denying him credits in respect of the overpayments by reason of the letter of 30th October 2013.

40. Much of the appellant's submissions to the Court were taken up with the manner in which he was given credit (or, as the case may be, not given credit) for two payments totalling €5,000 which he made on 3rd January 2008 (in the sum of €2,695.35) and 28th January 2008 (in the sum of €2,304.65) in response to a demand made by the respondent in respect of VAT for the VAT period September/October 2005. That demand was based upon an estimate raised by the respondent on 4th April 2007, in the absence of any return having been made by the appellant. When he eventually filed a return, on 4th February 2011, the appellant declared the liability for the period to be €1,374. At the hearing of this appeal, the appellant claimed that the respondent had erroneously applied the €5,000 against the sum claimed by the respondent for VAT for this period in the consolidated statement of claim, being the sum of €2,792. However, he said that it is apparent from the amended schedule presented to the High Court that the amount claimed for VAT in respect of that period was reduced by the respondent to €1,824. So, therefore, he argues that he did not receive full credit in respect of the payment of €5,000 made by him. This argument would appear to extend to the difference between the actual liability for VAT for the period which transpired to be €1,834, and the amount claimed in the consolidated statement of claim, which is €2,972, a difference of €968. However, I should add that it is unclear if the appellant accepts that the remaining balance of the €5,000 has been credited appropriately in his favour by the respondent.

Submissions of the Respondent

41. The respondent submits that all sums claimed in these proceedings arise on foot of returns made by the appellant himself, and not as a result of assessments or any other actions taken by the respondent. The respondent agrees that the appellant has made overpayments, and submits that those overpayments have been credited by way of offset of the appellant's liabilities to the fullest extent permissible by law.

42. In this regard, the overpayments of PAYE and PRSI made by the appellant in respect of the years 2003 and 2004 arose in circumstances where the appellant had failed to file returns within the prescribed period and the respondent raised an estimate of €7,200 in respect of each year. The appellant made payments in response to those estimates in the sum of €7,199 for the year ended 31st December 2003 and €7,200 for the year ended 31st December 2004 but did not file his return in respect of these years until 14th December 2010. While the returns filed indicated a nil liability, he made no claim for either a refund or a setoff in respect of these overpayments within the statutory period, which, in the case of 2003 would have expired on 31st December 2007, and in the case of 2004 would have expired on 31st December 2008. Moreover, there is no claim in these proceedings for PAYE or PRSI in respect of these periods.

43. The respondent submits that it is plain from s.865(4) of the 1997 Act that a claim for repayment of tax shall not be allowed unless it is made within four years after the end of the chargeable period to which the claim relates, and that s.865(6) makes it clear that the Revenue Commissioners may not repay an amount paid to them by way of overpayment except as is provided for in s.865, 865A or in any other provision of the Taxes Acts.

44. Section 865B(2) provides, *inter alia*, that where a repayment of tax cannot be made to a person by virtue of the provisions of s.865 of the 1997 Act, or, as far as VAT is concerned,

s.99 of the VAT Consolidation Act 2010, then that repayment shall not be set off against any other amount of tax due and payable by that person.

45. As to the Exception, the respondent makes two submissions. Firstly, this argument was not relied upon at all by the appellant in the High Court and it is not open to him to do so now on appeal.

46. Secondly, and in any case, the Exception only applies in circumstances where the tax that is due and payable has arisen by virtue of an assessment that is made or amended by the Revenue Commissioners, or any other action that is taken by them for recovery of the tax at a time that is four years or more after the end of the relevant period. In this case, it is submitted that the tax is due and payable by reason of the appellant's own returns, and not by reason of any of the matters referred to in s.965B(4)(b) of the 1997 Act.

47. It is further submitted that the only steps taken by the respondent to recover the tax due in respect of these periods was taken within four years, when the respondent served an estimate on the appellant. Moreover, the respondent does not seek to recover any PAYE/PRSI for the tax years ended 31st December 2003 and 31st December 2004.

48. The respondent also submits that the notification letters upon which the appellant relies are not offer letters as he contends. In order to avail to any entitlement to a refund, the appellant would have to make a claim for the same within a period of four years from the last day of the relevant period. Furthermore, it is submitted that it is not possible to offset sums due for refund against liabilities owing for a different relevant period i.e. the surplus available for refund or offset must have accrued in the same relevant period as the liability against which an offset is claimed.

49. The respondent's submissions as regards VAT are identical, save only for the obvious differences in the applicable statutory provisions. Section 99 of the VAT Consolidation Act of 2010 provides that where the Revenue Commissioners are satisfied that the amount of tax

actually paid in respect of a taxable period exceeds the tax that would properly be payable, then the Revenue Commissioners shall refund the amount of the excess. However, s.99(4) states that a claim for a refund under the Act may be made only within four years from the end of the taxable period to which it relates. Section 99(6) provides that the Revenue Commissioners shall not refund any amount of tax save as is provided for in the VAT Consolidation Act 2010, or in any orders or regulations made thereunder. While the appellant in this case also relies upon notification letters sent to him on 16th February 2012 and his “acceptance” of those “offers” (subject to the adjustment downwards of the amounts referred to in those letters), the respondent submits that, as in the case of the notification letters sent in relation to PAYE and PRSI, these letters were not offers, and that while the appellant did indeed reply to the letters, he did not claim a refund or seek an offset within the four year period as required by s.99 of the VAT Consolidation Act, 2010. While the appellant claimed an entitlement to offsets in respect of VAT for the periods November – December 2005 and May – June 2006, he did not lodge a return for those periods until 4th February 2011. Accordingly, the respondent submits, the trial judge was correct in finding that the appellant’s claim for offset was made outside of the statutory period, and in concluding that the respondent has no discretion but to refuse the appellant’s claim.

50. Moreover, there is no claim made against the appellant in these proceedings for the period November – December 2005 and nor was any action of any kind taken as regards VAT for this period. Accordingly, it is submitted, the Exception can have no application as regards the credit claimed in respect of this period.

51. In relation to the appellant’s claim that he was not given full credit for the payments totalling €5,000 made by him on 3rd January 2008 and 28th January 2008, the respondent contends that the trial judge was correct in her decision that this payment was fully allocated in the manner described at para. 14 above. The respondent drew to the attention of the court

certain documents which demonstrate the receipt of these monies and the manner in which they were credited by the respondent. In short, the respondent submits that €1,374 was credited to the VAT liability of the appellant for the period September/October 2005 and the overpayment in the sum of €3,626 was subsequently credited to the VAT liabilities of the appellant for the period May/June 2008 (€2,955.32) and March /April 2008 (€670.68). It appears from the documentation exhibited that the credit in respect of the overpayments was applied unilaterally by the respondent (in favour of the appellant) on 6th March 2015, more than seven years after the payments were made, and in relation to relevant periods of in or about seven years previously. In response to questions from the court, counsel was unable to clarify on what basis these offsets were afforded to the appellant in circumstances where more than four years had expired since the years in question. Counsel was unable to offer any explanation, and agreed with the court that, on the face of it, these credits were precluded by the statutory provisions relied upon by the respondent.

52. In regard to the sum of €1,424.88 referred to at para. 7 of the defence, the respondent submits that the trial judge was correct in her conclusion that this sum, which had originally formed part of an overpayment made by the appellant to the Revenue Sheriff, was remitted by the Revenue Sheriff to the respondent, and that it was subsequently credited by the respondent against the PAYE and PRSI liabilities of the appellant for the tax year ending 31st December 2003. The respondent referred the court to a summary statement issued by the respondent to the appellant dated 30th October 2013 wherein this credit can be seen. The respondent submits that the conclusion of the trial judge on this issue is a finding of fact based upon credible evidence.

53. Finally, the respondent addressed the sums referred to in para. 8 of the defence being the sum of €840 in respect of VAT for the period November/December 2008, and a sum of €3,837 which the appellant claims is the balance of the €5,000 payment that he made in

response to an estimate in January 2008, after payment of the actual liability due by him in respect of VAT for the period September 2005 – October 2005.

54. In the reply to the defence, it is pleaded that the claim of the appellant to an entitlement for offset in respect of the sum of €840 was made outside the four year time limit and cannot therefore be allowed. However, in submissions to the Court, it was submitted on behalf of the respondent that the claim for offset in respect of this sum was in fact made within the four year period and was credited to the appellant in respect of the period May – June 2007. While the Court was referred to documents to demonstrate that this was so, there was no document expressly identifying the application of sum of €840 as a credit against other liabilities of the appellant. However, the respondent submitted that it was incorporated in a larger credit, of €7875, which the respondent says was claimed by the appellant on 5th May 2011, and which was allowed to the appellant on 20th October 2011. This credit related to the VAT period of November-December 2008, and the respondent referred the Court to a statement identifying a credit in this amount in respect of VAT for this period.

Discussion and decision

55. At the outset, it has to be observed that the papers that were made available to the court for the purposes of this appeal were extremely difficult to follow, so much so that even the excellent counsel retained by the respondent had difficulty in explaining some matters to the court. Counsel explained that the responsibility for preparing the appeal papers rested with the appellant, but the respondent was asked to assist in this regard. Nonetheless, the appellant insisted, apparently, in having a significant input into the papers made available to the court. I do not think that it is unfair to observe that the disarray in the papers as presented to the court is reflective of the dealings that the appellant has had with the respondent generally and goes a long way to accounting for the unfortunate difficulties that he has had

in the management of his tax affairs, and the overpayments of tax which both parties agreed were made by the appellant.

56. In any case, I turn now to the matters raised by this appeal. I will first address the statutory provisions applicable to appellant's claims for credits or set off arising from payments made by him to the respondent, and certain arguments made by the appellant in relation to those provisions.

57. Section 865 of the 1997 Act makes provision for repayment of tax in circumstances where the amount paid was not due or which, but for an error or mistake in a return or a statement made by the person concerned for the purposes of an assessment of tax, would not have been due by that person (s.865(2)). S. 865(3) states that a repayment of tax shall not be due under s.865(2) unless a valid claim has been made to the Revenue Commissioners for that purpose, and s.865(4) provides that a claim for repayment shall not be allowed unless it is made within four years from the end of the chargeable period to which it relates. Section 865(6) provides that except as provided in s.865, or s.865A, the Revenue Commissioners shall not repay an amount of tax paid to them.

58. Section 865B(2) of the 1997 Act provides that where a repayment of any tax cannot be made to a person by virtue of the operation of, *inter alia*, s.865 of the 1997 Act and s.99 of the Vat Consolidation Act 2010, then, notwithstanding any other enactment or rule of law, that repayment shall not be set against any other amount of tax due and payable by, or from, that person.

59. I pause here to mention that in his written submissions, the appellant submits that the trial judge erred in stating that it was necessary to examine documents submitted to the court in order to test the merits of the appellant's claim that he had been given insufficient credit for certain payments and was due certain refunds. The appellant submits that he never sought repayment and/or a refund in respect of any of the overpayments made by him - he sought

only credit or set offs against his tax liabilities. However, I think that this is to miss the point; in order to establish an entitlement to set off, the appellant must first establish that he paid tax which he was not liable to pay, and secondly that he is entitled to a refund of the amount so paid.

60. Section 865B(3) and (4) provide for an exception to the prohibition on set off contained in s.865B(2). The circumstances in which the Exception may be invoked are “*where tax is due and payable in respect of the relevant period by virtue of [my emphasis] an assessment that is made or amended, or any other action that is taken for the recovery of tax, at a time that is four years or more after the end of the relevant period.*” The appellant relied upon the Exception for the first time in his notice of appeal. I address this issue below.

61. The appellant claims that he did not receive any response to his appeal to the Appeal Commissioners. However, he claims that the Appeal Commissioners must have amended the assessment of the respondent with regard to his PAYE and PRSI liabilities for the period in question, because the next communication that he received was the notification of 30th October 2013 which confirmed the overpayments of PAYE and PRSI, but also stated that an explanation was required before any offset could be applied. The appellant responded in December 2013 explaining the overpayment and claiming it as a setoff against his liability for the period concerned. However, other than the notification letter of 30th October 2013 which is not evidence of an amendment of assessment - he advances no evidence at all to support his contention that the Appeal Commissioners or the respondent must have amended his assessment to tax, and this allegation is denied by the respondent. In these circumstances, I have no hesitation in dismissing this ground of appeal, i.e. that the Appeal Commissioners must have amended the assessment of the respondent of the appellant’s liabilities to PAYE and PRSI, there being no evidence at all to support such a contention.

62. In any case, I turn now to address the matters under appeal, the first of which is the conclusion of the trial judge that the appellant is not entitled to offset overpayments made by the appellant in relation to his VAT liabilities for the periods November – December 2005 and May – June 2006, in respect of which he seeks credits in the sum of €21,151. The first observation I would make in relation to this ground of appeal is that there does not appear to be any amount claimed by the respondent in respect of VAT for the periods in question. While the sum of €5000 was claimed under this heading for the period May-June 2006 in the summary summons issued by the respondent in 2010 this was dropped as the proceedings progressed. No amount was claimed at all for the period of November – December 2005 in the 2010 summons (or for any other VAT period in 2005). No amounts were claimed for either period in the second summary summons, issued in 2012. Nor was any amount claimed for either period in the consolidated statement of claim delivered on 5th March 2013, or in the schedule handed into the court below in the course of the hearing.

63. Nonetheless, it is apparent, and it is not in dispute, that the appellant made overpayments in respect of these periods in respect of which he received statements from the respondent dated 16th February 2012. These statements indicated an overpayment of €6,129 for the period of November – December 2005 and €27,076 for the period May – June 2006. Each of these statements, having referred to the relevant balance, stated: *“This balance must be explained before it can be offset or repaid”*. By letter dated 29th June 2013, the appellant wrote to the Mr. Frank McLoughlin of the Kildare Revenue District, characterising the statements as *“offers”* and, having adjusted those amounts downwards, he then purported to accept the lesser amounts, which came to a total sum of €21,151, as credits.

64. It appears that the statements issued by the respondent on 16th February 2012 arose out of returns filed by the appellant in respect of the periods in question on 4th February

2011. What emerges from all of the above is that the appellant made payments in excess of his VAT liabilities for these periods of the order of €21,151. When exactly he made these payments is unclear, but that does not matter for present purposes. What matters for present purposes is *when* he first made a claim for set off in respect of these overpayments. Any such claim must, by reason of s.99(4) of the VAT Consolidation Act 2010 and s.865B(2) of the 1997 Act be made within four years after the end of the taxable period to which it relates. “Taxable period” is defined in s.2 of the 1997 Act as meaning “*a period of two months beginning on 1 January, 1 March, 1 May, 1 July, 1 September or 1 November*”.

65. It appears from the papers that the earliest date on which the appellant formally sought set off in respect of these payments was by letter of 29th June 2013, but the date relied upon by the respondent in resisting the claim of set off is the date on which the appellant made his returns in respect of these periods, being 4th February 2011. Needless to say, the earlier date could only favour the appellant.

66. Leaving aside the Exception, in the ordinary course of things the last date by which the appellant could have claimed any refund or set off for the overpayment in 2005 would have been 31st December 2009, and the last date for making any such claim in respect of the period May- June 2006 would have been 30th June 2010. Accordingly, the conclusion reached by the trial judge on this issue was, beyond any doubt, correct and the appeal under this heading must be dismissed, unless the appellant is entitled to the benefit of the Exception.

67. As regards PAYE/PRSI, the appellant claims the trial judge erred in failing to afford him an entitlement to set off in respect of the payments made in the total sum of €14,399 between October 2006 and January 2008. As recorded above, these payments were made consequent upon estimates raised by the respondent in circumstances where the appellant had failed to file any returns for the tax years 2003 and 2004. The appellant subsequently

filed returns for these years on 14th December 2010, disclosing a nil liability to tax, and it is not disputed that the payments made by the appellant – which related to the tax years 2003 and 2004 – were overpayments.

68. It cannot be gainsaid that any claims for refunds in respect of these overpayments, or, alternatively, claims for set off of other liabilities arising out of these overpayments, were required to have been made by 31st December 2007 in respect of the 2003 tax year and 31st December 2008 for the 2004 tax year. There is no dispute that no such claims were made within these periods. Accordingly, the decision of the trial judge on this issue also was correct, and, as with the appeal relating to overpayments of VAT, this ground of appeal must also be dismissed, unless the appellant is entitled to the benefit of the Exception.

69. As regards the Exception, the appellant argues that by these proceedings, the respondent has taken “other action” for the recovery of tax at a time that is four years or more after the end of the relevant period. In the case of PAYE/PRSI, he further argues that there must have been an amendment, in or about October 2013, to an earlier assessment, following upon his appeal to the Appeal Commissioners. At the hearing of this appeal, he appeared to develop these arguments further, suggesting that the audit conducted by the respondent in 2011/2012 also constituted “other action” for the recovery of tax.

70. It is apparent that not only did the appellant not make any argument regarding the application of the Exception in the court below, he did not seek the leave of this Court to advance any such argument on appeal, nor explain why this argument was not advanced in the court below. The respondent has therefore, quite properly, objected to the appellant advancing this argument for the first time on appeal. Therefore, before considering whether or not the appellant is entitled to the benefit of the Exception, it is first necessary to consider whether or not the appellant should be entitled to argue that the Exception applies, in circumstances where he did not make this argument in the Court below.

71. The principle that a party may not advance new arguments for the first time on appeal, without the leave of the court, is very well established. The issue was not discussed to any material extent at the hearing of this appeal. The respondent simply made the point that it was not open to the appellant to raise an argument on appeal that he had not raised in the Court below, and he should not therefore be entitled to argue that the various overpayments that he had made were available for set off by reason of the Exception. For his part, the appellant did not respond to this argument at all, which was clearly raised in the respondent's notice, and instead the appellant simply advanced his argument based on the Exception.

72. The law regarding new arguments on appeal was comprehensively reviewed by MacMenamin J. in the Supreme Court in the case of *Allied Irish Banks Plc v. Ennis* [2021] IESC 12. At para. 15 of his judgment, MacMenamin J. said:

“I address first, therefore, the approach in appeals from plenary hearings. In K.D. v. M.C. [1985] 1 I.R. 697, Finlay C.J. observed that it was a fundamental principle, arising from the exclusively appellate jurisdiction of the Supreme Court, that, save in the most exceptional circumstances, the Court should not hear and determine an issue which “has not been tried and decided in the High Court” (p. 701). However, he added that, “to that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice”. This remains the general principle. It emphasises the weight to be given to finality in litigation, subject to rights of appeal as set out in the Constitution and statute law. But this passage from K.D. also appropriately places the interests of justice arising in exceptional cases as an overarching principle (see also, Attorney General (S.P.U.C.) v. Open Door Counselling Ltd. [1994] 2 I.R. 333, and Blehein v. Murphy [2000] 2 IR 231).”

73. MacMenamin J. proceeded to consider the decision of O'Donnell J. (as he then was), speaking for the Supreme Court, in *Lough Swilly Shellfish Growers Co-operative Society*

limited & Anor. v. Bradley & Anor. [2013] IESC 16; [2013] 1 I.R. 227 (“*Lough Swilly*”) in which O’Donnell J. spoke of a “*sensible flexibility*” regarding the raising of new grounds of appeal in plenary proceedings, having regard to the “interests of justice”, as referred to in *K.D.* At para. 27 he said:

“Accordingly a certain sensible flexibility is exercised by the court depending on the demands of the case, and a similar approach could be considered when a point is sought to be argued which was not advanced in the High Court although closely connected to points which were argued, and which would not have any implication for the evidence adduced in the High Court.”

74. At para. 28 O’Donnell J. observed:

*“There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in *K.D. (otherwise C.) v. M.C.* [1985] I.R. 697 for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in *Movie News Ltd. v. Galway County Council*(Unreported, Supreme Court, 25th July, 1977)); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court*

might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made.”

75. I pause here to consider briefly the nature of the argument the appellant wishes to make pursuant to ss 865B (3) and (4)(b) of the Act of 1997. While the appellant obviously argued in the Court below that he was entitled to set off in respect of overpayments, and was met with the response with the argument that his entitlement to claim set off was barred by the four year time limit laid down by statute, he did not contend that he fell within the Exception. Although related to an argument advanced in the Court below, i.e. the “set off” argument, in my judgment the argument grounded on the Exception is, in substance an entirely new argument, which addresses a specific argument advanced against the appellant in the Court below to which he made no convincing response at that time, if indeed he responded to it at all. I do not think it would be accurate to describe it as a re-formulation of an argument or one that is closely related to an argument that he made in the High Court, because in order for the respondent to address it, it is necessary to address the issues of law and fact that are raised by ss 865(4)(b), which received no consideration at all in the Court below and in respect of which it had no opportunity to adduce any relevant evidence upon which it might have sought to rely in order to rebut any attempt by the appellant to claim the benefit of the Exception.

76. I return now briefly to *AIB v Ennis*. Having referred to the above passages from *Lough Swilly*, MacMenamin J. continued at para. 18 of his judgment in *Ennis*:

“But, although a grant of leave to argue new points, or raise new evidence, may arise in the interests of justice, it must be viewed from another perspective. Exceptions are not to be seen as a licence for lax procedure. There are serious competing considerations which will also concern a court when new arguments are sought to be raised on appeal. A person entitled to win a case should not be faced with the prospect

of losing it because a valid and decisive point was not made at the trial at first instance. There are real dangers in allowing a practice which is over-lax in permitting new grounds to be raised on appeal. Parties must be required to make their full cases at trial. An over-generous approach to permitting new grounds to be raised on appeal for the first time could only encourage either sloppiness, imprecision, or lead to attempts to take tactical advantage (per Clarke J. (as he then was) in Ambrose, paras. 4.11 – 4.13) [referring to *Ambrose v. Shevlin* [2015] IESC 10.

77. In *Ennis*, not only was the appellant seeking to raise a new legal argument, he was also seeking to adduce new evidence on appeal. That factor is not present in this appeal, and while that is not of itself conclusive, it operates in favour of the appellant, and brings the application towards the end of the spectrum described by O’Donnell J. where “*the Court retains the power in appropriate cases to permit the [new] argument to be made*”.

78. Furthermore, the argument the appellant wishes to advance would, if successful, have a very significant impact on the outcome of the appeal, and would reduce significantly, if not eliminate altogether, the liability that he was found to have to the respondent in the court below.

79. It is clear from these authorities going back as far as *K.D.* that, while the jurisdiction to entertain on appeal arguments that were not made in the Court below is one to be exercised very sparingly, and within the parameters discussed in *Lough Swilly* and *Ennis*, it is incumbent on the court as part of its consideration of such applications to consider whether or not the interests of justice require that the court should entertain the new argument. It is clear from the authorities that it is not sufficient that an appellant may have identified a good point. Such an approach would indeed “*encourage sloppiness, imprecision, or lead to attempts to tactical advantage*”. However, it weighs heavily in favour of the appellant that this is a case in which it is accepted that the appellant has made significant overpayments of

his liabilities to tax, and that if the Exception is available to him, it would have the effect of significantly reducing those liabilities. Moreover, the Oireachtas has made express statutory provision for the Exception and, given the very significant importance of the issue to the appellant, it would seem unjust to deprive him of the opportunity to argue the point, not least in circumstances where the issue is relatively new, and the respondent has been on notice of it since the filing of the notice of appeal. In my view, all of this tips the scales in favour of permitting the appellant to advance the argument.

80. Having said all of that, the extent of the arguments on the point advanced to the court by both sides was very limited, to the point of being scant. The appellant argues that the action taken by the respondent in the issue of these proceedings constitutes “*any other action that is taken for the recovery of tax, at a time that is four years or more after the end of the relevant period*”. He also argues (in relation to PAYE/PRSI) that he did not receive any response to a letter of appeal that he claims to have sent on 5th August 2013 to the Appeal Commissioners, and that the next communication he received following that letter was the notification letter(s) of 30th October 2013, notifying him of overpayments of PAYE and PRSI in 2003 and 2004, from which he infers that there must have been a revised assessment following his appeal to the Appeal Commissioners. However, there is absolutely no evidence of this, and indeed the only evidence of any kind as regards his appeal to the Appeal Commissioners is a copy of a letter of appeal dated 5th August, 2013 from the appellant to the Appeal Commissioners, included in the books of appeal to this Court, which it appears (from the index to the book of appeal, under the heading “Documents post Hearing”) was not produced or relied upon by the appellant in the Court below. The appellant also places some reliance on the audit carried out by the respondent in 2012, as being “*other action that is taken for the recovery of tax*”.

81. The respondent on the other hand argues that the tax claimed in these proceedings is tax that is due and payable by reason of the appellant's own returns to the Revenue Commissioners and not "*by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax...*". This applies in respect of both VAT and PAYE/PRSI. The respondent also makes the point that no claim is made in these proceedings for VAT for the periods in question i.e. November - December 2005 and May - June 2006.

82. The above was the full extent of the submissions of the parties as regards the application of the Exception to the overpayments made by the appellant. In considering the issue, it is of some significance that the appellant did not engage at all with the respondent's argument that the taxes claimed by the respondent in the proceedings are due and payable *by virtue of* the appellant's own returns, and not by reason of any other action taken by the respondent. Had this point been raised at first instance, the respondent would have had the opportunity to lead evidence in support of its contention and to rebut the appellant's allegations. His failure to do so cannot redound to his benefit and so he cannot on appeal be heard for the first time to assert simply that claimed taxes were not payable by virtue of his own returns. The appellant cannot have been taken by surprise by this point, which was clearly made both in the respondent's notice and in the written submissions of the respondent. The appellant's arguments focused on actions taken by the respondent (the revenue audit and these proceedings) or alleged to have been taken (an assessment or amendment to an assessment) for the recovery of tax more than four years after the "*relevant period*".

83. However, the appellant did not even attempt to explain how it can be said that the taxes claimed in these consolidated proceedings are due and payable "*by virtue of*" those actual and alleged actions. Moreover, as regards the latter (i.e. an alleged assessment or an alleged amended assessment), this is a matter in respect of which evidence from both sides would

be required, and it was not addressed by the parties in their evidence to the High Court for the obvious reason that the appellant raised the issue for the first time on appeal to this Court.

84. Just as significantly, the appellant did not take issue with the submissions of the respondent that the taxes claimed are due and payable by *virtue of* his own returns made in 2010 and 2011. If he disagreed with this assertion, it behoved him to say so and explain why, not least in circumstances where he was advancing the argument that the Exception applied to the overpayments made by him for the first time on appeal.

85. Moreover, the question as to whether or not the tax claimed in these proceedings is payable “*by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax*” is a question involving issues of law and fact. In circumstances where it was the appellant who was seeking to persuade the Court that the Exception applied, the onus of proof fell upon him to satisfy the Court that the tax claimed in these proceedings is payable by virtue of an assessment, an amendment to an assessment or by reason of these proceedings, and not by virtue of his own tax returns, as asserted by the respondent. If necessary, the appellant should have sought permission from this Court to advance new evidence in support of his new argument, (even though by doing so he would have increased the burden on himself in also seeking leave to advance the new argument). In failing, however, to identify any evidence to support his claim that the Exception applies, and in failing to address at all the respondent’s contention that the taxes claimed are due and payable by reason of *his own tax returns*, and not by reason of any of the matters referred to in s.865B(4)(b) of the 1997 Act, the appellant has failed to address an essential proof as to the application of the Exception, and, that is fatal to his claim that the Exception applies.

86. While that disposes of the arguments grounded on the Exception and the following observations are accordingly obiter, I think it is desirable to say something of the appellant’s submissions that the mere issue of proceedings or the mere carrying out of an audit could, in

either case, constitute “*any other action that is taken for the recovery of tax*” for the purposes of s.865B4(b) of the 1997 Act, thereby engaging the Exception, even though there was no argument about these submissions at the hearing of this appeal, beyond the appellant merely advancing the argument(s).

87. The first observation that I would make is that in each case, i.e. whether in respect of an audit or proceedings, it would be necessary (as demonstrated above) for the tax payer to demonstrate that the tax that is due and payable is due and payable *by virtue of* the audit or proceedings, as the case may be.

88. Dealing with “proceedings” first, I do not think it can ever be the case that tax becomes “due and payable” by virtue of any legal proceedings taken to recover tax. While proceedings may be issued to seek a court order for recovery of tax, it is axiomatic that the liability must pre-exist the action that is taken for that purpose. That this is so is clearly demonstrated by the fact that interest and penalties become payable on tax that is overdue by reference to the last date for payment prescribed by statute as the date by which the tax is payable. Moreover, tax, when due and payable may also be collected by other means, by referring warrants for collection of taxes that are due and payable to a revenue sheriff, in respect of which it is entirely unnecessary to have obtained a judgment or decree from a Court.

89. Secondly, if the mere issue of legal proceedings could, without more, constitute any other action for the recovery of tax, this would give rise to a patent absurdity, because in *every* case where the four year rule would otherwise apply, and the respondent issued proceedings for recovery of the relevant tax, the Exception would automatically be engaged.

90. So far as audits are concerned, according to the *Code of Practice for Revenue Audit and other compliance interventions*, published in July 2020, , the “function of Revenue conducting the audit is to:

- audit the returns for the year(s), period(s) or transactions indicated.....
- make any necessary adjustments
- settle and collect additional tax and duties if any, together with related interest and penalties and
- specify the remedial actions required to put the tax affairs of the person audited on a sound footing for the future.

91. The July 2020 publication has since been superseded by the Code of Practice for Revenue Compliance interventions, 2022, but this summary of the functions of a Revenue audit remains valid. In both documents, the various scenarios and options at the conclusion of an audit are addressed (section 5.2 of the 2020 code and section 4.1 of the 2022 code). Where the taxpayer's return is found to be acceptable, that is an end to the matter, and the taxpayer is so informed in writing. Where an additional liability is identified, steps are set out with a view to reaching agreement on the amount of the liabilities, interest, penalties and payment. Where agreement cannot be reached, it is stated that "*Revenue will make all necessary assessments, amendment of assessments or estimates and will issue the relevant notices to the taxpayer and agent*".

92. Accordingly, it is arguable that a Revenue audit may constitute "*any other action for the recovery of tax*" for the purposes of s.865B4(b) of the 1997 Act. Undoubtedly there are arguments to be advanced to the contrary. That being so and given the fact that this issue is not properly before this Court, I do not propose to address the issue further. All of these are matters for argument in an appropriate case, and not in these proceedings where, as I have already held, the issue does not arise because the appellant has failed to establish that the tax that is due and payable is payable by reason of any of the matters referred to in s. 865B4(b) of the 1997 Act.

93. It follows from this conclusion, and also the conclusions at paras. 66 and 68 above, that the decision of the trial judge in refusing the appellant's claim to entitlement to set off in respect of overpayments of VAT and PAYE and PRSI must stand, and the appellant's appeal therefrom must be dismissed.

94. The next matter that falls for consideration is whether or not the trial judge was correct in her conclusion that the respondent had given the appellant credit for payment of the sum of €1,424.88, which sum had been remitted by the Revenue Sheriff to the respondent (for the account of the appellant) in September 2007. Having examined the documentation before her, the trial judge concluded that, on the balance of probabilities, credit had been afforded to the appellant in respect of this sum. This was a conclusion formed by the trial judge on the basis of credible evidence, and specifically, she referred to the letter of 30th October 2013 whereby the respondent provided the appellant with a summary statement of account for PAYE and PRSI for the tax years 1st January 2003 to 31st December 2004. Included in this there is plainly a credit in the sum of €1,424.88, recorded as having been received on 19th October 2007.

95. At the hearing of this appeal, the appellant advanced no argument directly addressed to this conclusion. I am satisfied that the conclusion reached by the trial judge on this issue was open to her on the evidence and that the appeal insofar as this sum is concerned must be dismissed also.

96. The next item that falls for consideration is the sum of €840.04 which the appellant claims was an overpayment of VAT in the period between August 2008 and December 2008. It appears that a claim for overpayment of this sum was first notified to the respondent by letter of the appellant dated 29th June 2013, in which he stated that the omission to make such a claim previously had been an oversight on the part of his accountant. However regrettable this may be, it is clearly a claim made outside of the four year period, as any such

claim would have to have been made by 31st December 2012. Accordingly, the conclusion of the trial judge that the claim for a refund or offset of this sum was precluded by the lapse of time is correct, and the appeal in relation to this sum must also be dismissed. It is not therefore necessary to consider the alternative argument advanced by the respondent at the hearing of this appeal that the appellant in fact received a credit for this sum as part of a larger credit in the amount of €7875.

97. The appellant appeals from the conclusion of the trial judge that he was allowed credit in respect of overpayments totalling €3,837, which formed part of a payment made by the appellant in the sum of €5,000, following upon an estimate raised by the respondent (in the absence of returns from the appellant) on 4th April 2007. The estimate related to the VAT periods between September and October 2005. The appellant made the payment of €5,000 by way of two payments in January 2008.

98. The trial judge analysed credits given to the appellant during the relevant period, and observed that the sum of €2,955.32 (out of the payment of €5,000) had been credited to the appellant. It appears that the credit was not allocated until 6th March 2015. She noted that a further sum of €670.68 was allocated on the same date. These sums were credited against VAT liabilities in respect of the periods May/June 2008 and March/April 2008 respectively. Of the €5,000, a further €1,374 was applied in discharge of the actual amount of VAT payable for the period November – December 2005. These sums total €5000.

99. It again follows therefore that the trial judge had before her credible evidence demonstrating that the payment of €5,000 was fully accounted for by the respondent. Moreover, as is apparent from para. 51 above, the appellant appears to have been afforded, inexplicably, credits in respect of the 2008 periods referred to above outside of the four year time limit prescribed by statute, which obviously accrues to his benefit.

100. The appellant also relies upon s.960H of the 1997 Act, but it is unclear how that section can in any way avail him. That section is clearly for the benefit of the Collector General, providing as it does that monies that would otherwise be eligible for repayment or setoff may instead be applied by the Collector General in discharge of other tax liabilities of the person concerned, or alternatively the Collector General may withhold repayment until outstanding tax return have been made. Apart from the fact that the discretion conferred by this section is a matter for the Collector General, it is clear that the section only has application in circumstances where a repayment is due to a person in respect of a claim or overpayment. That does not arise in the facts of this case.

101. The appellant also places reliance upon s.955 of the Act of 1997. As I understand it, his reliance on this section is to support an argument that it is not open to the respondent to amend an assessment or to seek payment of tax more than six years after the date on which a return has been filed. However, the appellant's reliance on this section is misplaced. While he has argued that there must have been an amendment of an assessment, this is denied, and there is no evidence that this is so. Moreover, and in case the appellant was making this argument (I say this because it is not clear) the section does not operate in a general way so as to preclude all recovery of tax more than six years after a return has been made. What the section provides is that no *additional* tax shall be payable more than six years after the end of the chargeable period in which the return is delivered. Tax that was payable pursuant to the returns that were filed by the chargeable person, and that has not been paid, remains payable.

102. Finally, the appellant claims that the statements/notifications that he received from the respondent operate to estop the respondent from denying the appellant set off in relation to the overpayments identified by the statements/notifications. This submission of course refers to the letters of 16th February 2012 and 30th October 2013, from the respondent to the

appellant, as well as his replies thereto “accepting” the credits. However, it is clear that estoppel has no role to play in the consideration of these letters which do no more than notify a tax payer of credit balances which must be explained before a claim for refund or setoff can be entertained. However, if an application for a refund or credit is not made in time, it cannot in any event be entertained. There can be no doubt that the conclusion of the trial judge that correspondence between the parties can not under any circumstances have the effect of extending what is a mandatory period prescribed by statute for the making of applications for refunds and credits, was correct.

103. Notwithstanding the detailed arguments of the appellant, I am unable to identify any error on the part of the trial judge in respect of any of the conclusions that she reached. While one cannot but feel some sympathy for a tax payer who has overpaid his tax liabilities and is precluded from claiming credit in respect of those overpayments as against subsequent liabilities, the statutory provisions referred to above are clear. I think it must also be said that the time limits provided for claiming refunds or entitlement to set off can hardly be considered draconian and are designed, *inter alia*, to ensure that such claims are made with reasonable expedition and will not involve the respondent being required to rake over the coals of many years of tax history. Moreover, and perhaps more fundamentally, the appellant would not have found himself in these difficulties if he had complied with his statutory obligations as regards the making of his returns. The real source of his problems is that he made his returns for the various taxes years after they were due to have been made, and, even then, only after the respondent took enforcement action. Thus, it was his failure to file his returns on time that caused the time limits for claiming set off to expire.

104. It follows from all of the above that the appeal must be dismissed in its entirety.

105. As to costs, my provisional view is that since the respondent has succeeded entirely with this appeal, he is entitled to an order directing the appellant to pay his costs, with such

costs to be determined by adjudication in the absence of agreement. If the appellant wishes to contend for a different order, he shall do so by way of written submissions to be made within fourteen days from the date of delivery of this judgment, to which the respondent shall reply within a further period of fourteen days. In such event, each party shall be limited to submissions of no more than 1,500 words. In the event that the appellant avails of this facility, and is unsuccessful with his submissions, then he is at risk of a further order for any costs incurred by the respondent in addressing the issue of costs.

106. Since this judgment is being delivered remotely, Costello J. and Haughton J. have authorised me to indicate their agreement with it.