Neutral Citation Number: [2008] IEHC 427

THE HIGH COURT

2008 717 JR

PAUL ANTHONY MCGARRY

APPLICANT

AND

THE REVENUE COMMISSIONERS

RESPONDENTS

Judgment of O'Neill J. delivered the 6th day of October 2009.

1. Relief sought

1.1 The applicant was granted leave to pursue the following relief by way of judicial review proceedings by this Court (Clarke J.) on the 20th June, 2008:-

> An order of *certiorari* quashing the decision of the respondents dated the 16th June, 2008, to the effect that the applicant and the respondents have entered into an agreement for the purposes of s.1086(2)(c) of the Taxes Consolidation Act 1997, as amended.

1.2 Leave was also granted to the applicant to seek declarations in respect of a breach of s.3 of the European Convention on Human Rights Act 2003 and the Constitution. However, it was agreed at the hearing that the applicant would only pursue this aspect of the case if the above order of *certiorari* was refused.

2. Facts

2.1 The respondents issued an audit notification to the applicant on the 9th November, 2006. The audit commenced on the 7th December, 2006. It concerned the accounting period 2004. In January 2007 the auditor wrote to the applicant indicating that tax in the sum of €15,534 (€13, 527 for income tax and €2007 for VAT) was payable and that the statutory interest accruing on that sum amounted to €2206.07. The applicant made a payment in discharge of these sums on the 8th February, 2007. The auditor also indicated to the applicant that the level of tax default fell within the category of "*gross carelessness*" and a penalty at the rate of 30% of the tax due (€4,660.20) was to be raised in this regard. It was also made known to the applicant that details of his default would be published in Iris Oifigiúil.

2.2 The applicant took issue with the classification of "*gross carelessness*". His agents submitted to the auditor that the default more appropriately came under the category of "*insufficient care*" and challenged the imposition of a penalty of 30% on this basis.

2.3 The Code of Practice for Revenue Auditors ("the code of practice"), at para 9.4, provides for the mitigation of penalties by the respondents. It states:-

> "…
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> *In recommending mitigation of a penalty, the Auditor will consider;*
>
> *- Firstly, mitigation of the penalty based on the category of tax default concerned … and*
>
> *- Secondly, a further level of mitigation based on co-operation and whether the taxpayer has made a qualifying disclosure in respect of the default."*

A table then sets out the net penalty after mitigation in respect of each category of default (i.e. deliberate default; gross carelessness and insufficient care). In this case a finding of "*co-operation only*" was made by the auditor together with a finding of "*gross carelessness"*, which is defined by the code of practice in the following terms at para 9.5 (ii):-

> "…
>
> *Gross carelessness is distinguished from deliberate default by the absence of indicators in the facts and circumstances of the default, which are consistent with the intent. In cases of gross carelessness the Auditor is satisfied that the default can be explained solely by carelessness on the part of the taxpayer. Gross carelessness is distinguished from insufficient care primarily by reference to the size of the shortfall relative to the correct tax liability concerned.*
>
> *…"*

The applicable penalty, as per the table, in this case, was 30%. If a finding of "insufficient care" had been made, the applicable penalty would have been 15%. As indicated above the size of the discrepancy between the tax paid and the liability established determines whether "gross carelessness" or "insufficient care" is established.

2.4 With regard to publication, the code of practice says the following at para. 9.4:-

> "…

The amount to be published, if any, excludes tax included in a settlement (or related interest and penalties) where the penalty in relation to the tax does not exceed 15% of the amount of that tax. Accordingly, publication will not apply to the insufficient care category of tax default provided full co-operation is received from the taxpayer during the audit.

…"

Therefore, the consequence of a finding of "*gross carelessness*" was that publication would take place, which would not be the case had the auditor found "*insufficient care*".

2.5 The applicant requested an internal review of the auditor's decision. This was carried out by the District Manager in charge of the Revenue North City District. The outcome was that the original decision was upheld and a finding was made that the auditor had not acted unreasonably in imposing a penalty of 30%. The applicant then pursued an external review of the decision of the auditor. This was carried out by a Principal Officer in the respondents' Internal Review Unit and an external reviewer, as per the Taxpayer's Charter of Rights. The reviewers concluded that the imposition of a penalty of 30% was not "*unduly severe*" and that "*it was not manifestly incorrect or unfair for the Revenue Auditor to have indicated that publication will arise, given the absence of any 'Qualifying Disclosure' and your [the applicant] falling outside of the exclusion from publication provisions in Section 1086 Taxes Consolidation Act 1997.*"

2.6 After the reviews were carried out, the respondents wrote to the applicant by letters dated the 20th September, 2007, the 21st January, 2008 seeking a cheque for the amount of the penalty due. By letter dated the1st February, 2008 they made a demand for payment of the entire statutory fine and penalty in the amount of €15, 784 (€125 and €2007 as per s.27(1) (a) and (b) Consolidated VAT Acts, 1972-2007; €125 and €13, 527 as per s.1053 (1) (a), (b), (c), (i) and (ii) Part 47, Chapter 1, Taxes Consolidation Act 1997). The final paragraph of the letter stated:-

"In the absence of your remittance in the total sum of €15, 784 within 21 days hereof, the matter will be referred to the Revenue Solicitor's Office to initiate proceedings for recovery of penalties."

By cover of a letter dated the 21st February, 2008, the applicant sent a cheque in respect of that amount. That letter stated as follows:-

"This sum is paid on the basis that it constitutes the full amount of the fines and penalties pursuant to section 27 (1) (a) and (b) of the Consolidated VAT Acts, 1972-2007, and section 1053 (1) (a), (b), (c) (i) an (ii) of the TCA 1997, and on no other basis."

2.7 On the 6th March, 2008, the respondents wrote to the applicant to advise him that his "*offer"* of the entire sum of €33,604.07 (€15,534 in respect of tax and €18,070.07 in respect of interest and penalties) had been accepted by the respondents "*in settlement of additional liabilities, which were identified during the audit*" and that details of the settlement would be published in Irish Oifigiúil. In this regard the respondents purported to rely on s.1086 (2) (c) of the Taxes Consolidation Act 1997 ("the Act of 1997"), which provides that if an agreement between the respondents to refrain from instituting proceedings against a defaulting taxpayer in exchange for a specified sum comprising of the unpaid tax, interest on the tax and a penalty exists, then the respondents may add that defaulting taxpayer to a list to be published in Iris Oifigiúil.

2.8 The applicant's solicitors replied by letter dated the 13th March, 2008, and stated that no offer had been made by the applicant to settle liabilities. They pointed out that tax and interest, in the sum of €15, 784 had been paid on the 21st February, 2008, but not in discharge of the statutory liabilities identified by the respondent and not pursuant to an agreement. The letter stated:-

"…

Since our client paid the total amount of the fines and penalties for which he was liable under the legislation, no question of any agreement arises. We are advised that no proceedings could have been issued for the recovery of a 'fine or penalty' in circumstances where the amount of that fine or penalty had been discharged in full.

The Act only permits publication in circumstances where there has been agreement in the terms identified. We therefore invite you to identify the agreement that forms the basis for the application of section 1086(2) (c)."

2.9 In their letter dated the 16th June, 2008 the respondents indicated that the applicant had reached an agreement with the respondents, that the criteria set down in s.1086 of the Act of 1997 had been met and that publication was mandatory. It is this decision that is challenged in these proceedings.

3. Issue

3.1 The issue that arises in these proceedings is whether or not an agreement, within the meaning of s.1086 (2) (c) of the Act of 1997, existed as between the applicant and the respondents?

4. Relevant statutory provision

4.1 Section 1086 (2) (c) of the Act of 1997 (as amended) states as follows:-

"(2) The Revenue Commissioners shall, as respects each relevant period (being the period beginning on the 1st day of January, 1997, and ending on the 30th day of June, 1997, and each subsequent period of 3 months beginning with the period ending on the 30th day of September, 1997), compile a list of the names and addresses and the

occupations or descriptions of every person—

…

(c) in whose case the Revenue Commissioners, pursuant to an agreement made with the person in that relevant period, refrained from initiating proceedings for the recovery of any fine or penalty of the kind mentioned in paragraphs (a) and (b) and, in place of initiating such proceedings, accepted or undertook to accept a specified sum of money in settlement of any claim by the Revenue Commissioners in respect of any specified liability of the person under any of the Acts for—

(i) payment of any tax,

(ii)… payment of interest on that tax, and

(iii) a fine or other monetary penalty in respect of that tax…".

4.2 Section 1086 (2A) of the Act of 1997, as substituted by the Finance (No. 2) Act 2008, defines a "*specified sum*" as follows:-

"(2A) For the purposes of subsection (2), the reference to a specified sum in paragraphs (c) and (d) of that subsection includes a reference to a sum which is the full amount of the claim by the Revenue Commissioners in respect of the specified liability referred to in those paragraphs. Where the Revenue Commissioners accept or undertake to accept such a sum, being the full of their claim, then—

(a) they shall be deemed to have done so pursuant to an agreement, made with the person referred to in paragraph (c), whereby they refrained from initiating proceedings for the recovery of any fine or penalty of the kind mentioned in paragraphs (a) and (b) of subsection 2, and

(b) that agreement shall be deemed to have been made in the relevant period in which the Revenue Commissioners accepted or undertook to accept that full amount."

4.3 Section 1086 (3) of the Act of 1997, as amended by s. 126(1) (c) of the Finance Act 2002, provides for publication of the list mentioned in s.1086 (2) of the Act of 1997:-

"Notwithstanding any obligation as to secrecy imposed on them by the Acts or the Official Secrets Act, 1963 –

(a) the Revenue Commissioners shall, before the expiration of 3 months from the end of each relevant period, cause each such list referred to in subsection (2) in relation to that period to be published in Iris Oifigiúil, and

(b) the Revenue Commissioners may, at any time after each such list referred to in subsection (2) has been published as provided for in paragraph (a), cause any such list to be publicised or reproduced, or both, in whole or in part, in such manner, form or format as they consider appropriate."

4.4 Section 1086 (4) of the Act of 1997, as substituted by s.162 (1) (c) (i) of the Finance Act 2000 and as amended by s.126 (1) (d) of the Finance Act 2002, sets a threshold for the amount of the specified sum which triggers publication:-

"(4) Paragraphs (c) and (d) of subsection (2) shall not apply in relation to a person in whose case –

…

(c) the specified sum referred to in paragraph (c) of subsection (2) does not exceed €12,700.

(d) the amount of fine or other penalty included in the specified sum referred to in paragraph (c) or (d), as the case may be, of subsection (2) does not exceed 15 per cent of the amount of tax included in that specified sum."

It is to be noted in respect of s.1086 (4) (c) above that the threshold of €12,700 has been increased to €30,000 by virtue of an amendment made by s.143 (1) (a) of the Finance Act 2005 but this increased figure does not apply in the applicant's case.

5. Counsels' Submissions

5.1 Mr. Michael Collins S.C., for the applicant, submitted that there is no question of any agreement, express or implied between the applicant and the respondents. A pre-condition to publication, he submitted, was that an agreement containing the three elements as set out in s.1086 (2) (c) of the Act of 1997 (payment of any tax; payment of interest on that tax, and a fine or other monetary penalty in respect of that tax) exists as between taxpayer and the respondents. In this case, however, he pointed out that the applicant had already paid the tax owed almost a year before he paid the penalty and he contended that there was not an agreement under the terms of the Act in such circumstances, in that, the "*specified sum*" did not comprise of the three necessary elements. He submitted that once the payment of the 21st February, 2008, was made that there was no basis upon which the respondents could have issued proceedings against the applicant and therefore there was nothing to "*refrain"* from. The decision of the respondents of the 16th June, 2008, was, he submitted, *ultra vires*.

5.2 Mr. Anthony Collins S.C., for the respondents, noted that the factual circumstances were not in dispute in this case, only whether an agreement was reached or not. In his oral submissions he contended that by agreeing to pay the tax and interest in February 2007, subject to ascertaining the amount of the penalty that the applicant was moving into the territory of an agreement, even though the agreement was not created until he actually made payment of the penalty on

the 21st February, 2008. In this regard he acknowledged that he was departing from the written submissions that an offer was made by the respondents in their letter of the 1st February, 2008, which was accepted by the applicant by tendering a cheque on the 21st February, 2008. In their written submissions the respondents outlined how an agreement under s.1086 (2) (c) of the Act of 1997 would came into being:-

> *"16. The respondents submit that section 1086(2) (c) describes, in terms, the precise 'agreement made with the person in that relevant period'. The subsection thus contains the material terms of the agreement required for that provision to operate. Once those terms are met, the agreement, for the purposes of that provision, is complete. The agreement to which section 1086 (2) (c) refers thus has no existence separate from that provision. It is submitted that this is supported by the use of the words 'pursuant to' in the provision.*
>
> *17. Moreover nowhere does the relevant legislation provide that the agreement is separate from section 1086(2) (c) or that, as the applicant appears to suggest, is a condition precedent to the operation of that provision. Indeed it is submitted that it is difficult to read section 1086 (2) (c) otherwise than as describing the terms of the agreement set out therein. It is suggested that if one lifts the phrase 'pursuant to an agreement made with the person in that relevant period' from the beginning of the sub-section and places it at the end, the meaning of the provision does not change. It is submitted that this is a strong argument in support of the contention that the terms of the 'agreement' are envisaged by and contained in the sub-section. The 'agreement' has no existence outside of its statutory terms and since it is not expressed to operate as a condition precedent to the application of its terms it cannot be read as such.*
>
> *18. This approach is consonant with the principle of legal certainty, described at paragraph 13, above. By enacting section 1086(2) (c) the Oireachtas has described the precise steps that must be taken for the agreement envisaged by that provision to come into being. Taxpayers, and indeed all members of the public, know or are taken to know that, if they tender a specified sum of money in settlement of a claim on foot of an offer to refrain from initiating proceedings emanating from the respondents, they obtain the benefit of the statutory contract created by section 1086(2) (c) and that the respondents cannot thereafter extricate themselves from that bargain. The interpretation of this provision being urged upon this Honourable Court on the applicant's behalf would set this certainty at nought and would instead create what, it is submitted, would be an intolerable element of insecurity for taxpayers and the respondents.*
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> *…*
>
> *20. In the circumstances of this case, the respondents contend that the material terms of an agreement for the purposes of section 1086 (2) (c) are that:*
>
> > *(i) The respondents refrained from initiating proceedings for the recovery of any fine or penalty of the kind mentioned in paragraphs (a) and (b) of section 1086(2);*
> >
> > *(ii) In place of initiating such proceedings, the respondents accepted a specified sum of money in settlement of any claim by them in respect of the applicant's specified liability.*
>
> *21. On this analysis the agreement consists of the respondents offering to refrain from initiating proceedings for the recovery of the sums in question, which offer is accepted by the receipt by the respondents from the applicant of a specified sum of money in settlement of any claim by the former in respect of the latter's specified liability."*

Therefore, the import of the respondents' oral and written submissions construed together is such that the payment of the sum in respect of the fines and penalties completed the agreement.

6. Decision

6.1 The question for determination is whether what actually occurred in this case satisfies the terms of s. 1086 (2) (c) of the Act of 1997. It is agreed that the applicant has paid tax, interest and penalties to the respondents and that there was no default on his part in respect of the audit. However, was there an actual agreement which satisfied the requirements of s.1086 (2) (c)?

6.2 It is useful in this regard to examine the events as they unfolded in the case. At the conclusion of the audit the applicant accepted or agreed the amount of the outstanding tax and the amount of interest due thereon. He clearly did not accept the assessment of the penalty at 30% of the tax due and invoked the appeal or review procedures available to challenge this assessment. Ultimately the penalty assessed was upheld at 30%. Thereafter, by letter of the 20th September, 2007, the respondents requested payment of the sum of €4,660, the amount of the penalty. The applicant did not respond to this letter and a further letter dated the 21st January, 2008, was sent seeking payment of the penalty. The applicant did not respond to this letter either. After this the respondents send a demand dated the 1st day of February, 2008, for the entire amount of the penalty due, in the sum of €15,784. Strangely, the applicant responded promptly to this demand by tendering a cheque for the entire sum demanded, without any attempt to assert that his liability in respect of the penalty had been determined conclusively to be only €4,660. In this letter the applicant stressed that the payment was made solely on the basis of being the full amount as due under the relevant statutes. The respondents replied to this letter and the payment of the sum demanded by a letter of the 6th of March, 2008, in which they adopted the stance that the applicant's "*offer*" of €33,604.07, which was in respect of tax interest and penalty was accepted by the respondents.

6.3 At this point, in my judgment, there was agreement between the parties on the amount of tax and penalties due. The payment by the applicant of the entire sum demanded in the demand of the 1st of February can only, in my view, be construed as an agreement or acceptance by the applicant that that sum was due, as it was clearly open to the applicant to have forcefully claimed that no more than the 30% penalty was due. In choosing to forego his entitlement in this regard, he was clearly opting for or agreeing that the full amount demanded was due. Thus, in my view, at this stage, he was in agreement with the respondents on all three elements, namely the tax, the interest and the penalty.

6.4 Next it must be considered whether this state of consensus satisfies the requirements of s.1086 (2) (c). The appropriate approach to the construction of this subsection is not in dispute between the parties. Both cite in their submissions the well known authorities on the construction of taxing statues, namely *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 K.B. 64 at p.71; *Revenue Commissioners v Doorley* [1933] 1 I.R. 750 at p.765; *McGrath v McDermott* [1988] I.R. 258; *Texaco (Ireland) Limited v. Murphy* [1989] I.R. 496 and *Inspector of Taxes v. Kiernan* [1981] I.R. 117 at p.121. These cases establish that in construing a taxing statute the Court must adopt a literal interpretation, giving to the words used their natural and ordinary meaning. There is no place for the purposive approach. Both the liability to the tax and any exemption from it must be created by clear words. Lack of clarity or ambiguity must be resolved *contra preferentum* regardless of the awkwardness of the outcome, either for the taxpayer or the respondents.

6.5 What s.1086(2)(c) requires is that the respondents accept or undertake to accept a "*specified sum*" of money in settlement of any claim by the respondents in respect of a specified liability of the taxpayer for tax, interest and a fine or other monetary penalty. A "*specified sum*" is defined in sub s. 1086 (2A) as "*For the purposes of subsection (2), the reference to a specified sum in paragraphs (c) and (d) of that subsection includes a reference to a sum which is the full amount of the claim by the Revenue Commissioners in respect of the specified liability referred to in those paragraphs …".* Thus, the specified sum in this case was clearly the sum of €33,604.07, the total of the tax, interest and the penalty due and paid.

6.6 This begs the question, in the light of the applicant's submissions, can a specified sum be discharged or otherwise dealt with in more than one payment or does the subsection require that the specified sum be met by a single payment? Is the fact that the tax and interest were paid a year earlier in a separate payment to the penalties deny either of these payments, and in particular the latter payment of the penalty, the character of being a specified payment for the purpose of subs. 1086(2) (c)? In my judgement, a specified sum does not have to be a single payment. The word "*sum*" in its natural and ordinary meaning, can include several components making up the "sum". In normal colloquial parlance the word "*sum"* is used to denote an accumulation of lesser parts making up the "*sum*". The fact that the proceedings mentioned in s.1086 (2) (c) are only in respect of the recovery of the fine or penalty and not in respect of the tax or interest, clearly provides for separate recovery in respect of the three elements and tends to fortify me in my interpretation of the word "*sum*". Further support for this interpretation is to be found in the use of the phrase "*accepted or undertook to accept*" the specified sum, which suggests that a staged or staggered process of payment is permitted by the subsection.

6.7 The agreement or acceptance of the applicant and respondents on the three elements of tax, interest and finally penalty as discussed above led in my view to these items being "*specified*" within the meaning of s. 1086(2) (c).

6.8 This leads to a consideration of the other essential element set out in s. 1086 (2) (c), and that is the refraining from proceedings on the part of the respondents pursuant to the required agreement. The applicant submits that if the maximum amount due under the statute is tendered, there is no basis for any proceedings and therefore nothing to refrain from. While that submission has an apparent logical appeal, closer scrutiny unmasks an image of far less attraction. If a debtor pays the debt in full, then of course the creditor refrains from suing. It is not as though he is in some way restrained or estopped from suing, but the full discharge of the debt permits him to refrain from suing because there is no need for it. In other words, the refraining springs from the agreement to discharge the debt. In the same way, in this case, the agreement of the applicant on the three elements of the specified sum and his prompt discharge of the entirety of that sum, allowed the respondents to refrain from the proceedings in question, but it was the agreement of the applicants in that regard that brought about the refraining on the part of the respondents and, as such, in my view, that refraining was "*pursuant to an agreement made with the person in that relevant period"* as required by s. 1086 (2) (c).

6.9 Even if I am wrong in this latter conclusion, in my judgement, s. 1086(2A), (a) and (b), as quoted above, will govern the matter. This provides that where the respondents accept or undertake to accept the full amount of their claim as was done in this case, they are deemed by this subsection to have done so pursuant to an agreement as provided for in s. 1086 (2) (c) and that agreement is further deemed to have been made in the relevant period in which the respondents accepted or undertook to accept that full amount.

6.10 For these reasons I have come to the conclusion that the applicant's challenge to the decision of the respondents on the grounds discussed in this judgment must be rejected.