

THE HIGH COURT

2011 24 MCA

Between:

Joseph Tobin

Applicant

And

Eileen Foley (otherwise Eileen Daly)

Respondent

Judgment of Mr Justice Michael Peart delivered on the 22nd day of November 2011:

1. This application comes before the Court by way of Notice of Motion which issued on the 2nd February 2011. At that date the named applicant was a Principal Officer of the Revenue Commissioners. He has since retired, and a preliminary matter is an application by Gerard O'Mahony, an Assistant Principal Officer of the Revenue Commissioners to be substituted as applicant in the title of these proceedings. He has sworn an affidavit on the 26th May 2011 in which, inter alia, he has indicated his willingness to be so substituted, and I will therefore at the outset make an order amending the title of these proceedings to reflect that change.

2. The applicant seeks an order pursuant to the provisions of Section 1077B(3) of the Taxes Consolidation Act, 1997 ("the Act of 2007") determining whether the respondent is liable to a penalty under that Act by reason of her having negligently submitted an incorrect Capital Gains Tax return for the year 2003 following the sale of a licensed premises known as Harvey's Bar in Kinsale, Co. Cork, which sale was completed on the 19th December 2003 when the purchase monies were paid over by the purchaser.

3. The applicant seeks a further order from this Court determining the amount of such penalty to be in the sum of €102,460, and a further order pursuant to Section 1077C(1)(a) of the Act of 1997 that he do recover from the respondent the said amount by way of penalty.

4. Before setting out the factual background to this application I will set out the relevant statutory provisions which make provision for the respondent's liability to a penalty, the Court's power to make a determination that the respondent is liable to a penalty, an order for the recovery of such penalty, and certain other provisions relevant to the application.

Statutory Framework:

5. Section 1053 of the Act of 1997 provides as relevant:

"1053.—(1) Where any person fraudulently or negligently –

(a) delivers any incorrect return or statement of a kind mentioned in any provisions specified in column 1 of Schedule 20

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief, or

(c) submits to the Revenue Commissioners, the Appeal Commissioners or an inspector any incorrect accounts in connection with the ascertainment of that person's liability to income tax,

that person shall, subject to section 1054, be liable to a penalty of –

(i) €125, and

(ii) the amount of the difference specified in subsection (5).

(2)

(3)

(4)

(5) The difference referred to in subsection (1)(ii) shall be the difference between –

(a) the amount of income tax payable for the relevant years of assessment by the person concerned (including any amount deducted at source and not repayable), and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by that person had been correct.

(6)

(7)

(8)”

6. Column I of Schedule 29 sets out a large number of sections of both Acts and Regulations, but, relevant to the present application is that it includes Section 951(1) of the Act of 1997 which creates the obligation upon the respondent herein to prepare and deliver a return for any chargeable period in respect of, inter alia, capital gains tax, such return to be in the prescribed form and to contain all necessary particulars.

7. Section 1077(1) of the Act of 1997 provides that this section shall apply to capital gains tax and to, inter alia, section 1053.

Section 1077B of the Act of 1997 provides, as relevant:

"1077B (1).—Where

(a) in the absence of any agreement between a person and a Revenue officer that a person is liable to a penalty under the Acts or

(b) following the failure by a person to pay a penalty the person has agreed a liability to

a Revenue officer is of the opinion that the person is liable to penalty under the Acts, then that officer shall give notice in writing to the person and such notice shall identify –

(i) the provisions of the Acts under which the penalty arises,

(ii) the circumstances in which that person is liable to the penalty, and

(iii) the amount of the penalty to which the person is liable,

and include such other details as the Revenue officer considers necessary.

(2)

(3) Where a person to whom a notice issued under subsection (1) or (2) does not, within 30 days after the date of such notice –

(a) agree in writing with the opinion or amended opinion contained in such notice, and

(b) make a payment to the Revenue Commissioners of the amount of the penalty specified in such a notice,

then a Revenue officer may make an application to a relevant court for that court to determine whether –

(i) any action, inaction, omission or failure of, or

(ii) any claim, submission or delivery by the person in respect of whom the Revenue officer made the application gives rise to a liability to a penalty under the Acts on that person.

(4)

(5)” (emphasis added)

“Relevant court” referred to above is defined in Section 1077A as including The High Court, and “the Acts” referred to above is stated in the same provision to include the Capital Gains Tax Acts.

Finally, Section 1077C of the Act of 1997 provides as relevant:

"1077C. – (1) Where a relevant court has made a determination that a person is liable to a penalty –

(a) that court shall also make an order as to the recovery of that penalty, and

(b) without prejudice to any other means of recovery, that penalty may be collected and recovered in like manner as an amount of tax.

(2) Where a person is liable to a penalty under the Acts, that penalty is due and payable from the date –

(a) it has been agreed in writing (or had been agreed in writing on that person’s behalf) that the person is liable to that penalty,

(b) the Revenue Commissioners had agreed or undertaken to accept a specified sum of money in the circumstances mentioned in paragraph (c) or (d) of section 1086(2) from that person, or

(c) a relevant court has determined that the person is liable to that penalty.”

Factual background:

8. The affidavit grounding this application was sworn on the 24th January 2011 by Joseph Tobin prior to his retirement as a Principal Officer of the Revenue Commissioners. That affidavit recites that the respondent entered into a contract for the sale of Harvey's Bar in Kinsale on the 29th October 2003. The consideration was €1,270,000, and the sale was to be closed some four weeks later. Evidence is exhibited to establish that this happened and the purchase monies were paid to the respondent on the 19th December 2003. Accordingly any Capital Gains Tax ("CGT") liability arising on foot of that disposal was due for payment by 31st January 2004.

9. On the 21st January 2004 the respondent made a payment to Revenue in the sum of €9,116.54 in respect of CGT liabilities for the year 2003, but this payment was not apparently accompanied by any breakdown or other computation as to how it was calculated. In October 2004 the respondent filed a Pay and File tax return for the year 2003, but failed to insert any details of any disposals in 2003 in the CGT section of that return in any way. It was left blank. Revenue wrote to her by letter dated 16th December 2004 asking her to furnish a completed CGT return. The respondent responded to this request by sending that letter back to Revenue with a manuscript note thereon to the effect that Harvey's Bar was sold in March 2004, and stating also that the Contract had been conditional, and indicating that the date of completion was the date when the conditions were fulfilled. A computation of CGT was enclosed which was predicated on a disposal in March 2004, not 2003, and on having made deductions of €15,367 for legal fees, €25,400 for auctioneer's fees, and €150,484 for refurbishment costs. These calculations resulted in a stated CGT liability of €29,103, which was paid to Revenue on 14th March 2005.

10. In November 2005 Revenue wrote to the respondent seeking a copy of the Contract for Sale for the premises and vouchers in respect of the fees and refurbishment costs which she had deducted in her calculations. No reply was received to this request. A number of reminder letters were written to the respondent, all to no avail. Revenue wrote again on the 21st November 2007 referring to her failure to respond to previous letters, and pointing out also that from the Contract for Sale it appeared to be an unconditional contract, and that the gain was payable in respect of 2003 and not 2004. This letter also stated that the contract provided that the respondent had not carried out any development of the premises and that accordingly no deduction for enhancement expenditure would be allowed by Revenue. The letter went on to set forth a calculation for CGT for 2003 based on the available information, and Revenue concluded by saying that if the respondent did not agree with these figures she should send in her own computations with full supporting documentation, but that if Revenue had not heard from her within ten days, assessments would issue in accordance with Revenue's own calculations.

No response was received from the respondent, and Revenue duly issued estimated assessments on the 22nd November 2007.

11. Thereafter, the respondent appealed against the assessment on a number of grounds, including that the assessment had been raised without proper jurisdiction. The appeal was adjourned on five occasions during 2008, the last being so that the question of the Inspector's jurisdiction could be determined by the High Court. That issue was abandoned by the respondent when it came before Laffoy J. on an application by Revenue under Section 908(2) of the Act of 1997, when the respondent and her husband had sought to raise the same jurisdictional issue in those proceedings. This is referred to at paragraph 63 of her judgment delivered on the 3rd April 2009 – see reported judgment at [2009] 4 I.R.123.

12. When the matter came again before the Appeal Commissioner new grounds were advanced by the respondent, and the Appeal Commissioner ruled that there was no reason why these grounds could not have been stated in her Notice of Appeal, and refused to allow these new grounds to be advanced. The manner in which the respondent's arguments were advanced and determined are set forth in detail in Mr Tobin's affidavit. The Appeal Commissioner in the end rejected all remaining grounds of appeal advanced and confirmed the assessments. That decision was appealed by the respondent to the Circuit Court by letter of appeal dated the 27th May 2009. She paid a sum of €15,000 to Revenue on the 16th February 2010 on account of her CGT liability. Her appeal was heard and determined in the Circuit court on the 8th March 2010. At that appeal two grounds of appeal were advanced. Firstly she argued that she was entitled to deduct 50% of the deemed market value of the property in 1999 (when she purchased it) from the consideration received; and secondly, she argued that she was entitled to deduct the sum of €25,400 in respect of auctioneer's fees. The first ground was rejected by the learned Circuit Court Judge, and in relation to the second ground, while the respondent sought to rely upon a letter purporting to come from the auctioneer in question in support of her contention that she had paid that sum of €25,400 to him, Revenue produced a letter from the same auctioneer to them which stated that he had no record or recollection of having received any payment in respect of the said sale. The respondent was offered an adjournment in order to call the auctioneer as a witness, but her solicitor declined to avail of that opportunity. The second ground was rejected by the learned judge. No further appeal was filed, and there was no request that a case be stated for determination by the High Court. Accordingly, the Revenue assessment that the respondent had a taxable gain of €557,258 on the disposal of the premises is now final and conclusive.

13. On the 8th March 2010 the respondent sent a cheque to Revenue in the sum of €58,232 which she tendered "*in full and final settlement of her CGT liability for the year 2003*" and stated also that the acceptance of that cheque by Revenue would preclude Revenue from seeking any further sums from her in respect of that year. On the 9th March 2010, but before they had received that cheque from the respondent, Revenue wrote to her stating a CGT liability in the sum of €111,451, and, having given credit for payments received by that date, stated that the total sum due for tax and interest was €107,205. This letter stated also that the respondent was liable to pay a penalty equal to the amount of tax due plus €125 on the basis that she had fraudulently or negligently made an incorrect return. This letter concluded by stating that failing receipt of a satisfactory offer and payment in settlement of the balance of the respondent's tax liabilities, interest and penalties due, Revenue would take steps for enforcement and would issue a Notice of Opinion pursuant to the provisions of section 1077B of the Act of 1997 and proceed to bring the present application before this Court.

14. The respondent replied, inter alia, by stating that her payment of €58,232 by letter dated 8th March 2010 had been tendered and accepted as a full and final settlement of her liabilities. This was interpreted as an indication by her that she did not intend making any further payment, and accordingly Revenue on the 9th April 2010 issued a Notice of Opinion pursuant to Section 1077B of the Act of 1997 wherein Mr Tobin expressed his opinion that the respondent had negligently made an incorrect tax return for the year 2003, and that she was therefore liable to pay a penalty of 100% of the tax underpaid plus €125 pursuant to the provisions of Section 1053 thereof.

15. The respondent replied to this Notice of Opinion in a letter to Revenue on the 5th May 2010. She made a number of points in order to argue that she has acted reasonably, and, inter alia, stated that the Circuit Court judge had stated that he believed that she had acted fairly and reasonably when he refused an application for costs of that appeal against her. Revenue responded to that letter by rejecting the points she made and reiterated that they proposed bringing the present application.

Respondent's replying affidavit:

16. The respondent deposes that at all times in relation to her tax affairs she relied upon her "husband at the time". I take that to mean that they are separated. She states that she trusted him to take care of these matters for her as he was in business as a tax adviser, and had previously been a former Higher Grade Technical Inspector of Taxes. She states that she has no business experience

apart from collecting rents from a number of properties. She states also that she has at all times paid the CGT liability when demanded, and refers to the payment by her of €58,232 on the 8th March 2010 in the immediate aftermath of the failed appeal in the Circuit Court to which I have already referred. She states also that her priority has at all times been her family. She states that she sought to have interest waived due to inability to pay, and provided a statement of her affairs as requested by Revenue, but believes she received no response from Revenue in relation to this request for a waiver, and states also that her finances are in disarray due to the appointment of a Receiver over her assets. She refers also to an affidavit sworn in her support by her husband, James Daly, and which she exhibits to her own affidavit.

17. James Daly's affidavit refers to Harvey's Bar and to the licence attached thereto, and matters relating thereto which gave rise to the contention made at the outset that the contract was a conditional one, and that the sale was not completed until certain licensing difficulties were dealt with in the District Court in March 2004. It will be recalled that it was stated that the sale had not been completed until this alleged conditionality in the Contract for Sale was dealt with. Apparently, according to Mr Daly's affidavit, that licensing issue, whatever it was, was concluded in the District Court in March 2004. This was the reason put forward to Revenue for the fact that this disposal was not included for CGT purposes in the tax return for the year 2003 even though the sale was completed on the 17th December 2003 and all the purchase monies were paid over to the respondent at that time. He states that it appeared at the time that whatever Bank was advancing money for the purchase of Harvey's Bar had waived the requirement to have the premises licensed and allowed the sale to complete even though some issue remained in relation to the licence. It is for this reason that he believed that the contract was conditional.

18. Mr Daly accepts in his affidavit that the refurbishment works which were claimed as a deduction against CGT liability were not deductible in the computation of capital gains tax, and that it was incorrect to treat these as deductible expenses in the computation of tax made for the year 2004. He states also that the claim for deduction of auctioneer's fees was made on the basis of "a claim" by that auctioneer for such fees, and that the amount for legal fees was based on "normal scale fees" as advised by the respondent's solicitors. He also gives details of his training and experience in relation to tax matters. He goes on to state that he believes that the Revenue's view that this liability was relevant to the year 2003 is incorrect, and in this regard he relies upon Section 1053 (3) of the Act of 2007. That provision provides:

"1053. – (3) where any return, statement, declaration or accounts mentioned in subsection (1) was or were made or submitted by a person, neither fraudulently nor negligently, and it comes to that person's notice (or, if the person has died, to the notice of his or her personal representatives) that it was or they were incorrect, then, unless the error is remedied without unreasonable delay, the return, statement, declaration or accounts shall be treated for the purposes of this section as having been negligently made or submitted by that person."

Mr Daly believes that this section makes provision for the sort of error which the respondent made in this case by treating the disposal as one relevant to the year 2004 instead of 2003. He concludes his affidavit by stating that he believes that the respondent has acted as an honourable and responsible person in her dealings with Revenue, and he submits that there are no grounds for the imposition of any penalties upon her.

Affidavit of Gerard O'Mahony:

19. This affidavit addressed some of the averments made by the respondent in her affidavit. While noting that she states that she at all times relied upon her then husband, he makes the point that she at no stage gives any details of what advice he gave her, and that in those circumstances she cannot avoid responsibility for the returns filed.

20. He also submits that the payment of €29,103 made by the respondent on the 14th March 2004 after the tax return for 2003 had been filed and in which the respondent had left the section dealing with CGT blank, must be seen in the light of the fact that the respondent had previously paid to Revenue only a sum of €9,116.54 to Revenue in respect of the year 2003 on the 21st January 2004. That payment had not been accompanied by any computation or explanation, as already set forth above. He notes that this payment has never been explained as to how it was arrived at, and he submits that in these circumstances it is irreconcilable with her contention made subsequently that the disposal occurred in March 2004 and not in 2003.

21. He makes the further point also in relation to that payment of €29,103 that it was calculated on the basis that she was entitled to deduct €150,484 in respect of refurbishment costs, as well as auctioneer's fees and legal costs, and that much later the refurbishment costs were acknowledged not to have been a legitimate deduction for the reasons already referred to, and, in any event that she had never furnished any receipts or invoices in support of that claim, and that it transpired also that the auctioneer had never been paid the sum claimed by her to have been paid. He states that even the legal fees figure of €15,367 was later reduced to one of €6,050, and that there is doubt whether that sum was in fact ever paid, there being no evidence that it was.

22. He further refers to the payment made by the respondent in the sum of €15,000 paid on account of CGT for 2003 on the 16th February 2010, and notes that she has never explained how this figure was arrived at, and does not explain why it was not paid until February 2010 in circumstances where the submission made to the Appeal Commissioners in April 2009 showed a balance due at that date in the sum of €17,924.

23. Mr O'Mahony refers again to the respondent's averment that she handed all correspondence to her husband and relied on him totally. In that regard he states that by so doing she cannot absolve herself from all responsibility in the matter, and in relation to letters from Revenue which went unanswered, and to which I have referred already, he suggests that she was obliged to ensure that these were answered, even if she had handed them over to her husband. He refers also to the final payment of €58,232 made on the 8th March 2010 following the hearing in the Circuit Court, and states that neither the respondent nor even her husband, especially given his background as a tax expert and former Revenue Inspector, could ever have truly believed that this sum was the extent of her liability at that date, and that they could not have had any bona fide belief that no statutory interest was payable, where this payment, made some six years after it was due, represented less than 50% of the tax due.

24. He also does not accept that the respondent has no business experience as she has stated. He believes that she is experienced in this respect and that she has in fact extensive experience in the acquisition and disposal of commercial and residential property, and he submits that it is not credible for her to state that she was simply totally dependent on her husband as a financial adviser, and that she cannot disavow responsibility for a tax return signed and submitted by her simply by saying that she was acting in accordance with her husband's advices.

Conclusions:

25. The first issue is what standard of proof faces the applicant on an application of this nature. One argument is that this type of action should be regarded as quasi-criminal in nature because of the use of the word "penalty", and that accordingly when considering whether or not the respondent was negligent in signing and filing an incorrect tax return, the Court should give her the

benefit of any reasonable doubt about that matter, rather than reach a conclusion on the basis of a probability in that regard. The opposing argument is that there is nothing of a criminal nature about this application or the statutory provisions in play, and that it is simply a method or procedure leading to the recovery of money due and owing to Revenue under the relevant statutory provisions to Revenue, and that being a civil remedy in that regard, the civil test should apply.

26. There is no doubt in my view that the civil standard of proof – balance of probabilities – is the appropriate standard, even though penalties are, *inter alia*, the subject of the orders sought by the applicant. These are not criminal proceedings. They are civil proceedings brought in relation to unpaid taxes, interest and penalties under the Act of 1997 in order to collect them.

27. The same issue has been the subject of a judicial determination in England, namely by Mann J. in his judgment in *Revenue and Customs Commissioners v. Khawaja* [2009] 1 WLR. 398. That case was an appeal by way of case stated following a finding by the general commissioners in an appeal to them, and which they made on the basis of the criminal standard of proof, and which resulted in the general commissioners allowing in part the appeal of the taxpayer. Applying that standard of proof the general commissioners were not satisfied that the taxpayer had been negligent in understating his income in respect of certain remuneration, and reduced the penalties accordingly. The general commissioners appealed, and succeeded.

28. The nature of the statutory provisions under scrutiny in *Khawaja* are similar to those in play on the present application, albeit in the context of penalties imposed for submitting incorrect returns of income, rather than CGT. That difference is not material. Mann J. had the benefit of extensive legal submissions and was referred to many authorities, which enabled him to consider this and other issues in great depth and at some length. His conclusion is unequivocal, and to the effect that the mere fact that the relevant section refers to penalty is insufficient to require a criminal standard of proof. That decision is clearly not authority as such in this jurisdiction, but having read the judgment closely and having considered same, I have no hesitation in adopting his reasoning for my own conclusion that in an application under Section 1077B of the Act of 1997 a balance of probabilities test is the appropriate test for the Court to adopt when determining whether a person has fraudulently or negligently delivered, made or submitted an incorrect tax return or other material referred to in Section 1053 of the Act of 1997, and that such proceedings are civil in nature, and not such as to require a criminal standard of proof.

Application of civil standard of proof:

29. These premises were without any question disposed of, and the sale completed, within the year 2003. It was a disposal for which the CGT liability had to be paid to Revenue by 31st January 2004. Furthermore, it was necessary that the disposal be included in the tax return in respect of the year 2003. The argument advanced by the respondent, and which is supported by her then husband that in some way this Contract for Sale was a conditional, that conditionality being fulfilled only on the 8th March 2004 when some licensing matter was dealt with in the District Court is specious, and in reality and truth one that is spurious and without any basis in fact. It was put forward in my view in a purely self-serving way. It is not possible in my view that the respondent was not well aware that the sale of Harvey's Bar had been completed before the end of 2003. By completing the tax return in a way that failed to disclose that disposal in 2003, the respondent was at best negligent. This was not simply a careless oversight. Her subsequent calculations which made a deduction for the costs of refurbishment which she must be taken to have known had not been spent at the relevant time and for which no vouchers or invoices were ever produced, were at best negligent, and were not mere oversight. This is confirmed, if such confirmation be necessary at all, by the fact that this was later accepted as having been something which she could not stand over, and it was abandoned. To make a deduction in respect of payment to an auctioneer who had never even raised an invoice in this regard was at best negligent also, as was the deduction in respect of legal fees in an amount which was untrue. I make these findings of negligence applying the balance of probabilities test. But I fail to see how they would not survive the higher test of beyond reasonable doubt, if that were to be the appropriate test.

30. Negligence is a term which implies more culpability than mere carelessness or oversight. I do not accept as credible that the respondent is as inexperienced in business matters as she claims to be. Her statement of affairs which she sent to Revenue on 17th July 2010 sets forth a considerable list of properties owned by her and with a combined value of over €7.5 million euro with combined borrowings of almost €8 million. Her averment in her affidavit sworn on the 17th June 2011 that she has "*no business experience of any nature whatsoever other than collecting rents from a number of properties*" is a mere assertion incapable of credibility. Negligence in the context of this legislation means that a person having a duty to make a tax return truthfully and honestly fails to make all appropriate inquiries in order to ensure that the details contained in the return were complete, accurate and truthful. A person completing such a return must be expected to make appropriate enquiries if she herself does not have the necessary facts and information in order to complete the return. If she has to rely on others for information, she is under an obligation to ensure as far as reasonably possible that the information given is correct and truthful. There is no evidence that the respondent took any steps whatsoever to satisfy herself that what was contained in the return, or that information she gave at any later stage, was correct. If her evidence is to be accepted at all, it is to the effect that she blindly accepted what others had told her, and completed and signed the return. That is negligent and not merely careless or an oversight.

31. In these circumstances the requirements of the relevant sections of the Act of 1997 as set forth herein are satisfied, and I will make orders in the terms sought, namely:

- (i) An order pursuant to section 1077 B (3) of the Taxes Consolidation Act, 1997 determining that the respondent is liable to a penalty under that Act by reason of her having negligently submitted an incorrect Capital Gains Tax return for the year 2003.
- (ii) An order determining that the amount of that penalty for which the respondent is so liable is €102,460.
- (iii) An order pursuant to section 1077C (1) (a) of the Taxes Consolidation Act, 1997 that the applicant recover from the respondent the said penalty in the sum of €102,460 for which she is liable.