Neutral Citation Number: [2009] IEHC 431

THE HIGH COURT

2007 895 JR

Viera Limited

Applicant

And

The Revenue Commissioners

Respondents

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

1. Reliefs sought

1.1 This Court (Peart J.) granted leave on the 16th July, 2007, to seek the following reliefs by way of judicial review:-

1. A declaration that the notice of assessment to value added tax in the sum of €3,085,021 raised by the respondents on the applicant on the 14th December, 2006, pursuant to the provisions of s.23 of the Value Added Tax Act 1972 is invalid.

2. In the alternative an order of certiorari quashing the notice of assessment to value added tax in the sum of €3,085,021 raised by the respondents on the applicant on the 14th December, 2006, pursuant to the provisions of s.23 of the Value Added Tax Act 1972.

3. An order of certiorari preventing the respondents from relying upon the notice of assessment to value added tax in the sum of €3,085,021 raised on the applicant on the 14th December, 2006, to collect the said sum or any sum of value added tax for the period covered by the assessment.

1.2 On the 6th March, 2009, this Court (Hedigan J.) granted the applicant leave to amend its original statement of grounds to seek the following additional reliefs:-

4. A declaration that the assessment in the total sum of €3,085,021 described in the notice of assessment to value added tax dated the 14th December, 2006, raised by the respondents on the applicant pursuant to the provisions of s.23 of the Value Added Tax Act 1972 is one assessment only.

5. A declaration that the assessment in the total sum of €3,085,021 described in the notice of assessment to value added tax raised by the respondents on the applicant on the 14th December, 2006, pursuant to the provisions of s.23 of the Value Added Tax Act 1972 is out of time in respect of the total sum of €3,085,021 by reference to the provisions of s. 30(4)(a)(ii) of the Value Added Tax Act 1972, and is accordingly void.

2. Facts

2.1 The applicant is a construction company engaged primarily in the development and sale of residential houses. It applied for a refund of corporation tax for the year ended the 31st August, 2004, and in respect of this application it submitted a director's report and financial statements for the year ended the 31st August, 2004. The financial statements also included figures from the preceding financial year. Mr. Aidan O'Brien, an official of the respondents, in the course of dealing with this refund claim, noted discrepancies between the sales figures as reported in the financial statements and the total annual gross sales figures as returned by the applicant for value added tax ("VAT") purposes. He noted that the figures for VAT sales were considerably less than the sales figures contained in the financial statements in respect of the years ending the 31st August, 2003, and the 31st August, 2004. Mr. O'Brien was of the view that the matter warranted further investigation and on the 23rd August, 2005, a VAT audit commenced on the applicant company in respect of the financial year ended the 31st August, 2004.

2.2 On the same date as the commencement of the audit, a meeting was held at the business premises of the applicant company between Mr. Larkin, a director of the applicant company, Mr. Byrne of Dermot Brennan & Associates, auditors to the applicant company, and Mr. Lockhart, Tax Principal at Matheson Ormsby Prentice, Solicitors. It transpired that the applicant had entered into licence agreements with McPeake Auctioneers, the auctioneering firm engaged to sell the applicant company's dwellings. In essence, the licence agreements were agreements to let dwellings to McPeake Auctioneers on a short term basis, thereby purportedly surrendering possession to the auctioneers. The objective of this arrangement was to make the applicant liable for VAT on the lower value of the cost of land or buildings only, rather than at the higher full selling price as per s.4 of the Value Added Tax Act 1972 ("the Act of 1972").

2.3 On the 26th August, 2005, Mr. O'Brien wrote to the applicant to extend the scope of the audit to cover VAT from the 1st January, 2002, onwards. A further meeting took place at the business premises of the applicant between Mr. O'Brien and Mr. Byrne of Dermot Brennan & Associates on the 6th October, 2005. The day after this meeting Mr. O'Brien informed the applicant by letter that he did not accept the tax treatment of the licence agreements which was proposed by the applicant. This was replied to by Mr. Lockhart by letter dated the 13th February, 2006, which was, in turn, replied to by Mr. O'Brien on the 26th June, 2006, again reiterating his non-acceptance of the propriety of the scheme. On the 13th December, 2006, Mr. O'Brien wrote to the respondents to input estimates under s.23 of the Act of 1972 to recover VAT due on the selling prices of the applicant company's properties for the years ending the 31st August, 2003, and the 31st August, 2004. A notice of assessment then issued to the applicant company on the 14th December, 2006, in the sum of €3,085, 021. By letter dated the 22nd December, 2006, Mr. Lockhart, on behalf of the applicant company, advised the respondents that it was exercising its right to appeal the notice of assessment pursuant to s. 23(2) of the Act of 1972 on the grounds that "*it considers the assessment to be excessive*." Mr. Condon, who is Mr. O'Brien's supervisor, acknowledged receipt of the notification of appeal by letter dated the 24th January, 2007, and advised that all correspondence and contact should be directed to him with regard to the appeal.

2.4 On the 6th March, 2007, a meeting was convened by Mr. Condon with Mr. Lockhart and Mr. Kearney, an associate at Matheson Ormsby Prentice Solicitors. The applicant's solicitors claim that Mr. Condon stated that he had requested the meeting to obtain a better understanding of the issues involved as the particular facts in the case were not fully apparent to him from the file. The applicant now says that this demonstrates that the assessments of the 14th December, 2006, were raised in circumstances where the respondents could not have had a "*reason to believe*" that VAT was due and payable. The respondents dispute this and say that the meeting was held in the normal way, as a matter of administrative practice, in advance of the appeal hearing for the purposes of assembling all information relevant to the case, to identify any points of agreement and to net down the issues in dispute.

2.5 On the 30th April, 2007, Mr. Condon sent an email to the applicant company, setting out a list of points to be agreed prior to the appeal hearing together with the following questions:-

> *"The Revenue auditor noted during an examination of the company's records that 79 transactions were completed in the period March 2003 to 31 August 2003 whereby VAT was not charged on the sales.*
>
> *…*
>
> *Unless there was another licence agreement in place during the period of these transactions an issue arises as to why it was considered VAT should not be charged on the 79 transactions…?*
>
> *Are there licences between the parties for the periods other than the one furnished dated 5 January 2004.*
>
> *If so, how many licences are there and are they all on the same terms as the one furnished to this office?*
>
> *Did the licence agreement of 5 January 2004 terminate in 14 days, and if so how many transactions were effected in that period?*
>
> *If the above mentioned licence agreement did not terminate in 14 days, when did it terminate and how many transactions were effected during its period of tenure?*
>
> *How many transactions were effected overall in the years 31/8/2003 and 31/8/2004 wherein VAT was not charged and how many of those were in periods during which licence agreements of the kind furnished to this office were operative between the company and Mr McPeake?"*

2.6 On the 2nd May, 2007, Mr. Condon sent a further email to the applicant's solicitors seeking the following documents/information in respect of each site that was sold upon which VAT was not charged:-

> *"1. Contract for Sale*
>
> *2. Licence agreement*
>
> *3. Date of payment of booking deposit.*
>
> *4. Date of completion of sale.*
>
> *5. Date of completion of construction of house."*

2.7 These proceedings were instituted by the applicant company on the 13th July, 2007, on the basis that the meeting of the 6th March, 2007, coupled with the email correspondence of the 30th April, 2007, and the 2nd May, 2007, purportedly illustrate that the respondents issued assessments in December 2006 in the absence of knowing fundamental facts and that they could not have had the required "*reason to believe*" that tax was due and payable at that time.

2.8 On the 13th February, 2009, the applicant's solicitors wrote to the respondents informing them that it had come to their attention that there was a four year time limit for raising an assessment to VAT in respect of any taxable period as per s. 30(4)(a)(ii) of the Act of 1972, with effect from the 1st January, 2005, and that the assessment raised on the 14th December, 2006, was out of time. The section means that an assessment is out of time if it is not made within four years from the end of the earliest taxable period captured by the assessment. The respondents accepted in their letter dated the 20th February, 2009, that the assessment for the period of the 1st September, 2002, to the 31st August, 2003, was out of time but they did not accept that this was the position in respect of the assessment for the period of the 1st September, 2003, to the 31st August, 2004. The applicant took the view that the only assessment raised on the 14th December, 2006, related to all taxable periods from 2002 until 2004 and that it was out of time in its entirety and so applied to this Court (Hedigan J.) on the 6th of March 2009, to amend its statement of grounds dated the 13th July, 2007. Leave was granted by this Court to include the additional ground that the notice of assessment to VAT of the 14th December, 2006, refers to one assessment only in the total amount of €3,085,021 and that such a purported one total assessment is out of time in accordance with s. 30(4)(a)(ii) of the Act of 1972 and, accordingly, void in respect of the total sum.

3. Issues

3.1 The first issue to determine in these proceedings is the meaning of the phrase "*reason to believe*" in s.23 of the Act of 1972. In particular, it must be considered whether, in practical terms, "*reason to believe*" requires that the respondents be in a position to know the actual final amount of tax due and payable? It may be helpful to consider the meaning of the phrase "*best of their judgment*", as it appears in the equivalent U.K. statutory provision, that is, s.73 (1) of the Value Added Tax Act 1994. In addition, it is appropriate to consider whether the meaning of "*is of the opinion*", as that phrase was interpreted by the Supreme Court in *The State (Lynch) v. Cooney* [1982] I.R. 337 (i.e. the opinion must be one which is held *bona fide*, is factually sustainable and is not unreasonable), is the same as "*reason to believe*" .

3.2 The second issue to address is whether two assessments to VAT were made by the respondents or whether one assessment only was made by them on the 14th December, 2006? Must an assessment comprise of one assessment of a particular amount for a particular period of time and is the assessment of the 14th December, 2006, void for being out of time?

4. Reason to believe

The applicant's submissions
4.1 Mr. Hogan S.C., for the applicants, contended that the requisite "*reason to believe*" that the sum of €3,085,021 assessed on the applicant on the 14th December, 2006, was due and payable could not be demonstrated by the respondents in this case. He argued that the precise sum to be taxed could not have been known by the respondents in December 2006 as basic details were still being sought by them as late as April and May, 2007. Mr. Hogan relied on *The State (Lynch) v. Cooney* [1982] I.R. 337 where O'Higgins C.J. held that any opinion formed by the Minister under s.31 (1) of the Broadcasting Authority Act 1960, which gave the Minister the power to make an order banning the broadcasting of certain matters if he was "*of the opinion*" that the matter would be likely to promote, or incite to, crime or would tend to undermine the authority of the State, "*must be one which is bona fide held and factually sustainable and not unreasonable*". Mr. Hogan considered that the U.K. threshold of "*best of their judgment*" was a less onerous one and that it imported a far higher margin of appreciation vis-à-vis "*reason to believe*". He sought to distinguish *Van Boeckel v. Customs and Excise Commissioners* [1981] S.T.C. 290, upon which the respondents relied, on the basis that the case concerned the power to make an estimation of tax due, which was equivalent to s.22 of the Act of 1972.

4.2 It was further submitted that the affidavits sworn by officials of the respondents did not set out on what basis the calculations of tax due and payable were made and that the amount due could not have been arrived at without the information as requested in the emails of April and May 2007. He argued that there must be "*reason to believe*" that a particular amount of tax is due and payable in the interests of legal certainty.

The respondents' submissions
4.3 Ms. Clohessy S.C., for the respondents, submitted that the threshold of "*reason to believe"* had been met in the instant case. She relied on the English authority of *Van Boeckel v. Customs and Excise Commissioners* [1981] S.T.C. 290 which held that the threshold of "*to the best of their judgment*" meant that the inspector was not obliged to carry out exhaustive enquiries before making an assessment. She pointed out that Mr. Condon had made further enquiries in April and May 2007 in the context of the statutory appeal administrative system and that these enquiries had no bearing on Mr. O'Brien having a reason to believe that an amount of tax was due and owing in December 2006.

4.4 Ms. Clohessy contended that the U.K. threshold of "*to the best of their judgment*" was more onerous than "*reason to believe*". In her submission the inspector, in raising the assessment, acted to the best of his judgment and as a result a fortiori the Irish statutory test was satisfied.

Decision
4.5 Section 23(1) of the Act of 1972 deals with the making of assessments to VAT. It provides that "*where … the inspector … has reason to believe that an amount of tax is due and payable … the inspector … may, … make an assessment … and may serve a notice on the person.*" The equivalent statutory provision in the U.K. is s.73 (1) of the Value Added Tax Act 1994 which provides that where a taxable person has, *inter alia*, failed to make any returns or where the returns are incomplete or incorrect the Customs and Excise Commissioners "*may assess the amount of VAT due from him to the best of their judgment*" and notify this to the taxable person.

4.6 The meaning of the phrase "*best of their judgment*" was explored by Woolf J. in *Van Boeckel v. Customs and Excise Commissioners* [1981] S.T.C. 290 at pp.292-293:-

> "*…it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."*

This passage makes it clear that in the U.K. the Customs and Excise Commissioners, before exercising their statutory discretion to raise an assessment, do not have to carry out exhaustive investigations to obtain all possible information. They must consider the material that is before them fairly and arrive at a reasonable decision as to the amount due.

4.7 The applicant says that the respondents must hold an opinion which is *bona fide,* factually sustainable and not unreasonable as per *The State (Lynch) v. Cooney* [1982] I.R. 337.

4.8 The concept of having "*reason to believe*" involves an analysis of the subjective state of mind of the respondent's inspector based on the objective information before him. The reason which gives him to believe that tax is due and payable must be based on facts which are known to him. I am satisfied that the correct test is not dissimilar to that enunciated by Woolf J. in *Van Boeckel v. Customs and Excise Commissioners* [1981] S.T.C. 290 in respect of "*to the best of their judgment*", in the sense that the act of determining whether tax is due must be based on the material placed before an inspector and that a reasonable, as distinct from arbitrary, conclusion must be arrived at after assessing that material. It can be formulated as follows: - on the basis of the material before the inspector can he reasonably conclude that an amount was due to entitle him to raise an assessment for a particular period?

4.9 I note that in this case that all the information furnished to Mr. O'Brien was from the applicant company itself. As noted above, the audit on the applicant company was brought about on foot of applying for a refund of corporation tax for the year ended the 31st August, 2004. Mr. O'Brien held a director's report and financial statements for the year ended

the 31st August, 2004 which also included figures from the preceding financial year. These documents were submitted by the company in respect of the application for a refund. Mr. O'Brien also held the VAT returns made by the company which included details of their gross sales figures. Mr. O'Brien's file note of the meeting of the 23rd August, 2005, as exhibited in his affidavit sworn on the 22nd October, 2007, details the documents that were made available to him at the meeting as "*the audit trail, nominal* [bank] *accounts, linking papers and the* [financial] *records*". At para. 12 of his affidavit sworn on the 22nd October, 2007, he avers that it was explained to him that VAT had not been charged on the sales of undeveloped sites, as opposed to houses. He found that this was in order and excluded those sales from his consideration. In the meeting of the 6th October, 2005, Mr. O'Brien was furnished with a sample licence agreement. His file note of the 6th October, 2005, states as follows:-

> *"I had a look at the records for 2002/2003 and sample checked the details with the returns and agreed these.*
>
> *…*
>
> *The use of licence agreements commenced in Mar 03 and 79 transactions took place in this to y/e 31/08/03. This would equate to the difference of over €8 million between the VAT returns and the accounts."*

4.10 Therefore, at the time the assessment was raised in December, 2006, Mr. O'Brien held the financial returns and accounts for the financial years ending the 31st August, 2002, 2003 and 2004. He possessed information as to the overall sales figures and the amount of VAT the applicant company had paid and the sales of undeveloped sites. On the basis of the information before him and the interviews he had with representatives and advisors of the applicant company, Mr. O'Brien concluded that the licence agreements were a device to avoid VAT. Consequently, in my judgement, he had ample "*reason to believe*" that an amount of tax was due and payable by the applicant, which he was able to calculate by reference to the extensive aforementioned financial material. I am satisfied that the volume and quality of information available to Mr. O'Brien would also satisfy the test proposed by the applicant, namely, of having an opinion that was *bona fide*, factually sustainable and not unreasonable.

5. The assessment

5.1 The applicant makes the case that, as a matter of law, the assessment of the 14th December, 2006, was a single assessment of a particular amount but that it is void by virtue of s.30(4)(a)(ii) of the Act of 1972 which imposes time limits on the raising of assessments.

The applicant's submissions

5.2 The applicant submitted that at any given time there can only be one single assessment to VAT and there cannot be multiple assessments. It was submitted that the entire assessment was void in light of the time limits that applied to the raising of assessments under s. 30(4)(a)(ii) of the Act of 1972. Mr. Hogan submitted that the words "*in one sum*" in s.23 inferred that there is power to make an assessment in one sum of the total amount of tax due and that though the inspector may have formed the view globally that there was one amount of tax due, it was made up of the tax due in two separate taxable periods. He submitted that s.23 of the Act of 1972 should be construed as enabling the inspector to raise an assessment in respect of a specific period. He noted that the notice of assessment is subject to s.30 (4)(a)(ii) of the Act of 1972, a statutory precondition, which precludes an assessment which is statute barred. He submitted that this essential statutory precondition had not been satisfied and, therefore, the assessment of the 14th December, 2006 was void. Mr. Hogan accepted that the actual notice of assessment was different to the assessment. He noted that this differentiation was made clear in the English jurisprudence.

The respondents' submissions

5.3 Ms. Clohessy submitted that the statutory wording of s.23 is unambiguous and that there is a clear distinction between the making of an assessment and the subsequent issuing of a notice of assessment and that this is well established in case law. She referred to *Honig v. Sarsfield* [1986] S.T.C. 246 in this regard.

5.4 She further submitted that two separate assessments were notified in one notice dated the 14th December, 2006, and that the notice refers therein to two separate assessments. Such a notification is in accordance with the language of s.23 of the Act of 1972 and consistent with the decision of the Court of Appeal in *Customs and Excise Commissioners v. Le Rififi Limited* [1995] S.T.C. 103, in her submission. She contended that, as a consequence, the assessment for the period of the 1st September, 2003, to the 31st August, 2004, was within the four year period provided for in s.30 (4)(a)(ii) of the Act of 1972 and was not out of time. She submitted that no overall single assessment existed and that the seeking of reliefs in respect of such a purported assessment was misplaced.

Decision

5.5 Section 23 of the Act of 1972 states as follows:-

> *"Where, in relation to any period the inspector of taxes or such other officer as the Revenue Commissioners may authorise to exercise the powers conferred by this section … has reason to believe that an amount of tax is due and payable to the Revenue Commissioners by a person … then … in accordance with regulations but subject to section 30 make an assessment in one sum of the total amount of tax which in his opinion should have been paid … in respect of such period and may serve a notice on the person specifying –*
>
> *(i) the total amount of tax so assessed, … "*

5.6 Firstly, there is no doubt that a notice of assessment is not the same as an actual assessment. The language of the above section makes this clear. The Value Added Tax (Estimation of Tax Payable and Assessment of Tax Payable or Refundable) Regulations 2000 (S.I. No. 295 of 2000) sets out in regulation 5 (2) what a notice is to contain. In addition, the U.K. Court of Appeal in *Honig v. Sarsfield* [1986] S.T.C. 246 held that the charge to tax arose from the relevant

statutory provisions together with the making of the assessment and was no way dependent on notice to the taxpayer.

5.7 Section 23 of the Act of 1972 expressly refers to "*any period*". This must be construed as enabling the inspector to raise assessments in respect of specific periods and it is for the inspector to choose whatever period in respect of which he has reason to believe tax is due and payable. Section 23 of the Act of 1972 does restrict an inspector to making one assessment and one assessment only. It is quite clear that separate assessments can be raised in respect of separate periods and not one assessment in respect of several periods.

5.8 The actual assessments to VAT in this case were made on the 13th December, 2006, the day before the notice was issued. The first was for the period the 1st September, 2002, to the 31st August, 2003, and the second assessment was for the period the 1st September, 2003, to the 31st August, 2004. Mr. O'Brien made separate calculations in respect of both and created two separate computer printouts. On the second page of the notice of assessment the balance of tax due and payable for the period the 1st September, 2002, to the 31st August, 2003, was stated to be €1,140,681.58 and the balance of tax due and payable for the period the 1st September, 2003, to the 31st August, 2004, was stated to be €1,944,340.00. This illustrates that there were two assessments encapsulated in the notification of the assessment.

5.9 For these reasons, the assessment for the period the 1st September, 2003, to the 31st August, 2004, is valid.

6. Delay

6.1 It is to be observed that the second issue, concerning the time limit for the notice of assessment, was raised for the first time by the applicants on the 6th March, 2009, almost 20 months after these proceedings were instituted and in excess of two years after the notice of assessment was issued. In addition, the applicant brings these proceedings on the basis that it was only alerted to the claimed paucity of the knowledge on the part of the respondents in April and May of 2007.

6.2 I am satisfied that the applicant became alert to the paucity of knowledge on the part of the respondents, as they put it, as a potential ground for judicial review as a result of the e-mail correspondence of the 30th April and the 2nd May 2007. Thus, it is clear that these proceedings were commenced within the 3 month period prescribed by O.84 (21) of the Rules of the Superior Courts and, in my judgement, there is nothing in the evidence to suggest that the there was a culpable lack of promptness on their part in commencing the proceedings in July 2007. The same cannot, however, be said in respect of the amended grounds for which leave was granted by this Court (Hedigan J.) on the 6th March, 2009. Whilst there was correspondence between the parties in February 2009 in which the applicant raised the " *out of time*" issue for the first time, thereby prompting a concession from the respondents that the assessment for the earlier of the two periods in the notice of assessment was, in fact, out of time, no explanation is offered as to why this state of affairs was not raised earlier, given that the state of the law in this regard was well settled and all the relevant facts were known to the applicant once the notice of assessment was served. In my judgement there was gross culpable delay on the part of the applicant in this regard which has not been explained or excused, the consequence of which is that I must hold that the applicant was out of time in bringing this amended ground.

7. Conclusion

7.1 For the reasons set out above I must refuse the reliefs sought in these proceedings.