

BETWEEN

MICHAEL GLADNEY

PLAINTIFF

AND

JAMES JOSEPH DALY

DEFENDANT

JUDGMENT of Mr. Justice Robert Eagar delivered on the 19th day of May, 2017

1. This is a judgment on an application by the Revenue to enter final judgment in the sum of €210,845.34 together with further interest on the principal sum of €169,062.00 at the statutory rate of 0.0274% per day or part day thereof in relation to value added tax from the 10th day of July, 2015 until judgment or part payment.

2. The notice of motion was grounded on the affidavit of Mary Hogan of the Office of the Revenue Commissioners, Collectors General Division. She states that she is an officer of the Revenue Commissioners. She says that despite demand, no sum whatsoever has been discharged on foot of the claim. She further says that she believes the defendant has no defence and that an appearance has been entered solely for the purpose of delay.

3. The second affidavit is that of James Joseph Daly, the defendant in the proceedings. He says that the claim brought by the plaintiff was referable to a six month period of trading from the 1st of July, 2012 to the 31st of December, 2012. He said that there was no detail whatsoever provided in the endorsement of claim as to how this figure is computed, and further the plaintiff's affidavit grounding the application provided no detail whatsoever as to the basis on which the sum is claimed, or computed, or the methodology for computation. He confirms the plaintiff's claim purports to relate to VAT liability on his part for the six month period to the 31st of December, 2012. He says that for the above trading period, his output value added tax on turnover was €85,871.00. Against this figure he had for that period inputs of €50,599.00, and he believes that his VAT liability for the period was the sum of €35,272.00. Total payment of €30,973.73 was paid to the Revenue for the period in question and he refers to his bank statement.

4. He says that his accountants, Large West Accountancy Services, have made several efforts to lodge the outstanding balance owing for the period of July to December 2012 using the Revenue on-line service but due to the estimate provided by the Revenue, the system would not allow him to file this return.

5. He says and believes that he is has an excellent record with the Revenue in relation to VAT liability accruing throughout the course of his business and he refers to a copy of his ROS Revenue Record.

6. He says that he is primarily involved in the buying and selling of machinery and has been so for a number of years. He is also involved in the buying and selling of second hand cars and to a lesser extent heavy machinery. He says that the principal sum claimed by the plaintiff in the amount of €169,062.00 in respect of VAT allegedly due is incorrect.

7. The next affidavit is the supplemental affidavit of Mary Hogan. She said that the Revenue Commissioners had conducted an investigation of the tax affairs of the defendant for the tax year 2012. She says that there was no cooperation with the investigation by the defendant or his agent, and that they failed to respond to numerous requests made by the Revenue Commissioners for books and accounts relating to the defendant's business. She states that the defendant failed to pay any returns for the VAT period the 1st of July, 2012 to the 31st of December, 2012 and in the absence of any return, an assessment was raised in the amount of €200,000.00. She says that this was notified to the defendant and his agent on the 5th of February, 2013 and she says that neither the defendant nor his agent made any appeal against the assessment within twenty-one days of the notice, and accordingly the sum disclosed in the notice of assessment is deemed to be final and conclusive. She says that in the absence of an appeal it is now not open to the defendant to seek to challenge or dispute the sum disclosed in the notice of assessment. She accepts that the defendant has made payments to the Revenue Commissioners in the sum of €30,937.73 and this has been credited to the defendant against the sum disclosed in the notice of assessment leaving a balance due and owing by the defendant to the plaintiff in the sum of €169,062.00, together with interest already accrued and continuing. She also says that the affidavit filed on behalf of the defendant fails to disclose any defence.

8. Exhibited with the supplemental affidavit of Mary Hogan is a notice of assessment of tax payable dated the 5th of February, 2013 in relation to VAT in the sum of €200,000.00. Attached to this notice there is a paragraph underneath the sum as follows:-

"You may, if you claim that the amount due is excessive, on giving notice to me within a period of 21 days from the date of notification appeal to the Appeals Commissioners."

9. The next affidavit is a supplemental affidavit of James Joseph Daly who says that the averments made in the supplemental affidavit of Mary Hogan are entirely inadequate and did not raise in any way the issues raised in his original affidavit of the 26th of November, 2015.

10. He said that the assessment appears to have no connection with the monies rightfully owing by him, and that such monies rightfully due and owing by him have been discharged in full save for the sum of €4,334.27. At the time he said that his VAT assessment was assessed by the plaintiff on a six monthly basis.

11. He further says in or around 2009 or early 2010, Niamh Smith of the plaintiff's office performed an audit of his tax affairs, that he had fully cooperated with Ms. Smith and that he had no further reports, engagements or queries from Ms. Smith. At that stage, he believed that all his tax affairs were fully in order. He says that the plaintiff's allegation that he had not been cooperative with the plaintiff is an untrue allegation. He says that on the 27th day of November, 2012 Bridie Kelly and Eamon Kenny of the plaintiff's office

attended on him presumably for the purpose of an investigation into his tax affairs. This was within his six monthly return window wherein returns are required to be filed on the 19th of the month immediately after the VAT period. He says that he was not required to make any returns until the 19th of January and could not be deemed to be owing VAT at that time. He says that the plaintiff had levied an unattainable estimation of him personally in a premature manner.

12. A second supplemental affidavit was sworn by James Joseph Daly on the 23rd of November, 2016 which refers to the attendance by Ms. Kelly and Mr. Kenny of the plaintiff on the 27th of November, 2012. He said that Mr. Kenny wrote to him shortly after the meeting by letter dated the 3rd of December, 2012 stating that an estimate under s. 23 of the Valued Added Tax Act 1972 in the amount of €200,000.00 had been raised, and a formal notification of same would issue thereafter. He states that he was advised that the assessment was not validly raised, as his VAT return was not yet due to be filed.

13. A third supplemental affidavit sworn by James Joseph Daly on the 14th of February, 2017 in which he maintains that the estimate raised by the plaintiff was raised prior to the time for the filing of the relevant VAT returns and is therefore not valid.

14. Counsel on behalf of the plaintiff referred the court to the case of *Michael Deighan v. Hearne & others* [1990] 1 I.R. 499. The Supreme Court held unanimously that the exercise by the Inspector of Taxes of the powers vested in him by the then Income Tax Act of 1967 to make an assessment in default of a return, and by the Collector General of the power vested in him to issue a certificate to a sheriff did not constitute an administration of justice in breach of Article 34 of the Constitution.

15. The court also found that having regard to the importance of the revenue of the State within the constitutional framework to the right of a tax payer to appeal within a certain time and to the availability of judicial review in the event of arbitrary or capricious conduct, neither the power conferred on the Inspector of Taxes to raise an assessment nor the provision that it should become conclusive in default of appeal nor the power given to the Inspector to extend time for appeal nor the power given to the Collector General to certify sums in default, was unjust.

16. Finlay C.J. referred to the decision of *Kennedy v. Hearne* [1988] I.R. 481 of the High Court:-

"The learned High Court judge decided that having regard to the provisions of the income tax code and the procedure for assessment in default of the making of returns which had been outlined in the decision of the court, that the court could only intervene to set aside or vary the assessment otherwise than under the procedure provided by the Income Tax Acts if it were established either that the procedure carried out was ultra vires to statutory provisions or that one or other of those statutory provisions was invalid having regard to the provisions of the Constitution. The court could not try an issue of fact arising from an assessment made in default of a return otherwise than through the appeal procedure provided in the income tax code."

17. He continued in his decision:-

"That decision, in my view was correct, the plaintiff had ample opportunity on the facts as found in the High Court to challenge the validity of the assessments in respect of which he now complains and to proceed by the procedure of appeal through the Special Commissioners and through the courts which is available in such circumstances."

18. Counsel on behalf of the plaintiff submitted that it is of considerable significance that before instituting these proceedings, and up to the time they came to hearing, the applicant had not even sought an extension of time to appeal against the assessments which can be obtained in the discretion of the Inspector of Taxes, or on appeal from him to the Special Commissioners at any time.

19. Counsel for the plaintiff also referred to the judgment of Hunt J. in *Gladney v. Di Murro* [2017] IEHC 100. This was a claim by the Revenue Commissioners for income tax. Hunt J. stated:-

"The essential point made by the defendant is that the provisions of the Rules of the Superior Courts apply to claims by the Revenue in precisely the same manner as they apply to all other summary claims, and since the defendant has raised arguable defences to the claim of the plaintiff, the matter should be referred for plenary hearing in accordance with the normal and well-known principles applicable in such circumstances. The plaintiff replied to this proposition by a submission that the substantive provisions of the statutory code applicable to Revenue matters means that matters of defence to assessments raised by the Revenue must be dealt with solely within the specified statutory mechanism. Consequently, it is not open to the recipient of an assessment to neglect or refuse to invoke the statutory appeal procedure, and then to wait until after the issue of enforcement proceedings to challenge the assessment, because to permit this approach would have the effect of setting the relevant statutory provisions at naught.

In my opinion the scope of the matters that may properly be raised by the tax payer outside the statutory appeal procedure in revenue matters has been conclusively determined by the decision of the Supreme Court in *Deighan v. Ahern* (previously cited)."

20. He continued at paragraph 22:

"In my view, the defendant in this case is attempting to do precisely that which was found to be impermissible by the Supreme Court. The points of defence raised by the defendant pertain to the form of the assessment, the timing thereof, together with the correctness of the sum claimed and the availability of double tax relief in respect of payments made to the Italian tax authorities. Determination of each of these matters would require findings of fact relating the assessment raised by the Inspector, and therefore they lie squarely within the limitation identified by the Supreme Court, and may only be raised on appeal to the specialist tribunal constituted for that purpose, or to the courts where available."

21. The legislation relating to value added tax provides as follows:-

(1) Where in relation to any period the Inspector of Taxes and such other officer of the Revenue Commissioners may authorise to exercise the powers conferred by this section (hereinafter referred to in this section as other officer) has reason to believe that an amount of tax is due and payable to the Revenue Commissioners by a person in any of the following circumstances

(a) the total amount of tax payable by the person was greater than the total amount of tax (if any paid by him);

(b) the total amount of tax refunded to the person in accordance with s. 20(1) was greater than the amount (if) properly refundable to him; or

(c) an amount of tax is payable by the person in a refund under s. 20(1) has been made to the person,

In relation to any other action which may be taken the Inspector or other officer may in accordance with the regulations but subject to s. 30 make an assessment in one sum of the total amount of tax which in his opinion should have been paid or the total amount of tax (including a nil amount) which in accordance with s. 20(1) should have been refunded as the case may be in respect of such period and may serve a notice of that person specifying:

(i) the total amount of tax so assessed;

(ii) the total amount of tax if any paid by the person or refunded to that person in relation to the said period; and

(iii) the total amount so due and payable aforesaid (referred to subsequently in this section as amount due)

(2) Where a notice to serve at a person under subs. (1) the following provisions will apply:

(a) the person may if he claims that the amount due is excessive on giving notice to the Revenue Commissioners within the period of 21 days from the date of the service of the notice appeal to the Appeal Commissioners; and

(b) on the expiration of the said period where a notice of appeal is received, on determination of the appeal by agreement or otherwise, the amount due or the amended amount due is so determined in relation to the appeal shall become due and payable as if the tax were tax which the person was liable to pay for the taxable period during which the period of 14 days from the date of the service of the notice under subs. 1 expired or the appeal was determined by agreement or otherwise which taxable period is the later.

22. Counsel on behalf of the defendant submitted that the letter dated the 3rd of December, 2012 addressed to the defendant was in fact the assessment in that it said:

"At the end of the meeting I requested a payment in the sum of €200,000.00 on foot of invoices issued by you to Ultimate Plant Export Ltd. In absence of this payment I have now raised an estimate under s. 23 VAT Act 1972 to protect Revenue's interest. Formal notification will issue to you shortly"

and finally:

"please provide the full address of Pelican Plant Sales and copies of their sales invoices."

23. Counsel on behalf of the defendant stated that the Revenue had in fact made an assessment when the full period of six months had not expired. Counsel referred to a decision of Barton J. in *Gladney v. Caroline Lambe* [2014] IEHC 350 and quoting:

"It follows from the foregoing that there is a controversy between the parties the determination of which will lead to the result of either the plaintiff being entitled to summary judgment against the defendant or alternatively of providing the defendant with a defence to the plaintiff's claim. The issue in question is whether or not the letters of the 21st February, 2011, constitute valid notices of appeal within the meaning of s. 957(4) of the TCA of 1997. There may, no doubt, be subsidiary issues arising upon the facts of the case, but in relation to the matter now before the court, this is the essential question and issue for determination."

Barton J. refused the plaintiff's application for summary judgment and adjourned the matter for plenary hearing.

24. The principles relating to applications for liberty to enter final judgment were discussed in the decision of McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R.:-

"Where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure (summary judgment)."

In that case, there were issues relating to appeals against the assessment in question, as to whether or not the letters of appeal were valid.

25. Counsel for the defendant quoted from the decision of Charleton J. in *Menolly Homes Ltd. v the Appeals Commissioner and the Revenue Commissioners* [2010] IEHC 49:-

"I am not satisfied that the Appeal Commissioners had jurisdiction to enter into the validity of this assessment by the tax inspector to VAT liability. Instead the Appeals Commissioner were concerned with entirely abating the liability with reducing the amount of the assessment of tax leaving it stand or increasing it."

26. She also referred to a decision of the Supreme Court in *Vieira Ltd. v. the Revenue Commissioners* [2015] IESC 78. The Revenue Commissioners conducted an audit of the affairs of the appellant, *Vieira Ltd.* In the course of that audit, questions were raised as to whether certain arrangements entered into by *Vieira* relating to property, which had formed the basis of *Vieira's* acknowledged VAT liability, had the VAT consequences for which *Vieira* contended. *Vieira* unsuccessfully challenged the lawfulness of the raising of such an assessment in the High Court. At para. 5.2 Clarke J. stated on behalf of the Supreme Court:-

"These proceedings are not therefore concerned with the question of whether VAT is actually due, but rather with the question of whether there was a valid assessment or assessments in the first place. With particular reference to the question of whether the Revenue had in accordance with s. 53 of the VAT Act "reason to believe" that tax is due is not therefore necessary to reach a conclusion as to whether the Revenue view is correct. Rather it is only necessary to assess whether the Revenue has met this threshold of having as a matter of law reason to believe that tax was due."

At paragraph 9.8, Clarke J. stated:-

"I will return shortly to the question of the notice of assessment served in this case. However, on the facts it seems clear that two separate assessments, or in the precise words of s. 23 two separate exercises in which there was an estimate of the sum said to be due were actually made."

27. The Court accepts and is bound by the principle of the Supreme Court in Michael Deighan v. Hearne & others [1990] 1 I.R. 499 in that the Inspector of Taxes has a power vested in him to make an assessment, and if the Inspector raises an assessment and the applicant does not appeal within time, the only way that the court could intervene to set aside or vary the assessment otherwise than under the procedure provided by the Income Tax Acts would be if it were established that either the procedure carried out was ultra vires to the statutory provisions, or that one or other of those statutory provisions was invalid, having regard to the provisions of the Constitution.

28. It seems clear to the Court that the valid assessment had been made by the plaintiff on the letter dated the 6th of February, 2013 and related to the period of the 1st of July, 2012 to the 31st of December, 2012. This assessment was not appealed by the defendant. In those circumstances it appears that no valid defence can be raised in this Court as to summary judgment, save where there are judicial review proceedings. It is interesting to note that two of the decisions quoted by counsel for the defendant were, in fact, judicial review proceedings.

29. In the circumstances, the Court is of the view that in the circumstances of this case, no valid defence has been raised by the defendant and the plaintiff is entitled to judgment in the sum of €210,845.34 and interest.