Neutral Citation Number: [2008] IEHC 380

THE HIGH COURT

2003 12427 P

BETWEEN

KANWELL DEVELOPMENTS LTD.

PLAINTIFF

AND
THE REVENUE COMMISSIONERS

DEFENDANT

Judgment of Mr. Justice John Hedigan delivered on the 17th day of December, 2008

1. The parties
The plaintiff is a limited liability company having its registered office at 58 Upper Grand Canal Street, Dublin 4, and carries on business as builders and property developers. The defendant is the body charged with responsibility for collecting and administering taxation in the State and has its principal office at Dublin Castle in the City of Dublin.

2. Submissions of the plaintiff
Between 1st September, 1999, and 31st December, 2002 ("the relevant period"), the plaintiff, in the course of its business, collected the sum of €16,930 in Value Added Tax ("VAT") from works carried on and services rendered to customers. During the relevant period, the plaintiff paid the sum of €1,372,366 in VAT in respect of purchases made by it in the course of its business. The sum by which VAT payments made by the plaintiff exceeded the receipt of Value Added Tax, which had been collected by the plaintiff, amounted to a balance of €1,355,436. The plaintiff claims this sum as a balance due to it and claims that the defendant has refused to refund this sum and instead have purported to set off the monies owed to the plaintiff against the tax liabilities of two companies which, together with the plaintiff company, are a part of "the Cunningham Group". The plaintiff alleges that this set off was done without any express authority from the plaintiff and in the absence of any statutory authority to do so. The plaintiff claims that even were this set off done by agreement, the authority to do so ended after 27th September, 2002, when the plaintiff withdrew any authority that might have existed.

3. Submissions of the defendant

(a) It is agreed that the amount due by way of refund in respect of the relevant period, does not need to be determined in these proceedings. The issue for the court is as to whether the defendant was entitled to set off the amounts claimed, whatever they were.

(b) In respect of the period, up to July/August 2002, the plaintiff company requested the set offs and in the absence of any statutory bar, the defendant was entitled to do so.

(c) Subsequent unilateral set offs were authorised by statute and only involved setting off of Kanwell's VAT refund entitlement against its own other tax liabilities.

4. Background
The plaintiff company is engaged in property development and associated activities. It, Moorview Developments Ltd. and Valebrook Developments Ltd., were part of a group of companies known as "The Cunningham Group". Between 1st September, 1999, and 31st December, 2002, the company collected €16,930 in VAT and paid out €1,372,366. In the normal course, this could involve a refund to the plaintiff. There appears to have been ongoing discussions between the financial officers of the plaintiff company and the defendant as to how this refund balance was to be treated. The dispute at the heart of this case is as to whether the plaintiff asked for the balance to be set off against the tax liabilities of Moorview Developments and Valebrook Developments Limited and as to whether even were there agreement on this, the defendant needed statutory authority to do so. The plaintiff argues that there was no ongoing or prospective authority given by them for the set offs and that in the absence of statutory authority the defendant was not entitled to do this.

The defendant argues that the set offs were authorised by the plaintiff prior to 27th September, 2002, and the subsequent set offs, although not agreed, were authorised by statute. No statutory authority was required for the first set offs. Subsequent to 27th September, 2002, there were two set offs made, i.e. for periods September/October 2002, and November/December 2002, against the plaintiff's other tax liabilities and these required no agreement of the plaintiff because they were authorised by s.1006A of the Taxes Consolidation Act 1997, as amended. The defendant argues that the plaintiff was at all times aware of the earlier set offs, was agreeable thereto, and, in fact, requested these.

In the course of the hearing, I heard evidence on behalf of the plaintiff, from Mr. Ronan Quinn, Group Financial Controller, Ms. Eileen O'Riordan, Audit Manager with Cronins, accountants to the plaintiff and auditors thereto, Mr. Kieran O'Brien who was described as Chief Financial Officer for the Cunningham Group, Ms. Ita Hynes who was employed by the Cunningham Group as bookkeeper from 1999 to 2003 and Pat Purcell, Financial Officer for the plaintiff from spring 2001 until February, 2002. On behalf of the defendants, I heard the evidence of John Kelly, Executive Officer, Local Collection Section, whose role was to collect tax from the plaintiff for the benefit of the defendant. I consider the evidence given by Mr. John Kelly to be the most authoritative and convincing of all that which I heard in this case. The witnesses for the plaintiff seemed to me to have little recall of the matters central to this case. It was noteworthy that none of them had examined the records of the company. Ms. Ita Hynes said that she had no complaints in relation to the off sets being made by the defendant. She said that, occasionally, she requested Mr. John Kelly to make off sets against another tax and when asked, he did so. Mr. Quinn said he was aware there was an arrangement in place with the defendant in relation to off setting the VAT refunds due to the plaintiff. There were no complaints made about this. Ms. O'Riordan confirmed that at meetings, it was the plaintiff company that was proposing an arrangement. The common theme at meetings was to make an arrangement. She agreed they were dealing with the companies as a group. She confirmed she was never asked to complain about the offsets and said she was surprised when she heard the plaintiff was challenging these offsets. Ms. Ita Hynes said she was aware of the set offs which were intended to bring the plaintiff company's tax affairs up to date. Mr. Purcell said he never met Mr. Ronan Quinn. He agreed the evidence of a schedule dated 19th September, 2001, showed that the companies of the group were being treated together. He noted the plaintiff was carrying on a previous practice and agreed it was setting off its entitlement to refunds against the liabilities of the other two companies. Thus, it never sought repayment of the VAT due to be refunded. Mr. O'Brien did not inspect any of the company records and noted that he dealt with the plaintiff company's affairs for just two days per week. He agreed there were many

notifications from the defendant of the offsets as they occurred but did not recall ever seeing any. He said he was careful in his dealing with Revenue not to commit the company to any future course of action.

Mr. John Kelly, Executive Officer of Local Collection, was the defendant's collecting officer throughout the period in question. His evidence was to the effect that in early 1996 he "cold called" on the plaintiff and met Ms. Ita Hynes who referred him to Ms. O'Riordan of Cronins, accountants to the plaintiff. It was she, he said, who asked him to deal with all the companies together. He said he was prepared to do so. Mr. Kelly was emphatic and clear that the initiative for treating the companies together i.e. offsetting VAT refunds against tax liabilities, came from the plaintiff. Ms. O' Riordan's evidence seemed to confirm this. None of the plaintiff's witnesses were able to contradict this. Mr. Kelly testified to many meetings with the plaintiff's representatives up to the end of the relevant period. These involved agreeing the discharging of the three companies' accrued tax liabilities. He was requested on these occasions to "net down" the liabilities and this was confirmed by Ms. O'Riordan in her evidence. The arrangements made involved the set offs now being complained of, together with an instalment arrangement whereby payment would be made of €10,000 out of the sale proceeds of each property sold in a particular development.

Mr. Kelly's evidence was that all of the set offs done up to July/August 2002, were at the request of the plaintiff companies' representatives. They were all arranged at the various meetings he had with them. It was agreed at these meetings that the VAT credits that had accrued to Kanwell Developments up to a date about two months prior to the meeting would be used to offset the overall tax liability of the three companies taken together.

Documentary evidence in the form of letters supported this;

(a) Mr. Ronan Quinn to Mr. John Kelly, 29th August, 2000

(b) Mr. Pat Purcell to Mr. John Kelly, 8th August, 2001

(c) Kieran O'Brien to John Kelly, 27th September, 2002

In his evidence, Mr. Ronan Quinn accepted that his letter authorised the inter-company set off of the plaintiff's VAT claim for September/October, 1999 to May/June, 2000 inclusive. Ms. O'Riordan accepted this too.

Mr. Purcell claimed no recollection of his letter. Some confusion attached in his mind to a schedule attached to the letter. It seems clear from the evidence, however, that this schedule was produced at a meeting some six weeks later i.e. 19th September, 2001. In any event, the schedule seems to support the defendant's case that Kanwell's entitlements to VAT refund were to be used as set off against the other companies' tax liabilities. It is noteworthy that a letter from Ernst & Young, accountants to the plaintiff, dated 3rd September, 2003, accepts this letter of 8th August, 2001, as authorisation for the set offs of VAT credits accrued to the date thereof.

Mr. O'Brien's letter seems to further confirm authorisation of the set offs up to the period July/August 2002. Mr. O'Brien's evidence was that his letter did not authorise any further ongoing authority. This seems strongly supportive of the proposition that such authority did exist up to and including that period.

In light of the above, I have concluded that the set offs made during the period, up to July/August 2002 as applied by the defendant, were made at the plaintiff's request and authorised thereby.

5. Is statutory authorisation required for such set off?
There is no statutory authority specifically providing for such an offsetting arrangement as was made herein. There is no statutory prohibition in place either in respect of such an arrangement.

The plaintiff has argued that because there is no statutory provision providing for a right to set off one taxpayer's repayment against another taxpayer's liabilities, the defendant is precluded from doing so. The defendant submits that there is no authority for this proposition. Their case is that no statutory power is or was necessary where the set off is done at the request of the taxpayer to whom the repayment is due. The defendant's argument is that if the defendant owes money to a taxpayer and is requested by that taxpayer to pay the money to a third party, the defendant is (absent some statutory prohibition) entitled to do so. In this regard, the defendant has referred me to an article by Mary Lyons "*Offsetting or Withholding of Repayments of Overpayments*" (2001) 6 Irish Tax Review 605. This states at p. 605:-

> "Despite the recent legislation, offsetting is not a new phenomenon. Revenue has for many years accepted customer requests to use a tax repayment for one period to meet a separate tax liability in another period or taxhead. The latest legal changes are simply intended to build on the existing system by providing a more consolidated offsetting operation in the context of Integrated Taxation Processing, while at the same time ensuring a more effective response to defaulting taxpayers. Despite the legal changes, the basic rule that has always existed continues to apply - if the customer wishes a repayment to be applied in a certain way Revenue is happy to comply with that request."

This article also points out that the Taxes (Offset of Repayments) Regulations 2001, S.I. No. 399 of 2001, set out the order of offset to be applied and states at p. 606 that:

> *"The basic rules are as follows:*
>
> - *Primary rule - offset in accordance with the customer's wishes . . ."*

On this basis, the defendant submits that the regulations themselves make clear that it is the taxpayer's wishes which have precedence in determining the destination of set offs. If a taxpayer requests that a repayment be offset against a particular tax head, that request will take precedence over the statutory priority set forth in the regulations. The defendant further argues that there is nothing contained in the provisions of the Consolidated VAT Acts 1972 to 2002, as amended, the Sixth Council Directive 77/388/EEC of 17th May, 1977 or the Taxes Consolidation Act 1997, as amended, which prohibited or prevented the defendant from carrying out the set offs as requested by the plaintiff. Absent such a statutory prohibition, no explicit statutory power was required to enable the offsets once they were done at the request of or with the agreement of the plaintiff.

The plaintiff has argued that because there is no statutory provision providing for a right to set off one taxpayer's repayment against another taxpayer's liabilities, the defendant is precluded from doing so. In a submission made at the invitation of the Court by the plaintiff subsequent to the hearing, the plaintiff sought to rely upon the decision of the House of Lords in *Revenue & Custom*

Commissioners v. Total Network SL [2008] 2 W.L.R. 711. It submits that this decision supports the proposition that the Revenue Commissioners, being a creature of statute, cannot act save in accordance with, and pursuant to, an Act of the Oireachtas. The plaintiff relies upon the judgment of Lord Hope of Craighead but, as submitted by the defendant in response to this submission, this was not in fact the judgment of the Court but a minority judgment. In fact, the majority of the House of Lords held that the absence of specific authority to do something did not preclude the Revenue Commissioners from acting.

At paragraph 107 of the judgment, Lord Walker pointed out that the Commissioners frequently brought civil actions for which they had no express statutory power, he wrote as follows:-

> "The Commissioners regularly present bankruptcy petitions and winding up petitions against defaulting taxpayers of all sorts. In a winding up they can if necessary proceed against a receiver for misfeasance: *Inland Revenue Commissioners v. Gold Blatt* [1972] Ch 498. They do so in order to recover tax (not to "levy" it). So far as I can see they have no express statutory power to seek these remedies, but it has never been doubted that they are available. Similarly (though your Lordships heard no argument on the point from either side) there does not appear to be any specific statutory power for the Commissioners to obtain a freezing order. But it was only by obtaining a freezing order in private law proceedings that the Commissioners were able to prevent the conspirators from removing their ill gotten gains out of the jurisdiction. But for a freezing order, there would have been a severe loss to the Commissioners and to the general body of taxpayers."

I agree with the submission of the defendant that this case is in fact authority for their argument that the Revenue Commissioners could act herein as they did notwithstanding an absence of specific authority. On the evidence before this Court, such form of offsetting has been used for many years and I see no reason to call it into question here.

The defendant further argues that the plaintiff's case concerning group registration is misconceived, as such a matter never arose in the relationship between the defendant and the plaintiff in respect of these offsets. Such group registration as referred to by the plaintiff pursuant to the Consolidated VAT Acts 1972 to 2002, does not enable the defendant to set off VAT repayment claims against other tax heads as group registration is effective only for VAT purposes and not for other types of tax.

In short, the defendant argues that the offsets were made at the specific request of the plaintiff and that, as a result, the defendant was entitled to make those offsets and no statutory authority or mandate was required in order for the defendant to make these offsets. I agree with this submission.

6. Set offs of the refunds due re: periods September/October and November/December, 2002
These set offs were made only against amounts due by the plaintiff. No set off was made in respect of tax owed by what the plaintiff has referred to as a third party. The plaintiff's claim in this regard is objected to by the defendant as not made in the plaintiff's pleadings. It is common case that these set offs were Kanwell to Kanwell and it does seem that the defendant's objection is well made. The defendant, however, has indicated that it is prepared to meet the claim in respect of these two set offs also.

The defendant submits that upon the evidence of the plaintiff's letter of 29th May, 2003, the Kanwell to Kanwell set offs made up to that date were accepted by the plaintiff and that Mr. O'Brien and Ms. O'Riordan agreed this was a reasonable interpretation of the letter. The relevant part of this letter reads as follows:-

> *"The accounting records of Kanwell show that for the period from September 1999 to February, 2003, the company had a VAT recoverable balance of €1,391,489 due primarily to long term work it was undertaking in Galway. Of this balance an amount of €244,663 was used as an offset against PAYE/PRSI liabilities of the company leaving a net recoverable balance of €1,146,826."*

The defendant submits that this is in fact an inaccurate calculation but as agreed at the outset, that does not need to concern me. The amount described as €244,663 in fact refers to the offsets Kanwell to Kanwell. I accept the submission of the defendants that this letter as was agreed by Mr. O'Brien and Ms. O'Riordan, may be taken as confirmation that they were accepted by the plaintiff and I so find. It is clear that the plaintiff was well aware of those offsets and made no objection thereto.

The defendant submits that the final offsets which were made in July 2003, were not authorised by the plaintiff company but were within their power, pursuant to s. 1006A of the Tax Consolidation Act 1997, as inserted by s. 164 of the Finance Act 2000 and amended by s. 239 of the Finance Act 2001, which provided as at the date of the set offs as follows:

> *"(2) Notwithstanding any other provision of the Acts, where the Revenue Commissioners are satisfied that a person has not complied with the obligations imposed on the person by the Acts, in relation to either or both -*
>
> *(a) payment of a liability required to be paid, and*
>
> *(b) the delivery of returns required to be made,*
>
> *they may, in a case where a repayment is due to the person in respect of a claim or overpayment -*
>
> *(i) where paragraph (a) applies, or where paragraphs (a) and (b) apply, instead of making the repayment, set the amount of the claim or overpayment against any liability due under the Acts,and*
>
> *(ii) where paragraph (b) only applies, withhold making the repayment until such time as the returns required to be delivered have been delivered.*
>
> *(2A) Where the Revenue Commissioners have set or withheld a repayment by virtue of subsection (2), they shall give notice in writing to that effect to the person concerned and, where subsection 2i) applies, interest shall not be payable under any provision of the Acts from the date of such notice in respect of any repayment so withheld."*

It is clear the defendant did have the power to make such set offs even without any agreement. The plaintiff has further argued that the defendant failed to furnish notification of the offsets as required by s. 1006A (2A) thereby invalidating the offsets. This aspect of the plaintiff's case was not borne out by the evidence. The strongest evidence the plaintiff could produce was that there was no recollection of receiving those notices. Mr. Kelly's evidence was that such notices are automatically generated. On the balance of probabilities it seems to me that they were served. In any event, had there been a failure by the defendant in this regard, I cannot see how the plaintiff was prejudiced since, as found, all the relevant officers of the company were fully aware of the offsets. In my

view, the final offset made in July 2003 was made pursuant to statutory authority and in accordance therewith.

7. Plaintiff's knowledge and authority
Although it was suggested in correspondence between the parties, it was not specifically pleaded nor strongly argued that Mr. Purcell, in his dealings with the defendant on the issue of the plaintiff's VAT repayments, acted without the knowledge or approval of the plaintiff's Board of Directors. Such a proposition seems manifestly ill-founded on the evidence which clearly showed that in respect of the relevant period, everyone involved in the running of the plaintiff company was aware of and authorised the set offs made.

8. In summary
I find:-

(a) That the plaintiff company was the moving party in requesting the set offs the subject matter of these proceedings. In making them the defendant did no more than comply with the request of the plaintiff.

(b) No specific statutory authority was required to make these offsets.

(c) The plaintiff was at all material times aware these offsets were being made and agreed therewith.

(d) In relation to the offsets made after the relevant period, these were lawfully made in accordance with s. 1006A of the Taxes Consolidation Act 1997, as amended.

In the result I find for the defendant herein and will make an order dismissing the plaintiff's claim.