THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 251

[2016 No. 277]

Birmingham P.
Peart J.
Whelan J.

BETWEEN

JAMES DOYLE

APPELLANT

AND

JUDGE HICKSON AND THE REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Birmingham P. delivered on the 25th day of July 2018

1. This is an appeal from a decision of the High Court (Barr J.) of 6th May 2016 refusing an order of certiorari in respect of a decision of Judge Barry Hickson sitting in the Circuit Court in Wexford of 9th April 2014. The underlying proceedings concerned an appeal to the Circuit Court against the decision of the Revenue Appeals Commissioners. Immediately before the opening of the substantive appeal, counsel on behalf of the appellant made a preliminary application to the judge, seeking the dismissal of the amended assessments that were in issue, they being those in respect of Income Tax for the tax years ending 5th April 1992 and 5th April 1994. The appellant has sought to challenge the refusal to accede to the preliminary application by way of judicial review.

2. By way of background, on 18th May 2005, the appellant submitted a Notice of Intention to Make a Qualifying Disclosure in relation to tax defaults to the Revenue Commissioners Underlying Tax (Insurance Products) Project. The disclosure was made in circumstances where Mr. Doyle had invested IR£57,000 on 1st July 1991 and a further IR£42,775 on 28th February 1994. The defaults were indicated to be in respect of earnings between 1954 and 1980. For completeness, it should be noted that Mr. Doyle's accountants subsequently informed the Revenue Commissioners that the funds invested had been earned from farming activity prior to 1980, at a time when the appellant was not liable to pay Income Tax in respect of farming income. Mr. Doyle had been a farmer all his life, he is now aged 77 years and currently farms 164 acres in County Waterford.

3. By letter dated 18th October 2006, the appellant was informed that his case had been selected for examination in accordance with the provisions of the Code of Practice for Revenue Auditors. Revenue was not satisfied with Mr. Doyle's explanations and amended Notices of Assessment were raised on 22nd October 2010 in respect of undeclared income in respect of the tax years ended 5th April 1992 and 5th April 1994. The appellant appealed the amended assessments and a hearing took place before the Appeal Commissioners who dismissed the appeal and confirmed the assessments. The appellant remained dissatisfied and determined to appeal to the Circuit Court pursuant to the provisions of s. 942 of the Taxes Consolidation Act 1997. The matter was listed in June 2013, but not reached in the Court list, and ultimately it came on for hearing on 9th April 2014. At that stage, counsel on behalf of the appellant indicated that there was a preliminary issue that he wished to raise. The point he wished to canvass arose from the fact that Mr. Doyle had availed of the so-called tax Amnesty or the provisions of the Waiver of Certain Tax, Interest and Penalties Act 1993, to give it its full name. Counsel said that a Waiver Certificate had issued to his clients in accordance with the statutory provisions and that his client had produced the Certificate to the Revenue Commissioners in May/June 2001. Moreover, having done so, by virtue of that fact, the Revenue was precluded by statute from carrying on any further enquiries.

4. In response to the application, counsel on behalf of the Revenue Commissioners, placed reliance on s. 955 of the Taxes Consolidation Act 1997. Section 955(2) provides as follows:

> "(2)(a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period to which the return is delivered and
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> (i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years and
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> (ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered by reason of any matter contained in the return.
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> (b) Nothing in this subsection shall prevent the amendment of an assessment—

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),

(ii) to give effect to a determination on any appeal against an assessment,

(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(iv) to correct an error in calculation, or

(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid (notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made) where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3)."

He submitted that the Revenue's position was that Mr. Doyle had not made a full and true disclosure in respect of the IR£100,000 invested and that the position of the Revenue was, and had been from the outset, that this represented suppressed or undeclared income. He pointed out that the onus was on the taxpayer, in this case Mr. Doyle, to show how the income arose. Counsel on behalf of the appellant continued to assert that the effect of the Amnesty provisions was to preclude or cut off any enquiries by Revenue. In response, counsel for the Revenue said that there were statutory provisions in the Amnesty legislation in s. 4(1)(b) which mirrored in some way the wording of section 955. He said that the Amnesty provisions and s. 955 were mutually independent. Judge Hickson then ruled as follows, and it is this ruling which the appellant has sought to challenge by way of judicial review:

"[w]ell, I do not need to consider the Amnesty. The correct and true construction of the section has to be read in conjunction with whatever is set out in 955.2(a) but also in 2(b):

'Nothing in the subsection shall prevent the amendment of an assessment where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a) and to give effect to the determination in any appeal against an assessment or to take account of any fact or matter arising by raising an event after the return is delivered'.

If a full and true disclosure of the facts has not been made, then I am I satisfied section 955.2(b) is relevant to this case and I am not holding with your application."

Then, in response to a query from counsel for the appellant, the judge confirmed that his ruling applied in relation to s. 955 and also in relation to the Amnesty point.

5. In the judicial review proceedings, the applicant sought the following reliefs:

"(i) An order of certiorari by way of judicial review quashing the decision/order of the Circuit Court dated 9th April 2014 determining that the applicant was indebted to the Revenue Commissioners in the sum of €30,991 plus interest and penalties thereon.

(ii) A declaration that there is no jurisdiction for either the respondent or any other party in any form to hear and determine, or carry out any enquiry, or make any order relating to the payment or non-payment of taxes for a relevant period where there is in place an authorised and valid Certificate for the relevant period, pursuant to s. 2(4) or s. 3(6)(c) of the Waiver of Certain Tax, Interest and Penalties Act 1993.

(iii) A declaration that there is no jurisdiction for either respondent in any form to hear and determine, or carry out any enquiry, or make any order relating to the payment or non-payment of taxes for the relevant period where there is in place for the relevant period, an authorised and valid Certificate pursuant to s. 2(4) or s. 3(6)(c) of the Waiver of Certain Tax, Interest and Penalties Act 1993, in circumstances where the Revenue Commissioners had not first applied to the Appeal Commissioners as required and where the said Commissioners have not satisfied themselves that there are reasonable grounds to indicate that the declarations made on which the aforesaid Certificate was authorised did not contain a full and true statement of the declared amounts contained therein;

(iv) A declaration that the second named respondent is precluded from continuing with or commencing any enquiries relating to the payment or non-payment of taxes or arrears of taxes for the relevant period for which an authorised and valid Certificate applies pursuant to s. 2(4) or s. 3(6)(c) of the 1993 Act, unless and until the Chief Special Collector of the Revenue Commissioners first applies to the Appeal Commissioners, showing to the satisfaction of those Commissioners that there are reasonable grounds which indicate that the relevant declarations made by the applicant did not contain a full and true statement of the declared amounts upon which the Certificate was authorised.

(v) An Order of Prohibition by way of judicial review, prohibiting the second named respondent from continuing with or commencing any proceedings relating to or connected with the recovery of monies or taxes for the period covered by the Certificate furnished to the applicant by the respondent on 1st July 1994, unless and until the Chief Special Collector of the second named respondent first applies to the Appeal Commissioners showing to the satisfaction of those Commissioners that there are reasonable grounds which indicate that the relevant declarations made by the applicant did not contain a full and true statement of the declared amounts upon which the Certificate was authorised."

6. In the opening paragraph of his judgment, Barr J. commented that the case concerned the operation of the Waiver of Certain Tax, Interest and Penalties Act 1993, and that the central issue arising for the Court's determination was whether, pursuant to s. 5 of the 1993 Act, the production of a Certificate issued by the Chief Special Collector under s. 2(4)(a) of the 1993 Act in response to a particular enquiry by the Revenue Commissioners, within thirty days of the commencement of such enquiry, precludes all further enquiries in respect of the period covered by the Certificate, or whether further enquiries might be commenced by the Revenue Commissioners, thereby necessitating the holder of the Certificate to produce the Certificate in response to each subsequent enquiry. He commented, "as such, this case comes down to a net point of statutory interpretation".

7. The appellant says that the High Court judge was wrong to see this as a net point of statutory interpretation and says that the actual issue in the case was the failure of the Circuit Court judge to consider and rule on the submissions made to him.

8. The High Court judge summarised the arguments that were made in that Court as follows:

> "22. The applicant's case is that, having produced the amnesty certificate in 2001, the Revenue Commissioners are precluded from enquiring or investigating into the tax affairs of the applicant covered by the amnesty, without invoking the procedure of applying to the Appeal Commissioners; in other words, once the amnesty Certificate was produced, the Revenue Commissioners were obliged to respect its validity unless there was reason to doubt that the declaration made was true. The applicant contends that an application must be made to the Appeal Commissioners that there are reasonable grounds to indicate that the declaration made to the Chief Special Collector in relation to the tax amnesty is not true.
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> 23. It is the Revenue Commissioners' case that the 2001 investigation was different to that commenced in 2006. The Revenue Commissioners contend that there is an obligation to produce the Certificate within 30 days of the commencement of an enquiry by the Revenue Commissioners, on each occasion on which the Revenue Commissioners seek to make an enquiry.
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> 24. The applicant contends that no such obligation exists and that, while there is a distinction between the office of the Special Collector and the Revenue Commissioners, once the amnesty Certificate has been produced, the Revenue Commissioners are on notice of it and are bound by the provisions of s. 5 of the 1993 Act."

9. The relevant provisions of the Waiver of Certain Tax, Interest and Penalties Act 1993 are as follows. Section 2(2) provides:

> "This section applies to an individual who, for the relevant period, was in receipt of income or had chargeable gains in respect of which any tax (referred to in this Act as 'relevant tax') due and payable by him in accordance with any provision of the Acts has not been paid . . . "

Section 1 provides that the "relevant period" "means any period ending on or before the 5th day of April, 1991".

Section 2(3) provides:

> "An individual to whom this section applies shall—
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> (a) within the specified period give a declaration in writing to the Chief Special Collector which—
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> (i) is made and signed by the individual,
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> (ii) is in a form prescribed by the Revenue Commissioners and approved of by the Minister,
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> (iii) contains, in relation to the individual, a full and true statement of the respective amounts (referred to in this Act as "'the declared amounts') of—
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> (I) the income, and
>
> (II) the chargeable gains."

Section 2(4) provides:

> "On receipt by him of the declaration referred to in subsection (3) and the settlement amount, the Chief Special Collector shall give to the individual concerned—
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> (a) a certificate, in a form prescribed by the Revenue Commissioners and approved of by the Minister, stating, in relation to that individual—
>
> (i) his name and address,
>
> (ii) the settlement amount paid by him, and
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> (iii) the respective amounts of the declared amounts."

Section 2(5) provides:

> "Notwithstanding any other provision of the Acts but subject to section 4 , where an individual to whom this section applies complies with the provisions of subsection (3)—
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> (a) his liability to relevant tax in respect of the declared amounts—
>
> (i) shall be deemed to be satisfied by the settlement amount, and
>
> (ii) shall not be arrears of tax . . ."

Section 4 is as follows:

> "(1) The provisions of sections 2(5) and 3(4) shall not apply, and those provisions shall be deemed never to have applied, to a person where—
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> (a) such person fails
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> (i) if he is an individual, for the year of assessment 1992-93, or
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> (ii) in any other case, for any accounting period ending in the year beginning on the 1st day of January, 1993, and ending on the 31st day of December, 1993,

to duly deliver a return of income on or before the specified date in relation to that return, or

(b)(i) a declaration given by such person to the Chief Special Collector under subsection (3)(a) of section 2 —

(I) did not contain a full and true statement of the kind referred to in subparagraph (iii) of the said subsection, or

(II) is proven to be false in so far as the requirements of subparagraph (iv) of the said subsection are concerned,

or

(ii) a declaration given by him to the Chief Special Collector under subsection (6) (b) of section 3 did not contain a full and true statement of the kind referred to in subparagraph (III) of the said subsection, or

(c) the amount paid or remitted by him in respect of arrears of tax was less than the arrears of tax due and payable by him and any certificate issued to that person pursuant to section 2(4) or section 3(6)(c) shall be null and void."

Section 5 provides:

"(1) Where, in relation to any liability to tax (within the meaning of section 2 or 3, as the case may be) of an individual for the relevant period, being tax which has been remitted to the Chief Special Collector, an inspector or other officer of the Revenue Commissioners commences to make such enquiries, or take such action, as are within his powers, or gives a notice in writing to an individual of his intention to make such enquiries or take such action in relation to such liability to tax and the individual produces to the inspector or other officer, not later than 30 days from the commencement of the said enquiries or the taking of the said action, or the giving of the notice as aforesaid, a certificate referred to in section 2(4) or 3 (6)(c), as the case may be, in respect of such liability to tax given to him by the Chief Special Collector, the inspector or other officer shall, on production to him of the said certificate and on validation of that certificate in accordance with the provisions of paragraph (a) of the proviso to section 7(4), be precluded from continuing with or commencing the said enquiries or continuing with or commencing the said action unless, on application by him to the Appeal Commissioners, he shows to the satisfaction of those Commissioners that—

(a) enquiries made or action taken in relation to the liability to tax (within the aforesaid meaning) of the individual for any period commencing on or after the 6th day of April, 1991, indicate, or

(b) there are other reasonable grounds which indicate,

that a declaration made by the individual to the Chief Special Collector under section 2(3)(a) or 3(6)(b) did not contain a full and true statement of the declared amounts or the amount of Value Added Tax comprised in the arrears of tax, as the case may be."

Subsection 2:

"(a) An application by the inspector or other officer under subsection (1) shall be made by him by notice in writing to the Appeal Commissioners within 30 days of the receipt by him from the individual concerned of the certificate referred to in section 2(4) or 3(6)(c), as the case may be, given to that individual by the Chief Special Collector, and a copy of the application shall be furnished as soon as practicable by the inspector or other officer to the individual concerned.

(b) An application under subsection (1) shall, with any necessary modifications, be heard by the Appeal Commissioners as if it were an appeal against an assessment to income tax.

(c) Any action required to be taken by the individual and any further action proposed to be taken by the inspector or other officer pursuant to the inspector's or other officer's enquiry or action shall be suspended pending decision by the Appeal Commissioners on the application.

(d) Where, on the hearing of the application by an inspector or other officer under subsection (1), the Appeal Commissioners—

(i) decide that there are no reasonable grounds to suggest that the declaration made by the individual to the Chief Special Collector under section 2(3)(a) or 3 (6)(b) did not contain a full and true statement of the declared amounts or the amount of value-added tax comprised in the arrears of tax, as the case may be, then the individual shall not be required to take any action pursuant to the inspector's or other officer's enquiry or action and the inspector or other officer shall be prohibited from pursuing his enquiry or action, or

(ii) decide that there are such reasonable grounds, then the inspector or other officer may continue with his enquiry or action."

10. Barr J. concluded that a careful reading of the statutory provisions leads to the conclusion that the terms of s. 5 are confined to the singular enquiry or action commenced by the inspector at the particular time. He pointed out the reference in s. 5(2)(d) to "his enquiry or action" (emphasis of Barr J.). Accordingly, it seemed to him that even where an inspector had commenced enquiries; had been met with the production of an Amnesty Certificate; had applied unsuccessfully to the Revenue Commissioners with the result that "his enquiry or action is prohibited with s. 5(2)(d)(ii), that does not preclude other separate enquiries being commenced in the future". He pointed out that the wording of s. 5(2)(d)(i) was quite clear in that regard, the particular inspector "shall be prohibited from pursuing his enquiry". He said there was nothing to suggest that the Revenue Commissioners were thus precluded from commencing enquiries in perpetuity as had been contended by the applicant. He saw the wording of s. 5(1) as being:

"61. . . similarly clear: it provides that where, in relation to any liability to tax, an inspector or other officer of the Revenue Commissioners commences to make enquiries in relation to the tax liabilities of an individual for the period before 5th April 1991, and the individual produces an amnesty certificate, the inspector shall be precluded from continuing with or commencing the said enquiries unless he satisfies the Appeal Commissioners that there are reasonable grounds to suspect that the declaration on foot of which the certificate was obtained was not full and true; in other words, the inspector who commenced the enquiries shall be precluded from proceeding with them. There seems to me to be nothing in the wording of s. 5(1) that suggests that the Revenue Commissioners would be forever precluded from commencing enquiries in respect of the individual; the wording seems to be limited to the preclusion of the particular enquiries

commenced by the particular inspector at the relevant time.

62. Accordingly, I am of opinion that the true construction of s. 5 is that the taxpayer is obliged to produce the amnesty certificate in response to each enquiry that may be initiated by the Revenue Commissioners. This enables the inspector or other officer of the Revenue Commissioners, in circumstances where they may have received new information, to commence enquiries, and if an amnesty certificate is produced, to apply to the Appeal Commissioners for authorisation to continue. If the individual has made full and true declarations in order to obtain a certificate, then he has nothing to fear. If, however, the individual has made false declarations and has obtained a certificate on foot thereof, that certificate shall be deemed to be void in accordance with s. 4(1) of the 1993 Act."

Barr J. concluded his judgment by saying:

"63. In this case, even if I were to accept that the applicant produced his amnesty certificate in respect of the 2001 enquiry, that would not assist him: on the true construction of s. 5, the applicant was in fact required to produce the certificate in response to the 2006 enquiry if he wished to avail of the protection which it affords. He did not do so; indeed he delayed doing so until 2013, when the present proceedings were listed before the Circuit Court. This clearly was outside of the 30 day time limit laid down by s. 5. Accordingly, I am satisfied that the learned trial judge was correct in determining that he did not need to consider the amnesty certificate as the applicant had not produced the certificate in respect of the enquiry which was under consideration, and which forms the subject matter of the present proceedings."

11. In my view, the Circuit Court judge was not helped by the response of the Revenue to the preliminary application. This response being to place reliance on s. 955 of the Taxes Consolidation Act. It would clearly have been better had the judge been addressed on the interpretation of s. 5 of the 1993 Act that was being contended for by the appellant.

12. The Circuit Court judge's decision was to not accede to the preliminary application, but rather to embark on the substantive appeal. Was he correct not to accede to the preliminary application? Answering that question, as distinct from the question as to whether he did so for the correct reasons, does involve a point of statutory interpretation. I am entirely satisfied that the interpretation placed on s. 5 by Barr J. in the High Court was entirely correct. I would draw attention to the fact that what is precluded from continuing or commencing are the said enquiries, the said enquiries being those that have been notified and the notification of which precipitated the production of the Amnesty Certificate. I am quite satisfied that the production of the Certificate does not have a wider impact, and in particular does not have any implication for enquiries that might be commenced by a different inspector, perhaps at a completely different time and perhaps based on completely different information. If the applicant/appellant was to obtain the relief that he now seeks, then the result would be that the issue would have to be sent back to the Circuit Court for further consideration. The only possible outcome of that exercise would be that the preliminary issue would be rejected.

13. Sending the case back in such circumstances would be an exercise in futility. While the Circuit Court judge's reasoning may have been flawed, he was entirely correct when he decided to reject the preliminary application which was an application based on a clear misinterpretation of s. 5 of the 1993 Act. In my view, there could be no possible justification for quashing the decision of the Circuit Court judge by way of judicial review.

14. Accordingly, I would dismiss the appeal.