THE HIGH COURT
REVENUE

[2017 No. 84 R]

BETWEEN

JOHN TOBIN

APPELLANT

AND
CRIMINAL ASSETS BUREAU

RESPONDENT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 19th day of December, 2017

Introduction

1. In this case stated by Judge O'Donoghue of the Circuit Court, this Court is asked whether he was correct to uphold the refusal of the respondent (**"CAB"**) to admit the appellant's late appeal pursuant to s. 933(7)(a) of the Taxes Consolidation Act 1997 (**"TCA"**). This section allows for an appeal against an income tax assessment for a particular income tax year, not filed within the prescribed 30-day time period after the date of issue of the income tax assessment, to be admitted once certain conditions are met.

2. Judge O'Donoghue held that he *"was bound by the judgment in CAB v. K.D."* (unreported judgment of Finnegan P. delivered on 19th March, 2002) (**"*K.D.*"**) whereby it was held that the term *"other reasonable cause in s. 933(7)(a) of TCA had the same meaning as sickness and absence"*. Judge O'Donoghue found that *"the appellant failed to adduce any evidence which would have enabled him to come within the term 'other reasonable cause' in s. 933(7)(a) and accordingly, the respondent was entitled to refuse the admission of the appellant's late appeal"*.

Role of this Court

3. S. 941(6) TCA provides:-

> *"The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Appeal Commissioners with the opinion of the Court on the matter, or may make such other order in relation to the matter, and may make such order as to costs as to the Court may seem fit."*

Appellant's Contention

4. The appellant contended at the hearing before this Court that a more expansive interpretation of the relevant section should have been adopted and relied on the earlier judgment of Kearns J. (as he then was) in *CAB v. P. McS.* (unreported judgment delivered on 19th March, 2002) (**"*P. McS.*"**) which took into account *"the inevitable delays associated with Christmas holidays and the notorious vagaries of the postal system at that time"*. It seemed to Kearns J. in the circumstances of that case that *"an inspector must consider whether reasonable cause exists to satisfy him that the notice actually given should be regarded as having been appropriately given"*.

Chronology

5. At this juncture, a chronological summary of the relevant facts may assist in understanding the context for this appeal:-

> 12.12.2012 The respondent raised income tax assessments on the appellant for the income tax years 2004 to 2010 (emphasis added by this Court) in the sum of €129,943.00. The notice included a legend that in order to appeal, the taxpayer must enter a valid notice of appeal, file an income tax return and pay the appropriate tax and interest due in respect of that tax, all within 30 days of the date of the notice, as per ss. 933(1)(a) and 957(2) TCA.
> 07-09.01.2013 Returns were filed via the Revenue Online Service (**"ROS"**) for the appellant by an accountant declaring a total liability of €1,731.51.
> 09.01.2013 Payment of this sum of €1,731.51 without any interest was effected by electronic transfer to the relevant account of CAB and the appellant notified his appeal of the assessments.
> 16.01.2013 CAB wrote to the appellant's accountant emphasising that no appeal lies against an assessment until such a time that the chargeable person delivers the return and has paid the tax and interest (emphasis added by this Court) due and payable under s. 1080 TCA. The letter further explained that the application for an appeal

was therefore refused and CAB drew attention to the late appeal provisions of s. 933(7) TCA. The assessments which where the subject of the appeal were identified as those issued on 12th December, 2012. It was clarified that assessments which were generated following the ROS filings between 7th – 9th January, 2013 had been issued in error and were vacated.
24.01.2013 Payment of €854 for statutory interest was effected on behalf of the appellant which ought to have been paid according to the appellant's submissions to Judge O'Donoghue on or before 11th January, 2013 and was, therefore, *"just 13 days later"*.
28.01.2013 The accountant for the appellant wrote a four-page letter to the Income Tax Appeal Commissioner appealing the refusal to allow notices of appeal in respect of the assessments raised on 12th December and taking issue with the vacating of the assessments on 7th, 8th and 9th January, followed by an expression of an understanding of *"the complexity of the position the Appeal Commissioner may be left with…"*.
28.06.2013 The Appeal Commissioners upheld the inspector's decision to refuse the appeal.
02.07.2013 The appellant applied under s. 933(7)(a) TCA for an admission of a late appeal against the assessments. This occurred *"within 12 months after the date of the notice of assessment"*.
26.05.2015 The Appeal Commissioners refused to admit the late appeal.
18.02.2016 The matter came before Judge O'Donoghue by way of an appeal under s. 942 TCA.

6. Judge O'Donoghue identified the question for his determination as being:-

> *"Whether [CAB's] refusal to accept an application made under s. 933(7)(a) TCA for the admission of a late appeal against income tax assessments should be upheld."*

Statutory Provision for the Appeal

7. S. 933(7)(a) TCA provides:-

> *"A notice of appeal not given within the time limited by subsection (1) shall be regarded as having been so given where, on an application in writing having been made to the inspector or other officer in that behalf within 12 months after the date of the notice of assessment, the inspector or other officer, being satisfied that owing to absence, sickness or other reasonable cause the applicant was prevented from giving notice of appeal within the time limited and that the application was made thereafter without unreasonable delay, notifies the applicant in writing that the application under this paragraph has been allowed."* (Emphasis added by this Court)

K.D.

8. In *K.D.*, the inspector refused an appeal where the alleged *"reasonable cause"* for failing to comply related to his incarceration. There, the chronology which I have extrapolated from the judgment was as follows:-

> 21.11.2000 Assessments were raised for 1997, 1998 and 1999.
> 19.12.2000 CAB replied to the defendant's solicitor who had indicated an appeal would be pursued even though K.D. was in custody. CAB drew the attention of the solicitors to s. 933 TCA and refused the appeal due to the fact that the defendant had not complied with the requirements in s. 957(2) TCA.
> 22.02.2001 CAB replied to the two earlier letters from the defendant's solicitors noting that the appeal had been refused and drew attention to the failure to exercise the right to appeal from that refusal pursuant to s. 933(1)(a) TCA which thus rendered the tax charged *"free for collection"*.
> 07.03.2001 The defendant's solicitors delivered tax returns which disclosed a tax liability for two of the three years but no remittance for the tax or interest was effected. The reason for non-payment was that the defendant had no money, had no capacity to earn due to his incarceration and that there were *"confiscation proceedings"* pending. An undertaking to pay €13,934 due in respect of tax and interest for the period up to 1st March, 2001 by realising the defendant's interest in a mortgaged house, was offered.
> 23.03.2001 CAB replied to the letter of the 7th March restating that no application for an appeal was received and that the assessments were final and conclusive.
> 22.06.2001 The summary summons was issued to recover €334,706.31 for income tax and interest on foot of a certificate pursuant to TCA.
> 19.03.2002 Finnegan P. determined that the only appeal available to the defendant was an appeal pursuant to s. 933(7) TCA. The defendant relied on a solicitor's letter in January and March 2001 as *"an invocation"* of s. 933(7) TCA. Finnegan P. found that no such appeal had been taken by the defendant. CAB was not aware of any intention to appeal according to Finnegan P.'s judgment. Moreover, the reference to confiscation proceedings did not avail the defendant when seeking to rely belatedly on s. 933(7) TCA.

P. McS.

9. In *P.McS.*, the following summary may assist an understanding of the background to the reasoning of Kearns J. (as he then was):-

> 25.11.1997 Assessments were raised for the years 1992, 1993, 1994 and 1996 after the defendant had made returns and payments for those years, except for 1996.
> 22.12.1997 The defendant's solicitor sent a letter by registered post to the plaintiff which was not received until 30th December, 1997, noting that the defendant had already filed tax returns, objecting to the *"completely and unjustly excessive"* assessments and seeking the return of papers seized from his former accountant by CAB.
> 07.01.1998 CAB replied to that letter and a more recent telefax to the effect that no valid appeal had been received (as it had not been received within the prescribed time limits) while noting that an application to admit a late appeal could be made.
> 22.01.1998 A summary summons seeking £2,570,186.93 for tax and interest was issued by CAB on foot of appropriate certificates.

10. One of the alternative contentions on behalf of the defendants in *P. McS.* was that it must surely constitute *"reasonable cause"* for allowing a late appeal to demonstrate that the letter constituting the appeal had been posted on 22nd December, at a time when *"delays might reasonably be expected in the postal system due to the pressures of Christmas and Christmas holidays on the postal system"*.

11. After summarising all of the submissions and determining other matters in favour of CAB's position, Kearns J. found that:-

> *"...an inspector must consider whether reasonable cause exists to satisfy him that the notice actually given should be regarded as having been appropriately given. On the facts of this case it seems to me that, had he given the matter due consideration, he could only have concluded that reasonable cause did exist, taking into account the date of posting and the inevitable delays associated with the Christmas holidays and the notorious vagaries of the postal system at the time."*

12. In short, Kearns J. found that reasonable cause could be related to the vagaries of the postal system at the relevant time of the year.

Reconciliation of *K.D.* with *P. McS.*

13. As with many cases involving interpretation of statutes, the courts have regard to the specific facts which call for interpretation of the relevant statutory provision and employ principles or canons of construction.

14. The striking features of the facts in *K.D.* for this Court when grappling with the apparent precedent set by Finnegan P. relied upon by Judge O'Donoghue are:-

> (i) Finnegan P. was concerned with an application for summary judgment unlike the case stated before this Court now.
> (ii) K.D. only invoked an appeal (albeit K.D. may have had an intention to appeal) during the course of the summary recovery proceedings.
> (iii) Finnegan P. did not consider that the confiscation of K.D.'s assets could be "*other reasonable cause*" and confiscation of assets does not arise for consideration in this case stated.
> (iv) The undertaking with a future effect which was dependent on events occurring in favour of K.D., went without any particular comment from Finnegan P.

15. *P. McS.* also concerned summary recovery proceedings but there the learned judge found a certain hiatus during the Christmas period which could give rise to *"other reasonable cause"* within the meaning of s. 933(1)(7)(a) TCA.

Ejusdem Generis

16. In *K.D.*, Finnegan P. was *"satisfied that other reasonable cause"* must be read *ejusdem generis* (of the same kind) with the words *"absence"* and *"sickness"*. Therefore, the confiscation of assets as opposed to the detention of the defendant did not fall within the term *"other reasonable cause"*.

17. Finnegan P., in my view, employed the *ejusdem generis* principle in the limited alleged reasonable excuse of asset confiscation. He did so in a manner which did not dictate that *ejusdem generis* must be applied always to the interpretation of *"other reasonable cause"* in s. 933(1)(7)(a) TCA. If he did intend to do so, which is debatable at the very least, it was unfortunate that the circumstances arising in the earlier judgment of *P. McS.* had not been brought to his attention so that he could have applied his mind to the effect of the dogma like application of *ejusdem generis* which was only canvassed before Judge O'Donoghue.

18. This Court, by way of comment, views the *ejusdem generis* principle as an aid as opposed to a rule for interpretation. If the legislature wanted to ensure that *"absence or sickness"* was the genus for *"other reasonable cause"* in all circumstances to be applied, it could have inserted a word or words to that effect.

19. Having made that comment I now address the submission which relied on Cross's statement (Cross, *Statutory*

Interpretation, OUP, 1995) as cited in *Irish Fertiliser Industries Limited v. Commissioner of Valuation* (unreported judgment of O'Caoimh J. delivered on 31st July, 2002) that:-

> *"Where words are found following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category but not exhaustive thereof their construction should be restricted to things of that class or category, unless it is reasonably clear from the context or the general scope and purview of the Act that parliament intended that they should be given a broader signification."*

20. As persuasive as that passage may appear, it begs the question as to whether *"absence"* and *"sickness"* fall within one single genus or category. Murray J. (as he then was) in *CAB v. McDonagh* (unreported judgment of the Supreme Court delivered on 20th December, 2000) (***"McDonagh"***), as cited by Kearns J. in *P. McS.*, mentioned in respect of paras. (a) – (c) of s. 933(1) TCA:-

> *"...a lack of cohesion concerning the terminology used which seems to confuse the notion of an application for leave to appeal with that of an appeal simpliciter."*

21. There, Murray J. said that *"the Court must interpret the section in a schematic and contextual manner..."*. Although no issue arose in *McDonagh* about the meaning of *"other reasonable cause"*, Kearns J did preface his mention of *McDonagh* by stating that "*[t]he interpretation of section 933 of the Taxes Consolidation Act 1997 is fraught with difficulty"*.

Conclusion

22. Taking account of the general views expressed by Murray J. and those by Kearns J. about s. 933(7) TCA, it is my view that it is not correct to relate *"other reasonable cause"* to either *"absence"* or *"sickness"* as was submitted to Judge O'Donoghue and thereafter relied upon in his decision.

23. Therefore, it is open to the appellant to establish facts which may not relate to absence or sickness before a final determination about whether to admit the appellant's late appeal can be made.