THE HIGH COURT

[2012 No. 336 COS]

IN THE MATTER OF U.S. LTD AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

JUDGMENT of Mr. Justice Roderick Murphy delivered the 29th day of November 2012

1. The petition of Gerard Harrahil, Collector General, (the petitioner) as a creditor within the meaning of Article 2 of the Council Regulations (EC) No. 1346/2000 was heard on the 26th October and resumed on the 7th November, 2012.

The petition and verifying affidavit sworn on the 26th June, 2012, referred to the indebtedness to the petitioner on behalf of the Minister for Finance for the benefit of the Central Fund in the sum of €319,840.71 being the balance due by the company as unpaid corporation tax, PAYE/PRSI and interest, details which had already been furnished to the company by virtue of a s. 214 letter, dated the 9th March, 2012. There was a further sum due as continuing interest which was summarised as follows:-

	Tax	**Interest**	**Total**
Corporation Tax	€121,600.77	€31,534.82	€153,135.59
PAYE/PRSI	€117,063.78	€50,980.99	€168,044.77
Total	€238,664.55	€82,515.81	€321,180.36

Since the issue of s. 214 letter dated the 2nd March, 2012 and delivered on the 9th March, 2012, payment of €1,339.65 had been received from the company.

Notwithstanding the fact that 21 days had expired since the service of the demand, the company had not paid the amount of€319,840.71, being the balance, nor had it compounded with the petitioner for payment of the said sum. In the circumstances the company was unable to pay its debts and it was accordingly just and equitable that the company be wound up in accordance with Article 3(1) of Council Regulations (EC) No. 1346/2000. The petitioner sought such order together with an order for the costs of the petition.

The petition was served on the 26th June, 2012, as is evidenced by the affidavit of service of Anne Cassidy.

2. Grounding Affidavit
The affidavit of Joe Hughes sworn the 7th July, 2012, averred to the advertising by the Office of the Revenue Solicitor in the Irish Times, and the Irish Independent on the 2ih June, 2012, and in Iris Oifigúil on the 29th June, in which advertisements were exhibited.

The letter of consent of Jonathan Byrne to act as liquidator if appointed by the court and an affidavit of suitability of Owen F. O'Sullivan of PJ Walsh and Company Solicitors were filed on the 3rd July, 2012.

The directors of the company are S.G. director and secretary and V.H. director.

3. Replying Affidavit of S.G.
The director S.G. denied that the company was indebted to the petitioner in the manner alleged in the petition or at all. Since 2006 the company had paid to the petitioner a sum in excess of €2 million. He said the petitioner coerced the company by refusing to issue a C2 certificate unless the company entered a so called "settlement". That settlement did not represent the valid agreement by the company and the company continued to dispute the petitioner's calculation in every year since 2008 to the date of the petition. On receipt of what he termed the "alleged" notice of the petition the company's solicitor immediately wrote to the petitioner putting in dispute the amount allegedly due and appealing the tax assessment on the basis that it arose in large part, if not totally, from a "settlement" of their client's tax affairs in January 2009. The letter stated that their client indicated to Kathleen Redmond of the Revenue that it intended to appeal because it had only settled as it needed its C2 certificate in order to continue in business. The letter said that the company was told in no uncertain terms that if it appealed the tax assessment their C2 certificate would not be issued. The director said his client was in a very vulnerable position at the time and essentially bullied into the "settlement". He said that it was a misuse of power by the Revenue Commissioners and his client was still fully intent in vindicating its position.

4. Affidavit of Sean Clarke, Chartered Accountant
Mr. Clarke's firm was engaged by the company to audit its tax affairs. He averred that, on his calculations, the company was not indebted to the petitioner in the manner alleged in the petition or at all. In fact he calculated that the company was entitled to off set a credit which was due to it in the sum of€369,954 (in excess of the demand of€319,840.71). He said that that sum had been validly claimed in accordance with law and there were no technical or other objections why the company should not be given credit for the said sum. A figure arose from motor expenses, unclaimed costs and interest on penalties which are due back to the company. He prepared an account of the effect of expense details not claimed. He referred to those expenses in Appendix I to his affidavit as follows:-

Additional expenses unclaimed:

	V.H.	**S.G.**	**Total**	**Restricted**
Telephones	€18,044,	€4,020,	€22,064	
Car, Petrol etc.	€202,014	€31,428	€233,442	
Totals			€255,560	
Period 2004 - 2007				€204,440 (80%)

The claim for motor expense (Appendix II) was made on the basis of mileage for Mr. Halitchi's second hand Peugeot (October 2003 to June 2006) and new Renault (June 2006 to July 2011) amounting to €56,727 and €40,131 per annum respectively.

A claim for S.G.'s car for 2004 to 2007 amounted to €56,050; €56,080; €49,441 and €42,803 which included telephone bills at €5,167 for each of the four years. The totals were reduced to 80% in respect of personal use.

Appendix III and IV gave revised effect on five years and seven years though stated to be based on a four years restriction.

Figures for each of those years was regrossed at a 47% tax rate and a 49% tax rate for 2012.

Mr. Clarke said that he did the calculations in September 2011, for those unclaimed expenses for 2006-2010 only and the result showed a sum of €213,303 for tax which was claimed in excess of what was due. Based on a seven year 2004-2010, as detailed in appendix IV to his affidavit, the sum was €369,954 for the amount of tax claimed in excess of what was actually due.

Further adjustments in relation to telephone and motor expense were given in the final exhibit.

5. Affidavit of Tom James filed the 7th August, 2012.
Mr. James believed that a number of serious misrepresentations and material inaccuracies and omissions were contained in the director's and accountant's affidavit. An offset of €1,339.65 applied in regard to corporation tax since the issue of the s. 214 letter of the 2nd March, 2012.

It was totally denied that the company was "coerced" by the petitioners. The petitioner was legally entitled to withhold or cancel the C2 certificate if taxes remained unpaid by the company. The audit of the company took place in May 2005 and was finalised on the 2ih February, 2009. The findings of the audit demonstrated that the company engaged in serial non compliance over a number of years across a number of tax heads. Mr. James referred to a table showing an extract of the company's non-compliance in its payment of taxes between 2003 and 2007 which showed a final publishable account of tax of €1,284,297 which together with interest of €408,644 and penalties of €256,860, came to €1,949,800. This did not include a 2007 penalty of 10% of €373,052.

Mr. James said that the director had signed the settlement agreement on behalf of the company being advised by the company's accountants, Sean Clarke. The settlement agreement resulted from an audited tax review by the petitioner of the company and was final and legally binding on the company. There no any basis for the company to allege that the settlement agreement was not valid. He said there was an unpaid balance remaining of€167,285.02 (including interest) in respect of this audit settlement.

He referred to the settlement agreement which read as follows:

> "To Kathleen Redmond
>
> District 1 Revenue District
>
> Name; U.S. Limited
>
> No. 6359095T
>
> I hereby offer €2,452,852 in full settlement of the Revenue claim for tax undercharges, statutory interest and penalties in respect of

Tax Head	**€**
PAYE/PRSI	€1,195,007
Corporation Tax	€221,937
Relevant Contracts Tax (RCT)	€182,235
Value Added Tax (VAT)	€123,065
Subtotal	€1,722,245
Statutory Interest	€442,953
Penalty	€286,655
Total	€2,452,852

> I attach payment amounting to €-------- in settlement.
>
> I am aware that this offer is subject to the approval of the Revenue Commissioners.
>
> Signed: S.G. (the director) Address:
>
> Date: 16/1/09"
>
> A note at the end of the letter stated: "Settlements over €30,000 involving interest and penalties will be included in a list compiled by the Revenue Commissioners under s. 1086 of the Taxes Consolidation Act 1997, unless a full voluntary disclosure was made prior to the commencement of the audit."

Mr. James averred that the statement that the company continued to dispute the petitioner's calculations in every year since 2008 to the date of the petition was incorrect. The unpaid taxes upon which the petition issued related to the inspector's notice of estimation was based on the returns made by the company. The notice of estimation issued on the 17th June, 2008 and provided that the company had the right to appeal to the Appeals Commissioners. Mr. James confirmed that no appeal by the company was taken regarding this estimate. The notice of estimation with the notice of the right to appeal was exhibited.

Mr. James further averred that the remaining outstanding taxes upon which the petition was issued related to returns for PAYE/PRSI and corporation tax filed by the company. As such, it was now unsustainable for the company to aver that they were disputing the same. If the company had any issues they could have filed amended returns with the petitioner. He said he indicated this course of action to the solicitors of the company on the 27th September, 2011, where he also outlined the right to appeal regarding any refusal of such expense claim by the company. That letter referred to the (company) meeting with Sean Clarke to prepare amended returns of the company. Mr. James referred to a copy of the letter of that date from the solicitors for the company and a response by email on the same date from him. No amended returns from the company were made regarding the expenses claim.

Mr. James said that the company had appealed the withdrawal of the C2 certificate in May 2011, but subsequently withdrew the appeal at the opening of the proceedings before the Appeals Commissioners on the 17th August, 2011. The company had also requested an internal review and the matter was examined by the internal review unit of the petitioner. The unit wrote to the company on the 10th August, 2011, indicating that "there was no basis for the suggestion that the level of penalties (which averaged at only 16.6% of the overall tax default) imposed on the company should have been less than those agreed as part of the

settlement".

The internal review unit indicated, with regards to the expenses issue, that the company "had four years during the course of the Revenue audit within which to have put its affairs in order- such that it should have been able to claim these expenses". Furthermore, the internal review unit had stated that the company had provided "no documentary proof of the expenses in question being made available". The Revenue had highlighted that any expenses prior to 2007 were then out of time to claim or seek internal review of the settlement of the 1st January, 2009.

Mr. James detailed the instalment agreements in March 2009, August 2009 and February 2011, to allow the company to address its tax liability. While the court was not informed of the amount or timing of payments made under the contested agreement and under the instalment agreements, it is clear that there was part performance of those agreements. There was no evidence of any protest or claim to off set the amounts due in relation to the claims referred to in respect of motor expenses and/or telephone expenses. The final instalment agreement was entered into in February 2011, on foot of which a C2 certificate was issued to the company. The February 2011, instalment payment was paid by an RCTDC offset and the company confirmed to the petitioner that it could not meet the March or April payments. At that stage the petitioner was left with no option but to issue enforcement proceedings against the company. The company had failed on each occasion to meet the terms and conditions of the agreed arrangements.

Mr. Clarke's affidavit referred to the company being entitled to a set off of a credit which was due to them in the sum of €369,954 which it would appear to have referred to expenses regarding telephones and motor expenses. Mr. James said that if the company were claiming such expenses they should have filed amended returns for the relevant years. This was indicated to the company on a number of occasions, including the email from the 27th September, 2011, referred to, but the company had failed to do so. Some of the expenses claimed related to periods between 2004 and 2007 which was outside the statutory period of four years, which had been highlighted to the company by the internal review unit on the 1oth August, 2011. In addition the company had failed, to date, to provide any back up documentation of the expenses claimed regarding motoring expenses. The documents exhibited were merely spreadsheets and did not contain any vouching documentation. Mr. James said that he received documentation regarding telephone advices from the company, but the same would not be examined until amended returns regarding said expenses were filed by the company.

6. Further Affidavit of S.G.
The director's second affidavit dated the 2nd August, 2012, referred to Mr. James's affidavit and averred that Mr. James's involvement only began in 2009 and that he was not present at any of the meetings which took place during the audit and that his limited knowledge was the reason for his erroneous belief that the affidavits delivered by the company contained misrepresentations and material inaccuracies or omissions. He believed that a fair assessment of the overall position would show that the company was in credit.

The director accepted that the petitioner was entitled to withhold the C2 certificate, but could only do so consistently with the petitioners "Charter of Rights" by being fair and reasonable. He disputed that the company was "engaged in serial non compliance" and he believed that the petitioner was treating the company's forced "submission" as equivalent to "agreement". He said there was no binding agreement made by the company and the petitioner and that the "offer" exhibited was not an "agreement" and was incomplete on its face. He believed that to create the circumstances where binding agreement within the meaning of s. 933(3)(a) and (b) of the Taxes Consolidation Act 1997, there must be an appeal where the petitioner is then obliged to issue a notice under s. 933(3)(c) giving the company 21 days to withdraw from the agreement if so desired. The only other way the section allowed a binding agreement was if the company or its agent had issued a notice under s. 933(3)(d) withdrawing an appeal. The said that the company would have appealed the said estimation and audit figures had it not been for the threats made by the petitioner that any such action by the company would result in the withdrawal of the C2 certificate or the withholding of same.

He accepted the estimate referred to by Mr. James but he said the same was overtaken by events in the form of the audit which the petitioner conducted in the course of which matters such as the said estimate were put in abeyance until a corrected figure was arrived at. It was inappropriate for Mr. James to select one item from a mass of detail examined in the said audit and put it forward as being in some way conclusive. Such a case could only be made if the petitioner was bound in its contention that a settlement was reached on the 1st January, 2009.

The director said it was incorrect to say that the amended returns were not filed by the company: not only did the company file amended returns but, in addition, a meeting was held between the petitioner and representatives of the company at which the original vouchers in support of the said amended returns and claims for expenses were furnished to the petitioner. He referred to a copy of the receipt dated the 16th September, 2011. The exhibited receipt appears to have been signed by Joseph McEvoy of the Revenue and Brendan Kilty Senior Counsel for the company and referred to the receipt for 02 phone bills from the 1st November, 2004, to the 13th September, 2005, in respect of one telephone number and from the 20th April, 2006, to the 2ih January, 200?? (not legible on the court copy) in the name of V.H. the other director together with a reference to hand written workings for phone bills from October 2004, to August 2005. The note makes reference to Appendix II- "working of motor expenses for the other director", but no further details are given.

The director said he knew that the company's accountants experienced difficulties with the petitioner's failure to give them the information they required and he said this was in breach of the Charter of rights referred to. He said the full vouchers were presented at the face to face meeting referred to and noted that the (Revenue) admitted that he had received "documentation regarding telephone advices" but did not examine the same on the pretext of awaiting some amended return.

7. Cross Examination of Deponents
An application had been made to Laffoy J. in respect of cross examination of the deponents on behalf of the petitioner in relation to the grounding affidavits.

No such leave was granted. However, the court in that application refused an application for the cross examination of Kathleen Redmond who had dealt with the file before the files taken over by Torn James. No direction that the deponents be present on the date of the hearing was made. The order is as follows:-

> 1. That the motion herein requesting liberty to cross examine Kathleen Redmond prior to the said date be refused.
>
> 2. That the deponents of all affidavits filed and to be field as to three below in the said proceedings be available for cross examination on the 261h October, 2012.
>
> 3. That the company do file and serve a further affidavit by close of business on Tuesday the 23rd October, 2012, and

the petitioner do file any further affidavit by close of business on Thursday the 25th October, 2012.

4. That the petitioner's filing of the affidavit of verification of the said petition be deemed good pursuant to Order 122 of the Rules of the Superior Courts.

5. That the costs of this motion be reserved to the hearing of the said petition.

The respondent again applied for an order and submitted that there was need to cross examine.

In the event, counsel on behalf of the petitioner had no difficulty in Mr. James being cross examined subject to the direction of the court. The court allowed the cross examination of Mr. James only on strictly relevant matters in relation to the agreement with the company, the issue of the withdrawal of the C2 certificates and the cross claim.

Counsel for the respondent referred to s. 932 of the Act of 1997, which provided a prohibition on the alteration of assessment except on appeal. Mr. James said that, except where expressly authorised, a person is prohibited from changing a tax assessment that has been appealed pending the hearing of that appeal. Section 933(3)(b)provides that where, in relation to an assessment, the inspector and the appellant come to an agreement that the assessment is to stand or to be amended in a particular manner or discharged, the inspector shall give effect to the agreement and thereupon, if it is to stand, the amended assessment shall have the same force and effect as if no notice of appeal was given. Section 933 is an express authorisation of alteration of an assessment as foreseen by section 932.

The court noted that s. 933(3)(b) provides:-

> "Where, in relation to an assessment to which this subsection applies, the inspector or other officer and the appellant come to an agreement, whether in writing or otherwise, that the assessment is to stand, is to be amended in a particular manner or is to be discharged or cancelled, the inspector or other officer shall give effect to the agreement and thereupon, if the agreement is that the assessment is to stand or is to be amended, the assessment or the amended assessment, as the case may be, shall have the same force and effect as if it were an assessment in respect of which no notice of appeal had been given."

Counsel for the respondent asked If there was an appeal lodged and Mr. James responded that some of the tax heads, such as VAT, were appealed. Section 932 was not relevant to PAYE/PRSI and there was no appeal of PRSI and PAYE. He said that the company had signed a settlement agreement in January 2009, and this became a legally binding agreement between the parties once the taxpayer's offer was accepted.

He was asked whether there were amended returns and replied that in the original affidavit he said that the company had filed no amended returns. He stated that the returns had been sent to the Collector General and so he was not aware at the time that they had been filed.

He was asked if there was a heading for motor and phone expenses in 2006 and, if so, how did he conclude that the claims for the revised amounts were statute barred. He replied that s. 865, which dealt with the repayment of tax in relation to companies, provided under s. 1(b) that where a person furnishes a statement of return, such statement shall be treated as a valid claim, and if the claim was valid, it was the obligation of the company that the return be correct. The 2006 return included a claim for phone expenses. He said that the claim was statute barred where the figures were incorrect. The company had four years to amend the returns and if it failed to do this then the claim was time barred. He added that the Revenue had an obligation to uphold the law and it was the Revenue's published position to be fair to all taxpayers. He said it was not an isolated interpretation of the four year rule.

The court notes that s. 865(4)(b) provides that subject to subs. (5) a claim for repayment tax under the Acts for an chargeable period shall not be allowed unless it is made in the case of claims made on or after of the 1st January, 2005, in relation to any chargeable period referred to in para. (a) (claims made before the 31st December, 2004) within four years.

Subsection (5) refers to the entitlement to a repayment of tax and, accordingly, does not arise.

Mr. James said that an appeal needed to be made in writing within 30 days. It was unfair to suggest, as counsel had, that this was nit picking. The extension of time under s. 933(7)(a) in relation to a late appeal provided that if the tax payer did not make an appeal within 30 days he had the right to apply in writing to make a late appeal due only to absence, sickness or other reasonable cause. He said there was no notice given of such an application.

The subsection is as follows:-

> "(7)(a) A notice of appeal not given within the time limited by subsection (1) (ie. 30 days after the date of the notice of assessment) 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 the 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."

Counsel then cross examined Mr. James on the withholding of the C2 certificate. Mr. James said that he took over the appeal in 2010. He had no influence in the cancellation of the C2 certificate in 2010, but he made the decision in May 2011 to cancel the C2 certificate. He said that when he took over the case, he had received a letter from the company's agent which indicated that the company was looking for a way to have the C2 certificate returned. The agent of the company issued a letter on the day after he took over the file which mentioned the problems of not having the C2 certificate. He said that proposals regarding new arrangements and return of the C2 certificate had to be made by the company because the C2 certificate was not an automatic entitlement and the criteria of s. 531 had to be met.

Section 531 provides for payments to subcontractors in certain industries. Where the principal makes a payment in respect of relevant contracts entered into on or after the 15th May, 1996, the principal is deemed to make a payment to the subcontractor and is entitled to deduct from the payment and pay to the Collector General tax at the rate of 35% of the amount of such payment. The Revenue Commissioners shall in the application to them on that behalf by a person, issue to the person a certificate of authorisation if they are satisfied in relation to the matters contained in subs. (11) and (11)(a) for such period as the Revenue Commissioners may provide by regulations.

Mr. James said that the criteria in that section must be met. He said that the company was given all the opportunities to hold on to the C2 certificate. He noted that two thirds of all sub contractors operated without C2 forms and that just because the company operated in a labour context did not mean it was entitled to the C2 certificate. He said that the company had defaulted in 2010 and the C2 certificate was cancelled and that a second arrangement was made with the company in 2011 and the C2 certificate was returned. At that time there was no submission that the withdrawal of the C2 certificate had been used as a tool in relation to the agreement being made or the arrangements made subsequently.

Mr. James said that between 2009 and 2012 the Revenue had not disputed that outstanding amounts had been partly paid by way of cheque and RTC off set and another amount by a VAT off set. The one protection the Revenue had to ensure that the agreement was entered into and concession was given in terms of cash flow was that if there was default then the Revenue would cancel the C2 certificate or not renew it. He said it was made clear to the company on the reinstatement of the C2 certificate in 2011 that if the company were not paying the instalments, the C2 certificate would be cancelled. He qualified this by stating that where there was a breach in the instalment arrangements the C2 certificate had to be withdrawn as the company would be not in compliance with the provisions of s. 531 and had this not been so, the company would have had an unfair advantage over other companies in such a situation.

Counsel for the respondent then referred to the claims for credit due to the company which he said far exceeded the demand of the petitioner. Mr. James said that he was familiar with the claims made by Mr. Clarke on behalf of the company. He had seen those in September 2011, and alluded to that in his third affidavit.

He was referred to the averment by Mr. Clarke that there was credit due to the company in the sum of€369,954. Mr. James replied that that claim was statute barred by s. 865(4)(b) which provided for a four year time limit for making claims. He said there was no vouching documentation in respect of those expenses even if counsel for the company were correct on the time bar issue.

He said that in September 2010, he had a meeting with senior counsel representing the company who presented a receipt to show that there were telephone bills and appendices dealing with motor expenses for the two directors of the company. Mr. James said that at the time an amended return should have been made and any claims made prior to 2006 would have been statute barred. The email of July 2011, in order to give effect to the claim, would have required tax returns and an amended P35 claim and vouching documentation in relation to expenses. Mr. James said he did not have any dealings with Mr. Clarke and that there were never any discussions on how to deal with the returns.

He was referred to the analysis made by Mr. Clarke on a sample of vouchers as he did not have all the vouchers. Mr. James replied that the taxpayer would have had to have all the vouchers to make the claim.

8. Submissions of Counsel for the Respondent.
The respondent taxpayer had submitted to the court that he would not have paid the €2.4 million if the petitioner would have withdrawn the C2 certificate.

Counsel submitted that there was a *bona fide* dispute before the petition was presented. He said that *Stonegage Securities v. Gregory* [1980] Ch. 576 and *Mann v. Goldstien* [1968] 1 W.L.R. 1091 held that there was an abuse of process if a petition for a debt were presented where the debt was *bona fide* disputed.

He referred to In *Re. Silverhold* [2010] I.E.H.C. 111 in relation to a cross claim which arose in relation to the company accountant's alleged negligence.

He referred to the Charter of Rights binding the petitioner in relation to the treatment of the taxpayer in terms of equality of arms and justice.

Counsel submitted that of the sixteen months that followed the withdrawal of the C2 certificate, a serious state of affairs had arisen in or the company.

Submissions on behalf of the Applicant
Counsel for the petitioner submitted that half of the debt related to the amount outstanding for 2007 PAYE/PRSI on foot of figures supplied and returned to the Revenue by the agents for the company which was never appealed.

There was an obligation under s. 951 to make a return and subs. (1)(b) provides that in the case of a chargeable person, all matters required in respect of the chargeable period is to be delivered to the Collector General in a return of those particulars. No returns nor amendments in respect of the claim for motoring and telephone expenses were furnished and the four year limitation applied.

10. Decision of the Court.
The s. 204 Letter on which the petition was based referred to a debt of €319.941.71 being the balance after demand of the s. 204 letter delivered on the 9th March, 2012, and following the payment of €1,339.65.

The demand arose following the breach by the respondent taxpayer to comply with the agreement in writing dated the 16th January, 2009, between S.G., the director and secretary of the company, and the petitioner.

The letter had offered €2,452,852 in full settlement of the Revenue claim for tax under charges, statutory interest and penalties arising under PAYE/PRSI (€1,195,007). There were smaller amounts in respect of corporation tax, relevant contracts tax (RTC) and Value Added Tax.

The respondent claimed that the petitioner had coerced the company by refusing to issue a C2 certificate unless the company had entered into a so called "settlement". The director in his replying affidavit said that settlement did not represent a valid agreement by the company and that the company continued to dispute the petitioner's calculation in every year since 2008 to the date of the petition.

The court notes that, given the agreement on the 161h January, 2009, the complaint is not relevant if the court upholds the agreement. Moreover, no basis was given, no amended returns made and no vouching documentation was furnished substantiating a claim other than sample phone bills and motor calculations in 2011.

Mr. Sean Clarke, chartered accountant for the company, calculated that the company was entitled to a set off credit due to it in the sum of €369,954 which, he deposed, had been validly claimed in accordance with the law and there were no technical or other

objections why the company should not be in credit for that sum. The figure arose from unclaimed costs in respect of each of the two directors and interest and penalties due back to the company.

By letter of the 10th August, 2011, from the internal review unit of the Revenue to Brendan Clarke reference was made to Mr. Clarke's letter of the 8th July, 2011, which raised two issues, the level of penalties and unclaimed expenses. The Revenue letter referred to the background of the audit which began in May 2005, and was finalised on the 2ih February, 2009. The settlement, in the sum of€2,452,851, was accepted by the Revenue Commissioners as an alternative to initiating legal proceedings against the company in relation to its tax default over each of the years 2003 to 2006 (2007 PAYE/PRSI). It was stated that this was a binding legal agreement and it was not open to renegotiation or to review.

Penalties were based on the extent of tax default of €1,722,245, the range of non compliance issues by the company (including failure to submit returns, the claiming of VAT, input credits for non exiting purchases, non operation of PREN on payments to directors, failure to comply with its C2 certificate obligations and under declaration of RCT); the length of time it took to conclude the audit (cooperation issues) and the agreed settlement figures still not having been fully paid and no indication that the company's tax payment compliance requirements are currently being met.

It was considered that the original proposed level of penalties of 40% would have been justified. In the circumstances, it is considered that there is no basis for the suggestion that the level of penalties (which averaged at only 16.6% of the overall tax default) imposed on the company should have been less than those agreed as part of the settlement.

In respect of unclaimed expenses, the letter referred to the settlement being final and pointed out that Mr. Clarke's client had four years during the course of the Revenue audit within which to put its affairs in order such that it should have been able claim those expenses. Clearly, it did not do so.

Additionally, the letter stated that there was no documentary proof of the expenses in question being made available for expenses for years prior to 2007 were now out of time.

It was finally stated that the settlement was published in accordance with s. 1086 of the Taxes Consolidation Act 1997.

Counsel for the respondent claimed that the treatment by the Revenue was unconstitutional an abuse of process and a breach of the Charter of Rights and did not provide an equality of arms between the petitioner and the respondent.

The claim by Mr. Clarke on behalf of the company was a *bona fide* dispute in relation to the amount of tax owed.

The court has first to consider the returns of the offer contained in the letter of the 16th January, 2009, signed by the director. The court is satisfied that the findings of the audit of the company's accounts which began in May 2005 and was finalised on the 22nd February, 2009, and the averments of Tom James in his affidavit of the 7th August, 2012, demonstrate that the company engaged in serial non compliance over a number of years across a number of heads, and that this was not contested by the director nor, indeed, by Mr. Clarke.

The offer of payment of €2,452,852 on the 16th January, 2009, in full settlement by the taxpayer to the Revenue in respect of the claim for tax undercharges, statutory interest and penalties was approved by the Revenue Commissioners and accordingly, was binding. Moreover, some periodic payments were made without any reservation.

The court notes that the height of the respondent's present claim relates to a note signed by a Revenue official and the then counsel for the company on the 16th September, 2011, over two and a half years from the date of the offer, which purported to be a receipt for a sample of 02 telephone bills from October 2004, to August 2005, plus workings of motor expenses for the two directors. That note refers to an appendix of motor expenses but does not quantify these.

The telephone bills were, at best, a sample of claims made but no formal claim was made by Mr. Clarke or by the directors.

It is unclear from the receipt of the 16th September, 2011, whether the motor expenses, referred to in an Appendix (II) corresponded with the appendices in the schedules to Mr. Clarke's affidavit.

What is uncontested is that there was no return made in relation to these expenses nor, indeed, were complete vouchers to substantiate the claims available.

The court accepts that these claims were made, albeit in an ad hoc manner and without returns, revised or otherwise before the petition was served.

The court has also to consider the further arrangements that were made in relation to the non payment of the amounts offered.

The court also notes that the offer of settlement left a blank regarding the attachment of payments. Notwithstanding, the court accepts the evidence that arrangements were made and that those arrangements were not honoured by the taxpayer. Indeed the taxpayer, impelled by the withdrawal or non renewal of the C2 certificate - part performance - agreed to staged payments but, due not doubt to the worsening cash flow in more recent years, did not comply with the arrangements agreed to.

The court has carefully considered the effect of the provisions of the Taxes Consolidation Act 1997. The court is satisfied in relation to s. 933(3)(b) that where the Revenue and the appellant come to an agreement whether in writing or otherwise that the assessment is to stand, is to be amended in a particular manner or is to be discharged or cancelled, the inspector or other officer should reflect the agreement and thereupon, the assessment is to stand or amended, the assessment or the amended assessment as the case may be, shall have the same force and effect as if were an assessment in respect of which no notice of appeal had been given.

Counsel on behalf of the taxpayer had argued that, in the absence of an appeal, no such agreement should be enforced against the taxpayer. The court, in the circumstances of the subsection referred to, rejects that submission.

The court has also considered the statute of limitations in regard to the claims made. Section 865(4) refers to a claim for repayment of tax for any chargeable period not being allowed unless it is made within four years.

Income Tax (Relevant Contracts) Regulations 2000 (SI No. 71/2000) is for the recovery of tax charged under schedule D under s. 531 of the Taxes Consolidation Act 1997, already referred to. This section applies to proceedings for the recovery of any amount of tax or

a certificate signed by an officer of the Revenue as evidence until the contrary is proved that the amount is so due and payable and may be tendered in evidence.

Section 214(a) of the Companies Act 1963 as substituted by s. 123 of the Companies Act 1990 provides that:-

"A company shall be deemed to be unable to pay its debts-

> (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €1,269.74 then due has served on the company, by leaving it at the registered office of the company a demand in writing requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure compound for it to the reasonable satisfaction of the creditor."

Subsection (b) refers to execution or other process issued on a judgment being returned unsatisfied at all or in part has no relevance.

Under section 214(c) provides that "if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether the company is unable to pay its debts, the court shall take into account the contingent and respective liabilities of the company". It is clear that the present petition is based on para. (a) of s. 214 as is clear from para. 7 of the petition.

In *Re. WMG (Toughening) Limited (No. 2*) [2003] 1 I.R. 389 at 392, McCracken J. referred to the issue in that case as "whether the company's claim in the present case was a claim made in good faith and on substantial grounds. It is clear that the issue is not whether the company would succeed in its claim, but whether there is a bona fide dispute which should be determined by the courts in the normal way without putting the company's existence at risk".

The court is satisfied that there are no substantial grounds for the claims being made. This is so because such claims have not existed at the time of the agreement nor, indeed, the time of the variation of the discharge under the agreement by the arrangements made between the company and the petitioner. Moreover, despite having the advice and assistance of an accountant and the representation by senior counsel, the company failed and neglected to make returns and/or amended returns in relation to the sample telephone expenses and motoring expenses despite the request of the Revenue to do so.

In *Re. Claybridge Shipping Co. SA* [1997] 1 B.C.L.C. 572, the judgment of Lord Denning M.R., Shaw and Oliver L.J.J allowed an appeal against the decision of the High Court refusing the petition on the basis that there was strong evidence that the bank was a creditor and to dismiss the petition would deprive the bank of a remedy. In that case the company was a Panamanian registered company and had assets in the jurisdiction. Lord Denning believed that it would be convenient to have a moravean injunction remedy alongside the petition to wind up.

In *Re. Bayoil SA: Seawind Tackers Corp v. Bayoil SA* [1999] 1 All E.R. 374, although Bayoil did not dispute the debt in which the petition was based, it contended that the Court of Appeal ought to stay or dismiss the petition on the ground that it had a genuine and serious counterclaim which it had been unable to litigate, in an amount exceeding the amount of the petitioner's debt. The companies' court had accepted the company's contention as to the status of its counterclaim, but decided that it had a discretion which was at large and that it ought, in the circumstances of the case, to be exercised by granting the order sought.

The Court of Appeal found that the company had a genuine and serious cross claim which it had been unable to litigate, in the amount exceeding the amount of the petitioner's debt. Nourse L.J. at 382 emphasised that the "cross claim must be genuine and serious or, if you prefer, one of substance; that it must be one which the company had been unable to litigate; and it must be in a amount exceeding the amount of the petitioner's debt". In the circumstances he allowed the appeal and dismissed the winding up order.

Applying that judgment to the present case, it seems that not alone was no return made in respect of the *ad hoc* claim, but that there was no impediment to the company litigating if the claim had not been dealt with or had been rejected. The court is of the view that the company's failure to make a return, to vouch, in a proper and regular manner the claim for expenses within the statutory time limit, deprived the respondent of the right to litigate its claim. The court need not adjudicate on the genuineness of the claim. There was no evidence that the company had formed an intention to litigate.

The court accepts that the Revenue had informed the company, through the agency of Mr. Clarke, of the obligation to make an amended return and, indeed, of its right to appeal.

The overriding evidence is, of course, the agreement entered into on the 16th January, 2009, which the basis of the Revenue's claim and which the respondent argues was entered into under duress.

There is no evidence to rebut the averments of Kathleen Redmond in her affidavit sworn on the 3rd September, 2012, where she referred to the cautioned meeting on the 19th September 2005, with the director, Jim Ryan, Revenue official, and herself. It was indicated at that meeting that "the C2 certificate was being withdrawn immediately because of concerns with books and records and because returns were not up to date". This led to the relevant payment cards being withdrawn on the 29th September, 2005. Ms. Redmond decided not to cancel any C2 certificate at that time to allow for the easy reissue of the relevant payments cards should the company resolve the identified issues. This was communicated to the director and secretary, S.G. in an email dated the 28th September, 2005. The C2 certificate for the company expired on the 31st December, 2006 and further correspondence ensued.

Ms. Redmond categorically stated that there was no "forced submission" of the company to sign the settlement agreement dated the 16th January, 2009, as alleged by the director. The company was advised by their accountant, Mr. Sean Clarke, during the audit. The tax head involved in the settlement agreement dated the 16th January, 2009, as agreed with the company, was based on the documentation provided by the company throughout the audit. The penalty in the settlement agreement was reduced from 40% to 20% (generally). It was totally denied that "the company continued to dispute the petitioner's calculations in every year since 2008 to the date of the said petition. Ms. Redmond said no correspondence, disputing the alleged agreement, was received by her from the date of the settlement until she passed over the case to Tom James in August 2010.

The court is of the view, having regard to both the evidence of Ms. Redmond and Mr. James that the issue of "forced submission" regarding the settlement was a late attempt to frustrate the petitioner seeking to wind up the company. There was a mere assertion but no evidence of threats or coercion.

The court is satisfied that the Revenue were entitled to decline to deal with claims for expenses which were not properly included in revised or any returns.

The court is satisfied that the Revenue had all times dealt with the plaintiff in a reasonable and appropriate and fair manner. In the circumstances the court will make an order winding up the company and will appoint Jonathon Byrne, Certified Accountant, as Liquidator.