THE HIGH COURT

[2014 No. 198 R]

BETWEEN

MICHAEL GLADNEY

PLAINTIFF

AND

ANTONIO DI MURRO

DEFENDANT

JUDGMENT of Mr. Justice Hunt delivered on the 11th day of January, 2017

Issue

1. By summary summons issued on 15th April, 2014, the plaintiff claims the sum of €2,159,766.86 for income tax due in respect of the period 1st January, 2002 to 31st December, 2002, chargeable by way of "manual assessment", which said sum is comprised of tax in the sum of €1,039,882.28 and interest in the sum of €1,119,884.58. There is also a claim for continuing interest from the 11th February, 2014 until judgment or prior payment.

2. By notice of motion dated 15th August, 2014, the plaintiff applied for liberty to enter final judgment for the sum claimed and continuing interest. The defendant filed a replying affidavit setting out the reasons for his claim that there is no outstanding liability to the plaintiff, and requested that the plaintiff's claim be dismissed. The plaintiff's motion was heard on 6th July, 3rd of October, 7th November and 8th November, 2016, when the defendant argued that he had set out in his affidavits sufficient issues to comfortably pass the threshold required for leave to defend the proceedings. The plaintiff essentially argued that by virtue of the substantive law applicable to Revenue claims of this type, the scope for leave to defend in such proceedings was limited, and that the matters alluded to by the defendant were not such as to displace the entitlement of the plaintiff to liberty to enter final judgment at this stage of the proceedings. For the reasons set out below, I agree with the submissions of the plaintiff, and will order that the plaintiff has liberty to enter final judgment in terms of the particulars pleaded in the special endorsement of claim on the summary summons issued by the plaintiff.

Background

3. From 1973 the defendant operated a take away business from premises on the Malahide Road, Co. Dublin. In addition, from in or about 1988, he carried on a similar business from a unit at the River Valley Shopping Centre, Swords, Co. Dublin. At all material times, it is agreed by the plaintiff that the defendant submitted returns to the Revenue in respect of these businesses. In 2005, the defendant made a tax return indicating that he no longer traded in either of these activities. In his tax returns from 2007 to 2013 inclusive, the defendant indicated that his income was derived solely from the letting of two properties within the State in which he had an interest. At all material times, the defendant resided at various locations in Co. Dublin, and does not appear to dispute the plaintiff's assertion that he was always regarded as "resident" and "ordinarily resident" within the State for taxation purposes from 1973 to 2009 inclusive, and therefore subject to Irish tax on income from Irish earnings.

4. On 1st June, 2003, the Revenue Commissioners ("the Revenue") commenced an investigation into undeclared liabilities to tax associated with funds held by various persons subject to Irish tax law in accounts maintained with Bank of Ireland Trust Company (Jersey) Limited. In 2005, the plaintiff states that the Revenue was provided with confidential information suggesting that the defendant was the holder of funds in such an account ("the offshore account"), and by letter dated 26th January, 2005, the defendant was advised that his taxation affairs and the tax affairs of any company of which he was a director, or any trust in which he was either a settlor or beneficiary were then under investigation by the Revenue. In response to this letter, it appears that the defendant instructed an accountant, who wrote to the Revenue by letter dated 14th February, 2005, indicating that he would be in further touch when his enquiries and information were complete.

5. A Revenue memorandum dated 16th February, 2005 records as follows:-

> *"Roddy Comyn of CCMG rang in relation to the above. They have recently taken over the case from the late Hugh Gallagher. At present the only information available is that Mr. Di Murro transferred the funds back to Italy where there was some sort of an amnesty scheme for repatriated funds. Mr. Di Murro paid some €79,000 Italian tax. He alleges that it came from UK savings. (Emphasis added) Mr. Comyn has written on 31st January, 2005 to Bank of Ireland Trust Jersey in the Isle of Man where the records are maintained for copies of the bank statements. I advised that Mr. Di Murro had until 26th February to complete and submit the forms SA1 but in view of the new agents I will consider a short extension of time. Mr. Comyn is to advise me of any progress next week."*

6. In his initial replying affidavit, the defendant indicated that he had returned to live in Italy, and having regularised his tax affairs with the Italian revenue authorities, he considered the matter to be closed. Indeed, there does not appear to have been any further developments in relation to the case until 2010, when the Revenue apparently obtained a High Court disclosure order in relation to the aforesaid financial institution. Thereafter, by letter dated 15th October, 2010, the Revenue wrote again to the defendant seeking urgent clarification of a number of specific matters listed in that letter.

7. By letter dated 20th December, 2010, Seamus Walsh and Co., accountants, replied to the Revenue on behalf of the defendant. They answered the specific queries raised in the letter from the Revenue as follows:-

> (i) The defendant held a bank account in Jersey which was closed in September, 2003;
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> (ii) No monies from this account were remitted to the Republic of Ireland;
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> (iii) The defendant had no undeclared tax liabilities;
>
> (iv) On the closure of the bank account in September, 2003, the money was remitted to Italy and lodged into a "Scudo". The defendant paid some €79,000 tax on the funds remitted to Italy;
>
> (v) Accordingly, no further remittance was due by the defendant to the Revenue on foot of undeclared liabilities to Irish

tax.

8. On the basis of this information, the Revenue wrote in January 2011 indicating that they also considered the matter to be closed. However, the investigation into the affairs of the defendant was re-opened by the Revenue writing to Seamus Walsh and Co. on 1st November, 2011, referring to previous correspondence. The Revenue noted that the defendant had never claimed a non-domicile status on any of his completed tax return forms for previous years up to that point, as stipulated by s.71(2) of the Taxes Consolidation Act 1997 ("the Act"). This letter requested copies of all relevant statements in respect of the offshore account, or any other offshore financial institution, from the dates of commencement to closure, in order to establish the exact source and origin of funds lodged to the account. It also indicated that the Revenue was entitled to request such information to establish the origin or source of funds in a non-domiciliary case.

9. Thereafter, it appears that the Revenue received further correspondence on behalf of the defendant indicating that there would be no additional assistance to the re-opened Revenue investigation. Consequently, on 30th November, 2012 the Revenue issued the manual assessment which is the basis of the plaintiff's claim in these proceedings. This document sets out particulars of three sums assessed under schedule D, descried therein as "fish and chip take away", "gross rental income" and "miscellaneous income". It also contains the calculation of the sum subsequently claimed in the summary summons issued by the plaintiff. The issue of this document was followed by a demand notice to the defendant in respect of the sum claimed on 18th February, 2013, and a final letter of demand from the plaintiff on 26th February, 2013.

10. On 12th March, 2013, Seamus Walsh and Co. again wrote to the Revenue, referring to previous discussions and correspondence regarding this case. In essence this letter repeated reliance on the matters previously raised by the defendant in answer to the demands of the Revenue, and repeated the assertion that notwithstanding the failure of the defendant to tick the "non-domiciled" box on previous tax returns, the defendant was not domiciled in this jurisdiction. The letter closed with a suggestion that the Revenue was in possession of sufficient material and details to conclude that the matter should be closed on the basis that no additional taxes were due by the defendant.

11. The Revenue replied to this letter on 24th October, 2013. The first and very significant matter set out in that reply is a reminder to the defendant's advisors of the provisions of s. 933 of the Act in respect of appeals against assessments, and specifically to s. 933(7)(a) regarding the conditions that must be satisfied before a late appeal could be admitted.

12. In summary, s. 933 provides an initial entitlement to appeal an assessment to income tax to the Appeal Commissioners on giving notice in writing to the Inspector or other officer within 30 days after the date of the notice of assessment. If the Inspector is of the opinion that the person who is given the notice of appeal is not entitled to make such an appeal, the application shall be refused and the Inspector or other officer is obliged to notify the person in writing accordingly, specifying the grounds for such refusal. This refusal can itself be appealed by the person in question by notice in writing to the Appeal Commissioners within 15 days of the date of issue by the Inspector or other officer of the notice of refusal. The Appeal Commissioners must then deal with the appeal in the manner set out in s. 933(1)(d) of the 1997 Act.

13. Section 933(6)(a) provides that in default of notice of appeal by a person to whom notice of assessment has been given, the assessment made on that person shall be final and conclusive. A late appeal outside these initial provisions is possible under s. 933(7)(a), but that procedure must, in effect, be invoked by the person concerned within twelve months after the date of the notice of the assessment. Outside this second late appeal provision, a further appeal is possible pursuant to the provisions of s. 933(7)(d), but only where the intending appellant lodges an appropriate return and pays the full amount of the tax and interest due.

14. Returning to the letter of October 2013, although it accepted that the defendant was not Irish domiciled, it stated that he was regarded by the Revenue as resident and ordinarily resident for taxation purposes in this country, and was thereby liable to tax in this jurisdiction on his income arising worldwide from all sources wherever arising. His non-domiciliary status confined his tax liability on foreign income to remittances payable in the State, but the letter repeated that the fact that the defendant was non-domiciled did not preclude the Revenue from making such enquiries as were deemed necessary in order to establish the source and origin of funds held offshore.

15. The letter then referred to the correspondence of October 2010, and to eight specific lodgements made by the defendant to his offshore account via an account at Bank of Ireland, Ballyfermot between 1993 and 2000. The Revenue pointed out the apparent conflict between this information and the defendant's previous claim that the source of the funds in the offshore account had arisen from certain Italian financial services activities dating back to the 1960s (or alternatively from UK savings).

16. In my view, the Revenue were entitled to point out this apparent anomaly, which gives rise to considerable concern as to whether the defendant had been candid in his dealings with the Revenue, particularly during the correspondence exchanged in 2005 and 2010. This letter then went on to raise specific and reasonable requests for further details from the defendant in the light of what appeared to be an unsatisfactory situation.

17. These matters were addressed by a letter from Seamus Walsh and Co. dated 13th December, 2013. In my view, this reply is notable for its brevity, and for the complete absence of any reference to or explanation of the eight specific transactions mentioned in the previous letter. A separate cheque transfer was explained, and the letter concluded that other than the above cheque transaction, the defendant was still adamant that no other monies were transferred from Bank of Ireland Jersey to Bank of Ireland Ballyfermot. The other notable feature of this letter is that it made no reference to the clear and fair reminder in the previous letter as to the provisions of s.933 of the 1997 Act in relation to appeals in cases such as this.

18. In this case, these provisions meant that an initial appeal ought to have been lodged by the defendant within 30 days of the 30th November, 2012, or a late appeal by the 30th November, 2013. After that date, the only form of statutory appeal open to the defendant was that permitted by the filing of an appropriate return and the payment of the amount of the assessment. S.933(6) also had the effect that the sum assessed became a final and conclusive liability in default of a notice of appeal. No further correspondence ensued, and the next step was the issue of proceedings by the plaintiff as set out above.

Discussion

19. The essential point made by the defendant is that the provisions of the Rules of the Superior Courts apply to claims by the Revenue in precisely the same manner as they apply to all other summary claims, and since the defendant has raised arguable defences to the claim of the plaintiff, the matter should be referred for plenary hearing in accordance with the normal and well-known principles applicable in such circumstances. The plaintiff replied to this proposition by a submission that the substantive provisions of the statutory code applicable to Revenue matters means that matters of defence to assessments raised by the Revenue must be dealt with solely within the specified statutory mechanism. Consequently, it is not open to the recipient of an assessment to neglect

or refuse to invoke the statutory appeal procedure, and then to wait until after the issue of enforcement proceedings to challenge the assessment, because to permit this approach would have the effect of setting the relevant statutory provisions at nought. Separately, the plaintiff argued that none of the issues identified by the defendant were in fact sufficient to entitle the defendant to leave to defend the claim on the basis suggested by him.

20. In my opinion, the scope of the matters that may properly be raised by the taxpayer outside the statutory appeal procedure in Revenue matters has been conclusively determined by the decision of the Supreme Court in *Deighan v. Hearne & Ors*. [1990] 1 I.R. 499. That case involved a challenge by the plaintiff to the constitutionality of certain provisions of the Income Tax Act 1967, having regard to Articles 34, 37 and 40, ss. 3 and 5 of the 1937 Constitution. The judgment of the court on the non-constitutional issues was delivered by Finlay C.J. In that case, the High Court had declined to try a preliminary issue of fact, deciding that having regard to the provisions of the income tax code and the procedure for assessment in default of the making of returns, the court could only intervene to set aside or vary an assessment otherwise than under the procedure provided by the Income Tax Acts if it were established either that the procedure carried out was ultra vires the statutory provisions, or that one or other of those statutory provisions was invalid having regard to the provisions of the Constitution. The High Court held that the court could not try an issue of fact arising from an assessment made in default of a return otherwise then through the appeal procedure provided in the income tax code. (Emphasis added).

21. The decision of the Supreme Court (per Finlay C.J.) on this point is as follows:-

> *"That decision, in my view, was correct. The plaintiff had ample opportunity on the facts as found in the High Court to challenge the validity of the assessments in respect of which he now complains, and to proceed by the procedure of appeal through the Special Commissioners and through the courts, which is available in such circumstances. In particular, it is of considerable significance that before instituting these proceedings and up to the time they came to hearing the applicant had not even sought an extension of time to appeal against the assessments which can be obtained in the discretion of the Inspector of Taxes or on appeal from him to the Special Commissioners at any time. In the circumstances the learned High Court judge was correct in the decision which he reached, and I am satisfied this ground of appeal must fail."*

22. In my view, the defendant in this case is attempting to do precisely that which was found to be impermissible by the Supreme Court. The points of defence raised by the defendant pertain to the form of the assessment, the timing thereof, together with the correctness of the sum claimed and the availability of double tax relief in respect of payments made to the Italian tax authorities. Determination of each of these matters would require findings of fact relating the assessment raised by the Inspector, and therefore they lie squarely within the limitation identified by the Supreme Court, and may only be raised on appeal to the specialist tribunal constituted for that purpose, or to the courts where available. In so far as these issues may also involve the determination of legal or jurisdictional questions relating to the assessment, the appropriate channel remains the specialist tribunal, or alternatively the jurisdiction of the High Court on judicial review. It is also of considerable significance in this case that before attempting to raise such matters by way of defence to a claim for summary judgment, the defendant made no effort to avail of any of the statutory appeal procedures available to him, despite a very fair reminder and invitation issued to him by the Revenue in that respect.

23. Likewise, the desire of the defendant to ascertain the precise basis of the assessment through use of the discovery process does not give rise to a permissible ground of defence in a case of this kind. The observations of Gilligan J. in *T.J. v. The Criminal Assets Bureau* [2008] IEHC 168 are relevant in this respect. He noted that the whole basis of the Irish taxation system is developed on the premise of self-assessment, and that the whole basis of self-assessment would be undermined if, having made a return which is not accepted by the Revenue, a taxpayer was entitled to access all relevant information that was available to the Revenue. He noted that the Revenue were only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. A person subject to such an assessment has the right of an appeal to the Appeal Commissioners, the right to a further appeal to the Circuit Court, the right to a further appeal on a point of law to the High Court, and from there to the Supreme Court. To this list may be added the availability of judicial review against any actions of the Revenue or the Appeal Commissioners which are capable of engaging that remedy, and the ability of the Appeal Commissioners to state a case to deal with any legal complexities that may arise.

24. The observation of Gilligan J. to the effect that nobody is better placed than the taxpayer himself to know what income was received or what gains were made is particularly applicable to the position of the defendant in this case. I can see no practical reason why the defendant could not attempt to discharge the burden of proving that the assessed tax is not payable in a hearing before the Appeal Commissioners. I do not believe that a discovery order would be required to assist in that process. No doubt the Revenue or the Appeal Commissioners would have to give due consideration to any requests for information made by an appellant in the context of the appeal procedure. In this case, I can see nothing to displace the ordinary position that the taxpayer is best placed to marshal the facts and information relevant to the issue of his liability or otherwise to the tax claimed. In this case, the defendant knew well why he was being pursued by the Revenue, and in my view singularly failed to engage with important matters of substance communicated to him by the Revenue prior to the assessment being raised. As previously noted, he has also offered contradictory explanations at different times for the source of the funds held in his offshore account. In these circumstances, it is for him to adduce material to persuade the appropriate tribunal that the tax assessed is not payable.

25. The Oireachtas has determined that such factual disputes ought to be determined through the extensive appellate procedure described by Gilligan J., and in my view it is not in the public interest that disgruntled recipients of assessments should be permitted to delay contesting matters of dispute pertaining to either the existence or extent of a liability to tax until the point where the Revenue has moved to enforcement procedures, well after the expiry of the initial appeal time limits. On the contrary, it is in the public interest that such matters should be dealt with as stipulated by statute, rather than consuming scarce time and resources being litigated in court. The defendant still has the option of proceeding with an appeal, subject to fulfilling the conditions required to permit an appeal at this late stage.

26. The defendant relied upon the decision of O'Higgins J. in The *Criminal Assets Bureau v. Kelly* [2000] 1 ILRM 271 as indicating that it was possible to ventilate matters of substantive defence in a summary judgment application. In that case, O'Higgins J. permitted leave to defend on the basis of an assertion that representatives of the Bureau or the Revenue had intimated to the defendant's advisor that there was no need to appeal whilst negotiations were in progress, and on a legal issue as to vesting of property in the bankruptcy assignee. I note that there was no reference to the Supreme Court decision in *Deighan v. Hearne* in that case, and given the different factual circumstances of that case, and the absence of any reference to a relevant Supreme Court decision, I do not regard that decision as having a strong binding effect in the particular circumstances of the instant case.

27. In any event, I believe that the issues raised by the defendant in Kelly are distinguishable in nature from those mooted in this case. A legal issue pertaining to a bankruptcy point does not seem to me to be a factual issue arising from an assessment, but is a

discrete legal point outside the ordinary compass of an appeal against an assessment to tax. Likewise, whether enforcement proceedings are estopped by representation is a factual issue going to the ability to institute and maintain such proceedings, rather than an issue arising from the tax assessment in question. In the instant case, the defendant has raised matters that essentially relate to the assessment raised by the Inspector.

28. The defendant also relied upon the provisions of Order 68 of the Rules of the Superior Courts as supporting his entitlement to litigate the matters raised by him by way of defence to the summary claim of the plaintiff. These provisions apply the summary summons procedure to Revenue matters. They are procedural in nature and in my opinion do not have the effect of conferring jurisdiction where the substantive law applicable to the subject matter of a summary claim dictates that the proper forum for such matters lies elsewhere. In circumstances where the Oireachtas has clearly addressed the fundamental importance of revenue and tax matters to the modern State by the provision of a specific statutory code and procedure governing such matters, and where this general approach has been validated by the Supreme Court, it is not open to the High Court to entertain by way of defence in summary proceedings matters that properly and exclusively lie within the purview of the judicial review jurisdiction, or of the jurisdiction conferred on the relevant specialist tribunal by statute.

29. I agree with the submission of the plaintiff that to permit a parallel system of litigation in relation to matters such as this would be to seriously undermine or set at nought the appeal procedure prescribed by the Act. Consequently, although some or all of the matters relied upon by the defendant may be arguable in the appropriate context, I am satisfied that application of the reasoning approved in Deighan has the effect that such issues may not be litigated in the current proceedings. In effect, an assessment to income tax must be challenged either by judicial review or appeal. There is no "second bite" available in summary proceedings to a taxpayer who has neglected or refused to utilise the appropriate mechanisms to dispute an assessment to tax. In most other contested debt cases, court proceedings are the first opportunity for the defendant to identify arguable defences to claim for payment. That is not the position in Revenue assessment cases, and this difference constitutes the rationale for adopting a different and limited approach to the defence of summary claims in such matters.

30. Lastly, it was suggested that leave to defend to be granted on the basis that the plaintiff's claim was insufficiently particularised in the proceedings. In circumstances where the defendant had previously been furnished with the calculations set out in the notice of assessment of the 30th November, 2012, and where there was considerable correspondence between the parties before that assessment was issued, I do not believe that there is any substance in that complaint in the circumstances of this case.

31. As there is no arguable defence raised to the claim of the plaintiff which is admissible in the current context, there will be liberty to the plaintiff to enter final judgment against the defendant on the basis claimed in the summary summons.

Approved

27 January 2017