THE HIGH COURT

[2017 No. 360 M.C.A.]

IN THE MATTER OF PART 47 OF THE TAXES CONSOLIDATION ACT, 1997 AS AMENDED BY THE FINANCE (NO 2) ACT, 2008

BETWEEN

FERGUS O'BRIEN

APPLICANT

AND

KEVIN O'BRIEN

RESPONDENT

Judgment of Ms. Justice Pilkington delivered on the 18th day of December, 2018

1. By originating notice of motion, the applicant seeks the following reliefs:

> 1. A determination pursuant to s.1077B (3) of the Taxes Consolidation Act 1997 as inserted by the Finance (No. 2) Act 2008 that the respondent herein is liable to penalties in the total amount of €108,423.77 pursuant to s.1077E of the Taxes Consolidation Act 1997, s.27 of the Value Added Tax Act 1972, s.27A of the Value Added Tax Act 1972 and s.116 of the Value Added Tax Consolidation Act 2010.
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> 2. Such further or other order pursuant to s.1077C of the Taxes Consolidation Act, 1997 as inserted by the Finance (No. 2) Act 2008 regarding the recovery of the penalty of the subject matter of this application.
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> 3. The standard reliefs of further or other order and costs.
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> 4. In reality the reliefs are focussed on (1) above.
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> 5. The originating notice of motion issued on 29th November, 2017, the applicant's grounding affidavit sworn on the 21st November, 2017, replying affidavit of the respondent sworn on 6th March 2018, the supplemental affidavit of the applicant sworn on 4th April 2018 and finally the second replying affidavit of the respondent sworn on 16th May 2018.

2. The respondent's VAT liabilities have been quantified at €60,638 with a further fixed penalty of €125 for negligently failing to file VAT returns.

3. The income tax liabilities have been quantified for the period at €47,660.77 bringing a total penalty amount to €108,423.77.

4. The applicant contends that this respondent has failed to file VAT returns between 1st January, 2008, and 31st December, 2013 and failed to file income tax returns between 1st January, 2009 and 31st December, 2013.

5. On the 28th April, 2015 the respondent was compulsorily registered for VAT with affect from 1st January, 2008.

6. In May 2015 assessments to income tax were raised the years ending 31st December, 2009, 2010, 2011, 2012 and 31st December 2013. No valid appeal was ever lodged to these assessments and accordingly those assessments are now final.

7. In September 2015 assessments to VAT were raised for the taxable period ending 31st December, 2008, 2009, 2010, 2011, 2012, 2013 and 2014. These assessments have not been appealed and accordingly are also now final.

8. A notice of an opinion issued to the respondent on the 18th November, 2016; it is not relied upon as an amended notice of opinion issued on the 16th June, 2007.

The legislation

9. Section 1077B (3) of the Taxes Consolidation Act 1997 states as follows:

> "Where a person to whom a notice issued under subs. (1) or (2) does not, within 30 days after the date of such notice:-
> …
>
> then a Revenue officer may make an application to a relevant court for that court to determine whether-
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> (i) any action, inaction, omission or failure of, or
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> (ii) any claim, submission or delivery by,
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> the person in respect of whom the Revenue officer made the application gives rise to a liability to a penalty under the Acts on that person."

10. The imposition of penalties is dealt with in s.1077E and is headed "Penalty for deliberately or carelessly making incorrect returns, etc." in respect of income tax, corporation tax and capital gains tax. Subsection (3) states as follows:

> "Where any person deliberately fails to comply with a requirement to deliver a return or statement of a kind mentioned in any of the provisions specified in column 1 of Schedule 29, that person shall be liable to a penalty."

11. The penalty provision in s.1077E (4) is as follows in respect of subs.(3) above it is:

> "…the amount specified in subsection (12),
>
> reduced, where the person liable to the penalty cooperated fully with any investigation or inquiry started by the Revenue Commissioners or by a Revenue officer into any matter occasioning a liability to tax of that person, to—

(i) 75 per cent of that amount where subparagraph (ii) or (iii) does not apply,

(ii) 50 per cent of that amount where a prompted qualifying disclosure is made by that person, or

(iii) 10 per cent of that amount where an unprompted qualifying disclosure is made by that person."

12. Subsection (5) deals with where a person "carelessly but not deliberately" delivers an incorrect return or statement of any kind and subs. (6) deals with the situation where a person "carelessly but not deliberately" fails to comply with the requirement to deliver a return or statement of any kind.

13. Subsection (7) states as follows:

1"(a) The penalty referred to-

(i) In subsection (5) shall be the amount specified in subsection (11), and

(ii) In subsection (6) shall be the amount specified in subsection (12),

reduced to 40% in cases where the excess referred to in subparagraph (I) of paragraph (b) applies and to 20% in other cases.

(b) Where a person liable to a penalty co-operated fully with any investigation…"

14. Subsection (12) states as follows:

"The amount referred to in (b) of subsection (4) and in paragraph (b)(ii) of subsection (7) shall be the difference between-

a) the amount of tax paid by that person for the relevant period before the start of the Revenue Commissioners or by any Revenue officer of any inquiry or investigation where the Revenue Commissioners had announced publicly that they had started an inquiry or investigation or where the Revenue Commissioners have, or Revenue officer has, carried out an inquiry or investigation into any matter that would have been included in the return or statement if the return or statement had been delivered by that person and the return or statement had been correct, and

b) the amount of tax which would have been payable for the relevant periods if the return or statement had been delivered by that person and the return or statement had been correct."

15. It is clear that the categories of person to whom a penalty might be imposed are differentiated- subs. (3), speaks of a person who "deliberately" fails to comply, subs. (5) deals with a person "carelessly, but not deliberately" and that is referable also to subs. (6) and then to subs. (7)(b) dealing with a person who has "co-operated fully". Subsection (4) also sets out differing percentages for the imposition of a penalty and this is set out below.

16. It therefore follows that the penalty imposed by this legislation varies and is dependant upon the categorisations above.

17. The applicant contends that this is a case where the "deliberately" criteria applies. If that is accepted then, within that category, the penalty can be reduced "where the person liable has co-operated fully with any investigation or inquiry started by the Revenue Commissioners or by a Revenue officer into any matter occasioning a liability to tax of that person and is referable as set out above, to either 75% with regard to full co-operation of any investigation or inquiry started by the Revenue Commissioners, 50% in the case of a "prompted qualifying disclosure" and 10% in the case of an "unprompted qualifying disclosure."

18. "Qualifying disclosure" is defined as:

"A disclosure that the Revenue Commissioners are satisfied is a disclosure with complete information in relation, with full particulars of, all matters occasioning a liability to tax that gives rise to a penalty referred to in subs. (4)."

19. "Prompted qualifying disclosure" is defined as

"a qualifying disclosure that has been made to the Revenue Commissioners or to a Revenue official in the period between:

(a) The date on which the person is notified by a Revenue Officer on the date which an investigation or inquiry into any matter concerning a liability to tax of that person will start,

(b) the date that the investigation or inquiry starts."

20. "Unprompted qualifying disclosure" is defined as where a "qualifying disclosure that the Revenue Commissioners are satisfied has been voluntarily furnished to them…" (essentially prior to any investigation or inquiry started by them where upon notification of such an inquiry, the disclosure is made prior to that time.)

21. Finally, "carelessly" is defined as by a "failure to take reasonable care".

22. In respect of the imposition of the penalty in respect of VAT, the legislation is similar in almost all respects and mirrors the legislation above with respect to income tax. Section 27 of the VAT Act 1972, by the insertion 1A states:

"Where a person fraudulently or negligently fails to comply with a requirement in accordance with this Act or Regulations to furnish a return, that person shall be liable to a penalty of:

(a) €125 (this penalty does not appear in the income tax legislation).

(b) The amount… of the difference between-

(i) the amount of tax properly payable of such person if the said return had been furnished by that person and that return had been correct,

(ii) the amount of tax (if any) paid in respect of the taxable period for which the said return was not furnished."

23. Section 27A of the VAT Act 1972 and s.116 of the VAT Consolidation Act 2010 effectively deals with the situation where a person "deliberately" fails to furnish a return and the same percentage reductions if that person has "co-operated fully with any investigation or inquiry started by the Revenue Commissioners" and thereafter as to whether the person comes in the criteria of a "prompted qualifying disclosure" or an "unprompted qualifying disclosure".

24. Again subs.(12) of s.116 states:

> "The amount referred to in paragraph (b) of subsection (4) and in parargraph (b)(ii) of subsection 7 is the difference between: -
>
> (a) the amount of tax (if any) paid by that person for the relevant period before the start, by the Revenue Commissioners or by any Revenue Officer, of any inquiry... or where the Revenue Commissioners have, or a Revenue officer has, carried out an inquiry or investigation in respect of any matter that would have been included in the return if the return had been furnished by that person and the return had been correct, and
>
> (b) the amount of tax properly paid by that person for that period."

25. Within the categories defined above the applicant contends that the imposition of the penalty should be, in respect of both income tax and VAT within the respective categories where the respondent is a person who has "deliberately" failed to comply- that he does not come within the category of making a "prompted qualifying disclosure", an "unprompted qualifying disclosure" or any categorisation of "carelessly, but not deliberately delivering an incorrect return or failing to make a return". Nor it is contended has he co-operated fully in any sense with the investigation or inquiry of the Revenue Commissioners so as to permit any diminution in the penalty sought to be imposed.

26. In other words, this respondent comes within s.1077E(3)(4)(b) being liable for the full amount set out in subs.(12) as not being entitled to a reduction for any of the criteria set out within subs.(4)(b) of s.1077E. The same argument is advanced by the applicant in respect of the criteria imposed in respect of his failure to pay VAT- that he has "deliberately" failed to comply with the requirements of the Act, that he does not come within any of the definitions cited above in respect of income tax and VAT and moreover is not entitled to any reduction either within the definitions of "prompted qualifying disclosure" or unprompted qualifying disclosure, nor has he in any sense co-operated fully in any sense with the investigation or inquiry of the Revenue Commissioners so as to permit any diminution in the penalty sought to be imposed.

27. In the affidavits filed, the respondent seeks to dispute a number of matters, amongst them:

a) His objection to being categorised in any way as a "deliberate" defaulter as opposed to being merely 'careless'.

b) That for a significant period whilst there was outstanding income tax and VAT liabilities he was having difficulties with his accountant, in that there was a dispute about his failure to discharge accounting fees which resulted in him having difficulties in having returns filed and dealing with matters in respect of Revenue matters generally.

c) That once the position was explained to him by the applicant in 2013, the position was thereafter rectified and there has been no default since that time.

d) He sought to cooperate at the meeting, which was at the instigation of the applicant in October 2013.

e) The respondent also points out that the underlying judgment amount (as opposed to an imposition of a penalty) was sought against him in proceedings bearing record number 2016/189R, that he consented to judgment in respect of the amount sought on 26th January, 2017. He asserts his understanding, that in consenting to judgment being entered against him, this satisfied all his outstanding liabilities with the Revenue and brought matters to a conclusion between the parties. He did not thereafter anticipate a new set of proceedings seeking the penalties sought within this application.

f) The respondent correctly points out that being categorised as being in "deliberate default" means that there is a 100% tax geared penalty against him and he rejects such a clarification both in principle and on the facts of his case.

g) The respondent who is in his mid-70's ran a bed and breakfast business with his wife from 1990 to 2015. At the relevant times he avers to being unaware that VAT was payable on his business and furthermore, that none of his competitors were paying VAT. He also states, that he was below the threshold amount for some considerable period of time. Difficulties with his accountant referred to above also impeded his abilities to discharge the amount sought.

h) The respondent's significant difficulty (more so in my view than any of the matters set out above) and a relationship with the Revenue Commissioners that he describes as "difficult throughout" largely arises from a company established by the respondent being charged VAT by a third party entity in the conduct of the respondent company's ferry business. The respondent's company was ultimately reimbursed a certain sum of money, which that the respondent believes does not reflect the ultimate figure that the company established by him is due.

i) It is clear both in the affidavits filed and in the submissions made on his behalf that his difficulties with regard to his assertions as to his discharging VAT in circumstances where none was liable, has significantly clouded his relationship with the Revenue Commissioners and also his attitude to the discharge of VAT in respect of the matters at issue in these proceedings. Of course, the ultimate reimbursement of certain figures by the Revenue Commissioners was not a reimbursement to the respondent personally, but to a company and the two issues are, for the Court's purposes, entirely separate and distinct.

j) At one point the respondent appears to suggest, or to certainly have appeared to have adopted a view, that if the Revenue Commissioners had been incorrect as to the entitlement of a third party to discharge VAT in respect of the ferry business, that they likewise could well be (or were) incorrect in their view that VAT was chargeable in respect of his bed

and breakfast business.

k) Throughout the documentation the respondent takes the view that his other issue with the Revenue (the ferry business) must be dealt with initially prior to these matters. A loose form of 'set-off' also appears to be envisaged.

(j) In October 2013, when the applicant sought a meeting with the respondent he avers that the applicant's attitude to him was overly hostile and that the issues he had with regard to other VAT payments were not being addressed.

(k) Alternatively, the respondent points out that the reliefs are penal in nature, the reliefs sought are discretionary in nature and seeks mitigation in respect of all the circumstances that he has set out in detail within the affidavit.

(j) The respondent in his affidavit and submissions made by counsel sets out certain matters of a personal nature to which he claims regard should be had by this court and I will deal with this subsequently.

28. Within the grounding and replying affidavits of the applicant he sets out and confirms:

(a) That the respondent had Revenue liabilities in the amount of €160,000 (his principle liability) with approximately €35,000 collected to date by way of attachment of farm subsidy payments.

(b) He takes issue with the matters constituting the imposition of a penalty at the the lower end of the statutory regime penalty of "merely careless" and points out that the applicant did not properly disclose anything before the commencement of the Revenue audit or investigation nor did he at that point cooperate fully with it or respond properly to any inquiries of the Revenue Commissioners by providing all appropriate documentation to them.

(c) The applicant also points out that the VAT and income tax assessments are now finalised and whilst disputed by the respondent in general terms no specifics are adduced.

(d) The applicant avers and absolutely denies that there never was nor could the Revenue ever agree or consent that there was any consent or agreement that the adjudication before the Master of the High Court in respect of the principle debt was in full and final settlement of any and all outstanding claims and/or that there would be thereafter no imposition of any penalties arising from that indebtedness.

(e) The applicant's supplemental affidavit of 4th April, 2018 states that the respondent had not filed returns for the period since 2013 until the incorporation of the limited company on 16th March, 2016, that assessments had been raised for that period also and collection is awaited. The respondent asserts on more than one occasion that he has been tax compliant since 2013 when these matters were brought to his attention.

29. Accordingly, the issues are as to what categorisation is to be invoked for the imposition of the penalty and consider the submissions advanced by counsel for the respondent as to whether, as she contends, I should exercise any discretion pursuant to the inherent jurisdiction of the court.

30. It is common case, from the decision of *Tobin v. Foley* [2011] I.E.H.C. 432 that the appropriate test for the imposition of any penalty pursuant to the statutes recited above is one of the balance of probabilities.

31. For the reasons particularised below I find the default by this respondent comes within subsection (3) of both statutes. I find his default within the category of 'deliberate.' It therefore follows that he is then liable to the imposition of a penalty. The next issue is to consider, in imposing such a penalty, is as to whether the percentage diminution of the amount of penalty imposed within subpara. (4) (i) can be inferred from the statutory definition, where I must consider, whether this respondent has "cooperated fully with any investigation or inquiry started by the Revenue Commissioners or by a Revenue officer into any matter occasioning a liability to tax of that person" and thereafter whether he has made either a "prompted qualifying disclosure" or an "unprompted qualifying disclosure."

32. Accordingly, in my view (leaving aside the respondent's submissions as to why the reliefs sought within the notice of motion should be refused in full), the only question for determination, pursuant to an interpretation of the statute is the extent of the liability of the respondent to the imposition of the penalty.

33. In my view the statute itself sets out the parameters within which a penalty may or may not be imposed and accordingly any determination must operate within the same parameters.

34. With regard to sub-paras. above "prompted qualifying disclosure" and "unprompted qualifying disclosure" are both defined and I am satisfied, on the basis of the affidavits and exhibits filed that this respondent does not come within either of those categories of disclosure. Whilst the respondent protests that he has cooperated in my view the matters disclosed on affidavit paint a different picture. On many occasions documents were promised either to dispute the figures sought by the Revenue and/or to advance his own position. They were simply not provided. Ultimately the assessments raised by the applicant is not on the basis of documentation furnished by him and accordingly I cannot see that he comes within either of these two categories. Nor in my view has this respondent come within the definition of a 'careless' defaulter. In my view the position adopted by the respondent throughout is significantly more than careless. I appreciate his contention that he has sought to cooperate when asked and he did attend the meeting of October 2013 but thereafter and even at times during that meeting that cooperation was less then comprehensive. I therfore conclude that this respondent does come within the category of a deliberate defaulter.

35. Accordingly, therefore I must thereafter consider whether the respondent is entitled to any amelioration in penalty by virtue of his having "cooperated fully with any investigation or inquiry started by the Revenue Commissioners or by a Revenue officer into any matter occasioning a liability to tax of that person." Again I have difficulty in discerning any appreciable level of cooperation.

36. The language of the statute as quoted above talks of "cooperated fully" and in my view it cannot be said on the facts of this case that there has been a full cooperation by this respondent to the applicant. It may have been partial at times but in my view it was never full cooperation. The respondent may have had his own reasons for not doing so (largely related to the issues surrounding his company's liability for VAT in respect of his former ferry business) but in my view these are insufficient to deal with his liabilities both in respect of income tax and VAT as have been disclosed within the affidavits filed by the applicant.

37. In my view therefore subs. (3) of s.1077E and the similar criteria within s.27A and s.116 of the VAT legislation applies and on the balance of probabilites I find this respondent to be in deliberate default. Again on the balance of probabilities in my view none of the

ameliorating criteria set out in subs.(4)(b) of s.1077E and s.116 does apply in respect of either his liability to income tax or VAT on the facts of this case.

38. Thereafter the respondent has argued that the inherent jurisdiction of the court should be invoked in favour of the respondent.

39. In seeking to invoke the inherent jurisdiction of the court, the respondent relies upon the case of *Ross v. Cohalan* [2014] I.E.H.C. 686. On the facts of this case, the Revenue Commissioners were seeking to impose a penalty by reason the respondent having negligently submitted an incorrect and incomplete voluntary disclosure to the Revenue Off-Shore Assets Group. In July, 2005, the respondent made a qualifying disclosure and enclosed a cheque in full and final settlement of those liabilities. No response was received by the applicant until January, 2007. The Revenue issued an opinion in May, 2010, and an amended opinion issued on 13th December, 2012. Subsequently, the applicant issued the originating notice of motion; one of the arguments advanced by the respondent in that case was that there had been an ordinate and inexcusable delay by the applicant causing a legitimate expectation in the encashment of the cheque proffered in 2005 that the tax liabilities had, in fact, been settled in full. The Court considered the question of delay and the principles articulated by the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. On the basis of the facts outlined, the Court held that the delay was inordinate and that no reasonable excuse had been provided to the Court by the applicant and thus, the delay was inexcusable. On that basis, the Court favoured the respondents on the issue of delay and the relief sought (the imposition of a penalty pursuant to s. 1077B (3)) was refused.

40. In my view the delay criteria as found in *Ross v. Cohalan* above differs markedly from the facts of this case. The tax payer in that case was in a position to argue that he had understood that his payment to the Revenue would not be the subject of challenge. That is very different from the facts of this case where no payments whatsoever have been furnished (save recently in respect of the attachment of certain farm payments to satisfy the principle judgment). This respondent paid no income tax or VAT for in excess of four years within the period of assessment. I find no significant delay on the facts of this case on the part of the applicant. Nor do I find anything, notwithstanding the able submissions on behalf of the respondent that persuades me that, on the balance of probabilities, this respondent is in deliberate default and liable for 100% of the penalty imposed.

41. Counsel for the respondent has also pointed to certain matters in this respondent's personal history which I should and have considered. He is a gentleman of advanced years who has suffered serious physicial consequences arising from an ongoing health complaint. Moreover he is the carer for his daughter, who herself has serious health complaints. He is a farmer with a modest farmholding. Whilst I have a personal sympathy for the respondent in such circumstances, in my view I am obliged to adhere to the statutory provisions in the imposition of a penalty on the facts of this case.

42. Accordingly I make the following Order in the terms sought being;

> A determination pursuant to s.1077B (3) of the Taxes Consolidation Act 1997 as inserted by the Finance (No. 2) Act 2008 that the respondent herein is liable to penalties in the total amount of €108,423.77 pursuant to s.1077E of the Taxes Consolidation Act 1997, s.27 of the Value Added Tax Act 1972, s.27A of the Value Added Tax Act 1972 and s.116 of the Value Added Tax Consolidation Act 2010.

43. I shall hear the parties as to any further orders sought.