

THE HIGH COURT

COMMERCIAL

[2015 No. 152 J.R.]

BETWEEN

SARLINGFORD LIMITED

APPLICANT

AND

APPEAL COMMISSIONER KELLY AND FRANK GALLAGHER (NOMINATED OFFICER) AND THE REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 28th day of January, 2016

1. The applicant brought a motion before the court seeking discovery of three categories of documents. The application is opposed by the respondents.

2. In these proceedings, the applicant seeks judicial review of a decision of the first named respondent rejecting the applicant's appeal against a negative determination of the second and third named respondents concerning a claim by the applicant that certain patent royalty income should be treated as "*disregarded income*" for tax purposes because it derived from a "*radical innovation*" within the meaning of s. 141 of the Taxes Consolidation Act 1997, as amended. The applicant claims that it had a legitimate expectation that this tax relief would be available to it on a retrospective basis by reason of i.) certain correspondence with the third named respondent, ii.) a generally accepted view that this relief would be available on a retrospective basis, iii.) the treatment of another taxpayer, namely, Machine and Graphic Consultants Limited and finally, iv.) the fact that in 2004 or 2005, officials of the third named respondent carried out a general tax inspection of the group of companies to which the applicant belongs during which the question of this relief arose.

3. The categories of documents sought are as follows:-

(i) All documents whether stored in paper or electronic form in the power, possession or procurement of the Respondents in respect of an application made and considered in or about 2004 for determinations pursuant to s. 141(5)(d)(i) of the Taxes Consolidation Act 1997, in respect of Machine & Graphic Consultants Limited for qualifying expenditure back to 1998 subject (in the case of all documents) to any necessary redaction to protect the identities of the tax payer or its directors involved.

(ii) All documents created since on or about 26th March, 1996, whether stored in paper or electronic form in the power, possession or procurement of the Respondents or either of them in respect of a policy or practice of the Respondents, or either of them, concerning the retrospective application of the exemption which flows from determinations made pursuant to s. 141(5)(d)(i) of the Act of 1997.

(iii) All documents created since on or about 1st January, 2004, whether stored in paper or electronic form in the power, possession or procurement of the Respondents, or either of them, in respect of any inspection or audit of the applicant's tax affairs involving, in particular, a site visit to the applicant's premises in 2004 or 2005, carried out by officials of the third named respondent's Large Cases Division and/or other or local officials of the third named respondent acting either for and on behalf of the said Divisions or directly under the authority of the third named respondent.

4. It is accepted by the parties that because of the nature of the judicial review process, which is concerned with the legality of the decision challenged, the necessity for discovery will be more difficult to establish than in plenary proceedings. Despite this the courts will make an order for discovery if it is necessary for disposing fairly of the application for judicial review where there is a dispute on the facts which it is necessary to determine for that purpose. See *K.A. v. Minister for Justice* [2003] 2 I.R. 93, and *Keirns v. McGuinness & Ors* [2015] IECA 257.

5. This application for judicial review essentially involves an issue of statutory interpretation. The respondents argue that the question of legitimate expectation cannot arise in those circumstances. The respondents rely on the judgment of the Supreme Court in *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160. That case involved an application for an order of *certiorari* quashing a decision of the Revenue Commissioners wherein they purported to decide that the applicant was not entitled to a repayment of excise duty in respect of the purchase of a motor vehicle for a disabled driver under the provisions of tax regulations concerning excise duties on motor vehicles. In that case, the applicant claimed that the decision made by the respondents was made "*contrary to and in frustration of the legitimate expectation of the applicant that he would be entitled to such repayment under the said section by reason of the provisions of the said scheme*". Finlay C.J. said at p.167:- "*...this applicant could not pursue on the basis of expectation a remedy which would involve the carrying out by the statutory authority, the Revenue Commissioners, of activities which they were not empowered to carry out, and the payment or repayment of monies which they were not empowered to pay or repay.*"

6. McCarthy J. stated at pp. 168-169:-

"It is argued that he had a legitimate expectation that when he bought the new car he would get the rebates because he had got them in the past on that extra-statutory frame and that before he was to lose that right, he should be notified before he purchased the new car. Expressed somewhat differently, it may be said that having wrongly persuaded the licensing authority to exempt him under s. 43(1) [of the Finance Act 1968] and consequently recouped from the general body of tax payers the excise duty and the VAT that he had paid on his new car in 1983 and in 1985,

that when the Revenue Commissioners became alerted to possible abuses of the scheme, he should have been notified of their change of heart. Even if this extraordinary proposition were to be accepted, it would mean that the Revenue Commissioners would have to be ordered to pay out of the Central Fund a significant sum of money to someone not entitled to any such exemption. The concept that the courts should order the Revenue Commissioners or the Minister for Finance to pay money to someone plainly not entitled to it I find unusual. If expectation existed it was an illegitimate one."

7. O'Flaherty J. said at p. 175:-

"The matter may be tested in this way: if we were to accede to the applicant's submission and quash the Commissioners' decision what would be the effect of that order? It would be to tell the Commissioners that a concession should be granted to which the applicant was not entitled. The extremity of that course can be appreciated once it is realised that that brings us far beyond interfering in the merits of the case - aside from the fact that there are no merits - and involves our sanctioning a breach of duty on the part of the Commissioners."

8. In due course, the challenge to the Revenue Commissioner's decision by the applicant will be determined by means of statutory interpretation. If the applicant persuades the court that the correct construction of s. 141(5)(d) of the Taxes Consolidation Act 1997, as amended, permits the relief on a retrospective basis, then it will succeed. But if the court concludes that the relevant section does not permit the relief on a retrospective basis, the applicant is not permitted to maintain an entitlement to such relief based on legitimate expectation since that would involve the court requiring the respondents to give a concession to the applicant when it was not entitled in law to such a concession and would be contrary to the principles enunciated by the Supreme Court in *Wiley v. Revenue Commissioners*.

9. Since all three categories of discovery sought in this application relate to the issue of legitimate expectation, they cannot be regarded as necessary for disposing fairly of the issues that arise in the judicial review which, as I have already stated, involve a question of statutory interpretation.

10. I refuse the application for discovery.