THE HIGH COURT

[2015 No. 152 J.R.]

BETWEEN

SARLINGFORD LIMITED

APPLICANT

AND

APPEAL COMMISSIONER KELLY,

FRANK GALLAGHER (NOMINATED OFFICER) AND

REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 23rd day of June, 2017.

1. This is an application for judicial review arising out of a decision of the first named respondent on 15th January, 2015, in a tax appeal refusing tax relief to the applicant pursuant to s. 141(5)(d)(ii) of the Taxes Consolidation Act 1997 ("the TCA 1997"). That tax appeal was against a decision of the second named respondent of 30th April, 2012, which determined that, as a matter of substance, the applicant was not entitled to certain tax relief on the basis that the statutory criteria for such relief had not been met. That decision and the conduct of the second and third named respondents in and around the making of that decision are also the subject of the judicial review application.

2. The applicant is a manufacturing company involved in the manufacture of windows and doors for both commercial and residential premises. The applicant holds an Irish patent number 65365 and UK patent number GB2263127 in respect of an apparatus for the manufacture of such windows and doors. This apparatus involves the automated production of the windows and doors in a manner which is said to produce very significant productivity gains. The apparatus was the subject of a claim for tax relief under s. 141(5)(d)(ii) of the TCA 1997.

Statutory Provisions

3. Section 141(5)(d)(i) of the TCA 1997, insofar as is relevant to this appeal, provides as follows:-

> "Notwithstanding paragraph (c) but subject to subparagraph (ii), if in an accounting period the beneficial recipient…of the specified income shows in writing to the satisfaction of the Revenue Commissioners that the specified income is income from a qualifying patent in respect of an invention which—
>
> (I) involved radical innovation, and
>
> (II) was patented for *bona fide* commercial reasons and not primarily for the purpose of avoiding liability to taxation,
>
> the Revenue Commissioners shall, after consideration of any evidence in relation to the matter which the recipient submits to them and after such consultations (if any) as may seem to them to be necessary with such persons as in their opinion may be of assistance to them, determine whether all distributions made out of specified income accruing to the recipient for that accounting period and all subsequent accounting periods shall be treated as distributions made out of disregarded income and the recipient shall be notified in writing of the determination."

4. Section 141(11) of the TCA 1997 as inserted by s. 26 of the Finance Act 2011 provides:-

> "This section shall not apply to distributions made out of disregarded income on or after 24 November 2010."

5. Section 141(5)(d)(ii) of the TCA 1997 sets out a statutory appeal mechanism against a determination of the second named respondent as follows:-

> "A recipient aggrieved by a determination of the Revenue Commissioners under subparagraph (i) may, by notice in writing given to the Revenue Commissioners within 30 days of the date of notification advising of the determination, appeal to the Appeal Commissioners and the Appeal Commissioners shall hear and determine the appeal made to them as if it were an appeal against an assessment to income tax, and the provisions of the Income Tax Acts relating to the rehearing of an appeal and to the statement of a case for the opinion of the High Court on a point of law shall apply accordingly with any necessary modifications."

Factual Background

6. On 11th December, 1996, the applicant applied to the third named respondent for a determination under s. 141(5)(d)(ii) of the TCA 1997, namely that the invention of the apparatus involved radical innovation such that it was entitled to make tax free distributions to shareholders. By letter dated 10th February, 1997, the third named respondent requested the following:-

> (a) a copy of the patent application;
>
> (b) a submission demonstrating in what respects the process is contended to involve radical innovation; and,
>
> (c) any technical or trade literature supporting the foregoing contention.

The applicant did not reply to that letter and the application lay dormant for several years. In the meantime, the applicant went on to make tax free distributions in substantial sums to shareholders notwithstanding that no determination had been made.

7. Correspondence did not resume until 2009. By letter dated 18th March, 2009, the third named respondent questioned the entitlement of Mr. Donal Ring to receive tax free distributions from the appellant. Mr. Ring is a director and the CEO of the applicant

and the inventor and patentor of the invention which is the subject of a claim for a determination under s. 141(5)(d)(i) of the TCA 1997. Mr. Ring and twenty other named persons in receipt of tax free distributions from the applicant are in dispute with the third named respondent in relation to this matter.

8. On 30th April, 2012, the third named respondent gave its decision on the application stating:-

> "On the basis of the submissions and evidence supplied, I regret to say that it has not been demonstrated to my satisfaction that the invention involves radical innovation. As a consequence, I have determined that all distributions out of specified income shall not be treated as distributions out of disregarded income for the purposes of s. 141(5)(d) of the Taxes Consolidation Act…"

9. As the applicant was dissatisfied with this determination it gave notice of appeal by letter to the second named respondent dated 22nd May, 2012. The appeal was set down for hearing on 15th – 16th January, 2015, and in a Form AH1, signed by the second named respondent and dated 1st July, 2013, the nature of the appeal was stated to be the "Third Named Respondent's failure to make a determination under s. 141(5)(d) TCA on the basis that the invention did not involve radical innovation".

10. The Form AH1 does not have any statutory basis but is the form which is forwarded to the Appeal Commissioners by the third named respondent (or an inspector of taxes or nominated officer) which sets out the nature of the tax appeal and requests a date for the hearing of same.

11. Prior to the appeal hearing, the second and third named respondents made written preliminary submissions stating that:-

> (a) the invention in the case did not involve radical innovation; and,
>
> (b) the relief had ceased and was no longer available even if the invention did involve radical innovation.

12. The applicant argues in this judicial review that the tax appeal as particularised in Form AH1 related to the technological reasons as to why a positive determination in respect of radical innovation should be made regarding the invention. The question as to whether or not the relief had ceased and was no longer available was not an issue on the appeal and had never formed part of the decision of the second and third named defendants in their decision to refuse the relief sought. The complaint of the applicant is that the determination of the appeal by the first named respondent was on a basis not properly before the first named respondent. The finding of the first named respondent recorded that:-

> "…determination cannot, by virtue of s. 141(5)(d) apply to accounting periods earlier than 2012 (if that determination of the Rev Com dated 30.04.12 was decided by me in favour of the appellant).
>
> Dissatisfaction was expressed by the appellant."

13. Following that determination the applicant sought a rehearing of its appeal before Cork Circuit Court pursuant to s. 942 of the TCA 1997. The notice of appeal was served by way of a protective measure as there is a ten day time limit within which appeals to the Circuit Court have to be made.

Issues

14. The issues are formulated in the written submissions of the applicant as follows:-

> Issues Involving First Named Respondent
>
> (a) whether the first named respondent acted ultra vires the powers vested in him by s. 141(5)(d)(ii) of the TCA 1997;
>
> (b) whether the first named respondent was in breach of s. 141(5)(d)(ii) of the TCA 1997 in his determination in the matter;
>
> (c) whether the only appeal matter before the first named respondent on 15th January, 2015, was the appeal matter lawfully put before the applicant pursuant to the provisions of s. 141(5)(d) of the TCA 1997;
>
> (d) whether the first named respondent acted irrationally and/or unreasonably in determining the applicant's tax appeal on the basis of a matter not lawfully before him; and,
>
> (e) whether the first named respondent acted in breach of fair procedures in the matter in which he determined the applicant's tax appeal.

15. The following are the issues involving the second and third named respondents:-

> (a) whether the second and third named respondents' construction of s. 141(5)(d) of the TCA 1997 is wrong and misconceived insofar as it contends that the applicant is not entitled to the tax relief thereunder from the date of its first application for same;
>
> (b) whether the second and third named respondents acted in breach of fair procedures in the manner in which they dealt both with the application for tax relief and its appeal pursuant to s. 141(5)(d)(i) – (ii) of the TCA 1997;
>
> (c) whether the second and third named respondents acted unreasonably and irrationally in the manner which they dealt with post the application for tax relief and the appeal pursuant to s. 141(5)(d)(i) – (ii) of the TCA 1997;
>
> (d) whether the applicant had a legitimate expectation that it would be entitled to tax relief under s. 141(50)(5)(d) of the TCA 1997 from the accounting period in which it first applied for same;
>
> (e) whether the second and third named respondents breached the third named respondent's customer service charter and denying the applicant, *inter alia,* fair procedures and accurate and timely information in respect of its tax affairs; and,

(f) whether the applicant is entitled to bring the within application notwithstanding its lodgement of a protective appeal to the Circuit Court from the first named respondent's determination of the matter.

16. A party aggrieved by a determination of the third named respondent may, by notice in writing, appeal to the Appeal Commissioners and the Appeal Commissioners shall hear and determine the appeal as if it were an appeal against an assessment as to income tax. It is the unfavourable determination which both triggers the appeal and determines the subject matter of the appeal. The applicant argues that where no such issue arose before the third named respondent, it was not open to the first named respondent to hear and determine a preliminary submission in respect of time limits made by the second and third named respondents at the appeal hearing. This issue was not included in the unfavourable determination which triggers and was the subject matter of the appeal. The applicant argues that it was, therefore, not properly before the first named respondent. It was never part of the unfavourable determination. Nor did it form part of the basis of the appeal set out in Form AH1 completed by the second and third named respondents.

17. By virtue of s. 141(5)(d)(i) of the TCA 1997, the first named respondent is required to hear and determine the appeal as if it were an appeal against an assessment to income tax.

18. The appeal before the first named respondent concerned the finding of the third named respondent that the invention did not involve radical innovation and that, accordingly, all distributions out of specified income shall not be treated as distributions out of disregarded income for the purpose of s. 141(5)(d) of the TCA 1997. The issue concerning time limits which was raised by the second and third named respondents at the appeal hearing was not part of the decision under appeal. It was not included or even referred to in the determination nor did it appear in the Form AH1 completed by the second and third named respondents which set out the subject matter of the appeal.

19. The first named respondent did not make a decision on the issue arising on the appeal but rather made a decision on a point which was not part of the original decision and in respect of which no appeal was before him.

20. Taxation statutes should be construed in the same fashion as other statutes (see *Revenue Commissioners v. O'Flynn Construction Co. Ltd.* [2013] 3 I.R. 533). In the interpretation of such statutes, the court should adopt a purposive approach. The requirement that the Revenue Commissioners and Appeal Commissioners determine appeals made to them as if they were appeals against an assessment to income tax is a deeming provision. Such provisions should be construed in their ordinary and natural meaning consistent as far as possible with the policy of the Act. (See *Marshall (Inspector of Taxes) v. Kerr* [1993] S.T.C. 360). On this basis the applicant argues that only the issue of "radical innovation" was before the first named respondent for determination by him but that the first named respondent, in fact, made a decision based on a matter which was not properly before him.

21. In deciding the applicant's tax appeal on the basis of a preliminary submission which were not properly before him, the applicant claims that the first named respondent acted irrationally and that his decision offended against the rule of *audi alteram partem* since the applicant was not actually heard on the real subject matter of the appeal; namely, the "radical innovation" point.

22. In looking at the conduct of the second and third named respondents it is necessary to construe s. 141(5)(d)(i) of the TCA 1997. These respondents contend that the entitlement to have the income treated as distributions made out of disregarded income only arises in respect of the accounting period in which the decision is made and does not arise in respect of any earlier accounting period for which the qualifying conditions are satisfied and in respect of which the application for relief is made. There is no dispute that from 24th November, 2010, the relief sought was not available. The application for a determination under s. 141(5)(d)(ii) of the TCA 1997, was made on 11th December, 1996, and the factual background is set out earlier in this judgment. There is no doubt that the applicant delayed significantly in dealing with queries raised by the third named respondent on 10th February, 1997. The determination was made by the third named respondent on 30th April, 2012.

23. It seems to me that the respondents contention that the entitlement to have income treated as distributions made out of disregarded income only arises in respect of the accounting period in which the decision made flies in the face of common sense and is unreasonable. While it may have taken the applicant an inordinate length of time to put all the relevant information before the respondents, once that information was put before the respondents they should have considered the application on the basis that, if it succeeds, the relief will be granted in respect of each of the accounting years from the date of the application up until 24th November, 2010, subject to the disputed issue as to whether or not that period is limited to four years. It is, of course, a matter for the respondents and/or the Circuit Court (on appeal) to determine whether or not such relief should be allowed. To construe the section in the manner urged by the respondents would involve the granting of relief being at the discretion of the third named respondent depending on the timing of its assessment and the completion of its investigation. This could lead to arbitrary results, would depend on the resources of the third named respondent and, as a result, might give rise to differential treatment between tax payers. A correct construction of the section is that, if an applicant is entitled to relief, relief should be granted from the date of the application provided it receives a positive determination in respect of its application either in the first instance or on appeal.

24. The court has been referred to an extract from Francis Bennion, *Bennion on Statutory Interpretation* (5th Ed. LexisNexis 2008) where the author states at p. 968, s. 312:-

> "The courts seek to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to conclude virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial or productive, or a disproportionate counter-mischief."

25. I adopt those principles in coming to the view that s. 141(5)(d)(i) of the TCA 1997 should be construed in the manner urged upon the court by the applicant rather than the respondents. In construing the section in the manner in which he did, the first named respondent breached the constitutionally protected right of the applicant to natural and constitutional justice on several grounds. In the first place, there was a breach of the principle of *audi alteram partem* insofar as the applicant was not given an opportunity to be heard on the issue listed for appeal; namely, the "radical innovation" point. The interpretation of the first named respondent was unreasonable and irrational because he determined the tax appeal on the basis of material which did not form part of the applicant's appeal.

26. The respondents claim that the applicant had an adequate alternative remedy but it seems to me that this is not so. It commenced protective appeal proceedings in the Circuit Court but before the appeal should proceed in the Circuit Court it is necessary that the matter properly in issue in the appeal to the first named respondent; namely, the "radical innovation" issue should have been heard. It is entirely reasonable that the applicant would wish that it would get a determination on the "radical innovation" point before any further appeal should proceed. Therefore, I reject the contention of the respondents that an effective alternative

remedy exists and that this should be a ground for refusing a judicial review.

27. The law on legitimate expectation in this State is to be found in *Glencar Exploration plc v. Mayo County Council* (No. 2) [2002] 1 I.R. 84; *Wylie v. Revenue Commissioners* [1994] 2 I.R. 160; and *Atlantic Marine Supplies Limited v. Minister for Transport* [2010] IEHC 104. It is well established that a legitimate expectation cannot arise in respect of a right where none exists. So if, for example, the Revenue Commissioners are not entitled to give a tax exemption, a party cannot claim such exemption on the basis of legitimate expectation perhaps based on a claim that another taxpayer got that relief. In the case before the court, there is nothing amounting to a representation from the respondents that the applicant was promised a positive determination of its application under s. 141(5)(d). Rather, the applicant makes the case that legitimate expectation lies in respect of an interpretation of s. 141 that means that it should be granted relief with effect from the accounting period in respect of which it first applied for same. Indeed, I have held that that is so. But it cannot amount to a legitimate expectation. While Mr. Patrick Tobin, on affidavit, avers that the management of the applicant was justified in believing that the company's tax affairs, including the manner in which it treated the distribution of patent royalty income was in order, there is no representation in that regard.

28. So far as the alleged treatment of Machine and Graphics Consultants Limited is concerned, this cannot avail the applicant to an interpretation of s. 141 that is incorrect in law. The legitimate expectation relied on in this case is one involving an interpretation of a taxing statute and this is a relief for which the doctrine is not available.

29. The final submission of the applicant is that the respondents are in breach of the third named respondent's customer service charter in denying the applicant fair procedures and timely information in respect of his tax affairs. The applicant relies on *Keogh v. Criminal Assets Bureau* [2004] 2 I.R. 159 in which the Supreme Court held that an undertaking in the taxpayers' charter of rights (now the third named respondent's customer service charter) that the third named respondent Commissioners would provide accurate and timely information regarding taxpayer's entitlements and obligations under third named respondent law was binding and that the failure to meet this undertaking by omitting to inform the taxpayer of a statutory right of appeal entitled the taxpayer to be restored to the same position as if the undertaking had, in fact, been met.

30. The *Keogh* case can be distinguished from this application in a number of ways. In the first place, the Supreme Court in *Keogh* found that the absence of information from the Revenue Commissioners left the applicant in that case "in the dark" as to his right to appeal against assessments to income tax. The facts in this case were quite different and there is nothing to indicate that there was an absence of information from the Revenue which left the applicant "in the dark" as to its appeal against assessments to income tax. I cannot ignore the fact that the applicant took an inordinate length of time to deal with the queries raised by Revenue and that having originally applied for a determination on 11th December, 1996, and having been requested for further particulars on 10th February, 1997, nothing more happened until 2009, some eleven years later. I find no basis on which the applicant is entitled to relief based on any breach of the Revenue's customer service charter.

Conclusion

31. The applicant is entitled to an order of *certiorari* quashing the first named respondent's determination of the applicant's tax appeal given on 15th January, 2015, being the relief sought in para. D1 of the statement of grounds and the applicant is also entitled to the declarations sought in paras. D2, 3, 4, 5, 6, 10, 11 and 14. Insofar as paras. D8 and 9 are concerned I will make a declaration in favour of the applicant that insofar as it is entitled to the relief sought the period runs from the date of first application to the respondents but I will leave over for determination at any rehearing or appeal the disputed issue as to whether that period should be confined to four years. I will hear counsel on the nature of the order to be made following this determination.