Neutral Citation [2015] IEHC 546

THE HIGH COURT

[2014 137 JR]

BETWEEN

ROBERT STANLEY

APPLICANT

AND

THE REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Mr. Justice Hedigan delivered on the 7th day of August, 2015

1. In these proceedings the applicant seeks the following orders;

(i) An order of certiorari quashing the notice of assessment;

(ii) A declaration that notice of assessment was issued without and/or in excess of the respondents jurisdiction and without any basis in law;

(iii) A declaration that the notice of assessment is vitiated by error of law;

(iv) Without prejudice to the above, a declaration that the applicant did not fail to deliver a "correct relevant return" within the meaning of s.46 of the Capital Acquisitions Tax Consolidation Act 2003 (CATCA) by reason of having claimed a capital gains tax credit pursuant to s.104 CATCA in his November 2007 CAT return;

(v) In consequence of (iv) above, a declaration that the applicant was not guilty of "*neglect*" within the meaning of s.46 (7B) (b) and, accordingly, the notice of assessment was made outside the time limit specified in s.49 (6A) of CATCA and is thus null and void and without effect in law;

(vi) An order staying the statutory appeal pending before the Appeal Commissioners in respect of the impugned notice of assessment;

(vii) Such further or other order;

(viii) The costs of this application.

2. The applicant bases his claim essentially on one core issue. It was argued in the hearing as the key issue in the case. Section 49 of CATCA confers on the Revenue Commissioners the power to raise assessments to Capital Acquisitions Tax (CAT). This power however is expressly subject to s.49 (6A) which provides that:

"For the purposes of subsection (6) an assessment, a correcting assessment or additional assessment made in connection with or in relation to a relevant return may not be made after the expiry of four years from the date that the relevant return is received by the Commissioners.

(b) In this subsection 'relevant return' means … a return or an additional return within the meaning of section 46."

3. Section 49 (6B) provides however:

"(6B) The time limit referred to in subsection (6A) shall not apply where the Commissioners have reasonable grounds for believing that any form of fraud or neglect (within the meaning given in section 46(7B) (b)) has been committed by or on behalf of any accountable person in connection with or in relation to any relevant return (within the meaning given in subsection (6A)) which is the subject of assessment."

No issue of fraud arises so the real question is as to what "neglect" means. Section 46 (7B) (b) provides that

"'neglect' means negligence or a failure to deliver a correct relevant return (within the meaning given in section 49(6A) (b))."

The applicant argues that the correct interpretation of that expression is the core issue in these proceedings.

4. There is no dispute but that the notice of assessment the subject of these proceedings issued outside the four year time limit prescribed by s.49 (6A). By a letter of the 30th of December 2013, the respondents acknowledge that the assessment had been raised *"outside the relevant four year time limit"* and identified the basis for doing so as *"neglect, including negligence or failure to deliver a correct relevant return (within the meaning given in s.49 (6A) (b))."* By a further letter of the 17th February 2014, the respondent made it clear that it considers that it was entitled to raise the assessment when it did because, in its view, the return made by the applicant did not correctly quantify the CAT payable by reason of including a capital gains tax credit to which, in the Revenue's view, the applicant was not entitled. This letter stated as follows:

"The CATs assessments were raised as a result of the failure to deliver a correct return

….

It is considered that the credit claimed by each of your clients in respect of the Capital Gains Tax paid by their father is therefore disallowed under s.104 (3) of the Capital Acquisitions Consolidation Act 2003 (CATA). A credit for Capital Gains Tax is withdrawn where the asset is disposed of within two years of the gift or inheritance.

Enquiries on this issue have been ongoing with the agents for your clients and Mr. Stanley since 2008. On an analysis of the information actually provided as set out above it was considered that the Capital Gains Tax Credit claimed against your client's CAT liability was not due and should not have been claimed on the forms IT38. Your clients clearly therefore did not deliver a correct relevant return."

5. The applicant argues that if this is correct then s.49 CATCA permits the Revenue to raise an assessment if, at any time, they consider that a relevant return does not reflect their view as to the correct liability of the tax payer concerned. If this were so the applicant argues that the exceptions provided in s.49 (6B) CATCA for fraud and negligence would be entirely redundant: why would the Revenue ever bother to seek to establish fraud or negligence in connection with or in relation to a return if asserting that the return was "*incorrect*" was, in itself, a sufficient basis for escaping the four year time limit in s.49 (6A). The applicant further argues that this construction of s. 49 (6B) would render the four year time limit entirely illusory. In every case where the Revenue considered that the liability of a tax payer was greater than that set out in a relevant return it would, on that basis alone, be entitled to raise an assessment, without being constrained in any way by that time limit. Such a construction would result in an exception that swallows the general rule and effectively repeals the four year time limit which has been expressly provided by the Oireachtas and would undermine a fundamental protection for tax payers in breach of the principle of legal certainty. Thus argues, the applicant what is at stake here is a net legal issue: what is the meaning and effect of s.49 (6B) (read as it must be with s.46 (7B) (b)) and, specifically, does it mean (as the Revenue contends) that the four year time limit in s.49 (6A) is disapplied whenever the Revenue forms the view that the relevant return was incorrect in the sense of identifying a CAT position on the part of the taxpayer concerned with which the Revenue disagrees. If the Revenue are wrong (as the applicant contends) then it follows that the notice of assessment issued out of time, is invalid and must be quashed. If the Revenue are correct, then it follows that the notice of assessment is not out of time and the liability (if any) of the applicant under it will fall to be determined by the appeal commissioners in the ordinary way. This is the core issue in the case.

6. Limitation periods are to be found in all common law countries and in most systems of jurisprudence. Where that period has expired the potential defendant should be entitled to assume that he is no longer at risk and to order his affairs accordingly. See *Hegarty v. O'Loughran* [1991] 1 I.R. 148 at 157. But these limitation periods are subject to conditions e.g. fraud which may set a limitation period aside or cause it to be extended. In this instance, fraud or neglect, which may be manifested by the filing of an incorrect return, is such a condition. The issue between the tax payer and the Revenue Commissioners is the correctness of the return made. If it is correct, then no extension of the limitation period will be allowed and the assessment will fall.

7. I do not believe that any question of statutory interpretation arises in this case. I can find no obscurity or ambiguity nor does any absurdity flow from a literal interpretation of the statute. The statute means what it says i.e. an assessment may issue outside the four year limitation period if the return made by the tax payer is found to be incorrect. The exception does not in my view swallow the general rule as the applicant contends. The reason I think this is because if the tax payer believes that the assessment issued outside the four year limitation period and is not covered by the exemption because it is not incorrect, then he can appeal to the Appeal Commissioners. If after a full hearing they conclude that the return was not incorrect then the assessment falls under the general rule because the exemption does not apply. It is a matter of mixed fact and law as to whether a correct return was filed. That is classically a matter for decision by the Appeal Commissioners who I am satisfied have ample jurisdiction so to do. It is no function of this court in these proceedings to enter into any disputed tax issues concerning a CAT liability of the applicant. That is for the Appeal Commissioners. It is they who will determine whether the CGT tax credit claimed against CAT liability was not due and should not have been claimed on the form IT38.

8. Thus, on what the applicant himself has, I think correctly, described as the core issue in the case, I cannot find with him. The clear interpretation of the exemption clause does not in my view swallow the general rule. Where the Revenue have held that a return was incorrect and the taxpayer disagrees, he may appeal and it is for the Appeal Commissioners to determine, as a matter of mixed law and fact, whether the return was in fact incorrect. If it was, then the four year limitation period does not apply. If the return was correct then the assessment falls because the four year limitation period applies. This was the choice of the Oireachtas and it is clearly expressed in the statutory provisions. In the light of this decision, it is not necessary for the court to address any of the other issues that arose in this case.

The application is refused.