

THE HIGH COURT

REVENUE

[2012 No. 154 MCA]

IN THE MATTER OF SECTION 902A OF THE TAXES CONSOLIDATION ACT 1997

BETWEEN

AN INSPECTOR OF TAXES

APPLICANT

AND

A FIRM OF SOLICITORS

RESPONDENT

JUDGMENT of Mr. Justice Moriarty delivered on the 21st day of February, 2013

1. The applicant in this matter, who is the Manager in charge of the Offshore Assets Group in the Revenue Commissioners, seeks an order pursuant to s. 902A of the 1997 Taxes Consolidation Act from the respondent in respect of certain specified information and documentation regarding 19 transactions effected through two bank accounts in the name of the respondent. It is the final sub-section 7 of s. 902A, providing that applications under the section shall be held *in camera* which gives rise to the somewhat Delphic title, the application having been commenced under the actual names of the parties, but having by agreement been amended to accord anonymity, at the conclusion of the hearing, on 5th December last.

2. This application is part of the extensive and long-running investigation by Revenue into the use of offshore bank accounts by Irish residents, and for the recovery of taxes evaded by operation of those accounts, which has been widely publicised in recent years, featuring prominent newspaper notification, initial partial amnesty arrangements, and significant tax yields. In the course of that exercise, Revenue have already obtained High Court orders under s. 908 of the 1997 Act, directing financial institutions to furnish particular documents and information relevant to that investigation, which in the present instance elicited information relating to two accounts held in the name of the respondent at a substantial branch of a leading Irish bank, which are the office account and the client account of the respondents. The specific relief sought in this application refers to documents and information relating to such 19 transactions within those accounts, over the years 2005 – 2007, involving, on the one hand, four corporate entities, an individual and an individual couple and on the other hand, certain financial institutions located in the Isle of Man, Guernsey, Lichtenstein, Switzerland and Jersey. It appears that prior applications have been successfully sought from the High Court by Revenue under s. 902A in respect of third parties such as insurance companies, but that this is the first instance of such relief being sought against a firm of solicitors. This factor, involving as it does the element of legal professional privilege and other relevant aspects, has given rise to a considerable measure of differences between the parties, reflected in two affidavits on each side, extensive documentation exhibited, and argument in the course of the hearing.

3. The focus of the argument was primarily upon three issues, each addressed in the wording of section 902A. Firstly, the respondent contended that the applicant had failed to demonstrate the requisite reasonable grounds for suspecting that the tax payers in question may fail or have failed to comply with the provisions of the Tax Code, that such failure was likely to occasion serious prejudice to the proper assessment or collection of tax, and that what was contained in the material sought in the application was relevant to the proper assessment or collection of tax. Secondly and thirdly, the respondent raised concerns over both confidentiality to clients, and legal professional privilege, each in the context in which these matters were referred to in s. 902A aforesaid.

4. The preponderance of the argument at the hearing was directed to the first of these matters. Before addressing what was stated, I feel it is appropriate to refer to my own initial appraisal of the section in this regard, the wording of which conveniently fits into two pages, which are set forth in an Appendix immediately following the judgment.

5. The section, it seems to me, has been carefully drafted to incorporate its own checks and balances, in such a fashion as to equate the interest and duty of Revenue in obtaining from third parties designated documentation or information relating to tax payers, while providing against oppressive or capricious use of any entitlement conferred. These cheques are both internal and external, as regards the authorised officer or tax inspector in any particular case. Initially, he or she must only make application if satisfied:-

- (a) that reasonable grounds exist for suspecting that the taxpayer or taxpayers in relevant investigation may have failed or will fail to comply with statutory tax obligations;
- (b) that any such failure is likely to entail serious prejudice to the proper assessment or collection of tax; and
- (c) that the information likely to be obtained from the relevant documents sought, or likely to arise from the content of what is sought, is relevant to the proper assessment or collection of tax.

Further, exemptions from disclosure are provided for (ignoring one inapplicable medical contingency) in instances either of information with respect to which a claim for legal professional privilege could be maintained in legal proceedings, or of professional advice of a confidential nature given to a client, other than given as part of a dishonest, fraudulent or criminal purpose, the latter factor not here either arising or alleged.

6. In addition, external checks are set in being under the section to guard against inappropriate or intemperate deployment of it by the tax inspector seeking documents or information in any particular case. Apart from him or her having to be satisfied on reasonable grounds of the matters set forth in the preceding paragraphs, it is a condition precedent to making an application that the written

consent of a Revenue Commissioner be obtained before proceeding with any such application. Further, it is of course also provided that the High Court judge to whom application is made shall be satisfied that there are reasonable grounds for the application before ordering relief in the context of the documents or information sought, or any part thereof.

7. Accordingly, it seems that a not inconsiderable array of checks against unwarranted use of the section are inbuilt under its own terms. The inspector must be satisfied that reasonable grounds exist to justify forming the requisite suspicion in the first instance, he or she must procure the written consent of a Revenue Commissioner before taking matters further, a course I feel I am entitled to infer would be unlikely to be exercised in any merely formal or perfunctory context, and at the hearing the High Court judge in turn must be satisfied as to the existence of reasonable grounds for the application, before acceding to it in part or in whole. It would palpably be insufficient to proceed on what was referred to by the late Henchy J. in one of the older cases mentioned in the argument as "telepathy or a hunch", and what clearly is set forth is that a reasoned belief must be raised in the mind of the inspector, who must then procure the written sanction for the application of a Revenue Commissioner, and must then in turn convey all relevant matters to the High Court judge hearing the application, to the extent that he or she is satisfied of such reasonable grounds, before acceding to it. While I am indebted to both Mr. Barron and Mr. Simons for their helpful and succinct arguments, I feel both may momentarily have strayed from what seems to me the proper appraisal of the sections in portions of their arguments, the former in suggesting that what is conferred is a statutory trawling exercise, and in urging the court to accord curial deference to the inspector's view, and the latter in reference to the court even countenancing acting as "a rubber stamp" for the inspector, although I of course appreciate this was put by him only as the extreme of what would not be permissible.

8. In opposing relief, on the basis that reasonable grounds for the requisite suspicion had not been disclosed, Mr. Simons laid some stress on his contention that the substantial volume of material exhibited in the applicant's supplemental affidavit was largely generic and related to extraneous matters. I cannot fully agree. It may be that the sheer volume of what was raised was somewhat excessive, having read all of it, but it nonetheless relates to matters in the public domain which were much discussed in all media: aspects such as the identities of countries that proved most recalcitrant in curbing offshore tax abuses, showing clear affinities with the jurisdictions mentioned in the present application, and the conduct of banking institutions both in Ireland and elsewhere, as exemplified by the Credit Suisse First Boston sequence of advertisements in the Irish Times, seem to me relevant in setting the context of what is issue.

9. As to Irish jurisprudence in relation to interpretation of the section in question, I find some assistance may be derived from the decision of Charleton J. in the case of *Menolly Homes Limited v. the Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49, and from the decision of O'Neill J. in *Viera v. Revenue Commissioners* [2009] ITR 141. But in any event, appraising all the matters raised by the applicant, allied to what in the present instance is the relatively low threshold of reasonable grounds for suspicion, albeit subject to the checks noted, I believe this to be amply demonstrated by the applicant, and that in interpreting the section in this manner, no violence is done to canons of statutory construction, having due regard to the European Convention on Human Rights Act 2003.

10. To the degree to which I may be disposed to order relief, I am similarly not persuaded to refuse the application either on grounds of legal professional privilege, or confidentiality, as set forth in section 902A. In this regard, I note the sensibly restricted ambit of the relief sought in the second schedule appended to the notice of motion, whereby information and documentation sought is limited to the names and addresses of parties to the transaction and/or ultimate beneficiaries of the monies referred to in each of the transactions in issue, rather than seeking written advices, attendances or similar documentation. As to legal professional privilege, I accept that the leading case in respect of its extent remains the decision of Kelly J. in *Miley v. Flood* [2001] I.R. 50. In that case, which although appealed was compromised between the parties prior to the appeal coming before the Supreme Court, Kelly J. conducted an extensive review of the law of a number of common law jurisdictions, and concluded that the plaintiff as a solicitor was not entitled in Irish law to maintain a claim of privilege over the identity of the persons who had provided him with his instructions. I believe that a similar conclusion is warranted in the present instance, in which I have noted confidential memoranda or advices are not sought, and that legal professional privilege does not exempt the respondent from divulging the identities and addresses of persons who were ultimate beneficiaries in respect of each of the transactions in issue, together with relevant confirmatory documentation. Nor, in my view, does client confidentiality preclude or exempt the furnishing of that information and documentation. In the High Court case of *Walsh v. National Irish Bank* [2007] ITR 99, McKechnie J. endorsed certain categories of exceptions to the duty of confidentiality arising, in that instance, between a banker and its customer. These included both situations where disclosure was under compulsion of law, and where there was a duty to the public to disclose. McKechnie J. observed that those exceptions were not mutually dependent and must give way, where the circumstances so demand, to the overriding duty of disclosure in the public interest, noting that an example of this would be an attempt to undercover fraud or detect crime. In viewing confidentiality as outweighed in the present instance by an overriding public interest in ensuring the lengthy Revenue investigation is brought to finality, and taxes properly due addressed and discharged, I shall return to this aspect in the next succeeding paragraph. Mention was also made on behalf of the respondent of what were contended to be the comparatively limited amounts in pecuniary terms remaining in issue, as against what has already been raised by Revenue in the extensive investigation to date. It is true that the amounts presently remaining in issue are appreciably less than the aggregate of taxes, interest and penalties realised to date, but the sums remain in no sense derisory or *de minimis*, and the element of public interest, particularly at this belated vantage point, cannot be understated. No duty of confidentiality is absolute, and the present circumstances amply justify it being overridden.

11. A final matter merits reference. Ruling on the applicant's contended entitlement under the section inherently involves a balancing of the conflicting rights, duties and interests of Revenue, and of the tax payers who seek to resist an order. If the outcome of obtaining such portion of the s. 902A order as is presently relevant transpires to be that at least the corporate entities involved are insulated against any further scrutiny of, not merely the possible liabilities, but even the very identities of the individual tax payers involved, it will mean that this Court has acquiesced in the erection of an effective cul-de-sac, beyond which no further information may be elicited. If such is the interpretation of the aggregate deployment by Revenue of ss. 902 and 908A, it is difficult to see how any objective is served, other than providing a possible encouragement in future cases for the deployment of labyrinthine layers of corporate, banking and/or professional entities, with a view to shielding identities of individual Irish taxpayers. Mr. Simons has argued that the persons involved in the present application may have no liability to Revenue, whether through their deposit interests being exempt from tax, or having had such tax already deducted at source. This, of course, remains possible, but one would have thought that such positions could readily be demonstrated to Revenue, even if this has not been done in the several years since the material transactions. Should it be the case that tax and other sanctions require to be addressed, it is surely in the public interest, not least in the context of compliant taxpayers, including those who have cooperated in the investigation to date, that the law should take its course.

12. In all the circumstances, I accede to the application made. By agreement between the parties at today's hearing, after the principal content of the judgment was set forth, the matter has been put back for mention until Friday, 8th March next to address questions of costs and any remaining matters. While I incline to the view that the extent of the order should be as set forth in the schedule to the notice of motion, I will then hear counsel in this regard. A similar situation may conceivably arise if there are any

documents that required redaction in part.

Appendix

Taxes Consolidation Act, 1997 (Number 39 of 1997)

902A Application to High Court: information from third party.

“(1) In this section –

‘the Acts’ has the meaning assigned to it by section 1078(1);

‘judge’ means a judge of the High Court;

‘a taxpayer’ means any person including a person whose identity is not known to the authorised officer, and a group or class of persons whose individual identities are not so known.

(2) An authorised officer may make an application to a judge for an order requiring a person (other than a financial institution within the meaning of section 906A) to do either or both of the following, namely –

(a) to deliver to the authorised officer, or to make available for inspection by the authorised officer, such books, records or other documents as are in the person’s power, possession or procurement and as contain, or may (in the authorised officer’s opinion formed on reasonable grounds) contain, information relevant to a liability in relation to a taxpayer,

(b) to furnish to the authorised officer such information, explanations and particulars as the authorised officer may reasonably require, being information, explanations and particulars that are relevant to any such liability,

and which are specified in the application.

(3) An authorised officer shall not make an application under subsection (2) without the consent in writing of a Revenue Commissioner, and without being satisfied –

(a) that there are reasonable grounds for suspecting that the taxpayer, or, where the taxpayer is a group or class of persons, all or any one of those persons, may have failed or may fail to comply with any provision of the Acts,

(b) that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax (having regard to the amount of a liability in relation to the taxpayer, or where the taxpayer is a group or class of persons, the amount of a liability in relation to all or any one of those persons, that arises or might arise from such failure), and

(c) that the information –

(i) which is likely to be contained in the books, records or other documents to which the application relates, or

(ii) which is likely to arise from the information, explanations and particulars to which the application relates,

is relevant to the proper assessment or collection of tax.

(4) Where the judge, to whom an application is made under subsection (2), is satisfied that there are reasonable grounds for the application being made, that judge may, subject to such conditions as he or she may consider proper and specify in the order, make an order requiring the person to whom the application relates –

(a) to deliver to the authorised officer, or to make available for inspection by the authorised officer, such books, records or other documents, and

(b) to furnish to the authorised officer such information, explanations and particulars,

as may be specified in the order.

(5) The persons who may be treated as a taxpayer for the purposes of this section include a company which has been dissolved and an individual who has died.

(6) Nothing in this section shall be construed as requiring any person to disclose to an authorised officer –

(a) information with respect to which a claim to legal professional privilege could be maintained in legal proceedings,

(b) information of a confidential medical nature, or

(c) professional advice of a confidential nature given to a client (other than advice given as part of a dishonest, fraudulent or criminal purpose).

(7) Every hearing of an application for an order under this section and of any appeal in connection with that application shall be held in camera.”