[2017] IEHC 445

THE HIGH COURT

2015 No. 59R

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BETWEEN:

(1) MICHAEL GLADNEY

Plaintiff

AND

ANNINO FORTE

Defendant

(2) MICHAEL GLADNEY

Plaintiff

AND

CORRADO FORTE

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2017.

I. Introduction

1. Following a Revenue audit in which the Fortes (father and son) elected not to participate, the Revenue Commissioners demanded estimated unpaid taxes of each of the Fortes by way of notices of assessment. The sums sought by the Revenue Commissioners are vast, over €2.7m in the case of Mr Annino Forte, and over €2.5m in the case of Mr Corrado Forte. In the notices of assessment, the Fortes were advised that they could appeal the assessments to the Appeals Commissioners. However, instead of bringing appeals to the Appeals Commissioners, the Fortes, who appeared unrepresented before the court, decided that they would wait for the Revenue Commissioners to sue them for the alleged taxes owing and then dispute the alleged tax liabilities in court. Unfortunately, under the Tax Acts, the Fortes' failure to bring appeals to the Appeals Commissioners has had the effect that the notices of assessment, and the estimated liabilities identified therein, have become "*final and conclusive*". This has the result that estimated tax liabilities that have never properly been tested have become, through operation of statute, liabilities that are fully and finally owing at law.

II. The Conversion of an Estimate into a Debt

2. The applicable law which converts an estimated revenue liability into a debt fully and finally owing at law can be summarised as follows. Under s.58(1) of the Taxes Consolidation Act 1997, *inter alia*, profits or gains are chargeable to tax, notwithstanding that at the time the relevant tax assessment is made, (a) the source of same is not known to the inspector, (b) they are not known to the inspector to have arisen wholly or partly from a lawful source or activity, or (c) they are known to the inspector to have arisen from an unlawful source or activity. Under s. 933(1) of the Act of 1997, "*A person aggrieved by any assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf…shall be entitled to appeal to the Appeals Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing…".* Under s.933(6)(a) of the Act of the Act of 1997 "*In default of notice of appeal by a person to whom notice of assessment has been given, the assessment made on that person shall be final and conclusive*." It is this last provision that the Revenue Commissioners rely upon as giving them an unassailable legal entitlement to such monies as they estimate to be owing to them. Although there is provision in s. 933(7) and (8) of the Act of 1997 for the bringing of a late appeal to the Appeals Commissioners, s. 933(9)(a) appears to preclude the bringing of a late appeal at this time, providing that "*Where action for the recovery of income tax or corporation tax charged by an assessment has been taken, being [inter alia] action by means of the institution of proceedings in any court…neither subsection (7) nor subsection (8) shall apply in relation to that assessment until that action has been completed."*

III. Treatment of Persons Facing Financial Ruin

3. Confronted with two individuals who appear to face financial ruin in the event of the court granting judgment for the amounts sought, the court asked, in an interim judgment delivered after hearing, if counsel for the Revenue Commissioners would seek instructions as to whether, not least in light of (1) the professionalism that the Revenue Commissioners customarily bring to bear in their actions, and (2) the genuine confusion that appears to have existed between the Fortes, who appeared unrepresented in court, as to the availability of a remedy via the courts in the event that they elected not to proceed with an appeal to the Appeals Commissioners: (a) the Revenue Commissioners would consider undertaking a further special audit in all the circumstances arising; and/or (b) the Revenue Commissioners would be satisfied for the court to remit this matter to them or to the Appeals Commissioners for a fresh determination as to the liability presenting; and/or (c) the Revenue Commissioners would suggest to the court some other means of advancing matters in light of the concerns expressed by the court. The response of the Revenue Commissioners, a response which they were entitled to give, was to request again that the court make an order in their favour for the sums which they have come to court seeking, being amounts which, though never tested in fact, have become fully and finally owing by operation of law.

IV. Concerns Arising

(i) Introduction.

4. In its interim judgment, the court expressed concern as to the legal propriety of the effective excision of judicial discretion from the adjudicative process that has been achieved by the Taxes Acts (such that the court must effectively find estimated amounts, the quantum of which has never properly been tested, to be fully and finally owing). Two cases have been relied upon by the Revenue Commissioners as offering assurance to the court that it could proceed with confidence in this regard, being the decision of the Supreme Court in *Deighan v. Hearne and Ors* [1990] 1 I.R. 499 and the more recent decision of the High Court in *Gladney v. Di Murrio* [2017] IEHC 100.

(ii) Deighan.

5. Whether *Deighan* offers the degree of comfort contended for by the Revenue Commissioners is perhaps open to question. The court accepts the contention of counsel for the Revenue Commissioners that although *Deighan* relates to a different statutory provision, it

is equally applicable to the provisions at play in the within application. However, a couple of observations might perhaps be made. First, it appears from the facts of *Deighan*, as stated by Finlay C.J., at 502 and again at 506, that, following assessment, the plaintiff there simply did nothing. By contrast, in the within proceedings, Mr Corrado Forte engaged in very lengthy, if not entirely polite, correspondence with the Revenue Commissioners. Whether the purport of that correspondence, which entailed and/or rested upon a disputation of liability, offers a ground of possible distinction between this case and *Deighan* was not explored in the within proceedings. Second, the issue of mistake appears not to have arisen in *Deighan*. Counsel for the Revenue Commissioners submitted at hearing that the affidavit evidence in the within application offers no basis for any finding of mistake on the part of the Fortes. But, with respect, it does seem to the court that from the very outset, and even after the court's interim judgment, the Fortes have laboured under misapprehension as to how, in fact, they and their affairs stand positioned.

(iii) Di Murrio.

6. The judgment of the High Court in *Di Murrio* is a more recent decision by which the court considers itself to be bound. Notably, the court in *Di Murrio* distinguishes, at para. 26, on grounds of possible error and differing facts, the decision of the High Court in *Criminal Assets Bureau v. Kelly* [2000] 1 I.L.R.M. 271, in which it was held that it is possible to ventilate matters of substantive defence in a summary judgment application. (And it is perhaps of interest, albeit of no practical consequence, that in *Kelly*, a case in which there appears to have been no reference to *Deighan*, the High Court reached a different view as to what law and justice requires than that arrived at in *Deighan*). The court in *DiMurrio*, at para. 29, states that "*There is no 'second bite' available in summary proceedings to a taxpayer who has neglected or refused to utilise the appropriate mechanisms to dispute an assessment to tax*". Given that the verb 'neglect' when used in this context means, if one looks to the *Oxford Online Dictionary,* '[to] fail to do something', the above observations on their face appear (a) to apply even in cases of mistake (unless failure could not be found to exist within the penumbra of mistake, a proposition that the court does not consider would be of unfailing application), and (b) to yield the consequence that, as a matter of practicality the court has no substantive role in summary applications such as that now presenting, with the result that they might perhaps be contended to offer more a chimera than a chance of justice to a defaulting taxpayer who hopes for the beneficial exercise of court discretion. Be that as it may, the court considers itself in the context of the within application, not least by reference to the facts at play in *Di Murrio*, to be perhaps even more constrained by that decision than by *Deighan* alone, as to what it can now do.

V. Some Contentions Made by the Defendants

7. The Fortes claim that there is a lacuna or opaqueness in s.58 as to when and how it operates; respectfully, there is not: the manner in which the provision operates is entirely clear and has been described above. They contend that various equitable estoppels arise from the actions of the Revenue Commissioners in the within proceedings; however, there has been no representation by the Revenue Commissioners that has been relied upon by the Fortes to their detriment and thus the essential elements of any such estoppel are wanting. The Fortes have sought discovery of documentation from the Revenue Commissioners, both to defend themselves at, and it seems as a further justification for sending matters to, plenary hearing. The court sees no basis on the facts before it, or in the law applicable to the determination of applications such as that now before it, for sending this case to plenary hearing. And a desire for discovery, of itself, does not provide a justification for sending matters to plenary hearing: discovery is a means to an end, not an end in itself; it facilitates the proper determination of proceedings, albeit too often at great expense; it is not the founding-stone on which proceedings are, or ought to be, constructed.

VI. Conclusion

8. It seems to the court that neither the low threshold identified by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 for sending a matter to plenary hearing, nor that discernible caution which the court, mindful of the observations of McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, must bring to its decision-making in summary applications, require that the within application now be sent to plenary hearing. The amounts sought by the Revenue Commissioners of each of the defendants are owing at law, the only issues to be tried are simple and easily determined, and the affidavit evidence before the court fails to disclose even an arguable defence on the part of either and both of the defendants. The court must therefore, as a matter of law, grant the summary judgments sought. The various reliefs sought by the Fortes are refused, for the reasons aforesaid and/or because they are rendered moot by the court's just-stated decision as to the summary debt judgments sought.

9. By way of final note, it appears from the evidence before the court that there has been some level of tax evasion on the part of the Fortes. Such evasion falls to be and is deprecated by the court: taxation is the lifeblood of active government, and our system of government, though it may be ever-capable of improvement, is an undoubted force for general good. And still the court must admit to some unease at giving full and final judgment, as by law it must, for likely ruinous sums of money which began as estimated sums, the correctness of which estimates has never been tested and which in fact continues vigorously to be challenged, notwithstanding that those sums have become owing by dint of statute and fall therefore to be paid.