THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 230

Record Number: 2017 531

Peart J.
Baker J.
Costello J.

IN THE MATTER OF PART 47 OF THE TAXES CONSOLIDATION ACT, 1997 AS AMENDED BY THE FINANCE (NO. 2) ACT, 2008

BETWEEN:

ADRIAN DORR

APPLICANT/RESPONDENT

- AND -

CORMAC LOHAN

RESPONDENT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 31ST. DAY OF JULY, 2019

1. Given the abandonment of most of the grounds of appeal stated in the notice of appeal herein, a relatively nett issue remains for determination, namely whether, on the application for a determination by the High Court under s. 1077B (3) of the Taxes Consolidation Act 1997 as amended ("the Act"), there was sufficient evidence adduced by the affidavit grounding the present application for the Court to be able to properly determine, in the words of the section "whether (i) any action, inaction, omission or failure of, or (ii) any claim, submission or delivery by, the person in respect of whom the Revenue officer made the application gives rise to a liability to a penalty under the Acts on that person".

2. A description of the background facts will assist in placing that nett issue in its proper factual context. That can be conveniently done by reference to the said grounding affidavit sworn by the respondent on 3rd May 2017, paras. 5 *et seq*., and since these paragraphs succinctly and clearly describe the background, I will simply set them out almost *verbatim*:

> "5. By notification of audit dated 18 December 2012, the respondent herein, along with his agent, was notified that his tax affairs were to become the subject of an audit for the tax year 2010. By email dated 20 December 2012 the agent on behalf of the respondent sought to postpone the audit for a period. Accordingly, the audit was rescheduled for 1 February 2013. I beg to refer to a true copy of the said correspondence upon which pinned together and marked with the letters'AD2' I have signed my name prior to the swearing hereof.
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> 6. On or about the 21 February 2013, an interview was held with the respondent and his agent. It was indicated that a voluntary disclosure relating to understated turnover might be made. No records were made available at that time. Over subsequent months, the respondent was provided with numerous opportunities to provide a voluntary disclosure and/or his records. No meaningful, engagement was forthcoming. By letter dated the 22 May 2013, the respondent was advised of the intention of the Revenue Commissioners to call to his business premises on 30 May 2013 in order to commence the audit. The respondent was again advised of his requirement to have any disclosure that he wished to make available for examination along with all records. On or about the 28 May 2013, the respondent rang to indicate that he would not be available on the 30 May 2013 and no rescheduled time was offered. During that conversation the respondent indicated that he had no disclosure to make and that all VAT discrepancies were explainable. Between that date and July further attempts were made by Revenue to arrange a meeting with the respondent but none ever materialised. No disclosure of all records were ever received. I beg to refer to a true copy of the said correspondence that passed between the parties upon which pinned together and marked with the letters 'AD3' I have signed my name prior to the swearing hereof.
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> 7. The T1 figures returned by the respondent in his VAT3 returns did not match those of his declared sales in the accounts. On or about 3 July 2013, in the absence of a voluntary disclosure, records or meaningful engagement, Revenue raised VAT assessments based on the identified VAT discrepancies as per the available information. The following represents a summary of the undeclared VAT position …[summary provided showing "Total; €144.663.50"].
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> 8. I say and believe that an exchange of correspondence ensued following the raising of the VAT assessments. By letter dated 11 July 2013, an intention to appeal the VAT assessments was indicated, however, no formal appeal was ever lodged. The assessments are now final and conclusive and the figures therein contained form the basis of the within application. I beg to refer to a true copy of the said correspondence that passed between the parties upon which pinned together and marked with the letters 'AD5'I have signed my name prior to the swearing hereof.
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> 9. I say and believe that the Collector General has undertaken enforcement proceedings arising from the above assessments. I understand that three judgment mortgages have been registered against properties owned by the respondent.
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> **Notices of Opinion**

10. As per paragraph 3 above, and as set out in the Notices of Opinion and Amended Notice of Opinion, I say and believe that I am of the opinion that the respondent is liable to penalties in the following circumstances:

(a) He negligently delivered incorrect VAT returns for taxable periods in 2003, 2004, 2005, 2006, and 2007 in relation to Value-Added Tax. The capital tax liability has been quantified and assessed. The amount of the difference is €47,254. Furthermore, he failed to pay the liability arising. He did not disclose the said liability prior to the commencement of an examination into his affairs.

(b) He deliberately furnished incorrect VAT returns for the taxable periods in 2008 and 2009. The tax liability has been quantified and assessed. The amount of the difference is €42,752. Furthermore, he failed to pay the liability arising. He did not disclose same prior to the commencement of an examination into his tax affairs.

(c) He deliberately furnished incorrect VAT returns for taxable periods in 2010. The tax liability has quantified and assessed. The amount of the difference is €54,657.50. Furthermore, he failed to pay the liability arising. He did not disclose the said liability prior to the commencement of an examination into his affairs.

Given the respondent's behaviour and the failure to cooperate with the audit process I am of the opinion that the respondent was liable to a penalty of 100% of the difference. That is to say €144,788.50.

Attempts to Agree Penalty

11. I say and believe that the Notices of Opinion and Amended Notice of Opinion warned the respondent that unless within 30 days after the date of the Notices, he agreed in writing with the opinion and paid the amount of the penalty, an application would be made pursuant to Section 1077B of the Taxes Consolidation Act, 1997 to have this Honourable Court deem the respondent liable to the said penalty. No reply or payment has been received on foot said Notices.

12. I say and believe that although the Rules of Court do not require a further letter to be sent to the respondent warning of the application to this Honourable Court, the Revenue Solicitor on behalf of the Revenue Commissioners route to the respondent on 13 March 2017 reminding them of the consequences of failing to agree with the figures set out in the Notices of Opinion and Amended Notice of Opinion and making payment of the amount of the penalties described herein. The said letter also warned that, in default, an application would be made after the expiry of 21 days from the date of the said letter. No agreement and/or payment has been received from the respondent in reply to the said letter. I beg to refer to a true copy of the said letter that marked with the letters 'AD6' I have signed my name prior to the swearing hereof.

Conclusion

13. I can confirm that, as of the date of swearing hereof, the respondent has failed to agree with or discharge the amount set out in the Notices of Opinion or Amended Notice of Opinion herein. I therefore pray this Honourable Court for a determination pursuant to Section 1077B of the Taxes Consolidation Act, 1997 that the respondent is liable to the penalty described in the said Notices in the combined total of €144,788.50.

14. In circumstances where this Honourable Court is minded to make a determination pursuant to section 1077B of the Taxes Consolidation Act, 1997 I further pray this Honourable Court for an order pursuant to Section 1077C of the taxes Consolidation Act, 1997 as to the recovery of the penalties so determined."

3. The exhibits referred to in the above affidavit were also before the trial judge. There was no replying affidavit properly before the court, though it appears that during the course of the hearing of the application itself before the trial judge a replying affidavit was offered to the court in the form of an affidavit by the appellant sworn on 20 October 2017. While the recital at the commencement of the order, as perfected, dated 23 October 2017 refers to that affidavit, it does not appear to be contested that while it raised issues which the respondent considers to be "scandalous" in nature and about which the trial judge expressed displeasure that an officer of the court (*i.e.* the appellant who is a solicitor) would make unsubstantiated allegations of that kind, it did not contradict in any substantive way, other than by mere denial/travellers, the opinion expressed by Revenue as to be negligent/deliberate delivery of incorrect VAT returns for the years in question, nor provided any other evidence to the trial judge which she could have considered by way of response to the other averments in the grounding affidavit. The result therefore is that the only relevant evidence before the trial judge for the purposes of a determination to be made under s. 1077B of the Act was the grounding affidavit referred to and its exhibits.

4. This Court does not have the benefit of a transcript of the Digital Audio Recording of the proceedings in the High Court, nor any agreed note of the *ex tempore* decision of the trial judge, because the appellant did not comply with the directions of the court in this regard. That is something about which this Court is entitled to be very critical, where no satisfactory explanation has been provided as to why the Court's direction was not complied with, and particularly where the appellant is a solicitor, and therefore fully aware of his obligations to the Court to comply with such directions in order to present his appeal to the Court in a proper fashion.

5. Nevertheless, it can be easily inferred from the fact that the trial judge acceded to the application under s. 1077B (3) of the Act that she was satisfied on the evidence adduced that the "action, inaction, omission or failure of, or any claim, submission or delivery by, the appellant gave rise to a liability to the penalties advised to the appellant in the Notice of Opinion and Amended Notice of Opinion referred to. The order made under s. 1077 (C) of the Act is purely consequential upon the making of an order under s. 1077B and is not the subject of any separate ground of appeal before this court.

6. The essence of the submission made by the appellant on this appeal is that there was insufficient by way of evidence contained in the grounding affidavit above to prove the elements of negligence and deliberateness in relation to the delivery of incorrect returns to Revenue by the appellant, and that without such sufficient proof of those elements, the trial judge was not entitled to make the determination as sought in the application under the section. In that regard it is submitted that the expression of opinion by the applicant cannot simply be accepted as evidence for the purposes of the section, and that the affidavit grounding the application was therefore deficient.

7. I should add at this point that the penalty imposed in this instance, and which is the subject of the Notice of Opinion and Amended Notice of Opinion referred to is 100% of the difference in the tax liability found to arise. The imposition of a penalty of 100% of that difference arises where the opinion is formed that the taxpayer either negligently or deliberately delivered incorrect VAT returns.

There are lesser penalties applicable where the Revenue are satisfied that there is less culpability in relation to the delivery of an incorrect VAT return. Hence, in the present case, the appellant submits that there was not sufficient evidence, or indeed any evidence besides Revenue's own opinion in this regard as expressed in the grounding affidavit, that the appellant had delivered incorrect VAT returns either negligently or deliberately thereby justifying the penalty of 100% of the difference.

8. In my view there was ample evidence contained in the grounding affidavit and the exhibits from which the trial judge was entitled to determine that the appellant was liable to the penalties imposed. She was entitled to at least have regard to the Revenue's opinion, and the basis for that opinion as set forth in para. 10 in the affidavit, and which had been communicated to the appellant in the Notice of Opinion and Amended Notice of Opinion referred to, that the delivery of the incorrect VAT returns was either negligent or deliberate.

9. The mere expression of that opinion by Revenue that the tax payer is liable to the penalties cannot be determinative of the application, as otherwise the Revenue would be in a sense usurping the function of the trial judge under the section, who must make that determination. But the affidavit contains more than just the expression of the opinion. It provides an explanation of the background to the formation of that opinion, including by reference to the exhibited documents and records. The trial judge was in a position to consider the evidence adduced. She was entitled to have regard to the opinion expressed by Revenue. She was also entitled to have regard to the fact that the appellant had not sought to contest the opinion, or even to put in a timely affidavit setting out why he considered that his action by delivering incorrect VAT returns for the years in question was neither negligent nor deliberate, and as he had stated in one communication with Revenue that any discrepancies in the returns were capable of explanation.

10. Where a matter is brought before the Court on a motion grounded upon affidavit evidence, the appellant could have sought leave under O.40, r. 1 RSC to cross-examine the deponent as to the basis for the opinion that the delivery of incorrect returns was negligent and/or deliberate. He did not do so.

11. As I have said, I consider that the opinion formed by Revenue and as expressed in the grounding affidavit is part of the evidence that the trial judge was entitled to have regard to. But there must be more, and in the present case there was more, because the deponent explained the history of engagement and non-engagement of the appellant with Revenue. The trial judge was aware that VAT returns were prepared and delivered by the appellant to Revenue on the basis of self-assessment. She was aware that there were discrepancies found by Revenue between what was in the VAT returns and the sales records. She could have regard also to the fact that the assessments made by Revenue which were referred to in the grounding affidavit had not been appealed by the appellant and therefore had become final and conclusive. She could have regard to the fact that there was no response from the appellant after he received the Notice of Opinion and Amended Notice of Opinion.

12. In my view there was ample within the evidence adduced by Revenue on this application from which the trial judge could determine that the appellant was liable for the penalties specified. I would therefore dismiss this appeal.