THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2019] IECA 228
[2017 No. 444]
[2017 No. 445]

The President
McGovern J.
Baker J.

BETWEEN

MICHAEL GLADNEY

RESPONDENT

AND

ANNINO FORTE

APPELLANT

AND

MICHAEL GLADNEY

RESPONDENT

AND

CORRADO FORTE

APPELLANT

JUDGMENT of the President delivered on the 31st day of July 2019

1. These appeals were heard together, as indeed the underlying proceedings had been, in the High Court. The case involves an appeal from a decision of the High Court (Barrett J.) of 28th July 2017 which granted the plaintiff, the then Collector General of the Revenue Commissioners, summary judgment against both defendants, in the case of Corrado Forte in the sum of €2,513,383.17 and the case of Annino Forte in the sum of €2,723,238.17.

2. As pointed out by Barrett J, the background to the proceedings is to be found in a Revenue audit, on foot of which the Revenue Commissioners made a demand for estimated unpaid taxes by way of Notice of Assessment. The now appellants, who are father and son, did not participate in the assessment in the Revenue audit, with the assessment, and nor, despite being advised of their entitlement to do so, did they appeal the assessments to the Appeal Commissioners. Instead, they have sought to resist judgment on foot of the Summary Summons and Notice of Motion. However, they have found themselves frustrated by the fact that their failure to appeal the assessments has significantly disadvantaged them as the estimates have become final and conclusive.

The Statutory Architecture

3. Under s. 58(1) of the Taxes Consolidation Act 1997:

"(1) Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made

(a) the source from which those profits or gains arose was not known to the inspector,

(b) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or

(c) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity,

and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains."

Under s. 933(1) of the Act of 1997:

> "(a) 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 (in this section referred to as 'other officer') shall be entitled to appeal to the Appeal Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing to the inspector or other officer."

Critically, under s. 933(6)(a):

> "(a) 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."

4. It is clear that the High Court Judge did not view this statutory architecture with any enthusiasm. In particular, the High Court Judge was uneasy about the extent to which any judicial discretion was constrained. In those circumstances, the High Court delivered what was described as an interim judgment on 16th March 2017. In the course of the body of that interim judgment, the High Court indicated that it would be grateful if counsel for the Revenue Commissioners would seek instructions as to whether they would consider undertaking a further special audit in the light of the professionalism that the Revenue Commissioners customarily bring to bear on their actions and the genuine confusion that he felt existed on the part of the Fortes, who appeared unrepresented in Court, as to the availability of a remedy through the Courts in the event that they elected not to proceed with an appeal to the Appeals Commissioners. Alternatively, he wondered whether the Revenue Commissioners would be satisfied for the Court to remit the matter to the Appeals Commissioners for a fresh determination as to the liability, or, in the further alternative, if the Revenue Commissioners would suggest some other means of advancing matters in light of the concerns expressed by the Court.

5. The response of the Revenue Commissioners was to assert that they were entitled by statute to the orders sought and to request the Court to make those orders. The plaintiff drew

the attention of the High Court to the decision of the Supreme Court in *Duignan v. Hearne & Ors. [*1990] 1 IR 499, and the more recent decision of Hunt J. in the High Court in *Gladney v. Dimurrio* [2017] IEHC 100. The decision in *Gladney v. Dimurrio* was appealed and it appears that at the appeals stage, a settlement or compromise was arrived at. The High Court Judge in this case probed possible distinctions between this case and Duignan, pointing out that in Duignan, following assessments being raised, the taxpayers did nothing, whereas in the present case, the Fortes, and in particular, Mr. Corrado Forte, engaged in correspondence. The Judge pointed out that the correspondence was very lengthy, if not entirely polite. He saw a second possible distinction in the fact that the question of mistake did not appear to have arisen in Duignan, whereas he felt that notwithstanding the submissions of counsel for the Revenue Commissioners, which was that there was no basis for any finding of mistake on the part of the Fortes, he felt that they had laboured under a misapprehension as to how in fact they and their affairs stood positioned.

6. Despite the Judge's sympathy for the circumstances in which the then defendants, now appellants, found themselves, the High Court felt that the low threshold identified by the Supreme Court in *Aer Rianta v. Ryanair* [2001] 4 IR 607, for sending the matter to plenary hearing had not been reached. Even exercising the caution required, and mindful of the observations of McKechnie J. in *Harrisgrange Ltd. v. Duncan* [2003] 4 IR 1, it was clear to the High Court that the amounts sought by the Revenue Commissioners in respect of each of the defendants were owing and that both defendants had failed to make out even an arguable case.

7. In the course of the final paragraph of the judgment, the High Court had commented:

> "[b]y 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."

The appellants are aggrieved at the reference to tax evasion which, they say, is a conclusion that was arrived at without them having an opportunity to challenge it and which, they say, is a deeply damaging conclusion.

8. The appellants have formulated some 35 individual grounds of appeal. The respondent protests that the grounds of appeal are prolix, repetitious, and in certain instances, raise matters which were not ventilated in the Court below or supported by any evidence whatsoever. I am bound to say that this complaint has considerable substance.

9. In the course of written submissions, the respondent has sought to distil the multiple grounds of appeal into manageable shape. He groups the issues as follows:

(i) The validity of the estimated notice of assessment/statutory mechanism governing such notices and appeals therefrom;

(ii) the issue of locus standi i.e. whether the respondent has the right to prosecute proceedings for the recovery of the sums claimed;

(iii) the question of a s. 58 lacuna; the appellants contend that notices of assessment raised under this section cannot be appealed;

(iv) the fact that the Revenue Commissioners raised Notices of Assessment while the investigation was still ongoing;

(v) the failure of the Revenue Commissioners to respond to correspondence from the appellant which post-dated the Notice of Assessment and failed to expressly advise him of his rights in relation to an appeal; and

(vi) the High Court's refusal to consider a motion from the appellant in relation to discovery, estoppel, and other miscellaneous reliefs.

10. So far as the question of validity of the estimated Notice of Assessment is concerned, I agree with the High Court Judge that the statutory scheme is clear and has been since at least Duignan v. Hearne in 1990. The issue was readdressed in recent times by Hunt J. in Gladney v. Dimurrio and his observations therein, which are entirely non-controversial, have not lost their force by reason of the fact that a settlement was arrived at on appeal.

Locus Standi

11. This issue has been the central ground in not only the Notice of Appeal but in the written and oral submissions. Yet in spite of the emphasis now placed on the issue, it does not appear to have been an issue which was raised at first instance. The point regarding standing which the appellants seek to raise arises from the terms of s. 58(2) of the Taxes Consolidation Act 1997. The appellant's interest lies with s. 58(2)(ii). They draw attention, in particular, to the statement that:

> "the tax charged in the assessment may be demanded solely in the name of the body, and
>
> (II) on payment to it of the tax so demanded, the body shall issue a receipt in its name and shall forthwith—
>
> (A) lodge the tax paid to the General Account of the Revenue Commissioners in the Central Bank of Ireland, and
>
> (B) transmit to the Collector-General particulars of the tax assessed and payment received in respect of that tax."

12. In my view, the appellants have misunderstood the statutory provision. What occurred here is that Notices of Assessment were issued by an Inspector of Taxes. When the sums assessed were not paid and in the absence of any appeal to the Appeals Commissioners, the assessed sums were transmitted to the Collector General for collection. Proceedings issued in the name of the then Collector General. Section 960I(1) of the Taxes Consolidation Act 1997 provides:

> "[w]ithout prejudice to any other means by which payment of tax may be enforced, any tax due and payable or any balance of such tax may be sued for and recovered by proceedings taken by the Collector General in any court of competent jurisdiction." [Emphasis added]

Section 960I(1) puts the matter beyond any doubt. In truth, though, even absent the statutory provision, there would be no room for doubt. It is abundantly clear that s. 58(i) provides an alternative route through the assessment of an inspector as defined in section 2(ii). What is being dealt with by s. 960I(1) is an optional procedure for pursuing outstanding or underpaid taxes and its optional nature is made clear by the use of the word "may". So, there is provision that an assessment may be made solely in the name of the body i.e. the Criminal Assests Bureau ('CAB') and further provides that the tax charged in the assessment may be demanded solely in the name of the body. Even absent the terms of s. 9601(1), s. 58 is incapable of being interpreted as requiring that assessments will be made solely in the name of CAB and not in the name of any other body or requiring that the tax charged in the assessment shall be demanded solely in the name of CAB and not in the name of any other body. To the extent that this was a central ground of appeal, it is not one that I regard as having any merit and I would dismiss this aspect of the appeal.

Remaining Issues

13. The other issues raised on the appeal may be dealt with briefly. The appellants are of the view that the Notices of Assessments which were issued to them were incapable of being appealed. This, they contended in the High Court, gave rise to a lacuna. The High Court Judge felt that there was no lacuna or opaqueness and that the manner in which the provision operates was entirely clear. I would respectfully agree with the High Court Judge. Section 58(2)(c)(i)(ii) provides that the assessment:

> "shall not be discharged by the Appeal Commissioners or by a court by reason only of the fact that the income should apart from this section have been described in some other manner or by reason only of the fact that the profits or gains arose wholly or partly from an unknown or unlawful source or activity." [Emphasis added]

It is clear that the only effect of this provision is that the labelling or categorisation of unknown income as Case IV Schedule D is not a reason for discharging that assessment if

it subsequently transpires that, in fact, the source of the income fell within some different category. There simply is no lacuna of the kind suggested by the appellants.

14. The appellants have complained about the fact that the investigation into their tax affairs was kept open. The progress of the Revenue Commissioners' investigation was dealt with in the course of an affidavit sworn by Mr. Brian Sullivan, Revenue Officer. The fact that the Revenue Commissioners kept their investigation open until the conclusion of proceedings in the High Court does not, in my view, effect the validity of the Notices of Assessment in any way.

15. The appellants have complained about the response to their correspondence. In particular, they are dissatisfied with the response to a lengthy document headed 'Notice of Order for Particulars to Maria Mailer' sent on 23rd May 2013, outside the thirty-day statutory period for appealing assessments which had been raised. However, in my view, there is no obligation on the Revenue Commissioners to engage in correspondence. The documentation submitted did not appeal the assessed sums. The appellants had been informed of their right to appeal, but had not availed of that right.

16. The appellants are also critical of the approach of the High Court in certain respects, pointing, in particular, to the reference to tax evasion, a reference which they say is unjustified. Whatever validity those criticisms may or may not have, they do not amount to a point that would be sufficient so as to render the underlying decision invalid.

17. In summary, I am of the view that this was a case where the High Court was entirely correct in deciding to grant judgment and deciding to decline to refer the matter for plenary hearing. While, from the perspective of the appellants, the situation is undoubtedly an unfortunate one, it is, nonetheless, a very clear one.

18. No arguable grounds of appeal have been raised and, accordingly, I would dismiss the appeal and affirm the decision of the High Court.