THE HIGH COURT

[2022] IEHC 568

[2020 61 R]

BETWEEN

BRENDAN THORNTON

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

[2020 67 R]

BETWEEN

PAUL MCDERMOTT

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

NO. 2

JUDGMENT of Ms. Justice Egan delivered on the 17th day of November, 2022

Introduction

1. This judgment addresses the costs of these proceedings, an appeal by way of case stated from the Tax Appeals Commission ("TAC"), arising out of my principal judgment delivered on 1st July, 2022.

2. The first named appellant ("the appellant"), who effectively represented the interests of a large number of similarly placed appellants, had appealed against an assessment which the respondent ("Revenue") had raised to give effect to its refusal of the appellant's right to loss relief in respect of certain dividend transactions. The TAC determined that the assessments should stand for two reasons. First, the TAC determined that the appellant was not, through his involvement in syndicates, carrying on a trade in financial instruments and securities. As the appellant had not established that the dividend transactions were carried on in the course of his trade, any losses thereby incurred could not be offset against the appellant's taxable trading income ("the trading issue"). Second, the TAC determined that, in any event, s. 812 of the Taxes Consolidation Act, 1997 (TCA 1997) did not apply so as to deem the dividend income to be that of a company incorporated in the British Virgin Islands, rather than that of the appellant ("the s. 812 issue").

3. It was common case that the appellant could only have succeeded in his appeal if this court overturned the TAC on both of these points. In my principal judgment, I upheld the determination of the TAC on the trading issue. It was therefore not strictly speaking necessary for the court to proceed to determine the s. 812 issue. However, both parties expressly requested the court to determine this issue which it duly did. In the event, I determined that s. 812 did apply to deem the dividend income to be that of the owner of the shares rather than the appellant. Essentially therefore I held with Revenue on the trading issue and with the appellant on the s. 812 issue. This led to the requirement to consider the third issue before the court, namely the appellant's challenge to the TAC's finding that the expression of doubt submitted with the appellant's tax return pursuant to s. 955 (4) TCA 1997 was invalid ("the expression of doubt issue"). On this issue, I held in favour of Revenue.

4. The presentation of the trading issue and the s. 812 issue took up the vast majority of the initial four and a half-day hearing. On the trading issue, the appellant raised a sub-issue to

the effect that the presence or absence of a tax avoidance purpose or motive was an irrelevant consideration in determining whether the dividend transactions were trading transactions as same could only be considered in the context of the general anti-avoidance provisions set out in s. 811 TCA 1997 ("the s. 811 issue"). This necessitated an examination of s. 811, a provision of almost mind-numbing complexity. It was also apparent that the appellant's arguments on all three issues before the court went beyond the scope of his written submissions. The parties therefore elected to exchange further written submissions. By my estimate, the general presentation of the background of the case and of the trading issue (including the s. 811 issue) took three of the four and a half days of the initial hearing.

5. The s. 812 issue was of some complexity. Revenue relied upon a body of case law from the courts of England and Wales dealing with legislation somewhat equivalent to s. 812, which Revenue accepted was *"at best persuasive"*. However, it was nonetheless correct for Revenue to open these authorities to the court. Section 812 had never previously been litigated in Ireland, although it has been part of Irish law for many decades. In terms of court time, the s. 812 issue took slightly over a day to argue. In addition, when the court rose to consider its judgment, it became apparent that neither party had addressed the court on the meaning of the term *"income*" in the context of the TCA 1997 as a whole. As this was of central importance to the interpretation of s. 812, the court thus requested submissions from both parties on the point, which were furnished by means of additional short written submissions and an extremely brief further hearing.

6. The expression of doubt issue was dealt with in a concise manner and took no more than 45 minutes of the court's time per party, slightly less than half a day in total.

7. As the appellant has not succeeded in overturning the TAC determination or in obtaining any part of the relief which he sought from the court, Revenue submits that it has manifestly won the event insofar as concerns the appeal. However, although it contends that it

won *"the event"* in the *Veolia* sense ([2007] 2 IR 81), Revenue accepts that it has not been "*entirely successful"* within the meaning of s. 169 (1) of the Legal Services Regulation Act, 2015 ("the 2015 Act"). Revenue nonetheless asks the court to exercise its discretion and award it the entire costs of the case stated.

8. The appellant submits that, as Revenue succeeded only on the trading and expression of doubt issues, it was not *"entirely successful"* but only *"partially successful*" within the meaning of s. 168 (2) (d) of the 2015 Act. The appellant also submits that he was "*partially successful*" in respect of the s. 812 issue. As a result, the appellant submits that he should get 50% of his costs (representing what he contends are the costs of the s. 812 issue on which he was successful) whereas Revenue should get 50% of the costs (representing their costs on the trading and expression of doubt issues). As these orders reflecting the partial success of each side would essentially cancel each other out, the consequence according to the appellant, is that there should be no order as to costs. Failing this, the appellant contends that the costs in relation to the s. 812 issue should at the very least be withheld from the respondent.

Relevant legal principles

9. There is no dispute between the parties that costs in this matter are governed by s. 168 and s. 169 of the 2015 Act and O. 99 of the Superior Court Rules as amended with effect from 3rd December, 2019 ("O. 99"). The key principles of this regime are set out by Murray J. in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 and *Padraig Higgins v. Irish Aviation Authority* [2020] IECA 277. These principles can cumulatively be summarised as follows:

I. The general discretion of the court in connection with the ordering of costs is preserved (s. 168 (1) and O.99, r.2 (1)).

II. In considering the awarding of costs of any action the court should *"have regard"* to the provisions of s. 169 (1) (O.9, r.3 (1)).

III. The first issue to consider is whether one party or another has been *"entirely successful"* in the proceedings or whether, on the other hand, each party has been "*partially successful".*

IV. This in turn determines where the burden lies in deciding how costs should be allocated. In a case where the party seeking costs has been *"entirely successful"*, the party so succeeding *"is entitled"* to an award of costs against the unsuccessful party unless the court *"orders otherwise"*. This *prima facie* entitlement to costs is limited to a party who is *"entirely successful"* in the proceedings (s. 169 (1)). In considering whether one party or another has been *"entirely successful"*, the court should look beyond the overall result of the case and consider whether the proceedings involved separate and distinct issues which might be characterised as individual *"events"* (Simons J. in *Naisiunta Leictreach Contraitheoir Eire v. The Labour Court* [2020] IEHC 342 as approved in *Higgins*). Where a party obtains the relief it claimed but has failed to prevail on a distinct issue in the action on which it chose to base its claim, it is very difficult to see how it can be said to have been "*entirely successful"*.

V. If a party is *"entirely successful"* all of the costs follow unless the court exercises its discretion to *"order otherwise"* having regard to the factors enumerated in s. 169 (1). In determining whether to *"order otherwise"* and decline to award an entirely successful party their costs, the court should have regard to the "*particular nature and circumstances of the case*" and to *"the conduct of the proceedings by the parties"* (s. 169 (1)). Although the

court retains overall discretion, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings and the manner in which the parties conducted all or part of their case (s. 169 (a) and (c)). The court will also have regard to whether it was reasonable for a party to raise, pursue or contest one or more issues and to whether a successful party exaggerated his or her claim (s. 169 (b) and (d)). The court will also have regard to payments into court, settlement offers and mediation (s. 169(1) (e-g)).

VI. The court, in the exercise of its discretion, may also make an order that one or more parties who are "*partially successful"* in the proceedings should recover costs relating to "*the successful element or elements of the proceedings"* (s. 168 (2) (d)).

VII. In calculating the costs attributable to the issues on which each party prevailed, the court should seek insofar as possible in a broad-brush manner to allocate time as between the various issues. In this regard it is necessary to take note not merely of the time spent in court but also of the relevant pleadings, witness statements (if applicable) and written legal submissions etc.

VIII. Even where a party has not been "*entirely successful"* the court should still have regard to the matters referred to in s. 169(1)(a)-(g) when deciding how to award costs (O.99, r.3).

IX. Having regard to the general discretion in s. 168(1) and O.99 r.2 (a) a party who is "*partially successful"* but not "*entirely successful*" may still succeed in obtaining all of his costs in an appropriate case. Such an approach may be appropriate when for example, the issue on which the predominantly

successful party was unsuccessful did not add materially to the length or costs of the proceedings. The court may also be so inclined when the party who was predominantly successful in the proceedings failed only on a narrow ground which did not take up much of the hearing time or did not go to the heart of the issues in the case. Another factor which the court can consider in deciding to award full costs (or a significant proportion thereof) to a predominantly successful party may be that the material opened relevant to the issue on which that party was unsuccessful was also relevant to other issues in the case.

X. In the exercise of its discretion, the court may order a party to pay a portion of a party's costs, costs from or until a specified date, costs of particular steps in the proceedings (s. 168 (2) (a-c)).

Application of legal principles

10. The application of these principles to the present case involves the court addressing the following questions:

1. **Has either party to the proceedings been *"entirely successful"* in the case as the phrase is used in s. 169 (1)?**

   Revenue emphasises that both the trading issue and the s. 812 issue were legal arguments directed to the same ultimate result, namely the setting aside of the notice of assessment, on which the appellant was unsuccessful. Grouping together the trading issue and the s. 812 issue into one event, and treating the expression of doubt issue as a separate event, Revenue argue that it won both events and also won the overall event in the case in the *Veolia* sense.

This debate is largely academic however, as Revenue concedes that it has not been *"entirely successful"* in the s. 169 sense. This concession was well made. The trading issue and the s. 812 issue were entirely separate and distinct issues. The legal basis, the cases cited and the parties' respective arguments were very different in each instance. Although the appellant did not obtain the relief he claimed, Revenue has failed to prevail on a distinct issue in the action on which it chose to base its defence and cannot be said to have been *"entirely successful".*

2. **As neither party has been entirely successful, have one or more parties been *"partially successful"* within the meaning of s. 168 (2)?**

   Revenue has been "*partially successful*" on the trading issue and on the expression of doubt issue. The appellant has been "*partially successful*" on the s. 812 issue.

3. **As one or more of the parties have been "*partially successful"* and having regard to the factors outlined in s. 169(1)(a)-(g), should the court nonetheless exercise its discretion to award Revenue its full costs?**

   The s. 812 issue took a substantial period of court time and did materially add to the length and the costs of the proceedings. It cannot be said that the s. 812 issue was a narrow argument or that it did not go to the heart of the issues in the case. The s. 812 issue was one of the two main issues in the case.

   Revenue submits that s. 812 itself was intrinsic to the court's consideration of the trading issue (as the court needed to understand the context in which the appellant contended that the dividend transactions were trading transactions). Revenue argues that the same is true in relation to the expressions of doubt issue. It is said that the material opened on the s. 812 was also relevant to the other issues in the case. I cannot agree. Whilst it was important for the court to have an understanding of the meaning and effect of s. 812, it was not necessary for the court to determine whether

the transactions were covered by s. 812 in order to determine whether they were trading transactions and, still less to determine whether the expression of doubt was validly made.

Although reasonably raised and pursued by it (as to which see below), Revenue did not succeed on the s. 812 issue. The issue materially added to the length of the hearing and in reality very little of the material and extensive case law opened in argument on the s. 812 issue was relevant to the other issues in the case. For these reasons, I am not disposed to exercise my discretion to award the full costs of the case stated to Revenue.

4. **If one or more parties have been *"partially successful"*, then having regard to the factors outlined in s. 169(1)(a)-(g), should some of the costs be ordered in favour of the party or parties that were partially successful and if so, what should those costs be?**

Many of the factors outlined at s. 169(1)(a)-(g) are not of relevance here. No issue arises in relation to the conduct of the parties before and during the proceedings (s. 169(1)(a)). There is no suggestion that either party exaggerated their claim (s. 169(1)(d)). No payment into court, settlement offer or invitation by the court to settle arise in the present case (s. 169(1) (e-g)).

This leaves s. 169(1)(b) – whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings; and s. 169(1)(c) – the manner in which the parties conducted all or any part of their cases. Revenue argues that it did not shape the terms of the case stated or the questions posed. Revenue argues that it was the appellant who chose to challenge both the trading issue and the s. 812 issue. The appellant could have challenged only the trading issue. The appellant submits that he had no option but to challenge the s. 812 issue (as otherwise he

could never have hoped to succeed). He argues that Revenue could have defended the case on the trading issue only but chose to defend it on two separate issues, on one of which it failed.

In my view, it was not unreasonable for either party to raise and pursue the s. 812 issue, particularly as same had never been judicially determined in Ireland before. The reality is that both parties were agreed that it would be more efficient for this court to determine both issues; rather than to determine the case on the basis that the appellant would lose if either issue were determined against him rendering the other issue moot. Both parties were therefore in harmony in submitting that this issue needed to be determined and in requesting the court so to do.

In summary, I do not see that s. 169(1)(a)-(g) produce any factors of particular weight in the scales insofar as concerns costs of the s. 812 issue.

Decision

11. It is clear that Revenue not having been "*entirely successful*" in the proceedings has no entitlement under s. 169(1) of the 2015 Act to its costs. The court however will exercise its power under s. 168(2)(a) to make an order in its favour to the extent that it was "*partially successful"* in the proceedings just as it will do on the same basis in favour of the appellant. In this case it is therefore appropriate that Revenue obtain the costs attributable to the trading issue and the expression of doubt issue and that the appellant obtain the costs attributable to the s. 812 issue. In determining the costs so attributable, an allowance to Revenue of the costs of the presentation of the background factual and legal issues is appropriate.

12. Overall, the s. 812 issue was tried in a concise manner by both parties and, as indicated above, took only slightly in excess of one day out of the four and a half days initial hearing together with a further half day.

13. In calculating the costs attributable to these respective issues it is not possible to achieve a mathematically perfect allocation of time, effort and costs. I think that a reasonable division of the material and time directed to the presentation of the overall legal and factual background to the case, the trading issue on which Revenue prevailed and the expression of doubt issue on which Revenue also prevailed would be in the order of three and a half days in favour of Revenue. The presentation of the s. 812 issue, which took one and a half days, will be ordered in favour of the appellant. I see no reason here, not to apply a straightforward set off and to order that Revenue recover two days of its costs in the action. In addition, I will order that Revenue recover costs of the first and second set of written submissions. I will direct that the appellant recover the costs of the third set of written submissions (dealing with the s. 812/ *"income"* issue).

Conclusion

14. For the above reasons I will exercise my discretion in favour of granting Revenue two days costs of the case stated. The costs of written legal submissions are ordered as per paragraph 13 above. In addition, I will award Revenue one third of the costs of the costs application itself and one third of the costs of the written submissions in relation thereto. The said costs figures are to be adjudicated in default of agreement.

15. There will be a stay on this court's order as the appellant has indicated an intention to appeal the principal judgment and Revenue has indicated that, if necessary, it will cross appeal on the s. 812 issue.