THE HIGH COURT

[2021] IEHC 193

[Record No. 2019/299 R]

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 949AQ OF THE TAXES CONSOLIDATION ACT 1997 (AS AMENDED)

BETWEEN

DESMOND O'SULLIVAN

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 19th day of March 2021.

1. On 22nd February, 2021, I gave judgment in the above matter ('the substantive judgment'), which concerned a case stated for the opinion of the court pursuant to s.949AQ of the Taxes Consolidation Act 1997 ('TCA') in relation to a determination by a Tax Commissioner of 11th October, 2019 in an appeal by the appellant. That judgment is reported at [2021] IEHC 118, and should be read in conjunction with the present ruling.

2. At the conclusion of the substantive judgment, I indicated that I would give the parties fourteen days from the date of the judgment to make brief submissions as to the form of the orders to be made, and in particular the question of costs. In the event, both parties have made brief written submissions.

3. Not surprisingly, the respondent applies for an order for the costs of the proceedings to date, to be adjudicated in default of agreement. The respondent relies on ss. 168 and 169 of the Legal Services Regulation Act 2015 ("the 2015 Act"), and in particular s.169(1) which provides that where the party seeking costs has been "*entirely successful*" in the proceedings, such party "*is entitled to an award of costs unless the court orders otherwise".* In determining whether to order otherwise, the court should have regard to the matters set out in s.169(1). The respondent submits that it has been entirely successful in its appeal, and that there are no relevant matters which would justify a departure from the usual rule that costs follow the event. The respondent therefore submits that it is entitled to its costs of the proceedings.

4. The appellant points out that s.949AR(1) of the TCA provides that:

> *"The High Court shall hear and determine any question of law arising in a case stated and - …[(c)]…may make such order as to costs as it thinks fit."*

5. The appellant's submissions point out that, prior to the passing of the Finance (Tax Appeals) Act 2015 – the Act which revised the system of tax appeals and brought into being the Tax Appeals Commission ('TAC') – a taxpayer aggrieved with a determination of the Appeal Commissioners had the right of a *de novo* hearing of an appeal in the Circuit Court. As a result of the 2015 Act, "*the only recourse available to a disgruntled party is a right of Appeal on a point of law to this Honourable Court in accordance with Sections 949AP and 949AQ [of the TCA]* …".

6. It was submitted that the established practice before the TAC is that each side bears its own costs. It is further submitted that, under the old system, the Circuit Court rarely awarded costs "*save in the event of appeals lacking substance*".

7. The appellant submits that his appeal, while not successful, did not lack substance, and that the former practice of the Circuit Court for which the appellant contends should be followed in cases stated to the High Court under the new regime, such as the present case. The submissions go on to state as follows:

> "*It is further submitted that the imposition of a costs order against the appellant could lead to a precedent which could dissuade aggrieved appellants from appealing their cases and this could result in miscarriages of justice arising which would be particularly unsavoury given that tax appeals before this Court often succeed in overturning errant Tax Appeal determinations…".*

8. The appellant stresses that the awarding of costs is "*entirely at the discretion of this Honourable Court*" and that the interests of justice require in the present case that no order be made in relation to costs. The appellant makes the case that the respondent's entitlement to statutory interest accrues from the date the tax was due for payment until the date the tax liability is discharged, and that this, together with the possibility of a penalty which the respondent has power to impose results *in "a significant sanction on the appellant*". In all the circumstances, the appellant submits that the appropriate costs order is that no order be made for costs.

9. Effectively, the appellant argues that, if costs are routinely awarded against appellants who are unsuccessful in a case stated to the High Court from the TAC, this will have a "*chilling*" effect on taxpayers who are aggrieved by the decision of the TAC in that they may be deterred from taking the matter further by the grim prospect of heavy legal costs being awarded against them if they are unsuccessful in the case stated before the High Court. Having said that, it seems to me that the opposite is also the case; if there is no costs sanction for a party who loses his appeal before the TAC, and brings an unmeritorious case stated from that decision before the High Court, it may become routine for appellants who lose before the TAC to invoke the case stated procedure, even where they have little chance of success.

10. It goes without saying that the case stated procedure relates only to questions of law. It is often the case that there will be a genuinely difficult point of legal interpretation in relation to the TCA which may warrant a case stated by the losing party to the High Court, so that a definitive interpretation of that provision may be obtained. In such a case, one can well see that a court might be of the view that the losing party in the case stated should not have to bear the other side's costs as well as its own.

11. In the present case, there was no question of the interpretation of an abstruse provision of the TCA. Essentially, the appellant contended that the proceedings had been misconducted by the TAC in a number of ways, and erred in law in doing so. The appellant was entirely unsuccessful in this regard.

12. It seems to me that, in the less formal setting of the TAC, where the rigid rules of evidence and procedure which may be applied in a court may be relaxed, and where it may well be in a given case that neither the Commissioner nor the parties conducting the appeal on behalf of the parties are lawyers, it will very often be the case that the aggrieved party will allege that this very informality has led to some error of law in the manner in which the proceedings have been conducted which has given rise to a miscarriage of justice. I think that a party that wishes to state a case on this basis bears a high onus to show that there is some infirmity in the way in which the proceedings have been conducted which suggests that there has been an error of law or jurisdiction. It does not seem to me that such an application should be lightly made. If it became routine for applications for a case stated to be made in relation to the decisions of the TAC, the purpose of having a forum for the resolution of tax appeals which is relatively informal and less reliant on legal formalities and personnel, thus reducing the costs and expense of the parties, would be set at nought.

13. While I appreciate that the appellant in the present case was aggrieved at the manner in which the TAC hearing was conducted, he has been entirely unsuccessful in establishing that the Commissioner erred in law in the manner in which he conducted the appeal. The TAC has been vindicated in relation to the manner in which the Commissioner conducted the appeal, and the respondent has been forced to incur the cost of contesting the case stated. While there may well be cases in which the issues are finely balanced and require careful consideration as to their legal merits, I consider in the present case that the justice of the case does not require that the appellant be spared having a costs order made against him. I do not think that any of the factors set out at s.169(1) of the 2015 Act are engaged sufficiently to justify a departure from the principle set out in that section that costs follow the event. Indeed, in my view it would be unjust in the present case if the respondent were compelled to bear its own costs of the case stated.

14. Accordingly, there will be an order of the court affirming the determination of the Commissioner pursuant to s.949AR(1)(a), and an order for the costs of the proceedings in favour of the respondent, to be adjudicated in default of agreement.