

THE HIGH COURT

[2021] IEHC 815
[2019/251 MCA]

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

BETWEEN

GERALDINE KAVANAGH

APPLICANT

AND

FRANK HYNES

RESPONDENT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 17th day of December, 2021.

1. The Applicant, Ms. Kavanagh, is an Officer of the Revenue Commissioners and brings this motion in that capacity.
2. The Respondent, Mr. Hynes, is a taxpayer who, in respect of the years 2015 and 2016 delivered tax returns which were, in 2017, subject to audit by Revenue. The returns declared that, in respect of income, charges and capital gains for each of the two relevant years Mr. Hynes had an assessable income of "NIL". Mr. Hynes' wife (Martina Hynes, with whom he was jointly assessed, declared no assessable income for 2015 and assessable income of €7,920 for 2016.
3. At the conclusion of the audit, Revenue raised amended assessments on Mr. Hynes. These amended assessments, dated the 7th of September 2018, showed income tax due of €361,137.02 for 2015 and €112,624.41 for 2016. These assessments were not appealed within the time prescribed by section 959 AF of the Taxes Consolidation Act 1997 (as amended), to which I will refer as the TCA. As Mr. Hynes did not avail of his right to appeal the assessments, and has not in any other way successfully challenged them, these assessments are now "final and conclusive" in accordance with section 959 AF (3) of the TCA.
4. Revenue now applies for orders determining that Mr. Hynes is liable to penalties in the amount of €440,930.80, and enabling Revenue to recover this sum from Mr. Hynes. €440,930.80 is, of course, 100% of the tax assessed by Revenue. The precise reliefs sought in the motion, dated the 26th of July 2019, are as follows:-
 - "1. A determination pursuant to Section 1077B(3) of the Taxes Consolidation Act, 1997 as inserted by the Finance (No. 2) Act, 2008 that the Respondent herein is liable to penalties pursuant to 1077E of the Taxes Consolidation Act 1997 (as amended) in the sum of €440,930.80.
 2. An Order pursuant to Section 1077C of the Taxes Consolidation Act, 1997 as inserted by the Finance (No. 2) Act, 2008 that the Applicant recover from the Respondent the said penalty in the sum of €440,930.80.
 3. Such further Order as this Honourable Court deems just.
 4. An Order providing for the costs of and incidental to this application."

5. While the motion was originally returnable for the 21st of October 2019, its progress was hindered by a number of factors. These included the Covid-19 pandemic, and the striking out of the motion on the 8th of September 2020 for non-attendance when it appeared in the Chancery 2 list. The motion was reinstated by Order of this court, despite opposition by Mr. Hynes.
6. There were two other reasons why the motion took so long to be heard.
7. Firstly, Mr. Hynes sought (in this motion) to join two "co-defendants". These were Mr. Val Stone and Ms. Catherine Stack, practising as Stone Solicitors. The reasons advanced by Mr. Hynes for the joinder of these solicitors are somewhat unclear. In any event, this relief was refused by O'Regan J. on the 4th of November 2019, as was an application by Mr. Hynes to link this motion with other proceedings.
8. Secondly, Mr. Hynes informed O'Regan J. on the very day that the application to join Stone Solicitors was refused (the 4th of November 2019) that he wished to contest the underlying tax liability set out in the amended assessments. This was notwithstanding the fact that, as of that date, the assessments were final and conclusive for the reasons described earlier in this judgment. O'Regan J. adjourned the motion, in accordance with Mr. Hynes' application, to await the outcome of summary proceedings taken by the Collector General against Mr. Hynes in respect of the underlying tax liability. Ultimately, judgment against Mr. Hynes was marked in the summary proceedings in favour of the Collector General in January 2020; this judgment was not appealed as of November 2020 (when this motion was sought to be re-entered).
9. Mr. Hynes swore no affidavit disputing the current motion, though he did deliver both a sworn affidavit and an unsworn document in the context of the motion seeking to join Stone solicitors. He also delivered an affidavit in opposition to the reinstatement of the motion after it had been struck out in September 2020, as a result of Revenue's inadvertence. I have considered these three documents, which were properly brought to my attention by Counsel for Revenue at the eventual hearing of the motion on the 6th of December 2021. Mr. Hynes did not appear and was not represented at the hearing.

A. THE FACTS

10. Revenue's application is grounded on the affidavit of Ms. Kavanagh. Rather than paraphrase them, I will set out in full what I believe to be the relevant contents.
11. Having described the 2015 and 2016 returns made by Mr. Hynes, and having set out the notification of Revenue Audit dated the 3rd of July 2017, Ms. Kavanagh says:-
 - "6) The audit commenced on 27th July by way of initial interview with the taxpayers and was conducted in conjunction with an audit on JW Fashions Limited of which the Respondent was a Director. During the audit the Respondent Advised that he was suffering from ill health which he wished noted for the record. He further requested that his cousin, Alan Hynes, attend for support. This was agreed to

however the Respondent was advised that his cousin could not act as his agent as he was not on record as same.

- 7) The within application relates to the Respondent only and at the commencement of the interview the Respondent was asked whether he wished to make a qualifying disclosure. He indicated that he did wish to make a qualifying disclosure and suggested that a purported qualifying disclosure had been sent to a separate department in Revenue. It was indicated to him by Sinead Downey, on behalf of Revenue, that it was his personal responsibility to ensure any disclosure was presented at this interview. At the end of the interview Alan Hynes advised that he would provide the purported disclosure the following Monday, 31st July 2017. Ms. Downey agreed to accept any purported disclosure for consideration, if made, by that date. For the avoidance of doubt, I say that no qualifying disclosure was ever made by or on behalf of the Respondent for the audit period.
- 8) As part of the interview and audit process Revenue requested, inter alia, that the Respondent provide details of all bank accounts, credit union accounts and credit cards held in his and his wife's names together with the related statements. Further, all books and records for both JW Fashions Limited and personal financial records for the Respondent were requested. The Respondent agreed to request relevant statements from the bank and to forward all records to Revenue.
- 9) On 31st July 2017 certain documents were sent by Alan Hynes to Revenue concerning legal proceedings unrelated to the Respondent's personal taxation affairs. By reply Revenue wrote to the Respondent on 4th August 2017 and I beg to refer to the e-mail dated 31st July 2017 and letter dated 4th August 2017 upon which marked with the letters and number 'GK2' I have signed my name prior to the swearing hereof. As can be seen from Revenue's response it had been notified by Alan Hynes that a disclosure would be presented on the Respondent's behalf, but none was received. It is therefore stated that on that basis, no future disclosure would be treated as qualifying. It is further stated that no books and records were available for inspection at the commencement of the audit and a further 7 days would be allowed for the Respondent to present same to Revenue.
- 10) No response was received therefore on 20th October 2017 a warning letter was sent to the Respondent pursuant to section 900(3) of the Taxes Consolidation Act 1997 ('TCA 1997') giving a further 21 days to produce all bank statements relevant to the respondent and his wife for the period 2015 and 2016. On 17th November 2017 Sinead Downey, on behalf of Revenue, attended Hynes Jewellers shop wherein the Respondent hand delivered records pertaining to him and his wife. A receipt for same issued on 17th November 2017. Further bank statements were sent by email dated 30th November 2017 by Alan Hynes to Revenue. I beg to refer to copies of the correspondence dated 20th October 2017, 17th November 2017 and 30th November 2017 upon which pinned together and marked with the letters and number 'GK3' I have signed my name prior to the swearing hereof.

- 11) On 10th January 2018, following an examination of the documentation provided by the Respondent, Revenue wrote seeking further information concerning his affairs. In particular there were a number of unexplained lodgements to the various bank accounts which did not correspond with the Respondents tax returns for the years 2015 and 2016. Revenue sought the details of, *inter alia*, the source of the said significant lodgements. I beg to refer to a copy of the said letter together with an appendix of queries upon which marked with the letters and number 'GK4' I have signed my name prior to the swearing hereof.
- 12) Between January 2018 and April 2018 Revenue received correspondence from an email address, [REDACTED] (the address previously used by Alan Hynes) through its MyEnquiries, Revenue's Online Customer Contact forum relating to the Respondent. The Respondent had no tax agent on record and your deponent had concerns about engaging in contact through this forum as the Respondent was not personally identified to Revenue therefore your deponent wrote directly to him at his home address. I beg to refer to a series of screen shots with related emails between January 2018 and March 2018 together with my response of 27th March 2018 and 11th April 2018 upon which pinned together and marked with the letters and number 'GK5' I have signed my name prior to the swearing hereof. As can be seen from my response I continued to seek details of all bank accounts held by the Respondent and his wife from 2013 onward.
- 13) Between April 2018 and August 2018 your deponent continued to write to the Respondent seeking, *inter alia*, details of all relevant bank accounts. Revenue's examination of the documentation already provided suggested that there were further undisclosed bank accounts held by the Respondent and/or his wife. Further, the records provided showed lodgements to the already disclosed accounts that did not reflect the tax returns filed by the Respondent for him and his wife for 2015 and 2016. I continually sought an explanation for these lodgements with no response. In the absence of the Respondent providing all relevant documentation your deponent indicated that amended assessments would be raised for 2015 and 2016 to include the unexplained lodgements as income in the hands of the Respondent and his wife. I beg to refer to letters dated 11th April 2018, 11th June 2018, 14th June 2018, 11th July 2018, 14th August 2018 upon which pinned together and marked with the letters and number 'GK6' I have signed my name prior to the swearing hereof.
- 14) Amended assessments were raised on 7th September 2018 for 2015 and 2016 showing income tax due €361,137.02 and €112,624.41. The said amended assessments were not appealed within the statutory time frame provided by the TCA 1997 and therefore became final and conclusive. I subsequently wrote to the Respondent on 23rd October 2019 noting the amended assessments were not appealed and indicated that, in accordance with section 1077E TCA 1997, a tax geared penalty would apply. I indicated that I was of the opinion that a 100% penalty should apply to the Respondent and sought agreement to same from the

taxpayer. In the absence of agreement you deponent sought reasons why a 100% penalty should not apply. I beg to refer to the amended assessments dated 7th September 2018 and the letter dated 23rd October 2018 upon which pinned together and marked with the letters and number 'GK7' I have signed my name prior to the swearing hereof. No response was received from the Respondent."

12. At paragraph 15, Ms. Kavanagh summarises Revenue's position:-

"In all of the circumstances I say and believe that the Respondent is liable to penalties pursuant 1077E of the Taxes Consolidation Act 1997 for deliberately delivering incorrect returns of income charges and capital gains for the years 2015 and 2016 in relation to income tax. No agreement to the said penalty set out in the letter dated 23rd October 2018 was forthcoming therefore on the 3rd December 2018 and pursuant to Section 1077B of the Taxes Consolidation Act, 1997, I issued a Notice of Opinion to the Respondent setting out my opinion that the Respondent is liable to a penalty of 100%. In applying a penalty of 100% it is your deponent's opinion that Respondent did not co-operate with the audit in any meaningful manner. The Respondent delayed the production of relevant records to the audit and it is your deponent's belief that there are still documents outstanding. Revenue had to engage the provisions of section 900 TCA 1997 before any documents were produced by the Respondent. Large sums of money were lodged to the Respondent and his wife's bank accounts which remain unexplained and were not included in the Respondent's tax returns for the relevant years. Your deponent believes that the failing to record such lodgements in the income tax returns was deliberate on the part of the Respondent. Further, the Respondent failed to respond to correspondence from Revenue over an extended period of time."

13. On the 22nd of January 2019, Revenue issued a Notice of Opinion to Mr. Hynes; that Notice (like the Notice which replaced it on the 7th of February 2019) proposed penalties of 100% of the tax liability to be paid by Mr. Hynes. The February Notice was required because of errors in the January Notice. Mr. Hynes did not reply at all to the February Notice, at least by the time this motion was brought. His response to the January Notice was unusual, and is described in these terms by Ms. Kavanagh (at paragraph 17 of her affidavit):-

"On 30th January 2019 your deponent received an email from an email address registered to the Respondent wherein it is stated, *inter alia*, that '*any of the lodgements identified as having been made to my personal bank account are equivalent to the earnings and the lodgements made by Hynes Jewellers (Wexford) Limited*'. The email apparently seeks to rely on the original income tax returns made for the relevant years. Your deponent replied to the Respondent by letter dated 1st February 2019 indicating that if there is further documentation or evidence supporting any amendment to the assessment it should be presented to Revenue. Your deponent sought to meet with the Respondent. A further email was received on 4th February 2019 seeking to rely on a statement made to An Garda

Siochana in what appears to be an unrelated matter to the Respondent's within taxation affairs. I neg to refer to the email dated 30th January 2019, your deponents letter of 1st February 2019 and a series of emails forwarded to your deponent an 4th February 2019 upon which pinned together and marked with the letters and numbers 'GK9' I have signed my name prior to the searing hereof."

14. These, therefore, are the relevant facts.

B. THE LEGISLATION

15. Section 1077E (2) of the TCA provides:-

"Where any person -

(a) delivers any incorrect return or statement of a kind mentioned in any of the provisions specified in column 1 of Schedule 29 where that return or statement contains -

(i) a deliberate understatement of -

(I) income, profits or gains...

that person shall be liable to a penalty."

16. The 2015 and 2016 returns made by Mr. Hynes fall within the type of return or statement listed in column 1 of Schedule 29.

17. Subsection (3) stipulates the penalty "shall" be as specified in subsection (11), which specifies this calculation of the full amount of the penalty to be applied:-

" [...] the difference between -

(a) the amount of tax that would have been payable for the relevant periods [or could have been claimed] by the person concerned (including any amount deducted at source and not repayable) if that tax had been computed in accordance with the incorrect or false return, statement, declaration [, claim] or accounts as actually made or submitted by or on behalf of that person for those periods, and

(b) the amount of tax that would have been payable for the relevant periods by [, or refundable to,] the person concerned (including any amount deducted at source and not repayable) if that tax had been computed in accordance with the true and correct return, statement, declaration [,claim] or accounts that should have been made or submitted by or on behalf of that person for those periods [...]."

18. Revenue have calculated this amount at €440.930.80.

19. A similar regime applies if the understatement of income is made "carelessly but not deliberately [...]"; subsection (5).

20. The provisions to which I have referred are all mandatory. In the event of a deliberate or careless understatement of income:-
- (a) The taxpayer is liable to a penalty;
 - (b) The penalty must be in the amount specified in subsection (11);
 - (c) The penalty is to be the difference between the tax payable on the actual income and the tax payable on the underdeclared income.
21. The penalty can be reduced in the event that “[...] the person liable to the penalty cooperated fully with any investigation or inquiry [...]” initiated by Revenue; subsection (4) in the case of deliberate understatement of income, subsection (7) in the case of incorrect returns which are made carelessly but not deliberately.
22. The level of potential reduction of the penalty is governed by whether or not the taxpayer had made (a) an unprompted qualifying disclosure or (b) a prompted qualifying disclosure or (c) no qualifying disclosure. However, regardless of whether or not any form of qualifying disclosure has been made, there can be no reduction of the full penalty unless the taxpayer has fully cooperated with Revenue in its investigation of the taxpayer's affairs.
23. There has been no such cooperation here. According to the evidence of Ms. Kavanagh, no books and records were available for inspection by Revenue at the commencement of the audit. These were sought by Revenue on the 4th of August 2017. When there was no reply to this letter, Revenue on the 20th of October 2017 sought these records pursuant to the provisions of section 900 (3) of the TCA 1997. Certain records were provided to Revenue in November 2017. Subsequent to the provision of these records, notably bank statements, Revenue continued to believe that there remained relevant bank accounts undisclosed by Mr. Hynes. Much more importantly, Mr. Hynes never addressed adequately legitimate queries raised by Revenue on the bank statements provided in November 2017. I will return to these queries later in this ruling.
24. In light of the legislation, therefore, the required level of penalty to be levied on Mr. Hynes is 100% of the undeclared tax liability. As already noted, this only arises in the event that Mr. Hynes deliberately understated his income when making his initial returns for 2015 and 2016 are carelessly made incorrect returns for these years. This, in turn requires three questions to be answered. These are:-
- (1) Did Mr. Hynes understate his income for 2015 and 2016?;
 - (2) If so, did he do so deliberately?
 - (3) Did Mr. Hynes carelessly but not deliberately make incorrect returns?
25. On the evidence before me, I find that Mr. Hynes did understate his income for both 2015 and 2016. In respect of the first period, there is evidence of large lodgements into a PTSB

account in his name (and that of his wife) including sums paid in by way of bank draft in the amount of €215,000 (11th of February 2015), €18,000 (1st of May 2015) and €9,979.76 (9th of July 2015). In respect of the second period, there is evidence of lodgements into the same PTSB account of 150,000 (14th of January 2016) and €5,172.48 (27th of July 2016).

26. Over the two years, it will be remembered, both Mr. Hynes and his wife declared either NIL liability for income tax, or approximately €7,000 (in the case of Ms. Hynes, for 2016). None of the lodgements which I have just listed have been explained in any meaningful way by Mr. Hynes, nor have a range of other lodgements about which details were sought by Revenue in its letter of the 10th of January 2018. While by no means determinative, it is of more than passing interest that Mr. Hynes did not even attempt to challenge the amended assessments, and ultimately failed to defend the summary summons proceedings brought by the Collector General.
27. Given these facts, I find that Mr. Hynes understated his income for each of the years 2015 and 2016. The separate question, as to whether he did so deliberately or carelessly, is more difficult. Particularly where no account is provided by the taxpayer as to how an incorrect return was made, it can be challenging to ascertain exactly why this happened. However, in this case the facts strongly support a finding that the understatement of income was deliberate. In particular, the payment of monies into accounts of Mr. Hynes himself, the amounts of the monies so paid, the contrast between the actual tax liability (in excess of €400,000 over two years) as opposed to the liability declared (NIL) taken in conjunction with the lack of any meaningful or coherent explanation as to why the understatement of income happened all point emphatically to a conclusion that the under declaration was deliberate.
28. On the evidence, if I had not come to the conclusion set out in the last paragraph, I would have decided that Mr. Hynes had carelessly but not deliberately delivered incorrect tax returns for 2015 and 2016. As it happens, it is unnecessary for me to decide that particular issue.
29. In making these findings, I have applied the civil standard of proof in accordance with the judgment of Peart J. in *Tobin v. Foley* [2011] IEHC 432.
30. I therefore find that Revenue is entitled to Orders in terms of paragraphs (1) and (2) of the Originating Notice of Motion, as set out at paragraph four of this judgment.
31. I will list the matter for 10am on the 12th of January 2022 to deal with any outstanding matters, including the costs of this motion.