Neutral Citation No. [2013] NICA 77 | *Ref:* **MOR(T)9152**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **06/12/2013**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

V

MARK McATEER

MORGAN, LCJ

[1] This is an appeal against sentence. On 10 May 2012 the appellant was arraigned and pleaded not guilty to 3 counts of furnishing false VAT returns. On 12 March 2013 he was re-arraigned and pleaded guilty to all 3 counts. He was sentenced on 2 May 2013 by His Hon Judge Grant to a determinate custodial sentence of 4 years and 6 months comprising 2 years 3 months' imprisonment and a licence period of 2 years and 3 months. However, on 6 August 2013, the determinate custodial sentence was rescinded as the appellant had been sentenced under the incorrect legislation and the appellant was resentenced to a custody probation order of 4 years' imprisonment and one year's probation, the judge having indicated a commensurate sentence of 5 years' in respect of the offence.

Background

[2] The background was that the appellant submitted VAT returns containing false statements in January, February and March 2009 claiming refunds totalling £567,420.17 and this amount was in fact paid to the appellant. There was a recovery of some £30,000 odd which remains secured at the moment, together with a sum of

£3,000 which was recovered in cash from the appellant on or about 15 May 2009, that being money that he had withdrawn from his bank acount on that occasion despite the fact that he was advised that he should not do so.

[3] The factual circumstances are helpfully set out in the appendix contained to the prosecution's skeleton argument. Maca Construction Limited was a limited company of which the appellant was the sole director and the business was registered to his home address in Limavady. He represented to Gortavoy Plant Limited in Pomeroy that he had obtained a number of construction contracts in Iraq and it appears that Mr Loughran, who was a director of that company, supplied him with 4 sales invoices in respect of plant and consultancy fees for use to obtain letters of credit for the export of those services to Iraq. Mr Loughran made it clear that the invoices were supplied on that basis and were not to be used for VAT but the applicant, apparently not having succeeded in whatever plan he had to proceed with the Iraqi venture, then decided to use the invoices as part of his VAT returns for December 2008 and January and February 2009.

[4] The agreement with Gortavoy was that payment would be made by letters of credit sourced from the Iraqi Government which were due to be received within 90 days of the invoices being raised by Gortavoy. The matter came to light as a result of an investigation by the VAT authorities on 27 April 2009 when they visited Gortavoy's offices and it was noted that the credit notes had been cancelled and that the invoices were identified as pro forma, indicating that they should not have been submitted.

[5] The appellant was arraigned in May 2012 and on a number of occasions his case was due to proceed before the courts but had to be taken out and on each of these occasions the appellant maintained his plea of not guilty until the morning of the day on which the trial was actually going to proceed.

[6] He was assessed as presenting a medium likelihood of re-offending. The pre-sentence report indicated that he did not meet the threshold as a significant risk of serious harm. It indicated that probation would offer him the opportunity to work to reduce the likelihood of re-offending and would have a particular focus on the effect of management of risk in the community and assessed that this should include

the additional requirement for the appellant to engage in any programme of work deemed appropriate during the supervision period. The learned trial judge was clearly persuaded that that was an appropriate way forward because he imposed a one-year probation requirement.

[7] So far as the authorities are concerned, Mr Justice Hart in R v Hunter reviewed the authorities in relation to this matter and adopted the approach of following the line of authority that was then appropriate in England. In relation to that case, a fuel case in which the Revenue had been deprived of something of the order of £600,000, and where the offender had benefited to the tune of somewhere between £60,000 and £120,000 and was a secondary, but necessary party in the fraud, he adopted a starting point of 5 years' imprisonment.

[8] More recently, the Recorder dealt with a case of Ashock Kamar which was another Revenue fraud case, in which he took into account the advice of the Sentencing Guidelines Council and expressed the view that, in the area of Revenue fraud there should be little distinction between the approach taken in this jurisdiction and the approach taken in the rest of the United Kingdom. In general terms that appears to us to be a sensible approach albeit, that in this jurisdiction one has to be alert to the fact that there has been significant criminal activity in the field of Revenue fraud, both in terms of cigarette smuggling and fuel laundering, as well as in cases of this sort.

[9] Turning then to the Sentencing Guidelines Council, the first issue that we have to address is whether or not this was a professionally planned operation because the parties accept that that is an indicator of seriousness which can affect the offence. We are satisfied that this was an offence which was clearly motivated by greed on the part of this appellant. One can see that, inter alia, from his actions after he was advised by police that he should not touch the monies which were then in the bank and despite that, on the day of the interview, it appears that he withdrew £5,000. He then subsequently withdrew another £6,000, another £5,000 and eventually on 15 May 2009, was detected withdrawing a further £3,000. So that indicates a high level of greed and an absolute lack of remorse on his part. But it is accepted that inevitably, this was a fraud that was going to be detected, that he had

used his own company in relation to it, that it had none of the hallmarks of careful planning such as involved in carousel frauds by way of the setting up of false companies and a plan to make away with the money without detection. We are satisfied that, although this is an offence dominated by greed, that it is not an offence that could be said, in this particular case, to have been professionally planned.

[10] Taking all of those factors into account, we consider that the appropriate starting point in this case, before consideration of the plea and looking at all of the circumstances, is a sentence of 4 years' imprisonment.

[11] Personal circumstances in cases of this sort must inevitably carry very little weight. Sentences in this area need to be deterrent and those who commit these offences commit them in circumstances where they are placed effectively in a position of trust by way of their obligation to comply with the tax system. People who choose to defraud the tax system and the public in this way, need to understand that inevitably a sentence of imprisonment must follow.

[12] This man did in the end assist himself by ensuring through his counsel that he agreed a certain measure of the evidence that was to be provided in the case as well as, at a late stage, pleading guilty to the charges. Ms Lynch has suggested that that justified credit of the order of 25%. Ms McCormick does not take much issue with that, although I think that we would consider that a generous approach. But even taking as we do, a commensurate sentence of 3 years' imprisonment, we then have to look to see how that should be dealt with taking into account that the learned trial judge felt that this was a man who would benefit from probation.

[13] In looking at that, we have to balance on the one hand the need to ensure that the sentence is properly deterrent with the benefits that the appellant may obtain from probation and taking all of those factors into account, we are going to substitute for the sentence imposed, a sentence of 2 ½ years' imprisonment and 12 months' probation on the assumption that Mr McAteer is willing to undergo the probation at the end of the period. Are you happy to do that? Very well, well then we will substitute 2 ½ years' imprisonment and 12 months' probation.