IN THE SUPREME COURT OF NEW ZEALAND

SC 69/2006
[2006] NZSC 109

BRENT JOHN GILCHRIST

v

THE QUEEN

Hearing: 7 December 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: Appellant in person
K B F Hastie and R J Ellis for Crown
C T Gudsell as Amicus Curiae

Judgment: 15 December 2006

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Anderson J)

[1] Mr Gilchrist ran a tax consultancy business by means of an arrangement called E-Tax Trust. The sole trustee was a company of which Mr Gilchrist was a major shareholder and the sole director. The business was a taxable activity under

the Goods and Services Tax Act 1985. Between June 2001 and August 2003 GST was not paid. That was because Mr Gilchrist preferred to apply the cash flow of the business to other commitments.

[2] On several occasions the Commissioner of Inland Revenue invoked s 157 of the Tax Administration Act 1994 which enables the Commissioner, by notice to a taxpayer's debtors, to require monies which the debtor would otherwise pay to the taxpayer to be paid instead to the Commissioner. Another procedure available to the Commissioner is a written notice under s 17 of the TAA requesting a taxpayer to provide information specified in the notice. There are sanctions for non-compliance by a taxpayer. These include a procedure under s 17A of the TAA for obtaining a District Court order for the production of books and documents. There are also penal sanctions.

[3] Section 143 of the TAA prescribes certain absolute liability offences including that of not providing information to the Commissioner or any other person when required to do so by a tax law.[1] Section 143A, which prescribes knowledge offences, includes the offence of a person knowingly not providing information (including tax returns and tax forms) to the Commissioner or any other person when required to do so by a tax law. Section 143B prescribes evasion or similar offences. Relevant to this appeal are s 143B(1)(b) and (f) which provide as follows:

> (1) A person commits an offence against this Act if the person—
>
> (b) Knowingly does not provide information (including tax returns and tax forms) to the Commissioner or any other person when required to do so by a tax law; …
>
> …
>
> and does so—
>
> (f) Intending to evade the assessment or payment of tax by the person or any other person under a tax law;

[4] On 24 July 2003 the Inland Revenue Department issued a notice under s 17 to E-Tax Trust formally requesting a list of debtors as at 28 July 2003, such information to be provided by 4 August 2003 at the latest. On 31 July 2003

[1] Section 143(1)(b).

Mr Gilchrist entered into a deed of assignment purporting to assign the debts owed to the trust to a company, E-Tax Trust Ltd, of which he was the sole director. The value of the debts was more than $43,000, notwithstanding which no consideration was given for the assignment. On that same day Mr Gilchrist emailed the IRD alleging that the s 17 notice was unlawful. He also wrote to the client debtors advising them of the assignment and requiring them to pay the debts to the assignee company. Mr Gilchrist did not inform the IRD of what he had done. The IRD learned about that when one of the trust's clients made an inquiry of the Department about the arrangement. At a meeting with the IRD on 24 September 2003 Mr Gilchrist disclosed what he had done. That led to his being tried in the District Court on an indictment alleging an offence against s 143B(1)(b) and (f) and an alternative count under s 143A(1)(b).

[5] The District Court Judge, who tried the case without a jury, found Mr Gilchrist guilty on the first count under s 143B(1)(b) and (f). She found that Mr Gilchrist had been under considerable financial pressure; that he had been advised by the IRD that the Department would issue s 157 notices; that he knowingly failed to provide the information requested in the s 17 notice; and that he had carried out an underhand scheme to ensure payment of the client debts to him rather than to the IRD.

[6] It is plain that if Mr Gilchrist had provided the information in the notice as and when required, the Department would have required payment of the client debts to it pursuant to the s 157 procedure, and that his deliberate non-compliance with the s 17 notice was to pre-empt payment of due tax by way of that procedure.

[7] Mr Gilchrist unsuccessfully appealed against conviction to the Court of Appeal. Having been given leave to appeal to this Court he submitted that his conduct, as found by the District Court Judge, did not constitute the offence prescribed in s 143B(1)(b) and (f) of the TAA. In essence, his argument was that the provision under which he was convicted was not intended to criminalise the non-payment of tax, in the circumstances prescribed by the section, where there had been no evasion of the assessment of tax. His assessments were in order and there was no issue of evading assessment.

[8] He submitted that GST liabilities involved self-assessment and therefore if a taxpayer correctly calculated GST and left the assessment documents in his desk that would not amount to tax evasion, and s 143B(1)(b) and (f) would not apply in the event that GST was not in fact paid.

[9] Mr Gilchrist's submission to the effect that a mere process of calculation amounts to an assessment is plainly wrong. There must be a tax return made under, for example, ss 16 or 17 and assessment occurs when the return is received by the IRD. Section 92B of the TAA provides:

> **92B Taxpayer assessment of GST**
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> (1) A taxpayer who is required under the Goods and Services Tax Act 1985 to provide a GST tax return for a GST return period must make an assessment of the amount of GST payable by the taxpayer for the return period.
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> (2) An assessment under this section is made on the date on which the taxpayer'sGST tax return is received at an office of the Department.
>
> (3) This section does not apply to a taxpayer for a GST return period if the Commissioner has made an assessment of the GST payable by the taxpayer for the return period.

[10] In comprehensive written and oral submissions Mr Gilchrist traced through the history of s 17 and other statutory provisions relating to failure to supply information and to tax evasion. His purpose was to demonstrate that before the passing of the TAA there had not been statutory provision for an offence in the apparent terms of s 143B. Section 17(8) of the Inland Revenue Department Act 1974 prescribed the offence of refusing or failing to furnish in writing information requested by the Department. The penalties for the offence, under s 47B(3) of that Act, were fines. A similar offence of refusing or failing to furnish information was an offence under s 416 of the Income Tax Act 1976 and also carried penalties limited to fines, under s 416B(2). Section 420 of the Income Tax Act made a tax evader liable to penalty tax up to treble the amount of the deficient tax. As all counsel acknowledged, the Commissioner's practice in relation to serious cases of fraudulent tax evasion was to initiate prosecution under the Crimes Act 1961. A similar offence of refusing or failing to furnish information was prescribed in s 62(1)(c) of the GST Act with monetary penalties being provided in s 62(3). Under s 67 of the GST Act

the tax evasion had the consequence of liability for penal tax. Both the Income Tax Act[2] and the GST Act[3] provide for the publication of the names of tax evaders.

[11] Against that historical background Mr Gilchrist relied on an Explanatory Note to the Tax Administration Bill 1994 in these terms:

> The Bill contains both –
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> (a) The existing provisions of the Inland Revenue Department Act 1974, with the exception of those relating to Taxation Review Authorities; and
>
> (b) Most of those provisions of the Income Tax Act 1976 that deal with the administrative and procedural aspects of the income tax law, including penalties.
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> With the exception of the substantive amendments proposed to the Inland Revenue Department Act 1974 in *Part XV* of the Bill, the Bill is not intended to result in any change to the existing law. Minor drafting changes of a cosmetic nature have been made and spent provisions eliminated.

[12] The Explanatory Note is consistent with the purpose of the Act as explained in s 2(1) as follows:

> The purpose of this Act is to re-enact the administrative provisions contained in the Income Tax Act 1976 and the Inland Revenue Department Act 1974 in a reorganised form.

[13] When the TAA was enacted a failure or refusal to furnish information to the Commissioner became an offence under s 200 and, under s 221(3), carried financial penalties. Liability for penal tax in the case of tax evasion was provided for under s 186 and the publication of the names of tax evaders was dealt with in s 223.

[14] Given this historical background, submitted Mr Gilchrist, the term "assessment or payment" appearing in s 143B(1)(f) ought be construed as a description of tax evasion by not filing a return or otherwise evading assessment.

[15] Mr Gilchrist's argument seems to envisage the evading of the payment of tax by a gambit of evading assessment. But if that were the case the words "or payment" would not have been included because they would be redundant. Evading

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[2] Section 427.
[3] Section 74.

assessment must have the consequence of evading payment. Since the reference to payment is included, Mr Gilchrist's argument requires the "or" to be read as "and". There is no justification for doing so. The purposes of the relevant Part of the Act are explained in s 139 in these terms:

> The purposes of this Part are—
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> (a) To encourage taxpayers to comply voluntarily with their tax obligations and to co-operate with the Department; and
>
> (b) To ensure that penalties for breaches of tax obligations are imposed impartially and consistently; and
>
> (c) To sanction non-compliance with tax obligations effectively and at a level that is proportionate to the seriousness of the breach.

The words in question, ascertained from their text and in light of their statutory purpose are unambiguous and do not require the examination of former statutes to elucidate them.

[16] In any event, Mr Gilchrist's historical argument loses all force in view of amendments made to the TAA in 1996, well before the current proceedings. The amendments enacted Part 9, the purposes of which are described above, which classified and brought together a range of administrative and criminal penalties under various tax Acts. The 1994 enactment had collated diverse administrative procedures. The 1996 amendment collated and reformed sanctions for compliance. Prosecutorial provisions in the case of evasion or similar offences, previously requiring recourse to the Crimes Act, were now brought under a tax Act which identified tax-specific ingredients of criminal dishonesty.

[17] In relation to criminal behaviour the Part 9 purposes are exemplified in ss 143, 143A, and 143B, which group offences generically as absolute liability, knowing or evasion offences, and thereby provide a more apt vehicle for prosecuting tax evasion than the Crimes Act.

[18] The TAA defines "assessment"[4] as "an assessment of tax made under a tax law by a taxpayer or by the Commissioner". The scheme of the Act envisages that usually, although not always, assessments for tax will be made by a taxpayer on the basis of information which is required to be returned to the IRD. If an assessment, whether by a taxpayer or the Commissioner, is disputed, disputes proceedings can be invoked under Part 4A of the TAA. A taxpayer's tax obligations are set out in s 15B. They include making an assessment if required under a tax law[5] and correctly determining the amount of tax payable under the tax laws.[6]

[19] If a taxpayer had no obligation to pay assessed tax the assessment would be an exercise in futility. Section 15B(c) stipulates the obligation of a taxpayer to pay tax on time.[7] Another specified obligation is to disclose to the Commissioner in a timely and useful way all information (including books and records) that the tax laws require the taxpayer to disclose.[8] It is, therefore, unsurprising that the TAA should recognise as tax evasion a knowing breach of the disclosure obligation with the intention of evading the payment obligation.

[20] Returning to s 143B(1)(b) and (f), we think it plain that the legislation prescribes an offence of knowingly not providing information to the Commissioner or any other person, when required to do so by a tax law, intending to evade the payment of tax under a tax law. That is what Mr Gilchrist did and on the facts as found by the District Court he was properly convicted.

Conclusion

[21] For these reasons we are satisfied that the trial Judge was entitled to find that by failing to comply with a notice validly issued under s 17 of the Tax Administration Act 1994 the appellant committed an offence against s 143B(1)(b) and (f) of the Act in that he knowingly failed to provide information to the

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[4] Section 3.
[5] Section 15B(aa).
[6] Section 15B(a).
[7] "On time" for the purposes of performing a tax obligation is defined in s 3 in terms of payment on or before due date.
[8] Section 15B(e).

Commissioner when required to do so by a tax law, and did so intending to evade the payment of tax by E-Tax Trust. The appeal is accordingly dismissed.

Solicitors:
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