35/81

SUPREME COURT OF VICTORIA

ALVA NATONE PTY LTD v UNGER

Southwell J

20 July 1981 — (1981) 52 FLR 294; 36 ALR 665; 12 ATR 206; 81 ATC 4,443

INCOME TAX – FAILURE TO LODGE RETURN – INFORMATION LAID – AVERMENT – AVERMENT OF MIXED FACT AND LAW – FINDING THAT TIME FOR LODGING RETURN WAS REASONABLE – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *INCOME TAX ASSESSMENT ACT* 1936, S223.

The question whether the time allowed for lodgment of the tax return was reasonable was a question of fact the existence of which the informant may aver. In the absence of any evidence from the defendant which might fairly raise an issue as to the reasonableness of the time allowed, the magistrate was entitled to find, as he did, that he was satisfied of proof of that fact. It is to be observed that the reasonableness of the time in general is a question of fact peculiarly within the knowledge of the taxpayer. It cannot be said to be unjust to cast upon the defendant an evidentiary onus in such a proceeding, for example, by calling an accountant to speak of the difficulties involved. Whilst it is unnecessary to decide whether, irrespective of the averment, there was proof of reasonableness so far as the time limitation was concerned, it would have been open to the magistrate in all the circumstances to find that the time was reasonable, irrespective of the averment.

SOUTHWELL J: This is the return of an order nisi to review a decision of the Magistrates' Court at Melbourne by Mr GS Hoare SM whereby Alva Natona Pty Ltd (which I shall call "the defendant") was convicted and fined $50 in default distress for an offence against s223 of the *Income Tax Assessment Act* 1936.

On 15th October 1980 the respondent, who is the Deputy Commissioner of Taxation (who I shall call "the informant") served upon the defendant a notice addressed to the defendant as trustee for the "Collsplace AA-1 Trust". The relevant part of the notice reads:

> "Pursuant to the provisions of the *Income Tax Assessment Act* 1936 (as amended) I hereby require you to furnish to me at my office at the above-mentioned address within fourteen clays of the date hereof a return in writing on the appropriate form, duly signed by you, setting forth a full and complete statement of all income derived from all sources, whether in Australia or out of Australia, during the year ended the 30th of June 1980 by the Trust. Failure to comply with the requirements of this notice may result in legal proceedings being instituted without further notice."

There is a reminder below that a person who does not furnish a return by 31st August next following the year of income is liable to additional tax, and a statement that if the person to whom the form was addressed considers that a return is not necessary, he is asked to complete the questionnaire on the reverse side of the form and return that. It is common ground that the defendant did not send (to use a neutral word) any return, although I was informed during the hearing that this has since been done. However, there were 62 other prosecutions against the defendant in respect of Collsplace Trusts numbered from AA2 to YY20, and it seems all are dependent upon the finding in this case.

The informant duly laid an information against the defendant dated 27th November 1980 returnable on 17th December 1980. The relevant part of the information states:-

> "The informant saith and pursuant to s243 of the *Income Tax Assessment Act* 1936 (as amended) avers that the said defendant company at Melbourne contrary to the said *Income Tax Assessment Act* did fail to comply with a requirement dated 15th October 1980 requiring the said defendant company to furnish within 14 days of the date of the requirement a return in writing setting forth a full and complete statement of all income derived from all sources in Australia and elsewhere during the year ended 30th June 1980 by the AA1 Coles Place Trust and the informant avers that the time allowed for compliance with the said requirement is reasonable."

The informant called no *viva voce* evidence, relying upon the averments. Counsel for the defendant unsuccessfully submitted that there was no case to answer and no evidence; he relied upon submissions similar to those made here, to which I will refer. It will be convenient first to set out the relevant provisions of the Act. Section 223 reads:

> "(1) Any person who fails to duly furnish any return or information or comply with any requirement of the Commissioner as and when required by this Act or the Regulations or by the Commissioner shall be guilty of an offence. Penalty: Not less than $4 or more than $200."

Section 243 in part reads:

> "(1) In any taxation prosecution every averment of the prosecutor or plaintiff contained in the information complaint declaration or claim shall be *prima facie* evidence of the matter averred.
>
> (2) This section shall apply to any matter so averred, although—
> (a) ...
>
> (b) the matter averred is a mixed question of law and fact, but in that case the averment shall be *prima facie* of the fact only; (3) ... (4) ...
>
> (5) This section shall not lessen or affect any onus of proof otherwise falling on the defendant."

Ground A of the order nisi reads:

> "The Magistrate was wrong in law in declaring that the respondent had produced *prima facie* evidence that the time allowed for the lodgment of the return was reasonable."

In support of that ground, Mr Hampel QC, who appeared with Mr Murphy for the defendant, submitted that the informant could not rely upon an averment that the time allowed for lodgment of the return was reasonable. He referred to *Ganci v The Deputy Commissioner of Taxation* (1975) ATC 4097, and in particular at p4102. In that case the New South Wales Full Court held upon a prosecution under s264 of the Act for an alleged failure to supply information, that the informant must prove that the time allowed for compliance with the request was reasonable. Mr Hampel submitted that the question whether the time was reasonable is a question of mixed fact and law, or alternatively was a question which involved forming a conclusion from other proven facts. Conceding that s243 itself permits an averment of mixed fact and law, he nevertheless submitted that where there was difficulty in separating the facts from the law the Court should exercise caution, relying in his argument, in support of both grounds A and B, upon *dicta* of Jordan CJ in *ex parte Sullivan re Craig & Anor* [1944] NSWStRp 28; 44 SR (NSW) 291 at p301; 61 WN (NSW) 197 where His Honour, after referring to the line of High Court authority in relation to restrictions that should be placed upon averments of a like nature, said:

> ''This being the state of the decided cases, the law-making authority, when it was minded to alter the law on the subject, did not take the course of providing that the burden of proving innocence should be upon the accused or that the averments of the information should be *prima facie* evidence of the matters averred, whether of law or of fact. It accepted the decisions as correctly stating the effect of such a provision as Regulation 32A(1) and proceeded to qualify them by the addition of sub-regulation (2). Hence, now, when the matter averred is a mixed question of law and fact, the averment must be treated as *prima facie* evidence of the fact, though not of the law. Since the word 'question' makes nonsense of the sub-clause if read literally, it must presumably be read in the sense of 'matter', and any matter of fact properly averred is now *prima facie* evidence of that matter, notwithstanding that evidence in support or rebuttal of it, or of any other matter, is given by witnesses."

In his general submissions, Mr Hampel submitted that the proceedings were criminal in character and that this was of some significance. Dealing with that last point first, Mr Burnside, for the informant, submitted that the proceedings were civil, not criminal, in character, and relied upon *Jackson v Butterworth* [1946] VicLawRp 51; (1946) VLR 330; [1946] ALR 382; 8 ATD 214 and *Naismith v McGovern* [1953] HCA 59; (1953) 90 CLR 336; [1953] ALR 846; 10 ATD 405. In the former case Fullagar J at p332 said:-

> "A second matter of law which was debated was whether a taxation prosecution under Part VII of the Act is a civil proceeding or a criminal proceeding. If it were a criminal proceeding, the standard of proof which is required in criminal cases would be required here, and it would be necessary for the Court to be satisfied beyond reasonable doubt of the guilt of the defendant. In the view which I

> have ultimately taken of this case this question does not appear to be important, but I may say that, in my opinion, the proceeding is civil and not criminal in character. The procedure is by action to recover a penalty and the rules of civil procedure apply."

In the latter case the Full High Court did not doubt the correctness of that decision: see p341 of the latter report. Mr Burnside further submitted that the question whether the time was reasonable was a question capable of averment, that it was common ground that all persons in receipt of income were required to lodge a return by 31st August, that where a notice gave fourteen days to do so and was served 3½ months after the close of the financial year and 1½ months after the date returns are due, *prima facie* the time allowed was reasonable. He relied on *British Launderers Research Association v The Borough of Hendon Rating Authority* (1949) 1 KB 462 at p471, where Denning LJ sitting on the Court of Appeal in a rating appeal, said:

> "On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original documents. Their determination is essentially a question of fact for the tribunal of fact and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If, and insofar as, those conclusions can as well be drawn by a layman properly instructed on the law as by a lawyer, they are conclusions of fact for the tribunal of fact, and the only questions of law which can arise on them are whether there was a proper direction in point of law and whether the conclusion is one which could reasonably be drawn from the primary facts."

See also *R v Scurry* 86 WN NSW 1 at p8, where Astbury JA said (and this is relevant to Ground B):

> "Accordingly, the word 'fails' in s36(4), in my view, imports an omission not being an omission caused by impossibility for which the licensee is not responsible to perform one of the acts referred to in s36(1), irrespective of the reason for the omission, but no failure to perform any one of such acts can be said to have occurred until a reasonable period of time in all the relevant circumstances has elapsed to enable the act in question, according to its quality, to be performed. This is a question of fact."

In my opinion the question whether the time allowed was reasonable is a question of fact the existence of which the informant may aver. In the absence of any evidence from the defendant which might fairly raise an issue as to the reasonableness of the time allowed, the magistrate was entitled to find, as he did, that he was satisfied of proof of that fact. It is to be observed that the reasonableness of the time in general is a question of fact peculiarly within the knowledge of the taxpayer. He knows of any difficulties or complexities which may present themselves in the preparation of a taxation return. It may well be that the Deputy Commissioner has little knowledge of those matters.

It cannot be said to be unjust to cast upon the defendant an evidentiary onus in such a proceeding, for example, by calling an accountant to speak of the difficulties involved. That is not to say, of course, that the defendant bears the final onus of proof: see *R v Hush; ex parte Devanny* [1932] HCA 64; (1932) 48 CLR 487 at p507 per Dixon J (as he then was). It is, accordingly, unnecessary for me to decide the second question debated, this is whether, irrespective of the averment, there was proof of reasonableness so far as the time limitation was concerned, but I think I should express my view that it would have been open to the magistrate in all the circumstances to find that the time was reasonable, irrespective of the averment. In my view, this ground must fail.

Ground B reads:

> "The Magistrate was wrong in law in declaring that the respondent had produced *prima facie* evidence that the applicant had failed to furnish a return."

Here the defendant submitted that the expression furnish a return was a term of art involving mixed fact and law, that the two could not be separated, or could not be separated without undue difficulty, that reference to Regulations 21, 25 and 26 of the *Income Tax Regulations* showed that a number of steps had to be taken before a return was furnished, and the bald statement that a person failed to furnish a return could not properly be the subject of an averment, nor did it give the defendant or the magistrate any idea of the nature of the real allegation made. He

conceded that had the information went on to allege, for example, that the Deputy Commissioner had not received a return, the averment would be valid and could be relied upon.

In my opinion, the submission is one which might be appropriate and telling upon an application, on the hearing of the prosecution, for particulars of the offence. There are a great number of offences, from murder and manslaughter down, where the indictment gives no particulars. In indictable offences those particulars are commonly disclosed in the depositions. In a summary jurisdiction it is not unusual for the Court in the interests of fairness to indicate that while the information is not vulnerable to attack, the Court would not proceed to hear it until particulars are given. If the defendant was here labouring under any doubt as to the precise nature of the allegation, it could have sought particulars. Since it is common ground that no return was made, the defendant could scarcely have been surprised by being given the particular, for example, that the return had not been received. While there are a number of steps which must be taken to furnish a return, it does not follow that the expression is a term of art, by which, as I understand him, Mr Hampel was referring to mixed fact and law, which could not or could only with difficulty, be separated and identified. The fact that a number of steps must be taken does not involve a finding that the question becomes one partly of law. In my opinion, the question whether an income tax return has been furnished is a question of fact which may properly be averred under s243 of the Act. This ground also is not made out.

Ground C reads:

> "The Magistrate was wrong in law in declaring that the notice served by the respondent on the applicant requiring him to lodge the return was not meaningless and void."

The defendant submitted that since a trust was merely a word used to describe a relationship between parties, it was not an entity capable of earning or deriving income, and that the notice of 15th October 1980 was meaningless. Mr Hampel submitted that the expression "income derived by the Trust" could mean, firstly, income derived by the defendant because of the existence of the trust, for example, management fees payable in respect of its trusteeship. In my opinion, the simple and short answer there is that on the ordinary meaning of the words, "derived by the Trust'' could not be said to be the same as "derived by the company". If the notice had sought information as to income derived by the company, it could simply have said so.

Secondly, it was said it could mean "income derived by a beneficiary by reason of the existence of the Trust." Again, in my view, the same short and simple answer is called for.

Thirdly, it was said it could mean "income produced by investment of Trust property in the hands of the defendant and not distributed by it". It could indeed, and that was part of the information the notice sought to extract. Mr Hampel felt forced to concede that had the notice read "by the Trust property" or "by the Trust estate", the notice would not be bad, but that the words "by the Trust" meant no more that "by reason of the existence of the Trust". In my opinion, such an interpretation does violence to the ordinary and natural meaning the words. It would be absurd to think that the notice sought information as to income earned by anyone as a consequence of the existence of the trust. While a trust is not a legal entity, the law has for long referred to "trust income", "trust property" and "trust estate". It is not without significance that Mr Hampel was not able to cite any authority for the proposition that the expression "income derived by the Trust" is meaningless. On the other hand, Mr Burnside was able to draw some comfort, albeit small, from the reference to "trust income" in the said notes to ss99A and 100A of the Act, for example, but more comfort, I think, from the use of those words in Regulation 15, which reads:

> "15(1). A return setting forth a full and complete statement of the income derived by every Trust during the year of income shall, if required by the Commissioner by notice published in the *Gazette*, be made and furnished by the Trustees resident in Australia or by any one of them."

Moreover, he was able to refer to textbooks, for example Parker and Mellow 2nd ed., where Chapter 12 is headed *Taxation of a Trust*; to *Modern Trusts and Taxation* by Gurvich, Munn and Reither, Chapter 4 of which is headed "Taxation of Trusts" and where further reference is made to trusts furnishing income tax returns; to *Halsbury*, 4th ed., vol. 23, para. 1409, where reference is made to "residence of a trust for tax purposes"; to *Reid's Trustees v The Commissioner of Inland Revenue*; and Vol 14, Reports of Tax Cases, 512, where at pp523 and 524 the Lord President

twice refers to "income of a trust"; and to *Commissioner of Taxation v Forsyth* 55 ALJR 340 at p341, where Murphy J refers to "payment to a family trust". He submitted that it was clear from those references that the word is not capable of being misunderstood, but is now, and has long since been, a word clearly understood in the law. In my view, while none of those references are conclusive of the matter now under consideration, they lend support to the view that the expression "trust income" or "income derived by a trust" is one that is, and has for a long time, readily been understood in the law.

In my view, the notice calls upon the defendant to give information as to the income, however earned, produced by the trust estate or property, which may, of course, consist of many forms. In the absence of evidence to the contrary, I assume that the defendant as a trustee for a named trust would have knowledge of transactions relating to trust property which have produced income. I should say that I am emboldened in the views that I have stated by the remarks of Cross J in *Klein v Deputy Commissioner of Taxation* 80 ATC 4527, where at p4532 His Honour says:

> "As a preparatory observation, may I say that it appears to me not unreasonable for a Court in construing an instrument affecting the requirements of citizens to furnish returns of income for the financial year of 1976/7 to seek and give that instrument validity, The economic consequences of the Court striking down that notice as invalid could be grave. Of course, if the Court is driven to a firm conclusion that the notice is invalid, the Court must so hold, but the judicial arm should not lightly seek to frustrate legislative intent in essential statutes by harsh interpretations of challenged provisions. It should seek to assist the enforcement of the people's indirectly expressed will unless that will as expressed in the statute, regulation or notice is so uncleanly and uncertainly stated as not to amount to a valid expression of such will at all. Particularly is this so where one is dealing with a necessary power which the Commonwealth possesses under its most important revenue-raising statute and with the purported exercise of that power."

And further, by reference to *Wilover Nominees Ltd v The Inland Revenue Commissioners* (1974) 3 All ER 396 at p501; [1974] 1 WLR 1342, where Stamp LJ said:

> "Of course one of the duties of the Court today, as always, is to protect the individual from abusive power by the executive, but, as Golding J indicated in somewhat different terms, it is also the function of the Court not on fanciful grounds to assist a taxpayer to obstruct a fair and proper exercise of the powers with which the officers of the Revenue are armed for the performance of their duty to collect taxes which are extricable."

Accordingly, in my view, the order nisi must be discharged, and I shall hear counsel on the question of costs.

APPEARANCES: For the applicant Alva Natona Pty Ltd: Mr G Hampel QC with Mr TME Murphy, counsel. Garrick, Gray & Co, solicitors. For the respondent Unger: Mr J Burnside, counsel. Messrs BJ O'Donovan, solicitors.
