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SUPREME COURT OF NEW SOUTH WALES — COMMON LAW DIVISION

COMMISSIONER of TAXATION v WORMALD INTERNATIONAL AUSTRALIA PTY LTD

Yeldham J

6 December 1985 — [1985] 17 ATR 129; 85 ATC 4844; (1985) 81 FLR 330

TAXATION – INCOME TAX PENALTY – FAILURE TO FURNISH RETURN WHEN REQUIRED – DEEMED INEXPEDIENT TO IMPOSE ANY PENALTY – CHARGE DISMISSED – WHETHER APPROPRIATE IN THE CIRCUMSTANCES: *CRIMES ACT* (CWTH) 1914, S19B: *TAXATION ADMINISTRATION ACT* 1953, S8E.

W. Pty Ltd was charged with failing to lodge a tax return when required. At the hearing, W. Pty Ltd was not represented, no evidence was called on its behalf, no submissions were made, and no explanation was offered for the delay. When the prosecutor indicated that W. Pty Ltd had lodged its return 4-5 days before the hearing and had no prior convictions the Magistrate, for those reasons, deemed it inexpedient to inflict any penalty and dismissed the charge under s19B of the *Crimes Act* 1914. Other reasons given included the assertion that W. Pty Ltd had multi-national trading operations and held a status as a long-established public listed company with substantial paid-up capital. On appeal by the Commissioner—

HELD: Appeal allowed. Remitted to the magistrate.
(1) The Magistrate's determination to dismiss the information under s19B was erroneous in point of law.

(2) Before the provisions of s19B of the *Crimes Act* 1914 can be invoked, there must be something that clearly distinguishes the circumstances of the offence under consideration from the typical offence, or circumstances of an unusual personal nature to the defendant.
***Kelton v Uren* (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534, applied.**

(3) In the absence of an explanation why the return had not been filed when required, it was not open to the Magistrate to dismiss the charge under s19B on any of the matters referred to by him, including the fact that the defendant had no prior convictions.

YELDHAM J: [1] This is an appeal by way of case stated by the Commissioner of Taxation against the decision of a magistrate, who dismissed an information against the respondent, Wormald International Australia Pty Limited under s19B of the Commonwealth *Crimes Act*. The information, to which the respondent pleaded guilty, and which was laid on 12th April 1985, asserted that on 1st February 1985 the company had been required by notice in writing to furnish on or before 15th February 1985 a taxation return for the year ended 30th June 1984 and had failed to do so.

The hearing before the magistrate was on 24th May 1985. It does not appear from the copy of the transcript of the short proceedings in the Local Court that the respondent was represented. Certainly, no evidence was called on either side and no submissions were made on behalf of the respondent. In particular, no explanation for the failure to lodge the return within the time required by the notice was offered. The solicitor who appeared for the appellant indicated that it did appear that a return had been lodged "in the last four or five days", that is, some three and a half months after the initial service of the notice upon the respondent. The magistrate was also informed that the latter had no prior convictions. The transcript then records the following:

> "BENCH, I think the appropriate case for me to dismiss it under s19B. It is dismissed under s19B. INFORMATION DISMISSED under s19B.
> MR SUDOL: Your Worship, I am instructed in cases of 19B to ask for the Court's reasons for that decision.
> BENCH: I exercise my discretion in view of what has been told to me today, that the return has been filed and the fact that the defendant company has had no previous convictions of a similar nature."

In the stated case the magistrate said under the heading "Grounds of Determination":

"I exercised my discretion under s19B of the *Crimes Act*, 1914, to dismiss the charge on the grounds that:
(i) the defendant had multi-national trading operations;
(ii) the status of the defendant, a long-established public listed company with substantial paid-up capital;
(iii) the defendant has filed a return within four or five days of the hearing;
(iv) the defendant had no previous convictions of a similar nature."

The maximum penalty prescribed in the case of a first offender for failure to lodge a return when required to do so is a fine of $2,000 (see s8E of the *Taxation Administration Act* 1953 as inserted by the *Taxation Laws Amendment Act* No. 123 of 1984). By s19B of the Commonwealth *Crimes Act*, it is provided as follows:

"(1) Where
(a) a person is charged before a court with an offence against the law of the Commonwealth, and

(b) the court is satisfied that the charge is proved, but is of the opinion having regard to
[3] (i) the character, antecedents, age, health or mental condition of the person;
(ii) the extent (if any) to which the offence is of a trivial nature or
(iii) the extent (if any) to which the offence was committed under extenuating circumstances,
that it is inexpedient to inflict any punishment or to inflict any punishment other than a nominal punishment or that it is expedient to release the offender on probation, the court may by order dismiss the charge ..."

On behalf of the appellant, Mr Cowdery submitted that the magistrate had erred in law in exercising his discretion as he did, and in taking into account a number of extraneous matters which were not relevant to a proper decision as to whether or not the information should have been dismissed under s19B. (see *Uznanski v Searle* (1981) 26 SASR 388; [1981] 52 FLR 83 at page 84.) There was, of course, no evidence before the magistrate that the respondent had multi-national trading operations or, indeed, as to its status as a long-established public listed company with substantial paid-up capital. Even if he was entitled to take judicial notice of those matters (and this I doubt) I am quite unable to see their relevance to any matter referred to in s19B. A failure by a large and well-known public company to obey the relevant taxation laws would not entitle it to leniency, any more than would a similar breach by a small and little known company or by an individual. Indeed, the offence may be thought to be more deserving of censure than it otherwise would have been.

Nor do I think that the fact that a return had been filed within four or five days of the hearing entitled the magistrate to regard the offence as either trivial or as one committed under extenuating circumstances. Perhaps if it had been filed a day or two after the time limited by the notice it may have come within that **[4]** description, although what is trivial and what is not would normally involve questions of fact and degree. Generally speaking, a finding of triviality could not be challenged on appeal, but I do not regard it as open in the present case to the tribunal of fact to hold, in the complete absence of any explanation or any evidence of the reasons why no return was filed as required by the notice, that the information should be dismissed having regard to one or both of the matters referred to in s19B sub-s1(b)(i) or (iii).

I said earlier that the matter is essentially one of fact and degree. As with all questions of degree, cases may occur in which it is difficult to decide on which side of the borderline they fall. This particular difficulty was referred to in *Chapman v Chapman* [1954] UKHL 1; [1954] AC 429 at pages 445-6 by Lord Simonds LC; [1954] 1 All ER 798; [1954] 2 WLR 723, who said that he was not as a rule impressed by an argument about the difficulty of drawing the line, since he remembered "the answer of a great judge that although he knew not when day ended and night began he knew that midday was day and midnight was night". Thus, although questions of triviality and the like involve, in normal circumstances, question of fact and degree, with which this Court will not interfere, there are some cases (and this is one of them, in my view) where the evidence is of such a nature that it cannot be held, as a matter of law, that provisions such as those which are to be found in s19B, insofar as they relate to the nature of the offence can justify the application of that section in favour of the offender.

Here the offence was a failure to lodge a return as required by the appropriate notice. As I have earlier said, no reason for non-compliance **[5]** was given, and the offence was complete

upon the expiry of the time limited by such notice. To describe the failure as trivial would really involve the proposition that all similar failures by all taxpayers were within the same description. Certainly what Zelling J said in the *Commissioner of Taxation v Hagidimitriou* (1985) 16 ATR 839; (1985) 85 ATC 4539 would deny that proposition. In *Kelton v Uren* (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534 Jacobs, J of the Supreme Court of South Australia was concerned with cases where each respondent had pleaded guilty to a charge of failing to comply with a requirement to furnish an income tax return. The prescribed penalty then under the *Income Tax Assessment Act* was a minimum fine of $4 and a maximum fine of $200. In each case the magistrate, purporting to act under s19B of the Commonwealth *Crimes Act*, dismissed the complaint without conviction in view of the antecedents and character of the defendants, and what he regarded as being the trivial nature of the offence. Although s246 of the *Income Tax Assessment Act* which has now been repealed, played an important part in the decision of His Honour, I think that assistance in the present case is to be found from the following passages from the judgment, which appear at pages 535-6:

> "I was at first disposed to think that the appellant might call in aid s246 of the Act, which provides that 'No minimum penalty imposed by this Act shall be liable to reduction under any power of mitigation which would, but for this section, be possessed by the court'. By parity of reasoning with the decision of the High Court in *Cobiac v Liddy* [1969] HCA 26; [1969] 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257, however, I feel bound to hold that s246 has no operation except upon conviction, for it is only upon conviction that a penalty is to be imposed ... Section 246, however, is a clear statutory indication that the penalties prescribed by the Act are intended to be imposed and, while it is not possible to exclude the operation of s19B of the *Crimes Act*, there must be **[6]** something that clearly distinguishes the circumstances of the offence under consideration from the typical offence, or circumstances of an unusual nature personal to the defendant before that section can be properly invoked in dealing with this particular offence. The history of the way in which the penalty provisions of the legislation have been applied by the courts, to which further reference will be made later, suggests that such cases must be very rare indeed.
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> However that may be, there is clearly nothing in the circumstances of the present offences which could justify them in being characterised as 'trivial'. No doubt the offence constituted by a breach of s223 may not in itself be a serious offence, compared with other offences punishable by law, but that is not the test of triviality. There must be something which clearly distinguishes the particular breach of the section under consideration from what may be regarded as a typical breach of the section. In applying that test, it must be remembered that the substance of the offence is not the failure to furnish a return, for the Act does not impose a general obligation to furnish a return. It imposes that obligation only upon notice, and it is non-compliance with the notice that constitutes the offence. Viewed in that way, it is quite impossible to say that there are any circumstances of extenuation in either of these cases.
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> When one turns to the other limb of s19B of the *Crimes Act*, under which the learned special magistrate purported to act, all that can be said about the character and antecedents of the defendants, in support of the order, is that neither defendant was known to have any previous convictions; but that, standing alone, can scarcely be sufficient, more particularly when one has regard to the scope and purpose of this legislation. It is a fiscal measure, which imposes obligations and burdens upon the whole community, and it would defeat the purpose of the legislation if the courts were to condone the neglect of those obligations, and possible avoidance of the burden, in the case of a first offender, simply because he is a first offender. More particularly is that so when administrative steps have been taken, prior to prosecution, to remind the defaulter of his obligation."

(see also per Windeyer J in *Cobiac v Liddy* [1969] HCA 26; [1969] 119 CLR 257 at page 276; [1969] ALR 637; (1969) 43 ALJR 257).

In my opinion none of the matters upon which the magistrate here purported to rely, including the fact that the respondent had no prior convictions for a similar offence, justified the formation of the view that it was inexpedient to inflict any **[7]** penalty. Especially is this so in the complete absence of any explanation of the long delay in lodging the return in obedience to the notice given on 1st February 1985. The only reasonable inference is that such return was lodged because the summons, which was issued on 12th April, was to be heard on 24th May. The fact that this was the company's first offence of this nature was, to use the words of Windeyer J, merely a peg "on which to hang leniency dictated by some extraneous and idiosyncratic consideration". There was not even any evidence of the length of time during which the respondent had been a taxpayer.

Thus I consider that the magistrate's decision did miscarry. The question asked in the stated case is whether his determination was erroneous in point of law. That question I answer in the affirmative and, regrettable though it is, I remit the matter to the Local Court with this expression of opinion, in order that the appropriate penalty might be imposed, whether or not after the hearing of further evidence (a matter which is, of course, within the discretion of the magistrate). So far as the question of costs is concerned, in *Kelton's case* Jacobs J, at page 537 said this;

> "The appeals were properly brought to establish a matter of principle, but it does not appear that either respondent initiated or suggested the orders under appeal and I think it would be an unfair burden to require them to pay the costs of the appeal. There will therefore be no order as to the costs of the appeal ..."

I think the position here is the same, and I order the parties to pay their own costs of the appeal.
