58/87

SUPREME COURT OF SOUTH AUSTRALIA

TALISCO PTY LTD v SARNEY

Olsson J

26 February 1987 — 87 ATC 4343; [1987] 18 ATR 420

INCOME TAX – FAILURE TO FURNISH RETURN ON TIME – DELAY DUE TO TAX AGENT – UNFORESEEN PROBLEMS IN TAX AGENT'S OFFICE – TAXPAYER HAVING PREPAID ESTIMATED TAX – NOTICE TO TAX AGENT TO FURNISH RETURN NOT COMPLIED WITH – RETURN LODGED UPON RECEIPT OF SUMMONS – WHETHER CONVICTION AND FINE APPROPRIATE – WHETHER ORDER OF DISMISSAL APPROPRIATE: *TAXATION ADMINISTRATION ACT* 1953, S8C; *CRIMES ACT* 1914, S19B.

T.P/L placed its taxation affairs in the hands of a firm of registered tax agents. Due to extraordinary and unforeseen circumstances occurring in its office, the firm was unable to meet its lodgment programme with the Taxation Office; however, it made arrangements for T.P/L to prepay estimated tax. As a result of the delay in the tax agent's office, a notice to furnish the return was sent to the tax agents. However, this notice was not complied with and a summons was duly served on T.P/L. Immediately, the return was lodged whereby it was ascertained that T.P/L was entitled to a refund. Upon the return of the summons, the magistrate convicted T.P/L and fined it $250 with court costs. Upon appeal—

HELD: Appeal allowed. Penalty set aside. Charge dismissed pursuant to s19B(1)(c) of *Crimes Act* 1914 (Cth).
1. A taxpayer is primarily responsible for compliance with the provisions of the taxation legislation. Therefore, it is not appropriate to absolve the taxpayer where the situation is no more than that a tax agent has been dilatory and has let its client down.

2. Further, in respect of charges of failing to furnish a tax return, it will be a relatively rare case in which a disposition under s19B of the *Crimes Act* 1914 (Cth.) will be appropriate.
***Kelton v Uren; Kelton v Harris* (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534; 81 ATC 4119, applied.**

3. However, in the present case, it was not "run-of-the-mill," and due to the very unusual and extenuating circumstances, it was entirely appropriate to dismiss the charge pursuant to s19B(1)(c) of the *Crimes Act* 1914 (Cth.).

OLSSON J: [ATC 4344] This is an appeal by a defendant company against the sentence imposed upon it by a magistrate consequent upon its conviction of an offence under sec 8C of the *Taxation Administration Act* 1953. The appellant is a company in a substantial way of business in Mount Gambier. It holds the Toyota franchise for the town and thus deals in various types of motor vehicles of that brand. I infer that it is also engaged in the usual run of associated services and allied activities. It should be said at the outset that the appellant has been trading for a considerable number of years and has an unblemished prior record. During the relevant period the taxation affairs of the appellant were handled by a firm of registered tax agents known as James FJ Auswild & Co (to which I shall refer as 'Auswild') which practised in Sydney. That firm was a modest size organisation which had a reputation in Australia for specialising in the preparation and processing of income tax returns related to motor vehicle retailing businesses. It had a normal staff of some 10 persons.

As I understand it the appellant supplied the relevant data for the preparation of its income tax return for the year ended 30 June 1985 to Auswild in a timely manner. It is common ground that, in accordance with well-settled practice, tax agents such as Auswild negotiate preparation and lodgment programs in respect of their clients year by year with the Taxation Office through its tax agents liaison centre. I infer that this is designed to achieve a practical and sensible workflow through both the tax agents offices and the Taxation Office. Normally, when a taxpayer establishes a pattern of ongoing retainer of a registered tax agent, all correspondence dealing with that taxpayer's returns passes direct between the Taxation Office and the agent concerned. Such was the situation in the instant case and it is quite apparent that, at all material times, the

appellant was largely, if not totally, unaware of what was passing between Auswild and the tax agents liaison centre. Moreover when the Taxation Office ultimately issued the notice to furnish a return, which was the necessary prelude to the sec 8C prosecution, it went direct to Auswild and not to the appellant.

Given that background a most unfortunate and remarkable sequence of events occurred during the mid to latter half of 1985. No less than three senior members of the staff of Auswild unexpectedly died within six months and one younger accountant resigned. Needless to say these occurrences rendered the agreed lodgment program of Auswild quite impossible of achievement. It is not disputed that considerable interchange took place between Auswild and the tax agents liaison centre in Sydney and this led to a major rescheduling of work. Unfortunately for the appellant its return was one of the last to be prepared in respect of the fiscal year in question.

In the meantime, arrangements had been made for the appellant to prepay estimated tax by quarterly instalments. In the result, when the subject return was ultimately lodged and assessed, it became apparent that the appellant had overpaid and was in fact entitled to a refund. It followed that the Taxation Office was not out of pocket at any stage.

The precise reasons why the appellant's return took so long in preparation have not emerged. However, it is clear that, for some reason, the Taxation Office issued a sec 8C notice addressed to the appellant c/- Auswild on 12 March 1986. Because it received no timely response from Auswild the present complaint was issued on 30 May 1986. Of course the appellant itself was quite unaware of the issue of the notice.

It is conceded by the respondent that the outstanding return and a letter of explanation were delivered to the Taxation Office immediately following issue of the complaint and summons. Despite representations on behalf of the appellant, and the fact that no tax was actually payable, the respondent elected to proceed with the prosecution. Its rationale for so doing was simply that Auswild had failed to react to its sec 8C notice in a timely manner.

It has not been disputed that despite the late lodgment by Auswild of a very substantial number of returns because of the problems which beset them, in the event only three prosecutions (including that now under consideration) were launched. Of those only one (that directed to the appellant) led to a conviction. The remaining two were dealt with **[4345]** by courts outside this State and were dismissed without conviction, presumably pursuant to sec19B of the *Crimes Act* 1914, as amended. As I remarked in the course of the hearing of the appeal, it is small wonder that the appellant perceives its treatment as being grossly unfair. Having regard to the atypical background of this matter counsel for the appellant urged the learned magistrate to exercise the discretion vested in him under sec19B of the *Crimes Act*. However, the learned magistrate declined to do so. He convicted the appellant and fined it $250 plus $20 court fees. In so doing so he said:

> "I Regret to say that the basic submission made is very familiar. I can certainly have sympathy for the Company and any taxpayer that finds himself in a situation where their agent has let them down. The agent may have done so for perfectly valid reasons, but the onus of course rests with the taxpayer to comply with the Legislation. I suppose one could say that if you place your matter in the hands of an agent you are responsible for the agent's actions, good or bad. If it is considered that there is an appropriate defence by improper actions of a third party, then that should be maintained. The bare submission however that somebody else has caused you to breach the Legislation is usually not Regarded with any great favour by the Courts. The Legislation has to be strongly enforced and I think for various obvious reasons. It appears to me that, in this case, there was some considerable time before the return was placed with the Department. The Department granted a variation to the due date for lodging of the return. It is of some concern that the Company does incur a conviction but there are many cases of this nature. In fact both the cases before me today appear to be offering the same sort of explanation. A conviction has to be recorded. Even though it is probable that the Company will call upon its accountant to pay the fine, I think the appropriate fine is towards the lower end of the scale."

It is immediately apparent that the learned magistrate was disposed to regard this as a "run- of-the-mill" case of its type — one which fell to be disposed of on a "basic submission ... (which was) ...very familiar". He treated it simply as yet another routine case in which a tax agent had let its client down, albeit that mitigating circumstances warranted a penalty towards the lower end of the scale. I do not share that view. Whilst I agree with the learned magistrate

that where the situation is no more than that a tax agent has been dilatory and has let its client down it would largely tend to defeat the efficacy of the legislation to absolve the taxpayer (who, after all, is primarily responsible), this was clearly not a scenario falling within that category.

Not only were there extraordinary and quite unforeseen circumstances giving rise to the problems in Auswild's office but, in the final analysis, the arrangements made to repay estimated tax resulted in the appellant being entitled to a refund for the relevant fiscal year. Moreover the return was lodged promptly after the summons was issued. It seems extraordinary that, at the conclusion of the Auswild saga, the sole victim of prosecution should be such an appellant. For the life of me I cannot understand why the complainant saw fit to adopt such an intransigent attitude simply because the sec 8C notice was not responded to as it ought to have been. There would have been a great deal more to have been said in favour of its attitude if in fact money had been found owing to it.

There can be no doubt on the authorities that, in terms, sec19B of the *Crimes Act* is capable of application to a sec 8C prosecution and conviction of a corporate body such as the appellant (*John C. Morish Pty Ltd v Luckman* (1977) 16 SASR 143; (1977) 30 FLR 88, *Lanham v Brambles-Ruys Pty Ltd* (1984) 37 SASR 16; (1984) 55 ALR 138). With respect I agree with Jacobs J in *Kelton v Uren; Kelton v Harris* (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534; 81 ATC 4119, that it will be a relatively rare case in which there is practical scope and any warrant to resort to sec19B in relation to prosecutions of the nature of that now under consideration, having regard to the scheme of the *Taxation Administration Act*. As he there commented at ATC p4120; FLR p233:

> " ... While it is not possible to exclude the operation of sec 19B of the *Crimes Act*, there must be something that clearly distinguishes the circumstance 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."

I entertain no doubt that, having regard to the various facets which I have identified, the learned magistrate fell into error in his categorisation of the offence. It is not "run-of-the-mill" and the circumstances were both very unusual and extenuating. They were such as to render resort to sec 19B entirely appropriate. In my view the appeal must be allowed and the penalty imposed set aside. In lieu thereof the charge ought to be dismissed pursuant to subsec (1)(c) of sec 19B of the *Crimes Act*. There will be orders accordingly.
