50/85

SUPREME COURT OF SOUTH AUSTRALIA

COMMISSIONER of TAXATION v HAGIDIMITRIOU

Zelling J

12, 26 August 1985 — [1985] 85 ATC 4539; [1985] 16 ATR 839

TAXATION – OFFENCES – FAIL TO FURNISH RETURN WHEN REQUIRED – INCREASED PENALTY – WHERE PREVIOUS CONVICTION – MEANING OF 'PREVIOUS CONVICTION' – LEVEL OF PENALTY: *INCOME TAX ASSESSMENT ACT* 1936 (CTH) S223; *TAXATION ADMINISTRATION ACT* 1953, SS8B, 8C, as amended by *TAXATION LAWS AMENDMENT ACT* 1984 No. 123 of 1984, S297.

The Commissioner of Taxation appealed against the penalties imposed in the Magistrates' Court on H. and 14 others, complaining of the inadequacy of the penalties. The range of fines imposed for first offenders where the taxation return had been lodged before the date of hearing was from $50 to $80; where the return had not been lodged, from $70 to $100. Where a previous conviction was proved, the fines ranged from $75 to $100; slightly higher where there had been two previous convictions. In H.'s case, mitigating factors included his being a first offender, the accountant had lost the papers, and H. was not liable to pay tax for the relevant period. On appeal—

HELD: Appeal dismissed in light of the mitigating factors.
(1) Whilst the question of penalty remains a matter for the discretion of the Court, where a person is found guilty of an ordinary offence, such as failing to furnish a taxation return, it is suggested that the imposition of a penalty between $250 to $500 should be the starting point from which the Court may increase or decrease having regard to the circumstances of the particular case.

(2) Where, in such offences, a person has a previous conviction in respect of an offence under the (now repealed) provisions of s223 of the *Income Tax Assessment Act* (Cth), the fines should range between $500 to $1000.

(3) Where, in such offences, a person is convicted of two offences under s8B of the *Taxation Administration Act* 1953 (Cth), the penalty should be in the range of $1000 to $2000.

(4) A prior conviction of such offences need not be prior in time; the two convictions may be imposed before the same Court on the same day.

ZELLING J: [4540] This is the first of fifteen appeals, all heard at the same time, at the instance of the Commissioner of Taxation, complaining of the inadequacy of penalties applied in Magistrates' Courts in this State in relation to persons who refuse or fail when and as required pursuant to a taxation law to furnish a return to the Commissioner. Such a failure is a breach of Section 8C of the *Taxation Administration Act* 1953-1984.

What I have to say in the instant case with regard to the general principles of law canvassed in these appeals will apply equally, without the necessity for repetition, in each of the other fourteen appeals which will be dealt with at the same time. Until the 1984 amendment of the *Taxation Laws Amendment Act*, failure to furnish a return to the Commissioner when required was an offence under Section 223 of the *Income Tax Assessment Act* 1936. The penalty provided by that Act was a fine of not less than $4 and not more than $200. I am told by Mr Bleby QC, who led for the appellant Commissioner, that that penalty had remained unchanged since the enactment of the first *Income Tax Assessment Act* in 1915. The 1984 *Taxation Laws Amendment Act* which created the offence under Section 8C, also inserted a new Section 8E providing for new penalties. For a first offence against Section 8E the punishment enacted was a fine not exceeding $2,000.

Where however a person was convicted of an offence against Section 8C, and the Court before which the person was convicted was satisfied that that person had previously been convicted of a relevant offence, then the penalty was a fine not exceeding $4,000. A relevant offence for this purpose is a conviction for an offence against Section 8C or against two other sections of the *Taxation Laws Amendment Act*, or against several sections of the *Crimes Act* which are not

relevant for the purpose of this judgment. A previous conviction for the purpose of this sub-section is a conviction of a relevant offence of an occasion earlier than, but no more than, 5 years earlier than the person's conviction of a subsequent offence, (which does not matter for the purpose of this judgment) or where the person is convicted of the earlier offence and the subsequent offence before the same Court at the same sitting and the earlier offence was committed at a time or on a day earlier than, but not more than 5 years earlier than the subsequent offence or at the same time or on the same day as the subsequent offence. Accordingly, for the purpose of this subsection the prior conviction need not be prior in time; the two convictions may take place before the same Court on the same day. The penalty for a third offence where a person has previously been convicted of two or more relevant offences is a fine not exceeding $5,000 or imprisonment for a period not exceeding 12 months or both those penalties.

The basic complaint by the Commissioner of Taxation was that Courts of Summary Jurisdiction in South Australia were still imposing penalties in relation to the new Section 8C which might have been perfectly valid penalties under the repealed Section 223 but bore no relation to the great increase in penalties which the 1984 *Taxation Laws Amendment Act* provided for. Looking at the fifteen cases which came before me, the range of penalties imposed for a first offence where the taxation returns had been lodged after the date of the complaint before the hearing before the Special Magistrate, was a range of fines from $50 to $80. Where the return had not been lodged at the time the complaint came on for hearing, the range was of the order of $70 to $100. Where there had been one previous conviction under the repealed Section 223 and a subsequent conviction under Section 8C the range appeared to be from $75 to $100. Where there had been two previous convictions under Section 223 together with the present conviction under Section 8C, which happened in two cases, the fine was $120 in the one case and $140 in the other.

I was provided with a list of penalties imposed by Courts of Summary Jurisdiction sitting in Adelaide during the first week in June 1985, and the penalties under the new Act ranged from $50 to $150, which is very much in line with those fifteen which have come before me. I was also supplied with a list of penalties for similar offences in other States of the Commonwealth and the two Territories. For a first offence the levels of penalty ranged between $250 to $500 with some penalties both above and below that general rate. Where there was a prior relevant conviction the figures ranged from $1,200 to $4,000. In general the penalties in other States were substantially higher than penalties for similar offences imposed in Magistrates' Courts in this State. A table was also put before me showing that the number of offences for returns not lodged on time is increasing substantially in each year from 1978/79 to 1982/83, the last year for which figures are available.

I put it to Mr Bleby that if I were to interfere with penalties for first offenders in this list of fifteen appeals before me, I would be punishing them much more severely than others whose cases were dealt with in the same Court and sometimes on the same day. The Commissioner accepts this, but wants a standard laid down for the future. Accordingly I have not interfered with the penalties of those who were first offenders. There were in all cases mitigating circumstances, but I have interfered where there were prior convictions under Section 223 or deemed prior convictions under the new Section 8B.

In the case of Hagidimitriou he was a first offender. He sent his taxation papers to an accountant to prepare his return. The accountant shifted from one address to another and lost the papers. Further there was no tax payable by Hagidimitriou in relation to the tax year 1983/84 which is the relevant tax year. He in fact received a refund of $1,700. All of these mitigating factors suggest to me that the case of Hagidimitriou is not a case in which I should interfere with the penalty. That appeal is dismissed. However I make it clear both in this case and in the other fourteen that hereafter Magistrates should, for a first offence, where the offence is a run-of-the-mill offence, in order to keep some correlation with penalties in other States, and also to give effect to the manifest policy of the 1984 Act, impose in what I might call run-of-the-mill cases of first offenders a fine of something between $250 to $500. That is not intended to fetter the discretion of Magistrates. There will obviously be some cases both below and above that figure, but a figure of that magnitude should be regarded as a starting point from which one either increases or reduces the fine because of the circumstances of the particular case.

For offences which have a previous offence under the repealed Section 223, the fines should in my opinion be of the order of $500 to $1,000, with the same qualifications as I have just expressed. Where the defendant is convicted of two offences which are relevant offences under Section 8B, then the penalty range should be of the order of $1,000 to $2,000.

I express no opinion where more than two relevant offences fall for consideration under Section 8B because there is not sufficient material before me to be able to express a competent opinion on the subject. Such offences would however obviously attract a higher penalty than those in the three ranges that I have just referred to. However, to increase the penalty on Mr Hagidimitriou in these circumstances would, as I put it to Mr Bleby, be in the words of Devlin J in *Reynolds v GH Austin & Sons Ltd* [1951] 2 KB 135 at 149, "pouncing on the most convenient victim" and I do not propose to do that. The appeal in the case of Hagidimitriou will therefore be dismissed.
[His Honour then delivered judgments in respect of the remaining appeals, 11 of which are reproduced below.]

THE COMMISSIONER OF TAXATION v HOLDEN

ZELLING J: In this matter I refer to what I have already said in the case of *Hagidimitriou* and I turn to the facts. The respondent was a physiotherapist who was required to lodge a return with the Commissioner. At the date of the hearing the return had not been lodged and an order had to be made pursuant to Section 8G of the *Taxation Administration Act* for lodgment of the return. The provisional tax for the previous assessment was $4,487. The defendant had already been convicted of an offence under the repealed Section 223 for a previous year. Mr Winter SM fined the defendant $140 and $17 costs. Because of what I have said, in that these offences are only a few taken out of a much larger range, I do not propose to impose as high a fine as I think ought to be imposed hereafter on a defendant who has been convicted of an offence against Section 8C and who has already been convicted of an offence against the repealed Section 223. In the circumstances I propose to set aside the fine of $140 and impose in its place a fine of $300 together with $17 costs. I shall hear the parties as to the question of the costs of this appeal.

THE COMMISSIONER OF TAXATION v NANASI

ZELLING J: Again I repeat what I have already said in the case of *Hagidimitriou*. The respondent in this case was a partner in a used car business. The return had been lodged shortly before the hearing, together with the payment of money to cover his taxation liability. Counsel was unable to tell me whether the payment of the additional money was sufficient to cover the assessment. In any event the default appears to have been the fault of the taxpayer's accountant, though that of course does not affect the primary liability of the taxpayer to see that his return is lodged. This is a first offence with some mitigating circumstances. The respondent was fined $70 with $17 costs. In the circumstances I do not propose interfering with the fine and the appeal will be dismissed.

THE COMMISSIONER OF TAXATION v STANLEY CONDOUS

ZELLING J: I repeat what I have already said in the case of *Hagidimitriou*. Stanley Condous was fined $100 together with $17 costs. In his case there was a previous conviction under Section 223 of the *Income Tax Assessment Act*. The fault in not having the return in by the prescribed time appears to have been the fault of Steve Condous who is the respondent in the next case before me, rather than that of Stanley Condous, but as I have said that cannot displace the primary obligation of the respondent to attend personally to the lodgment of his income tax return within the necessary time. For much the same reasons as I gave in the case of *Holden* I allow this appeal. The fine will be increased from $100 to $300 together with $17 costs. I shall hear the parties as to costs.

THE COMMISSIONER OF TAXATION v STEVE CONDOUS

ZELLING J: I repeat what I have said in the case of *Hagidimitriou*. Steve Condous was a first

offender and he was fined $80 and $17 costs. The return was lodged at the time the case came on for hearing. I was told by his Counsel that the tax return had not been filed because the respondent was too busy electioneering to secure his election to the Adelaide City Council. I do not regard that as an excuse. However, as he is a first offender I will not increase the penalty and the appeal will be dismissed.

THE COMMISSIONER OF TAXATION v CRICHTON

ZELLING J: In this case the defendant is a public accountant. His excuse was that he was so busy doing his clients' returns that he did not have time to do his own. He was fined $100 and costs. He has a previous conviction for an offence under Section 223 of the repealed Act. For the reasons given in the case of *Holden* I think that fine is too low. The fine of $100 will be set aside and in its place a fine of $300 will be imposed together with $17 Court fees below. I shall hear Counsel on the question of costs in this Court.

THE COMMISSIONER OF TAXATION v MATTHEWS

ZELLING J: I repeat what I have said in the case of *Hagidimitriou*. In this case the return had been lodged since the issue of the complaint, and a sum of $3,000 had been paid in to cover tax, on which the respondent received a refund of $639.03. She has one previous conviction for the 1982 year. She was fined $80 and $17 costs. The mistake was the mistake of her accountant. The respondent was overseas and was unaware of the requirement to furnish the return, and did not know of the matter until later. For the reasons given previously I think that the fine must be increased, but this offence has atypical elements about it and I shall set aside the fine of $80 and impose a fine of $200 in its place, together with $17 costs. I shall hear Counsel on the question of costs in this Court.

THE COMMISSIONER OF TAXATION v MARTIN

ZELLING J: In this case there were two notices to lodge income tax returns for the years ending 30th June 1983, and 30th June 1984. Mr Prescott SM fined the respondent $75 on each count with $17 costs on the first count. This second conviction was a prior conviction within the meaning of Section 88 and a much more substantial fine should have been imposed on the second count. I will leave the fine of $75 stand on the first count for the reasons I have canvassed in other cases. On the second count the fine of $75 will be set aside and a fine of $500 imposed in its place. I shall hear the parties on the question of costs.

THE COMMISSIONER OF TAXATION v REHN

ZELLING J: I repeat what I had to say in the case of *Hagidimitriou*. The facts are that this was a first offence. The return had been lodged prior to the hearing and assessed, and no tax was payable. There was some fault on the part of the tax agent. In this case the respondent repeatedly urged her accountant to get the tax return in and did everything to see that it was got in but without much success. This is without doubt an atypical case and Mr Prescott so treated it and fined the respondent $50. I must say that even allowing for the higher penalties which ought to be in force today, I can understand the imposition of a very low penalty in a case such as this. The appeal will be dismissed.

THE COMMISSIONER OF TAXATION v RUSSELL

ZELLING J: I repeat what I have already said in the case of *Hagidimitriou*. In this case the return was lodged prior to the hearing. The respondent had a previous conviction under Section 223 of the *Income Tax Assessment Act* for which he had been fined $80. On the present occasion Mr Prescott SM fined him $75. There are no remarks of the Magistrate on penalty on the file

and I cannot follow the transcription of the Magistrate's notes from the notebook. For reasons I have already given the penalty must be taken to be manifestly inadequate because of the prior conviction. I therefore set aside the fine of $75 and impose a fine of $300, plus $17 costs, and I shall hear the parties on the question of costs.

THE COMMISSIONER OF TAXATION v MITRIS

ZELLING J: I repeat what I have said in the case of *Hagidimitriou*. The defendant's occupation was that of a contractor and company director. His taxable income was $25,196. He had been twice convicted under Section 223 of the *Income Tax Assessment Act*. Mr Fiala SM imposed a fine of $120 with Court costs of $17. With two previous convictions the fine should have obviously been much more substantial than it was. I set aside the penalty of $120 and impose in its place a penalty of $500 together with $17 costs. I shall hear Counsel on the question of costs in this Court.

THE COMMISSIONER OF TAXATION v THORNTON

ZELLING J: There were four counts in this complaint and summons relating to the tax years 1980-1981, 1981-1982-1983, and 1983- 984. The respondent had not filed tax returns for any of those years. Mr Prescott SM fined the respondent $100 on the first count and dismissed the other three counts without penalty. The dismissal of the other three counts cannot possibly stand having regard to the wording of the new Act. Each of those three counts should have been dealt with as very serious infringements of the Act and as prior convictions in the case of the first three counts. I set aside the dismissal without penalty on the second, third, and fourth counts and the penalty on the first count. I substitute convictions on each of the second third and fourth counts. I impose a penalty of $750 on each of the first three counts and of $500 on the fourth count making a total of $2,750 on the four counts, together with $17 costs. I shall hear the parties as to costs in this Court.
