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SUPREME COURT OF SOUTH AUSTRALIA

COMMISSIONER of TAXATION v VIERGEVER

O'Loughlin J

16 September 1985 — 85 ATC 4573; [1985] 16 ATR 930; (1985) 40 SASR 56

TAXATION – SALES TAX – FAIL TO FURNISH INFORMATION AS REQUIRED – APPEAL AGAINST INADEQUACY OF PENALTIES IMPOSED – LEVEL OF PENALTY FOR "SALES TAX" OFFENCE – WHETHER HIGHER LEVEL THAN FOR "INCOME TAX" OFFENCES: *SALES TAX ASSESSMENT ACT* (No.1) SS4, 23; *TAXATION ADMINISTRATION ACT* 1953, SS8C, 8E.

V. was convicted and fined $200 on each of four offences of failing to supply certain information to the Deputy Commissioner of Taxation as required. The information required related to whether V. was carrying on business as a manufacturer or as a wholesale merchant and whether he had sold etc. any goods. On appeals against the penalties imposed—

HELD: Appeals in 3 cases allowed; penalties set aside. Penalties of $1200 imposed on each of the 3 charges. Appeal in respect of the charge relating to the requirement to provide information three days before the amending legislation became effective dismissed.

(1) Whilst the question of penalty remains a matter in the discretion of the magistrate, where the offence is a "run-of-the-mill" sales tax offence, a fine between $350 and $700 should be imposed.

(2) Where, in such offences, a person has been previously convicted under the repealed provisions of s7 of the *Sales Tax Procedure Act* 1934, a range of penalties of $800 to $1200 is suggested.

(3) Where, in such offences, a person has been previously convicted under the provisions of the amending legislation, a tariff of between $2000 and $3000 should be applied.

(4) A conviction for an offence against the repealed provisions does not make a conviction against the new provisions a second or subsequent offence.

O'LOUGHLIN J: *[After setting out the facts and relevant statutory provisions, His Honour continued]:* … **[4575]** Section 8E(3) of the *Taxation Administration Act* contains provisions for penalties for third and subsequent offences but, for that subsection to come into operation, it is necessary for the Commissioner to make an election which he did not choose to do in this particular case. Hence, the provisions for a fine not exceeding $5,000 or a period of imprisonment not exceeding twelve months or both, contained in that subsection, need not be considered in this judgment.

What is important, however, is a concession made by Mr McNamara, who appeared on behalf of the appellant, that penalties for second, third and subsequent offences, as provided for in sub-s(2) and (3) of s8E, only come into force when one is considering the penalties for offences against the *Taxation Administration Act*. If, therefore, one is considering the penalty to be imposed on a conviction (for the first time) under s8C of the *Taxation Administration Act*, regard can be had to such convictions (if any) as have been imposed upon the particular taxpayer for breaches of the repealed s7 of the *Sales Tax Procedure Act* for the purposes of determining the quantum of the penalty for the first offence under s8C. But the earlier convictions under the repealed s7 do not entitle the Court to treat the first conviction under s8C of the **[4576]** *Taxation Administration Act* as a second or a third or a subsequent offence.

At this stage, it is appropriate to summarize the situation of this respondent as it existed on 3 July 1985 when the sentencing magistrate was required to impose penalties under the provisions of sub-sect (1) and (2) of s8E of the *Taxation Administration Act*. The first conviction meant that the respondent was liable under s8E(1) to a fine not exceeding $2,000; each of the second, third and fourth convictions meant that the respondent was liable to a fine in respect of each conviction not exceeding $4000. In so far as the learned Stipendiary Magistrate saw fit to impose a fine of $200 in respect of each of the four convictions, the Commissioner of Taxation,

as appellant in this Court, has said that each was manifestly inadequate.

I digress to mention another matter which is both significant and important. At the same time as the legislature made changes to the penalties which I have already described and which I will compendiously describe as "the sales tax penalties", the same legislation substantially increased the penalties for failure, in effect, to lodge income tax returns on their due date. Indeed both failures are now encompassed by the provisions of s8C of the *Taxation Administration Act* and its utilization of the expression "taxation law". In the month of August 1985, Zelling J in this Court considered 15 appeals (of which *FC of T v Hagidimitriou & Ors* contains the leading judgment), each of which complained of the inadequacy of penalties applied in the Magistrates' Courts in South Australia in relation to persons who refused or failed, when and as required pursuant to a taxation law, to furnish an income tax return to the Commissioner.

Zelling J was invited, during the hearing of the 15 appeals, to give some guidelines to magistrates in relation to the penalties which should be imposed in view of the increases which had been established by the December 1984 legislation. On this subject, His Honour said (at p4541):

> "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."

His Honour then went on to say that where an offender had a record of offending under the repealed legislation, that conduct constituted justification for a higher penalty in "the order of $500 to $1,000" and that:

> "Where the defendant is convicted of two offences which are relevant offences under s8B, then the penalty range should be of the order of $1,000 to $2,000."

To the extent to which the remarks of Zelling J referred to offences with respect to the failure to lodge income tax returns (which I will, for convenience, call "income tax offences"), I respectfully adopt and follow His Honour's remarks. The question for me to consider is whether "sales tax offences" should receive the same tariff and if they should not, why not? Mr McNamara argued that the tariff for "sales tax offences" should be higher than that set by Zelling J for "income tax offences". In support of this argument, he first pointed out that, by and large, the loss to the revenue is greater in "sales tax offences" for the reason that, in the majority of cases, income tax is pre-paid by the PAYE system or by provisional tax or by quarterly pre-payments of company tax. On the other hand sales tax is in the nature of a self-assessing tax and when properly operational, sales tax is paid monthly in arrears by the taxpayer when he lodges his monthly return with the Commissioner.

Next, said Mr McNamara, sales tax is, or should be, part of a regular and routine business operation conducted by business people who should be accustomed to the legislative requirements and who cannot properly be compared with the average payer of income tax who has a once only annual exercise to perform. Finally, Mr McNamara argued that, if the concept of an analogy is to be used, a taxpayer who fails to pay his sales tax on due date should be compared with an employer who does not pay **[4577]** the group tax which he has deducted from his employees' wages – and, said Mr McNamara the failure on the part of an employer to remit group tax should properly be regarded as a more serious offence than the failure on the part of a taxpayer to lodge his income tax return on due date. Once again, this argument emphasizes the fact that it is likely that the "sales tax offences" will delay the receipt of moneys by the revenue.

Mr Frayne, who appeared for the respondent, took up each of Mr McNamara's arguments in turn and attempted to negate them, if not wholly, at least in part. However, I have come to the conclusion that there is substance in what Mr McNamara has said and accordingly I have come to the conclusion that, as a matter of general practice, "sales tax offences" should attract a higher tariff than "income tax offences". Affidavits were tendered showing the range of penalties

imposed in various capital cities throughout Australia for "sales tax offences". I have derived no assistance from the figures contained in these affidavits, because of the disparity in the penalties and the lack of factual information which might otherwise have explained why the discrepancies were so large. However, it is clear to me that a fine of $200 for a first offence against s8C of the *Taxation Administration Act* can only be regarded as manifestly inadequate when regard is had to the fact that in December 1984 the maximum penalty was increased from $200 to $2,000. With the qualifications contained in the reasons of Zelling J in *Hagidimitriou's case* (*supra*), I have come to the conclusion that for a first offence, where the offence is a run-of-the-mill offence, a fine of something between $350 and $700 is called for. As His Honour said that is not intended to fetter the discretion of the magistrate:

> "There will obviously be some cases both below and above that figure."

If the particular offender has a history of offending under the repealed s7, then higher penalties will be called for; they will depend entirely upon the antecedents of the taxpayer; but in the case of the present respondent who had no less than 11 previous convictions under the repealed s7, it is obvious that he is an offender who deserves a penalty well in excess of the "run-of-the-mill" cases. Another individual circumstance which, in my opinion, is pertinent to the size of the penalty, is the amount of monthly sales tax which, on reasonable expectations, would be payable by the defaulting taxpayer. In the case at bar, the Commissioner has estimated it at $3,832 per calendar month.

Where the taxpayer is convicted of two or more offences the provisions of s8E of the *Taxation Administration Act* will have to be considered in that the maximum penalty is increased from $2,000 to $4,000. Here I believe that a distinction must be drawn between an offender who is dealt with on the one occasion for a failure to comply with notices in respect of two, three or more months – he will attract a higher penalty for the second and subsequent offences but he is not in the same category as a taxpayer who, having offended and been convicted and fined, is before the Court on a second occasion. Such an offender has not learnt from his first experience and must suffer a greater penalty. In suggesting a range of penalties of $800 to $1,200, I am limiting my remarks to the offender who, at the time of the commission of the offence, does not have a previous conviction under the *Taxation Administration Act* on a prior occasion.

For an offender who faces a second offence under s8E(2) who, at the time of the commission of that offence, has a previous conviction under s8C of the *Taxation Administration Act*, then a tariff of between $2,000 and $3,000 should be applied – but with the same qualifications to which I have already made reference. It will always be within the ultimate discretion of the magistrate to determine the particular facts of a particular case and to determine how those facts fit within the guidelines that I have set out. It is needless to repeat authorities for the proposition that discretions are not to be fettered by "iron and rigid rules": (*Gilchrist v Williams* [1978] 18 SASR 1 per Bray CJ at p4; see also *Taylor v Samuels* [1977] 16 SASR 266 per King J (as he then was) at p283).

It now becomes necessary to have regard to the penalties which were imposed on the respondent, Viergever. In *Hagidimitriou's case* (*supra*), Zelling J was disinclined to interfere with penalties for first offenders in the list of 15 appeals put before him. As he said he:

> "... would be punishing them much more severely than others whose cases were dealt **[4578]** with in the same court and sometimes on the same day."

I fully endorse those sentiments but the fact remains that Viergever had, as I have already mentioned, failed on 11 separate occasions to lodge the required information with the Commissioner under the repealed legislation. It is only with respect to the first of the four offences that the sentiments expressed by Zelling J apply. I say this because the notice issued by the Commissioner with respect to the month of October 1984 was raised on 11 December 1984, only three days before the amending legislation became effective. I do not feel that it would be proper to interfere with the penalty of $200 imposed by the learned Stipendiary Magistrate with respect to that offence. By the time Viergever received the second and subsequent notices, the new legislation was in force and he and all other taxpayers ought to have had sufficient opportunity to have become aware of the increased penalty. I regard the penalties imposed in respect of each of these offences as

manifestly inadequate; I set aside the penalties imposed by the learned Stipendiary Magistrate and in lieu thereof I impose penalties of $1,200 relating to the respondent's failure to comply with notices dated 8 January 1985, 5 March 1985 and 10 April 1985. I dismiss the appeal relating to the penalty imposed by the learned Stipendiary Magistrate with respect to the offences of failing to comply with the notice dated 11 December 1984.

I conclude by mentioning that the appeal by the Commissioner of Taxation with respect to Viergever was heard contemporaneously with two other appeals by the Commissioner of Taxation dealing with the affairs of Richardson's Engineering Pty Ltd and Richard W. Plunkett. The remarks which I have made in this judgment are intended to have general application to the affairs of these two taxpayers but I will, in separate judgments, separately consider the questions of the penalties imposed on them by the court of summary jurisdiction.

FCT v RICHARDSON'S ENGINEERING PTY LTD

O'LOUGHLIN J: This is an appeal by the Commissioner of Taxation claiming that a penalty of $120 imposed on the respondent by a court of summary jurisdiction at Adelaide in the State of South Australia for an offence against s8C of the *Taxation Administration Act* was manifestly inadequate. I refer to the remarks which I have made in the matter of *FC of T v Viergever*, judgment published this day. I do not intend to repeat those remarks but to confine myself to the particular circumstances as they applied to the taxpayer in this case. The respondent had failed to comply with a notice dated 10 April 1985 requiring information relating to its sales tax figures for the month of February 1985. The estimate of the Commissioner of the monthly sales tax involved was $5,837 which is not an insignificant amount and the taxpayer had three previous convictions for similar offences under the repealed legislation. For the reasons expressed by me in the matter of *Viergever*, I am satisfied that the penalty was manifestly inadequate. I set aside the penalty imposed by the learned Stipendiary Magistrate and in lieu thereof I impose a penalty of $850.

APPEARANCES: PA McNamara for the Commissioner. MA Frayne (instructed by Wallman and Partners) for the taxpayer.

FCT v PLUNKETT

O'LOUGHLIN J: There are four appeals by the Commissioner of Taxation claiming that penalties of $150, $175, $200 and $225 imposed on the respondent by a court of summary jurisdiction at Adelaide in the State of South Australia for offences against s8C of the *Taxation Administration Act* were each manifestly inadequate. I refer to the remarks which I have made in the matter of *FC of T v Viergever*, judgment published this day. I do not intend to repeat those remarks but to confine myself to the particular circumstances as they applied to the taxpayer in this case. The respondent had failed to comply with four notices dated 11 December 1984, 8 January 1985, 5 March 1985 and 10 April 1985 requiring information relating to his sales tax figures for the months of October and November 1984, and January and February 1985. The estimate of the Commissioner of the monthly sales tax involved was $1,564, an amount substantially less than the comparable figures in *Viergever's case* and in the matter of *FC of T v Richardson's Engineering Pty Ltd*, judgments published this day. The **[4579]** taxpayer has two previous convictions for similar offences under the repealed legislation. For the reasons expressed by me in the matter of *Viergever*, I am satisfied that the penalties were each manifestly inadequate. However, I decline to interfere with the penalty of $150 imposed in respect of the month of October 1984 because, as I said in *Viergever's case*, the relevant notice issued three days before the amending legislation came into force. I accordingly dismissed the appeal in relation to that particular offence. I set aside the penalties imposed by the learned Stipendiary Magistrate in each of the remaining three matters, namely the penalties of $175, $200 and $225. In lieu thereof I impose a penalty of $800 in respect of the offence relating to the month of November 1984 and penalties of $950 in respect of each of the months of January and February 1985.
