62/82

SUPREME COURT OF WESTERN AUSTRALIA

KARLOVSKY PLUMBERS PTY LTD v HUBBARD

Brinsden J

26 March 1982 — (1982) 12 ATR 871

SENTENCING - TAXATION - PROSECUTIONS AND PENALTIES - GROUP TAX - INSTALMENTS - COLLECTION BY - FAILURE TO REMIT THE SUM OF $16,494 - DETERMINATION OF LEVEL OF FINE - PRIOR HISTORY - MATTERS TO BE CONSIDERED - CONVICTION AND MAXIMUM FINE OF $1000 IMPOSED - WHETHER MAGISTRATE IN ERROR: *INCOME TAX ASSESSMENT ACT* 1936 S221F.

The appellant failed to remit deductions in the sum of $16,494 made from the wages of employees to the Commissioner of Taxation pursuant to s221F. The sum in question was paid more than three weeks after the due date. The appellant was convicted in the Magistrates' Court of the offence, and the maximum penalty of $1,000 fine was imposed on the ground that the amount of unpaid tax was so large that a realistic sanction should be imposed. Upon appeal—

HELD: Appeal allowed. Penalty reduced to $500.
(1) The amount of tax unpaid is not necessarily an important criterion in deciding on the penalty. This was the company's first offence, the delay was only three weeks and there could easily be larger amounts remaining unpaid in other cases. For these reasons the maximum penalty was inappropriate in this case.

(2) The penalty should be fixed by taking into account the loss of interest, calculated at current commercial rates, on the unpaid tax for the period during which the tax remained unpaid, and adding a further amount by way of deterrence.

BRINSDEN J: This matter is the return of an order nisi to review which was granted by Kennedy J on 8 January 1981, in respect of a decision by McCann SM at the Court of Petty Sessions, Beaufort Street, Perth on 26 November 1981 concerning a complaint that from 8 July 1981 the appellant being an employer registered at the office of the Deputy Commissioner of Taxation as a group employer, did fail to pay to the Commissioner on or before 7 July 1981 the amount of deductions made by the company under the provisions of s221C of the Act, from the wages of the company's employees during the month of June 1981.
It is common ground that the amount involved was $16,494 being the primary sum plus $67.10 which, I understand, represents an interest payment for late payment. It appears that the company should have paid this sum of money to the Commissioner no later than 7 July. The payment was actually made on 30 July so that means that it was three weeks late. The penalty for the offence as provided for in s221F(12) is a maximum penalty of $1,000 or a term of imprisonment not exceeding six months but, of course, that latter provision has no application to a defendant company.

His Worship said:-

> "In imposing the maximum penalty I had regard to the fact that the defendant company failed to pay the sum of $16,494,18 by due date. Although the delay was just over three weeks, not the longest delay coming before the court, it appeared to me that the amount of money deducted as taxation from the salaries and wages of employees was so large that some realistic sanction should be imposed.

That is all his Worship can recollect of what he said and indeed of what was brought to his attention during the course of the proceedings. I have, however, had the advantage of hearing counsel for the appellant who was also counsel on the plea in mitigation and I accept that the magistrate was told, indeed, I would have thought he would have appreciated that for himself by reason of the non-production of any record, that this company had not previously committed an offence against this section or at all, so his Worship was dealing with a first offender and as I have just mentioned he has imposed the maximum penalty.

Attack is made on his decision in respect of the quantum of the penalty in that it was excessive

in the circumstances of the case. There is recent authority on circumstances in which it becomes reasonable to impose a maximum penalty. I have been referred to *Reynolds v Wilkinson* (1948) 51 WALR at 17, where Dwyer CJ commented that the maximum penalty was for the worst cases of the sort. In *Bensegger v R* which is reported in (1979) WAR 65 at 68 Burt CJ commented on *Reynolds v Wilkinson* and said about what I have just quoted from the former Chief Justice's judgment:

> "That expression should be understood to be making out a range and an offence may be within it notwithstanding the fact that it could have been worse than it was."

It is said that this particular offence could have been much worse that it was and does not fall within the range of cases described as "the worst cases of the sort," and I believe that those submissions have been made out. I do not, for myself, see that it could be described as being within the range of worst cases of the sort. The delay in payment is a matter of three weeks which his Worship agrees in his reasons for judgment is not a time lapse of the greatest that the courts have experienced. Payment was made furthermore before the complaint was issued although admittedly only after the omission had been brought to the attention of the company.

The amount in issue is quite a large sum and so therefore it is a serious offence from the revenue's point of view but I, for myself, do not see that the amount that forms the non-payment is necessarily an important criteria in deciding on the penalty. It is possible it could be, but one can easily foresee cases where a sum much larger than this might not be paid, and if this sum warrants the maximum then, of course, a much larger sum could not result in a greater penalty. What seems to be more relevant is the record of the offender and the length of time over which the delay has occurred and whether the offender has been warned and has ignored warnings and that sort of thing. In this particular case we have a situation where the company is a first offender and the length of time that elapsed was three weeks.

I think the appeal has been made out in that the imposition of the maximum penalty was excessive and the question then arises, and I assume that the parties would want me to fix the penalty rather than send it back to his Worship, what penalty I should impose in lieu. To some extent the guidance for that is in my own decision in an earlier case which was under an equivalent section of the Tax Act in the case of *Bella Guarda Farm Pty Ltd v Flanagan* (1977) 16 ALR 716 and particularly 719-720 where in dealing with what was before me in that case I approved of the way another magistrate went about imposing a penalty by taking into account the loss of interest on the non-payment of the money and then adding something to that figure by way of deterrence. In that case I operated by common agreement with the parties on 15 per cent but I think I could take judicial notice of the fact that that rate is now conservative and 17 per cent or thereabouts is much more likely. What I propose is to have regard firstly to 17 per cent on $16,494 over a period of three weeks and then add on something for deterrence. The finite sum then achieved is not an exact computation by any means. But I do regard the offence as serious and I think it is correct, as submitted to me by the Crown today in opposition to the order nisi, that the courts should treat this offence as a serious offence and that the element of deterrence looms rather large in the infliction of the penalty. That comes about by the seriousness to the revenue of failing to comply with the Act with consequent disadvantage not only to the taxation department but to the whole community and perhaps that is the most significant reason, and also because, I think I can accept what his Worship implied, that this type of offence is fairly prevalent. In all, I think, the appropriate penalty should have been $500 and accordingly I am prepared to make the following. The order nisi be made absolute. The appeal allowed. The decision of his Worship varied by imposing a fine of $500 in lieu of $1,000.
