55/87

SUPREME COURT OF SOUTH AUSTRALIA

BIERWIRTH v McMILLAN

Von Doussa J

29 September 1986

(1987) 44 SASR 385; 88 FLR 277; 87 ATC 4184; (1986) 18 ATR 332

INCOME TAX – FAILURE BY EMPLOYER/TAXPAYER TO PAY GROUP TAX – PENALTY CONSIDERATIONS – STARTING POINT FOR IMPOSITION OF PENALTY – RELEVANT FACTORS WHEN SELECTING APPROPRIATE PENALTY: *INCOME TAX ASSESSMENT ACT* 1936, SS221F, 221W.

1. Section 221F(12) of the *Income Tax Assessment Act* 1936 provides that where a group employer fails to remit tax instalment deductions to the Commissioner within the time stipulated, the employer is liable to a flat rate penalty of 20% of the amount payable together with a 20%pa. interest penalty on the amount unpaid.

2. Where a court deals with an employer who has failed to pay group tax on time or at all, the penalty should reflect the loss to revenue. Accordingly, the sum of the penalties provided in s221F(12) should provide a starting point for a court to impose an appropriate penalty and the court may either increase or reduce the fine according to the relevant factors of the case.

3. Factors which may be relevant include the amount of the deduction(s) involved, the length of time withheld, the degree of seriousness, whether the deductions remain unpaid as at the date of sentence, the need for deterrence, the offender's antecedents and the circumstances surrounding the commission of the offence including the use to which the money was put. Where numerous offences are involved, the court may impose an overall penalty, ensuring that the penalty is not disproportionate to the offender's overall conduct nor beyond the offender's means and ability to pay.

Von DOUSSA J: *[After setting out the facts, the details of the charges and relevant statutory provisions, His Honour continued]* ... **[ATC 4189]** Counsel drew the attention of the Court to two decisions of Brinsden J in the Supreme Court of Western Australia, *Bella Guarda Farm Pty Ltd v Flanagan* (1977) 16 ALR 716; 8 ATR 150 and *Karlovsky Plumbers Pty Ltd v Hubbard* (1982) 12 ATR 871. Those decisions concerned appeals against penalty imposed for contraventions of sec 221G and 221F respectively, of the *Income Tax Assessment Act*. In *Bella Guarda* at pp719-720 his Honour said:

> "If indeed his Worship reached his decision as to the quantum of the sentences by estimating an amount of interest which the Commissioner had been denied by reason of the non-purchase of the tax stamps and then adding something to that figure by way of deterrent, in my view he approached the problem in a manner consistent with the recognised method of achieving a just sentence..."

The appeal was allowed and penalty reduced because the magistrate had erroneously calculated interest on the assumption that the amount involved was $61,000 and not $21,637. A substantial part of the penalty imposed in the first instance, and on appeal, reflected the "interest" denied to the Commissioner. I do not understand anything said by his Honour in *Karlovsky Plumbers* to depart from his approval of the way the magistrate went about imposing penalty in *Bella Guarda*. In *Karlovsky Plumbers* his Honour again performed an interest calculation and then added on "something for deterrence". He went on to say at p873:

> "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 **[4190]** that court 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."

These decisions provide helpful guidance. The penalty should reflect the loss to the revenue, and will therefore vary according to the amount of "tax" involved and the length of the delay in payment. There should be a deterrent component. These factors give a starting point from which to assess the fine, but they are not the only factors. *Karlovsky Plumbers* illustrates that the Court must have regard to the degree of seriousness of the offending conduct in the scale of seriousness of offences which may occur under sec 221F(5)(a). As both these cases concerned employers which were corporations, the occasion did not arise to consider how the personal circumstances of an individual non-corporate employer should be taken into account.

It should be remembered that at the time of these judgments the relevant sections did not provide for the imposition of late payment penalties as is now the case under sec 221F(12) and 221G(4A). In my opinion, the late payment penalties now imposed by force of sec 221F(12) should provide the starting point for assessing penalty for a prosecution under sub sect(14). From this starting point the sentencing tribunal may then be moved either to increase or reduce the monetary fine, or to consider imprisonment, according to other relevant factors which arise on the circumstances of the particular case. *[His Honour then considered other matters and continued]* ... **[4191]** A submission made by Ms McCrohan reflected para. 29. It was said that a contravention of sec 221F(5)(a) must always be viewed most seriously, as it involves the misapplication of moneys which are in the nature of trust moneys. The submission went so far as to assert that unpaid deductions were trust moneys being dishonestly withheld and otherwise utilised by the employer.

That submission as an absolute proposition cannot be accepted. In some cases the circumstances could justify such a submission but in others – and the present case is one – the submission is unrealistic and the allegation of dishonesty absurd. I am yet to discuss the circumstances of this case, but they indicate that the employer was a struggling small businessman who had a cashflow problem which made it very difficult for him to continue the employment of his workmen, and to pay the deductions on time. To have actually set aside the deductions when the workmen were paid would have required him to cease buying fuel and other expendables necessary to continue his day-to-day business activities. He did not have the money to set aside, and he chose to await payment by his debtors of outstanding accounts before remitting the money to the Commissioner.

The Commissioner's guidelines recognise that the mechanical application of a flat 20% penalty may result in excessive penalties, hence the guidelines in para 23 that the flat rate penalty may be remitted down to a level equivalent to 4% flat of the unpaid amount of the deductions. The Taxation Ruling provides guidelines for the administrative remission of the statutory penalties. It is to be expected that the "soft options" recognised in these guidelines will have been tried on earlier occasions, before an offender is prosecuted. Generally speaking, the sentencing court should assume this and have regard to the 20% flat penalty unless there are facts brought to its attention which establish that the offender has not previously been shown administrative leniency under sec 221N. There may be cases where the taxpayer asserts he is entitled to that leniency under the Taxation Ruling guidelines, but – perhaps because the Commissioner takes a different view of the facts – that leniency has not been given. It would then be appropriate for the Court to determine for itself where the truth lies. The Court may be satisfied that the circumstances fall within the guidelines of para 26, for example, so that to have regard to a 20% flat penalty would be patently unfair.

Then, as a component of the sub sec (12) penalty, regard must be had to the 20% pa. penalty which runs from the due date when the deduction should have been paid to the date of actual payment. This penalty reflects the loss to the revenue by the delay in payment whereas, in my view, the flat rate penalty is intended as a deterrent. Where the payment of payments withheld have been paid before sentence is imposed, the interest component can be calculated. If payment has not been made, the offence is significantly more serious as the offending conduct is continuing. Interest should be calculated to the date of sentence, and the fact that payment remains outstanding treated as a matter of aggravation.

I return to the proposition that the starting point in fixing the penalty or penalties to be imposed for contravention of sec 221F(5)(a) should be the statutory penalty which would otherwise apply under sub sec (12). I have digressed to discuss Taxation Ruling IT 2171 and the Commissioner's use of the power of remission under sec 221N, to show that there may be grounds

for a group employer to assert that the statutory penalty should not necessarily be calculated at a flat rate of 20% on the deductions withheld. There may be grounds to use a lower percentage. All other relevant circumstances must then be considered which may in a particular case influence the sentencing tribunal to impose a higher or lower fine, or perhaps to depart significantly from the amount of the statutory penalty which would otherwise apply.

Such factors may include:

(a) The need for the penalty to be a deterrent. This will not in every case lead to a higher penalty. As I have observed, since *Bella Guarda* and *Karlovsky Plumbers*, the 1984 amendments have introduced a deterrent penalty – the 20% flat penalty subject to the power of remission. If consideration of the fine commences from the starting point I have suggested, it is important to recognise that Parliament itself has deemed a 20% flat penalty to be an appropriate maximum deterrent in the ordinary case. Care must be taken not to double the deterrent component. The statutory penalty imposed by sub sec (12) provides a general deterrent to other group employers. The deterrent purpose of the sub sec (14) penalty should be directed rather to the particular offender. His past history of offending will assure particular importance, although even with a persistent offender, whilst the deterrent effect of the sentence to him is important, the overall penalty must not be so high as to be crushing or be likely to lead to imprisonment on a default order where imprisonment is not the appropriate penalty: *Winkler v Cameron* (1981) 33 ALR 663 at p670. The means of the offender may often be an important consideration.

(b) The circumstances surrounding the commission of the offence. These will vary from case to case, and every case must be considered according to its facts. At the one extreme the offences might have occurred through circumstances beyond the control of the group employer, such as sudden ill-health or natural disaster. At the other extreme, the offence may be due to patent dishonesty by the employer in the wilful misapplication of deductions actually in hand for some purpose unrelated to the business. Between the extremes there will be an infinite combination of circumstances. When the employer is not a corporation, the degree of blame which should attach to his conduct may depend on whether he was let down by those to whom he had delegated the task of compliance. In some cases there may be factors which tend to aggravate the offence, in combination with other factors which tend to mitigate it. All must be carefully weighed. Only in this way can the gravity of the offence be estimated. In short, Regard must be had to the place which the conduct of the offender occupies in scale of seriousness of offences which may occur under sec 221F(5)(a), and the personal circumstances of the offender: *R v Morse* (1979) 23 SASR 98.

(c) It is as well to remember a golden rule of sentencing exemplified by the well-known remarks from the judgment of Napier CJ in *Webb v O'Sullivan* (1952) SASR 65 at p66 which are incorporated in the following passage from the judgment of King CJ in *Yardley v Betts* (1979) 22 SASR 108 at pp112-113; (1979) 1 A Crim R 329:

"To say that the criminal law exists for the protection of the community is not to say that severity is to be regarded as the sentencing norm. Times and conditions change, and the approach of judges to their task must be influenced by contemporary conditions and attitudes. But public concern about crime, however understandable and soundly based, must never be allowed to bring about departure by the Courts from those fundamental concepts of justice and mercy which should animate the criminal tribunals of civilized nations. They are summed up, in the aspects relevant to the present discussion, by Napier CJ in *Webb v O'Sullivan* (1952) SASR 65, at p66:

'The courts should endeavour to make the punishment fit the crime and the circumstances of the offender, as nearly as may be. Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest.'

The protection of the public must remain our first concern, but if, consistently with that, we can, in our compassion, assist another human being to avoid making ruin of his life, we ought surely to do so."

Yardley v Betts concerned a criminal offence in the strict sense. Nevertheless the same principles apply here; the relevant interest of the public which is to be protected is the due observance of the revenue laws. In a particular case the leniency reposed in courts under sec 19B and 20 of the *Crimes Act* may even be exercised: see *Kelton v Uren; Kelton v Harris* (1981) 27 SASR 92; (1981) 52 FLR 232; 11 ATR 534; 81 ATC 4119. *[His Honour considered other matters and continued]* ... **[4195]** In the case of offences against taxation laws which are not specifically covered by sec 221W, or a like section, sec 45B of the *Acts Interpretation Act* 1901 permits the joinder of a number of offences against the same provision of an Act in the same complaint or summons "if those charges are founded on the same facts or form, or are part of, a series of offences of the same

or similar character"; and sub-sec (3) permits the imposition of one penalty in respect of both or all those offences. In *Krenn v Klitscher* (43 SASR 199 judgment No.9673, delivered 3 December 1986) Olsson J thought it appropriate to impose one penalty in a case where a taxpayer had been prosecuted for two offences for failing to comply with an order of the Court, made under sec 8G of the *Taxation Administration Act*. I agreed with that view in *Collins v Denton* (1987) 43 SASR 192; (1987) 85 FLR 139. Where there are numerous offences charged I think the desirability of that course increases.

It is of course open to the sentencing tribunal, if it thinks good reason exists in a particular case where several charges are joined, to consider each offence separately and to differentiate between the offender's conduct constituting each offence. Whilst this course is open, it may frequently be a complex one to follow. Often the circumstances leading to the commission of the first offence in a series may also be the cause or a contributing cause to the commission of the second and subsequent offences. How are these overlapping causes to be separated? It would not be right to punish the offender twice for the same conduct. If, for example, a series of offences were due to a chaotic system of bookkeeping, if each offence were considered separately, there is a real risk that the penalty on each offence would punish the taxpayer for that system; whereas after penalty on the first offence, the only additional conduct not already taken into account would be the failure for the period of the relevant month to alter the established system of chaos. If the sentencing tribunal adopts this difficult course of considering each offence separately, at the end of the exercise the tribunal must stand back and look at the aggregate result to ensure that the penalty is not disproportionate to the offender's overall conduct; and that the penalty is not beyond his means and ability to pay. It seems to me there is a very real risk that if each offence is treated separately, some of the individual penalties and the aggregate result will be excessive. The risk can be amply illustrated by considering what would have happened in the present case if the learned special magistrate had decided that imprisonment was appropriate on each of the nine counts. Had he imposed significant gaol sentences on each, and then ordered that the sentences be served cumulatively, the result would have been an excessively long term of imprisonment.

A further alternative would be for the tribunal to consider and fix an appropriate overall penalty, then to divide it between all or some of the offences. The risk of excessive penalty to which I have referred would be avoided, but the order of the Court would be in a form more complex than is necessary. The use of sec 221W(4) of the *Income Tax Assessment Act*, or where appropriate, sec 456(3) of the *Acts Interpretation Act*, avoids this. *[His Honour dealt with the question of a court's taking into account further offences, and the circumstances of the offence and continued]* ... **[4196]** The magistrate took the view that the appellant had not properly adjusted his priorities and attributed the crux of his problem to the fact that the appellant "has done his own book work. He has not given proper attention to the necessary documentation. I regret that I must say that he has done so at his own risk". Whilst the inadequacy of the appellant's book work may have been one of the reasons for the offences, the liquidity difficulty experienced by his business was obviously another. There was no suggestion of dishonesty, of extravagant personal drawings, or of the use of money otherwise than in the **[4197]** course of maintaining the business. The pattern of payments illustrates that the appellant was meeting his obligations to the Commission when he could. The magistrate was informed that the appellant had health problems and was suffering anxiety. He and his family, as well as his employees, were dependent on the continuation of his business. He had endeavoured to improve his cashflow by trying to sell plant but without success. The magistrate accepted that "large fines will add to his burden and not improve his future viability".

The unpaid deductions, the subject of the nine counts charged was $15,338.95, and in the five additional matters $10,802.25. The maximum flat rate penalty which could be attracted under sec 221F(12)(b)(ii)(A) would be $5,228.24. In addition an interest penalty would attach under sec 221F (12)(b)(ii)(B). I have not endeavoured to calculate the interest penalty although I was informed by counsel that the amount would not exceed $500. The alternative statutory penalty under sec 221F(12) would at the most be in the order of $5,700.

The appellant had a number of prior convictions and apparently had been warned of the risk of further prosecution. There is no reason to think that he had not been extended leniency by the Commissioner in the past, or that there were circumstances which would continue to warrant significant remission of penalty under sec 221N, had a prosecution not been launched. In my view a figure of about $5,700 is an appropriate starting point from which to judge the appropriate fine.

It must be remembered that within this figure is a substantial deterrent "penalty" which fulfils the general deterrent purpose of punishment and, in the circumstances of this case, obviously provides a potent deterrent to the appellant. In the case of a defendant who continues to offend after he has paid sec 221F(12) penalties, or fines of a like amount, there would be strong reason to impose a heavier penalty by way of individual deterrent. However the appellant's earlier convictions were prior to the 1984 amendments. Only low fines were imposed, and at that time there was no 20% flat penalty. In this case there is no reason to think that a fine of several thousand dollars would not provide an adequate deterrent to him and an incentive to alter his priorities and improve his bookkeeping.

A significant factor in favour of the appellant is that he paid deductions with some regularity, although late. He paid the last of the outstanding deductions, the subject of the charges, 11 weeks before the complaint was laid; and paid the amount involved in the additional offences before he was sentenced. All the other matters which I have mentioned must be taken into account. A heavy fine will cause hardship, although there is no reason to think that a fine in the order of the statutory penalty would be totally beyond the means and ability of the appellant to pay, provided he was given time.

The aggregate penalties of $12,850 imposed at first instance are in my view manifestly excessive and must be set aside. In lieu therefor I consider that one penalty should be imposed pursuant to sec 221W(4) to cover all offences including the five offences to be taken into consideration. That penalty should be $4,500 together with $20 costs, in all $4,520 to be paid within four calendar months. As it is impossible to know the appellant's state of health or financial position at the expiration of that time, I do not propose to make a default order. If payment is not made, appropriate action can then be taken either for distress or imprisonment pursuant to the provisions of the *Justices Act*.
