

19/80

SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

GANKE v DEPUTY COMMISSIONER of TAXATION (CTH)

Street CJ, Nagle and Begg JJ

27 March 1975

[1975] 1 NSWLR 252; (1975) 25 FLR 98; 5 ATR 292; 75 ATC 4097; noted 49 ALJ 496**INCOME TAX – FAILURE TO FURNISH INFORMATION AS REQUIRED BY NOTICE UNDER S264(1)(a) – PROSECUTION UNDER S223 – COMMISSIONER'S POWER TO SPECIFY IN NOTICE A TIME WITHIN WHICH INFORMATION TO BE SUPPLIED – WHETHER TIME SPECIFIED MUST BE A "REASONABLE TIME" – ONUS OF PROOF: INCOME TAX ASSESSMENT ACT S223.**

By notice in writing dated 11/5/72 under s264(1)(a) of the *Income Tax Assessment Act*, taxpayer, a company director, was required to furnish on or before 25/5/72 certain information including details of his assets and liabilities as at 30th June for each year from 1967 to 1972 inclusive, a list of assets purchased and sold during the period 1/7/66 to 30/6/71 indicating the date each such asset was purchased and its cost price and the date of sale and sale price of each asset sold; and a list of companies in which he held an interest as shareholder since 1/7/66.

The taxpayer was convicted by a Magistrate of an offence under s223 for failing to duly furnish such information as was required. He appealed to the District Court from which a case was stated. The questions in the case stated concerned the Commissioner's power to specify in a notice in writing a time within which the information so required was to be furnished to him; whether the time stated was absolute in the sense that it precluded any inquiry before a court as to its reasonableness and finally, the onus of proof in such a matter.

HELD: Stated case answered as follows:

1. It is to be implied in s264(1)(a) that where the provision refers to a notice in writing requesting a person to furnish the Commissioner with "such information as he may require", it calls for a statement as to the time and place at which the information must be provided.

2. In addition, s223 itself, which refers to the furnishing of information "as and when required by this Act or the regulations or by the Commissioner", supplies the necessary power to prescribe a time within which the information is to be supplied.

3. Section 223 deals with an absolute situation and therefore demands a reading of the Act in such a way as to conclude that the request to be complied with must necessitate the indication of a time and place for compliance.

4. The word "fails" in s223 refers to an omission to do the thing by reason of some carelessness or delinquency on the taxpayer's part. It does not refer to an omission caused by impossibility for which the taxpayer in question is not responsible.

5. The Commissioner must allow a "reasonable time" for compliance with a request for information under s264.

6. The onus is upon the Commissioner to prove that the time he has allowed for the furnishing of the information is a "reasonable time".

The relevant part of the information was:

"On or before 25/5/1972 at Sydney ... on being required by the Deputy Commissioner of Taxation by notice in writing dated 11/5/1972, to furnish him in writing at his office ... with the following information:

(1) Full details of your assets and liabilities, both business and private, as at 30th June each year 1969 to 1972 inclusive. Assets should be shown at cost price.

(2) A supplementary list indicating in respect of assets purchased and sold during the period 1/7/66 to 30/6/71 –

(a) the date of acquisition and the cost price of such asset purchased, and

(b) the date of sale and the sale price of each asset sold.

(3) A list of companies in which you hold, or have held interest as a shareholder since 1/7/66, indicating in respect of each company –

- (a) whether a public or private company;
- (b) locations of registered office and names of public officer;
- (c) date and place of incorporation;
- (d) nature of business;
- (e) particulars of your original shareholdings and any subsequent variations therein;
- (f) details of each official capacity in which you act, or have acted, and
- (g) the taxation office to which returns have been furnished."

It should be generally observed that the Act to be effective must give to the Commissioner powers to require the furnishing to him of information and taxpayers returns, and that without the power to prescribe a time for the furnishing of information or returns the general object to be achieved by the Act would be severely restricted. For general principles relating to this type of legislation see *Commissioners of Customs & Excise v Ingram & Ors* (1948) 1 All ER 927 and *R v Kempley* (1944) 44 SR (NSW) 416; 61 WN (NSW) 16.

In order that the Commissioner's notice in writing requiring a person under s264(1)(a) to give evidence before him, or to produce books, documents or papers, the Commissioner must of necessity indicate in the notice the time and place at which the evidence is to be given or the material provided, but the section does not specifically refer to those matters being included in the notice, nor does it in regard to the furnishing of information, as required by s264(1)(a). If such an implication is to be made, as indeed I think it must be, in s264(1)(b) then it seems to me that logic suggests a similar implication is s264(1)(a) and that where that sub-section talks of a notice in writing, furnishing the Commissioner with "such information as he may require" it calls for a statement as to the time and place at which the information must be provided.

In addition it seems to me that s223 itself supplies the power if necessary to prescribe a time at which the information is to be supplied, because of the phrase in that section "as and when required by this Act or the regulations or by the Commissioner". That phrase in my opinion refers just as much to a person failing to furnish a return as it does to a person who fails to furnish information.

Section 223 is designed to deal with an absolute situation, and it seems to me that it should be contrasted with s224. What s223 "proscribes is the failing to duly furnish information, whereas on the other hand s224 speaks of a refusal or neglect to duly attend, without just cause or excuse. The absolute nature of s223 appears to me to demand a reading of the Act in such a way as to conclude that the request to be complied with must necessitate the indication of a time and place for compliance.

Finally the question is raised in the stated case upon whom the onus rests to prove that the appellant was allowed a reasonable time in which to furnish the information sought by the Commissioner. In my opinion it is upon the Commissioner to prove that the time he has allowed is a "reasonable time".

References: *Ingram v Ingram* (1938) 38 SR (NSW) 407; 55 WN (NSW) 163; *R v Skurray* (1967) 86 WN Pt 1 (NSW) 1; [1967] 2 NSW 611.