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SUPREME COURT OF SOUTH AUSTRALIA

AMBROSE v EDMONDS-WILSON

Bollen J

21 January, 12 February 1988

(1988) 48 SASR 514; 92 FLR 429; 19 ATR 1217; (1988) 88 ATC 4, 173

INCOME TAX – FAIL TO FURNISH RETURN – ACCOUNTANT ENGAGED BY TAXPAYER – NOTICE SENT TO ACCOUNTANT – RETURN NOT FURNISHED BY ACCOUNTANT – TAXPAYER UNAWARE OF NOTICE – CHARGE LAID AGAINST TAXPAYER – WHETHER *MENS REA* OR HONEST MISTAKE OF FACT APPLY: *TAXATION ADMINISTRATION ACT* 1953, (CTH), S8C.

1. Having regard to the subject-matter of the *Taxation Administration Act* 1953 ('Act'), the object of S8C and its language, both *mens rea* and honest and reasonable mistake of fact are excluded by necessary implication.

2. Where a taxpayer's address for service was care of an accountant, and the accountant failed to comply with a requirement to furnish the return, the taxpayer was deemed to have received the notice, and the questions of his intention, knowledge and *mens rea* were all irrelevant to whether the taxpayer had committed an offence under S8C of the Act.

BOLLEN J: *[After setting out the facts, the nature of the charge, the Magistrate's reasons for judgment and the grounds of appeal, His Honour continued]* … **[517]** (SASR) Before me Mr Edmonds-Wilson, for the respondent, put forward more arguments than were put to the magistrate. The respondent is entitled to support the order of dismissal by any available argument. Mr Edmonds-Wilson travelled through many cases in a most interesting submission. In short his argument other than the one which succeeded before the magistrate (which, of course, he put to me) was that the relevant section required proof of intention, of *mens rea*, by the complainant.

But first the argument accepted by the magistrate. I was referred to a number of cases which deal with the words "fail" and "capable" in other legislation. I do not think that those cases are directly helpful. Of course, they help in a general way. But the phrase "to the extent that the person is capable of doing so" in s8C of the *Taxation Administration Act* must take its meaning and operation from the section itself considered in the light of the object of the whole Act.

Section 8C is a section designed to compel people to do things lawfully required of them pursuant to a "taxation law". The subsection has several *placita*. The magistrate referred to only one. True it is that that was the relevant one in the sense that it was the one not obeyed. But I think that the whole section should be considered. It is:

> "**Failure to comply with requirements under taxation law**
> 8C. A person who refuses or fails, when and as required under or pursuant to a taxation law to do so—
> (a) to furnish a return or any information to the Commissioner or another person;
> (b) to lodge an instrument with the Commissioner or another person for assessment;
> (c) to cause an instrument to be duly stamped;
> (d) to notify the Commissioner or another person of a matter or thing;
> (e) to produce a book, paper, record or other document to the Commissioner or another person; or
> (f) to attend before the Commissioner or another person, to the extent that the person is capable of doing so is guilty of an offence."

Now we can see that the phrase "to the extent that the person is capable of doing so" is general. That is to say, it is capable of applying to each *placitum*. Its force and effects may vary depending on that which is required of a person. With all respect I cannot agree with the magistrate. I do not think that the phrase refers at all to "the person's" knowledge or state of mind. I agree with the submission of counsel for the appellant that "the language of the *Taxation Amendment*

Act and the *Income Tax Regulations* lead to the conclusion that knowledge of the requirement was not necessary".

In this context I refer to the reasons of Mr DF Wilson, SSM, in *Kelton* (*Deputy Federal Commissioner of Taxation) v Goodes* (1978) 9 ATR 848. Amongst other things his Honour said (at 852):

> "There is a clear indication of an intention by Parliament that a purported requirement by the Commissioner under either section is nonetheless a requirement because it does not come to the notice of the person concerned."

Of course, Mr Wilson SSM **[518]** was referring to the "old" s223. The present phrase does not connote any requirement that the respondent should have known that the notice had been served. The scheme of "taxation law" is that a taxpayer may have an address for service removed from his own home or office. Parliament recognises that will often happen when people engage accountants to prepare their returns. Service of notices on such a taxpayer is good service if it is served at the removed address. It behoves taxpayers to take steps to see that accountants or tax agents keep them informed of the receipt of any notices. No doubt it is a system which can produce harsh results. But it is the scheme and from time almost immemorial taxpayers have suffered penalties through default of accountants and tax agents.

But in s8C Parliament allows for some amelioration of harshness. A man cannot be held responsible if he is required to do more than he has the capacity to do. Of course, one can see the force of the argument that a man has no capacity to respond to that of which he is ignorant. But this is one of those cases in criminal law where in effect the agent's knowledge is the knowledge of the person charged. Once the idea or scheme of service other than personal or other than at the home or "business-place" of a person is acknowledged, then attributed knowledge or irrelevance of knowledge must follow.

The phrase is directed to capacity to do something and not to knowledge of the requirement to do it. The respondent had the capacity to respond. He needed merely to get the information from the accountants and prepare the return himself or to lash the accountant into action or to take the information to another accountant for prompt preparation of the return. It is not correct, in my opinion, to say that the taxpayer cannot respond to the notice of this type because his agent has his books.

But that may not end the matter. Mr Edmonds-Wilson said that *mens rea* must be proved. He said, too, that even if the offence created by s8C(a) was not absolute it was one to which the defence of honest and reasonable mistake applies. That is to say he said that the "defence" often called the "*Proudman v Dayman* defence" applies: see *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536.

Mr Kavanagh for the appellant said that the offence was absolute, more than strict, but absolute. That is to say he was submitting that intention, knowledge and *mens rea* were irrelevant. I have thought about all the authorities to which I was referred. Much has been written about *mens rea* in statutory offences. Much has been written about the "defence" of honest and reasonable mistake. I think that, in this day and age, the less said by a single judge about the topic in general the better. I attempt to confine myself to saying no more than I believe to be necessary to decide this case. In *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 Brennan J said at CLR 566:

> "It is now firmly established that *mens rea* is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

[519] I respectfully think that this is completely correct and well supported by authority. I take it as my text. I add a reference to *Gammon (Hong Kong) Ltd v AttorneyGeneral of Hong Kong* [1985] AC 1; [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439. The Judicial Committee to the Privy Council in effect said that the presumption that *mens rea* was an essential ingredient of a statutory offence could be displaced by clear words and by necessary implication where the statute creating the offence dealt with an

issue of social concern provided that strict liability would be effective to promote the objects of the statute.

We can easily understand the object of the *Taxation Administration Act*. More pointedly the object of s8C is to compel compliance with things lawfully required of taxpayers pursuant to a taxation law. It is a section intended to promote and facilitate the assessment and collection of the right amount of income tax from taxpayers. The Commissioner must have quite extensive powers to enable him and his officers so to assess and collect. It is, of course, a very unattractive idea that any person can be convicted without his or her having any intention to break the relevant law or even to take a chance about breaking it. But sometimes it must happen.

Road traffic offences and offences under the legislation to provide for the sale of unadulterated food are examples. The interest of the community demands that in some class of statutory offence absolute liability should attach to people who are subjectively innocent. That is necessary for the operation of the legislation which in turn is seen by the legislature to be for the good of the general populace. The robust mind initially fights against penalties without guilty intention. But in the end it must be resigned to some areas, perhaps correctly called social issues, in which such penalties must regretfully obtain.

Section 8C does not expressly say that *mens rea* and honest and reasonable mistake are excluded but I think that consideration of the subject-matter of the Act, or the object of s8C and of its language shows that both *mens rea* and honest and reasonable mistake are excluded by necessary implication. I think the subject-matter of the legislation and the object of s8C cry out that he who has received a notice at his address for service must comply with it to the extent that he is capable of doing so. Intention, knowledge and *mens rea* are all irrelevant.

The respondent received a notice because it came to his address for service. He, by himself or his agent, had the capacity to comply with it. He did not comply. The offence is complete. I do not think that the magistrate's decision to dismiss because the offence was not made out can be supported. Mr Edmonds-Wilson referred me to s19(b) in the *Crimes Act* (1914) Cth). It may well be that I could determine whether any action should be taken under that section and, if so, what action. But in the first instance it should be a matter for the magistrate. I stand ready to hear more submissions by counsel whether I should now proceed to consider penalty and, if so, what penalty or send the matter back to the magistrate.
