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IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

M 816/84

BETWEEN

ROBIN DOUGLAS ADAIR

APPELLANT

AND

LEIGH HOTEL LIMITED

RESPONDENT

1384

Hearing: 10 October 1984

Counsel: Mr McGuire for appellant  
Mr Alderslade for respondent

Judgment: ~~2 NOV 1984~~ October 1984

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JUDGMENT OF PRICHARD J

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This is an appeal by way of case stated against the determination of a question of law arising in prosecutions of a company for four alleged offences of wilfully making false returns of income, and also prosecutions of the directors of the company for allegedly aiding and abetting the company in the commission of those offences.

The relevant provisions are s.416 (1)(b) and (e) of the Income Tax Act, 1976 which read:-

"416. (1) Every person commits an offence against this Act who -

- ...
- (b) Wilfully or negligently makes any false return, or gives any false information, or misleads or attempts to mislead the Commissioner or any other officer, in relation to any matter or thing affecting his own or any other person's liability to taxation; or...
  - (e) Aids, abets, or incites any other person to commit any offence against this Act or against any regulation made thereunder."

The taxpayer is a company by the name of Leigh Hotel Limited. The defendants in the court below were the company (charged with wilfully making false returns) and Eileen Frances Walker and Arnold John Walker, who are the shareholders and directors of the company (charged with aiding abetting and inciting the commission of the company's offences.)

The circumstances were that the company's returns of income for the years ending 31 March 1977, 1978, 1979 and 1980 were prepared by a firm of accountants. The returns were prepared from information supplied to the accountants by Mr & Mrs Walker as directors of the company.

The short point on which the learned District Court Judge dismissed all the informations was his determination, as a proposition of law, that the returns were not "made" by the company but by the accountants. It followed that, as the company was not the principal offender, Mr & Mrs Walker could not be convicted under s.416(e) as parties aiding and abetting the company.

The Judge held that s.18 of the Income Tax Act 1976 did not assist the prosecution. Section 18 provides that a "return purporting to be made by or on behalf of any person shall for all purposes be deemed to have been made by that person or by his authority as the case may be until the contrary is proved". The Judge found that the contrary had been proved.

The facts are set out succinctly in the Case Stated, as follows:-

"It was proved upon the hearing that for each of the 4 years in question the day to day financial records of the company were forwarded at various stages throughout the year to the company's accountant at Thames, the company's business being at Leigh. At the end of each financial year the accountant would prepare the annual return of income of the company. In respect of the years ended 31 March 1977 and 31 March 1980 the annual returns of income of the company were signed by Eileen Frances Walker who was at all material times a director of and major shareholder in the company. She signed the returns without regard to the contents because she had no experience of accounting matters.

In respect of the years ended 31 March 1978 and 31 March 1979 the annual returns of income of the company were signed by the accountant who at all material times was neither an officer of nor shareholder in the company.

I determined that to prove the charges it must be established the maker of the returns committed the offences. As the evidence was that it was the accountant in each case that was the maker of the returns the company could not be found guilty. It followed that the charges against Eileen Frances Walker and Arnold Jack Walker of aiding the company to commit the offences would also be dismissed."

The learned District Court Judge considered that he was bound by the authority of Bowen v CIR (1963) NZLR.35. However, in Bowen v CIR the issue in the appeal was not whether a return prepared by the taxpayer's accountant is, for the purposes of the Act "made" by the taxpayer. The situation was that an accountant who had prepared returns for a client was originally charged, in the Magistrates Court, with aiding his client in negligently making false returns. During the hearing, the Magistrate expressed the view that, because the taxpayer had not personally prepared the false returns he could not, if charged, be found guilty of negligently "making" the returns. It followed that the accountant could not be convicted of aiding him. So the informations were amended (in the Magistrates Court) to charges of negligently misleading the Commissioner in relation to matters affecting the taxpayer's liability to taxation. (S.149(b) of the Land & Income Tax Act, 1923 and s.228(1)(b) of the Land & Income Tax Act, 1954 - which are in the same terms as s.416(1)(b) of the Income Tax Act, 1976). On these amended charges the accountant was duly convicted. Against those conviction he appealed. Hutchison, J. did not concern himself with the question whether the amendment made in the Magistrate's Court was necessary; he dealt only with the question whether an intention to mislead is an ingredient of the offence of negligently misleading the Commissioner. The judgment of Hutchison, J. does not therefore address the question whether a taxpayer whose return is prepared for him by an accountant is the "maker"

of the returns - the most that can be said is that in dealing with the appeal as it was presented to him, without questioning the necessity for the amendments made in the Court below, Hutchison, J. seemed tacitly to accept as correct the view expressed by the Magistrate at first instance.

Mr Alderslade, for the Respondents, pursued the argument that the maker of a return of income can only be the person who physically prepares the return. If this is right, it would follow that a taxpayer who deliberately supplies his unsuspecting accountant with false information for the preparation of the taxpayer's return cannot be convicted of wilfully making a false return. This is altogether too simplistic. It has always been the attitude of the common law that he who hands the poisoned cup to an unsuspecting servant for delivery to the victim is guilty of the criminal act perpetrated against the victim. At one time it was suggested by some academic writers that this might not be the position in New Zealand - see (1975) N.Z.L.R. 699, 701-702 and (1977) N.Z.L.R. 4. But, if there was any real doubt, it was put to rest by the Court of Appeal in R. v. Paterson (1976) 2 N.Z.L.R. 394. It is now clear that in New Zealand, the sensible rule of the common law prevails: that with the obvious exception of some offences which are of such kind that the actus reus cannot be performed by an innocent agent (e.g. bigamy), a person who, with the necessary criminal intent, uses an innocent person as an instrument to

perform the physical act necessary to commit a particular crime is the principal offender in the commission of that crime.

The modern view of the basis of corporate liability in criminal law is fully examined in Nordik Industries Ltd v. Regional Controller of Inland Revenue (1976) 1 N.Z.L.R. 194. The effect of the "doctrine of identification" is that in criminal law a company is liable for the acts and defaults of its directors (and other officers who exercise the function of management) because the "directing mind and will" of the company resides in those persons, and so their acts and intentions are regarded as the acts and intentions of the company itself. This is a concept quite distinct from the concept of vicarious liability or agency.

The result is that if either Mr or Mrs Walker knowingly and intentionally furnished false information to the company's accountant for the purpose of preparing the company's returns, then that action, that knowledge and that intent were the act, knowledge and intent of the company.

The facts in Nordik Industries Ltd v. Regional Controller of Inland Revenue closely resembled those of the instant case. Nordik Industries' returns were prepared by an accountant from false information furnished by one of the two directors of the company. The accountant was innocent

of any complicity in the falsification of the returns. It was held that the company was rightly convicted of wilfully making false returns. The notion that a return of income is "made" only by the person who actually puts his pen to the tax form was not expressly confronted in the Nordik Industries judgment; but Cooke, J. had no hesitation in holding that the company was rightly convicted of wilfully making false returns.

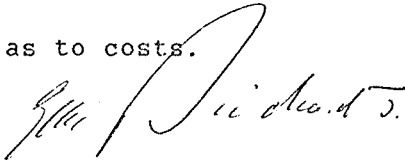
Mr Alderslade sought to distinguish Nordik Industries Ltd v. Regional Controller of Inland Revenue on the ground that in Nordik Industries there was no evidence to rebut the s.18 presumption, whereas in the instant case the learned District Court Judge expressly found that the presumption was rebutted. The distinction is invalid because s.18 is irrelevant. In Nordik Industries, as in the present case, it was undisputed that the returns were prepared by the accountant: the company was held liable, not by virtue of the s.18 presumption but as the instigator and perpetrator of the false returns - as the dispenser of the poisoned cup.

The enquiry in this case should have been as to whether Mr and/or Mrs Walker knowingly supplied the company's accountant with false information with intent that false returns be furnished. If falsity, knowledge of falsity and intent on the part of Mr and/or Mrs Walker are established, then the company is guilty of the offences charged.

By the same token, if either or both of the directors, knowingly and intentionally, furnished false information to the accountant for the preparation of the company's returns, then he or she, or both of them, as the case may be, should be convicted as parties to the commission of the company's offence.

Because of his view that the company could not be liable as the maker of the returns, the learned District Court Judge made no findings as to the falsity of the returns or as to the knowledge and intentions of the directors. The informations are therefore remitted to the District Court for the making of appropriate findings of fact and for determination accordingly.

I make no order as to costs.



Solicitors:

Crown Law Office, Auckland, for Appellant;

Chapman Tripp, Auckland, Solicitors for Respondent.