M.668/83

IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION
CHRISTCHURCH REGISTRY

IN THE MATTER of the Sales Tax Act 1974

AND

IN THE MATTER of an appeal against an assessment by the Collector of Customs of sales tax under the said Act

BETWEEN CHREON ELECTRONICS LIMITED whose registered office is situated at Christchurch, Electronics Distributors

Appellant

A N D THE COLLECTOR OF CUSTOMS at Christchurch

Respondent

Hearing: 22 and 30 March 1984

Counsel: D.I. Jones for Appellant
D.J.L. Saunders for Respondent

Judgment: 21 MAY 1984

JUDGMENT OF ROPER J.

This is an appeal pursuant to s.33 of the Sales Tax Act 1974 against an assessment of sales tax made by the Collector of Customs. It is a very odd case.

As the result of an investigation of Chreon's accounting records which began in January 1983, and interviews

with its Managing Director Mr C.J.B. Nicholls, four claims for unpaid sales tax totalling $177,201 were made against the company. Three of those claims totalling $110,562 are not challenged and I am concerned only with Claim 225, which is for $66,639 and is wholly related to the sale of 50 or so Kingtron electronic cash registers to Ballins Industries Ltd for installation in liquor outlets. If, as the Collector claims, and at least some of Chreon's records seem to confirm, the sale to Ballins Industries was by Chreon then sales tax is payable as Chreon is a wholesaler in terms of the Act, and s.12 provides, inter alia, that sales tax is payable on goods imported into New Zealand and sold by a wholesaler otherwise than to a licensed wholesaler for subsequent sale by him. The basis for the present objection is that in fact the cash registers were sold to Ballins Industries by another company, Microage (N.Z.) Ltd, which is a retailer. If that was the position then no sales tax would be payable unless some work had been done on the cash registers after they came into Microage's hands.

There is no dispute that the cash registers were imported from Japan by Pentagon Distributors, and were then sold to Christchurch Cash Registers (1981) Ltd. It is what happened to them after that that we are concerned with. The shareholders in Christchurch Cash Registers (1981) Ltd, which has now been wound up, were Mr Nicholls and a Mr Oakley. The shareholders in Chreon and Microage, which occupy the same premises, are Mr Nicholls and his father, and Mr Nicholls is the Managing Director of both companies.

The Collector's reasons for issuing Claim 225 can be simply stated. Invoices found in Chreon's records showed that the cash registers were sold to Chreon by Christchurch Cash Registers (1981) Ltd, and all of the invoices relating to the sale to Ballins Industries are in the name of Chreon. On the

latter invoices no sales tax has been charged in relation to the cash registers, although tax has been claimed on other materials included in the invoices; and on Christchurch Cash Registers' invoices to Chreon is the notation STYC (Sales Tax Your Care). Four of Ballins' cheques in payment for the cash registers were made out to Chreon, and two to Microage but all were paid into Chreon's bank account, a circumstance which is not as damning as might appear because at the relevant time the one account was used by both companies.

Section 32 of the Act provides that every assessment made by the Collector shall be taken to be correct and casts on the taxpayer the onus of proving that a lesser sum, or no tax, is payable.

In evidence Mr Nicholls said that the cash registers were in fact purchased from Christchurch Cash Registers by Chreon as agent for Microage; that some modifications to the electronics of the registers were then made by Chreon on behalf of Microage which then sold the registers to Ballins Industries. As Chreon had finance available at the time it made payment to Christchurch Cash Registers and when Ballins Industries made payment it went into Chreon's account.

The Customs Officers who gave evidence confirmed that Mr Nicholls had always challenged Chreon's liability to pay tax, although not always on the same basis. His first suggestion had been that the cash registers should have been invoiced direct from Christchurch Cash Registers to Ballins Industries. It was not until the 11th February 1983, a month after the investigation had begun, that Mr Nicholls referred to Microage's involvement, when he said that the sales to Ballins Industries had been recorded on Chreon invoices because Microage had no invoice forms at that time. Mr Tobeck, one of

the investigating officers, agreed without hesitation that Chreon's records were chaotic and that there was no suggestion that Mr Nicholls had been dishonest or deceitful.

My impression of Mr Nicholls was that while he has considerable expertise in the electronics field he is no businessman, and this contract with Ballins Industries, which was the biggest he had ever handled, taxed his administrative ability to the limit. Time was of the essence and he improvised.

At the conclusion of the evidence I indicated that I would perhaps be helped by the evidence of Chreon's accountant and at an adjourned hearing I heard the evidence of Mr M.G. Hadfield, a chartered accountant in public practice, who has been Chreon's accountant since 1975 and Microage's from 1981, when that company was incorporated.

In evidence in chief he said:-

"I have been able to prepare balance sheets for both companies, up to March 1982 only one company was trading, Chreon Electronics, and I completed the balance sheet for that company from 1975 to 1982, since 1982 I have been able to prepare interim balance sheets for Microage and Chreon Electronics. The bookkeeping system Mr Nicholls had to enable me to prepare accounts, this relates to the year 1982/83, the bookkeeping system was all merged into one system. It required considerable work to separate the two companies into their right trading areas. The system was quite chaotic actually and when my attention was drawn to it in July 1983 I was extremely concerned. As to whether there were entries in the bookkeeping system which related particularly to Microage, these were clearly identified in the prime records, entries were coming through into Chreon's books that related

to Microage. The bank statements deposits and payments were entries in the bank statements for Chreon which related to Microage.
BENCH: There was just one bank account for both? Yes, this is not unusual for a holding company with a subsidiary.
COUNSEL: Having become aware of this chaos in terms of bookkeeping I advised Mr Nicholls as to what he should do. I advised him immediately to commence another bank account for Microage to make easier the operation and recording of the prime records."

In cross-examination he said that following an analysis of the relevant records the entries of prime record had been reconciled between the two companies with the result that the items in the Ballins Industries' contract now appear in the Microage accounts. That result was of course arrived at on information supplied by Mr Nicholls and consequently must be viewed with a measure of reserve, if not suspicion.

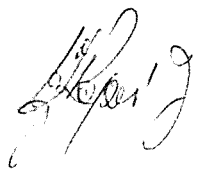
However, for all that, I am satisfied that Chreon has established on balance that it is not liable for the tax assessed on Claim 225.

I think one must look to the substance of the Ballins Industries' contract rather than the form as disclosed in the invoices on which the Customs officers, quite reasonably, relied. It is now clear that the whole of the correspondence relating to this contract, which was not made available to the Customs officers, was between Microage and Ballins Industries, and, as Mr Jones pointed out, in the event of breach it would have been Microage to which Ballins Industries would have turned for its remedy. The fact that on the Chreon/Ballins Industries' invoices the cash registers are referred to as "non taxable" (while tax is assessed on other materials) indicates that there was no attempt at concealment, and that the invoices do not tell the whole story.

Furthermore, it makes no sense whatever that Mr Nicholls, being free to use either of his companies, Chreon or Microage, for this particular contract, should negotiate it through the one that would attract a liability for sales tax. It is not questioned that it was open to him to sell through Microage when no sales tax would have been payable.

The appeal on Claim 225 is therefore allowed but that is not the end of the matter for it may be that Chreon, or perhaps Microage, is still liable for sales tax on the additional work done on the cash registers after their receipt from Christchurch Cash Registers. I am not able to assess that liability on the evidence before me. I reserve leave to the parties to apply for any further directions as may be necessary.

Costs reserved.



Solicitors:
H.W. Thompson & Morgan, Christchurch, for Appellant
Crown Solicitor, Christchurch, for Respondent