

Wair 636

IN THE MATTER of the District Court Act
1947

AND

IN THE MATTER of an Appeal Judgment of
Judge Green in the District
Court at Waihi

BETWEEN

THE COMMISSIONER OF INLAND
REVENUE

Appellant

AND

DENIM EXPORT LIMITED

Respondent

Hearing: 31st May, 1984

Counsel: Morgan for Appellant
Milne for Respondent

Judgment: 1-6-84

JUDGMENT OF SINCLAIR, J.

This appeal, following a decision of the District Court at Waihi, concerns an action brought by the Commissioner of Inland Revenue to recover P.A.Y.E. deductions made by an employer in respect of wages paid to its employees.

The present Respondent was not the employer which was, in fact, a firm called Waikino Clothing Manufacturing Co. Ltd, which is now in liquidation.

To enable the Appellant to maintain this action reliance was placed upon the provisions of S.276 of the Income Tax Act 1976 which provides as follows:

"276. Liability of new companies for tax payable by former companies with substantially same shareholders or under same control -

"(1) For the purposes of this section -

'Company' means a New Zealand company or an overseas company within the meaning of this Act:

'New company' means a company carrying on business in New Zealand and consisting substantially of the same shareholders as an original company or being under the control of the same persons as an original company:

'Original company' means a company which, having at any time carried on business in New Zealand, has, whether before or after the commencement of this Act, ceased to carry on business in New Zealand; and includes any such company that has been wound up.

(2) Where an original company has been wound up, its shareholders and directors, as on the commencement of its winding up, shall respectively be deemed to be the shareholders and the persons having the control of the company for the purposes of this section.

(3) Where an original company was, when it ceased to carry on business in New Zealand, liable under this Act for any income tax or was liable to be assessed for any such tax, and that tax has not been paid, the new company shall, for the purposes of this Act, be deemed to be the agent of the original company and shall be liable for all tax payable by the original company. It shall also be liable for all tax for which the original company would have been liable if it had continued to carry on business in New Zealand."

It is necessary then to establish who the shareholders were in the Waikino Clothing Manufacturing Company which was the original company, and who the shareholders are in Denim Export Limited, the Respondent, to ascertain whether or not Denim Export Limited falls within the definition of "new company" within the meaning of S.276 of the Statute.

In the District Court on this particular aspect the Judge was able to establish the shareholding in the Respondent company but stated that he was unable to determine who the shareholders were in the original company, that is Waikino Clothing Manufacturing Company.

When the points on appeal were received by me I noted

immediately that the Crown Prosecutor stated that evidence had been produced in the form of an exhibit which established a shareholding in the original company. On looking at that particular exhibit I found that there were a number of documents stapled together, one being the certificate of incorporation, the second being the annual return for 1980, a summary of share capital and debentures, and a form relating to the particulars of Directors and Secretary. There did not appear to be any other document which related to the shareholders in the company.

On looking at the form relating to the particulars of Directors and Secretary it was apparent that there was another document underneath. When a proper examination was made it was discovered that the last two documents were stuck together by some means and when they were separated the final document was a list of the then present members of the company. They were Peter William Maxwell as to 4,500 shares and Kerr Alexander Maxwell as to 500 shares, giving a total capital of \$5,000 which was that referred to in the summary of share capital. The two Directors were the same persons as were the shareholders.

So far as Denim Export Limited is concerned that company has a capital of \$4,000 and the shareholders are Peter William Maxwell as to 3,900 shares and Helen Ray Maxwell 100 shares. Thus Peter William Maxwell is the principal shareholder in Denim Export Limited and was the principal shareholder in Waikino Clothing Manufacturing Company.

Mr Milne accepted that the exhibit showed the above position and accepted that there had been tendered to the District Court evidence which would have enabled it to have ascertained who the shareholders were in the original company

had not the two documents earlier referred to been stuck together.

I mention at this point that there were no notes of evidence available at the hearing of the appeal for the reason that they had been taken on tape which had been cleaned before the District Court became aware that an appeal had been lodged. The fact that there was no evidence available has a consequence on the outcome of this appeal which I will refer to later.

However, in the District Court the Judge went on to consider whether or not for the purposes of S.276 of the Income Tax Act 1976 the Respondent would in any event have been liable for the P.A.Y.E. liability of the original company.

After examining S.276 of the Statute His Honour came to the conclusion that it referred but to income tax, and as the tax in question was P.A.Y.E. tax, that the two were not synonymous and that therefore the Respondent could not be liable for the P.A.Y.E. tax which had been owing by the original company. However, the Court was obviously not referred to S.373 of the Income Tax Act 1976 which provides as follows:

"Subject to this part of this Act, the other parts of this Act shall apply with respect to every amount that any employer, employee or other person is liable to account for or pay to the Commissioner under this part of this Act as if the amount were income tax."

That section is in the same part of the Act as the provisions relating to P.A.Y.E. taxation, namely Part XI.

Thus on a plain reading of S.373 of the Statute for the purposes of the Statute the P.A.Y.E. tax is deemed to be income tax with all the consequences which flow from that situation.

While it is true that under the Statute deductions of P.A.Y.E. tax are provided by S.365 to be held on trust for the Crown, that does not provide the machinery for the recovery of that tax by the Crown if it is not in fact paid to it. Indeed, in Part XI there is no machinery for the recovery of the P.A.Y.E. tax and one must then go to Part XIII which deals with the payment and recovery of tax. S.399 in that part of the Statute states that all unpaid tax shall be recoverable by the Commissioner on behalf of the Crown by suit in his official name. The word "tax" is not defined in S.399 but in S.2 of the Statute it is defined as "income tax".

A similar situation arises with other types of tax under this Statute; to name but one I refer to withdrawal tax which appears in Part X and in relation to that tax S.336 provides that the other parts of the Statute so far as they are applicable and with any necessary modifications should apply to withdrawal tax as if it were income tax levied under S.38 of the Statute.

There are other examples which can be pointed to in support of the conclusion that P.A.Y.E. tax for all recovery purposes is to be treated as though it were income tax and when one applies that consideration to the provisions of S.276 of the Statute then if the necessary evidence is present it would enable a Court to hold that a "new company" could be liable for the P.A.Y.E. tax due by the "original company". Thus, in the instant case, subject to the necessary evidence being available, the Respondent could be made liable for the P.A.Y.E. tax due by Waikino Clothing Manufacturing Company.

Before concluding this judgment I simply comment that on the face of the documents which were before this Court, namely

the exhibits relating to the incorporation and particulars of shareholders etc. in relation to the two companies in question, it appears that there may well be good ground for holding that the present Respondent can be regarded as a "new company" by reason of the provisions of S.7 of the Statute. S.7 provides that a company shall be deemed to be under the control of the persons by whom more than 50% of the shares or more than 50% of the nominated capital or more than 50% of the paid up capital or more than 50% of the voting power is held. Thus Mr Peter William Maxwell appears to fall within that definition in respect of both companies. Under s-s.(4) of S.7 two companies are deemed to consist substantially of the same shareholders if not less than 50% of the paid up capital of each of them is held by the shareholders in the other or if not less than 50% in nominal value of the allotted shares in each of them is held by shareholders in the other. Once again Mr Maxwell appears to fall within that particular provision of the Statute.

However, as this Court was not aware of the evidence which was called in the District Court, and as neither counsel appearing on the appeal had been counsel in the District Court, it was deemed wise to approach the solution to this problem on a cautious note in case there was any evidence present which could result in a conclusion being arrived at somewhat different from that which appeared to exist on the face of the documents which were on the file and it was therefore requested that the matter be remitted back to the District Court for a re-hearing.

Accordingly, having come to the conclusion which I have I consider that the earlier judgment of the District Court

was, for the reasons I have given, erroneous. Accordingly the matter is remitted back to the District Court at Waihi for re-hearing.

The Respondent sought costs in respect of this appeal on the basis that it was not its fault that the evidence was no longer available from the District Court. That situation applies equally to the Appellant and in all the circumstances I am of the view that there should be no order as to costs.

D. D. King

SOLICITORS:

Crown Solicitor, Hamilton for Appellant

W. G. Broadbent & Co., Paeroa for Respondent