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IN THE MATTER of a determination of
the District Court at
Hamilton

BETWEEN THE COMMISSIONER OF
INLAND REVENUE

APPELLANT

AND JOY WRIGHT LIMITED

RESPONDENT

Hearing: 11th April, 1984

Counsel: C.Q.M.Almao for Appellant
Milne for Respondent

Judgment: 13 April, 1984

JUDGMENT OF GALLEN, J.

The respondent was charged that on the 21st August, 1981 and on the 21st October, 1981, it knowingly applied an amount of tax deductions made by it from the wages of its employees during the months of July 1981 and September 1981 respectively for a purpose other than the payment thereof to the Commissioner of Inland Revenue, being offences against s.368 of the Income Tax Act 1976. The respondent pleaded not guilty. The learned District Court Judge stated that it was proved upon the hearing that --

(a) P.A.Y.E. deductions were made in the months of July and September 1981 from the wages paid to the persons employed by the company during those months.

(b) Payment of those P.A.Y.E. deductions was not made to the Commissioner of Inland Revenue by the dates on which they were due and were therefore deemed to have been applied for a purpose other than payment to the Commissioner.

(c) Mrs. Joy Wright was the responsible officer of the company, and was the person who carried out all the business activities of the company including the payment of wages and P.A.Y.E. tax.

(d) The P.A.Y.E. deductions in respect of each of the months of July and September 1981 and due to be paid to the Commissioner by the 20th of August and October 1981 respectively were paid in November 1981.

(e) About the end of August 1981 Mrs. Wright was in a depressed state as a result of family circumstances and business and financial pressures.

(f) That this condition had been developing over a period of time and continued until towards the end of December 1981

(g) During the period from August to December 1981 Mrs. Wright attended at work and was able to achieve a certain amount of her activities but financial records, in particular the wages book, became less and less complete in detail.

On all those facts the learned District Court Judge held that he

"was satisfied on balance that Mrs. Wright by reason of her depression was unable to integrate her activities sufficiently to carry out that part of her business responsibilities which related to the accounting to the Commissioner of Inland Revenue for P.A.Y.E. deductions. Mrs. Wright was the principal officer of the company and the failure of the company to account was due to her illness. That illness was sufficient to establish a defence in terms of the proviso to Section 368 (3) of the Income Tax Act 1976 which provides that no person shall be convicted of an offence of failing to

account for P.A.Y.E. deductions if he satisfies the Court that the amount of the tax deduction has been accounted for and that his failure to account for it within the prescribed time was due to illness, accident, or other cause beyond his control."

He therefore dismissed the informations.

The appellant now appeals by way of case stated and the opinion of the Court is sought on the following questions:-

1. Whether depression such as that suffered by Mrs. Wright was "illness" in terms of the proviso to Section 368 (3) Income Tax Act 1976.
2. Whether depression such as that suffered by Mrs. Wright was "other cause beyond her control" in terms of the proviso to Section 368 (3) Income Tax Act 1976.
3. Whether a defence under Section 368 (3) Income Tax Act 1976 is available to a company where it is established that the principal officer has failed to account within the prescribed time due to illness or other cause beyond that person's control.

There is very little authority on the interpretation of the section concerned. In Commissioner of Inland Revenue v. J.F.McCormick Ltd. (1964) N.Z.L.R.56, Macarthur, J. held that the words "illness, accident or other cause beyond his control" appearing in the equivalent section of the Act then in force were not to be construed ejusdem generis and that therefore the words "beyond his control" were not

to be interpreted in some way as pertaining to illness or accident. He did, however, hold that that particular defence was only available when it was proved that a situation existed where there was some cause beyond the defendant's control which prevented him from paying to the Commissioner moneys already held by him and impressed with a trust in favour of the Crown. In that case the funds were not held since the respondent had been unable to pay because his own debtors had been slow in meeting their responsibilities.

Mr. Almaso submitted that for the proviso to operate as a defence it would be necessary to show circumstances existed which physically prevented the respondent from making payments. He suggested as an example the situation where a respondent was hospitalized. He also accepted that a person who suffered from disease of the mind to such an extent as to be incapable of acting would be entitled to rely upon the defence.

Mr. Milne submitted that the emphasis put on physical ability by Mr. Almaso was not in accordance with the wording of the section. Although the word "prevent" was used in the McCormick case, it is not in fact used in the section itself which simply refers to the failure to account being due to illness, accident or other cause beyond the control of the respondent.

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In essence, I consider the situation will always be a matter of degree and will depend upon a factual finding that circumstances existed whereby there was a direct causal connection between the circumstances put forward as a defence and the failure to pay. Mr. Milne conceded that a very minor physical disability such as a cut finger would not suffice. Mr. Almao conceded certain extreme situations which clearly would.

In this case the learned District Court Judge clearly found as a fact that the depressive illness of the principal officer of the respondent resulted in her being unable to integrate her activities sufficiently to carry out that part of her business responsibility which related to the accounting to the Commissioner of Inland Revenue for P.A.Y.E. deductions. This is a finding of fact made after hearing the evidence. Clearly he accepted that the degree of disability was sufficient to bring the respondent within the provisions of the proviso to the section. I consider he was entitled so to find. In those circumstances, I answer the first question "Yes

In those circumstances it is unnecessary to answer question 2 and I do not do so.

Mr. Almao fairly conceded that, if a defence was ever to be open to a corporate body under the provisions of the section, question 3 would have to be answered "Yes" and I answer the question accordingly.

The respondent is entitled to costs which I fix at \$250.

R. G. Allan J.

Solicitors: Crown Solicitor, Hamilton, for Appellant
Tompkins, Wake & Co., Hamilton, for Respondent