IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.292/84

BETWEEN DRISCOLL

Appellant

A N D THE COMMISSIONER OF INLAND REVENUE

Respondent

Hearing: 5 November 1984

Counsel: S.P. Williams for Appellant
R.G. Douch for Respondent

Judgment: 28-11-84

JUDGMENT OF GALLEN J.

The appellant Terence Robert Driscoll, appeals against conviction in respect of a charge laid under the provisions of s.368 (1) (b) of the Income Tax Act 1976. That section is in the following terms:-

> "Knowingly applies or permits to be applied the amount of any tax deduction or any part thereof for any purpose other than the payment of the tax deduction to the Commissioner; or....."

The background is unusual. The appellant is a director of a company known as Design Manufacturing and

Service Engineers Limited. Obviously it was a company which had a substantial payroll and at some earlier stage, its method of accounting for PAYE deductions was to make payment by way of cash on a weekly basis. For various reasons, it was decided to change the system and the company commenced making payment by establishing a special account with its bankers to which the deductions were paid, a cheque on this account being forwarded to the Department of Inland Revenue by the 20th of the month following the making of the deductions.

The learned District Court Judge in a reserved decision, made a number of findings of fact. The points on appeal take issue with some aspects of these findings, but there appears to be little doubt as to the principal facts upon which he based his decision. By December 1981, the company's financial position had resulted in a very substantial overdraft with its bankers. A letter was sent to the company by its bankers, this letter being dated 23 December 1981. Effectively the letter indicated that the company's ovderdraft accommodation was limited to $150,000. The Managing Director was advised that the control of the issue of cheques was solely in the hands of management and it was the responsibility of the management of the company to ensure cheques were not issued unless the overdraft limit was not exceeded. Reference was made in the letter to holiday pay and the company was advised the position was to be regularised by 20 January 1982.

This letter was not received by the appellant until his return from holiday in mid-January 1982. At that time, the overdraft exceeded the limit referred to in the letter by a very considerable margin. The learned District Court Judge indicated also that it was known to the company officers in January that the cheques for PAYE deductions for November had been dishonoured. The findings of fact are therefore clear, that in January the company and its management were aware that the bank would not meet cheques above the overdraft limit and that one cheque at least for PAYE deductions, had been dishonoured.

On 23 February, an inspector from the Department of Inland Revenue investigated the position and as a result of his discussions with the appellant, the company returned to the earlier procedure whereby deductions from wages were paid immediately to the Department. From some stage later in February therefore, payments were made in accordance with the obligations of the company. Unfortunately, for the earlier part of February, payments had not been made. According to the system which the company had been operating, the February deductions should have been paid to the Department by 20 March. Apart from those cash payments made after the adoption of the new system, the remaining amounts owing in respect of the period were not paid.

S.368 provides that a tax deduction is deemed to have been made:-

> ".....if and when payment is made, of the net amount of any source deduction payment, and the amount of the tax deduction shall be deemed to have been applied for a purpose other than the payment thereof if the amount of the tax deduction is not duly paid to the Commissioner."

Once the cheque for the net wages had been drawn therefore, the company was required to make payment of the deductions and it did not do so. The appellant relies upon the proviso to subs.(3) of s.368 which is in the following terms:

> "Provided that no person shall be convicted of an offence under subsection (1) (b) of this section 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."

Clearly in this case, the failure to account was not due to illness or accident. The appellant says that it was caused by another cause beyond his control in that the bank dishonoured the company's cheques and would not advance sufficient funds to ensure that the obligations were met. I cannot accept that having regard to the circumstances of this case, such a situation could properly be regarded as coming within the proviso. The

company by paying out only the net wages, has had the benefit of the deductions, if only to the extent that they reduced the amount which would otherwise have been owing on overdraft.

It was alleged that the company and its management did not knowingly apply the deductions for a purpose other than payment of the tax. The basis for this submission depends upon a contention that the company was not aware of the bank's refusal to advance the necessary funds at the appropriate times and that the appellant as representing the company's management, could reasonably have assumed that the bank would continue to accept the arrangement which had previously been made. While there may be some strength in this contention as far as earlier months are concerned, it cannot have any validity for the February payment. This was not due even under the replaced system before 20 March and the learned District Court Judge has found as a fact that the company management and therefore the appellant, was aware by mid-January of the bank's refusal to meet further payments and also specifically, that an earlier cheque for payment of deductions had been dishonoured. The management should therefore have been aware that in those circumstances the February payments would not be met and the defence contemplated by the proviso is not therefore made out.

The appellant was charged as a person responsible and as I understand the contentions of the appellant, no issue is taken with this rather unusual course. I conclude therefore that the appeal against conviction must be dismissed.

The appellant also appeals against sentence. It is submitted that this would have been an appropriate case for a discharge under the provisions of s.42 of the Criminal Justice Act. I accept that this is an unusual situation. The appellant did make arrangements for future payments when the Department of Inland Revenue required him to do so, but this does not account for the intervening period when, according to the findings of the learned District Court Judge, the management of the company must have been aware that dedutions were not being accounted for although they were being made. It is submitted that the effect on the appellant personally of a conviction will be severe and that this is not just, bearing in mind that he had been selected for prosecution rather than the company, or either of the other directors.

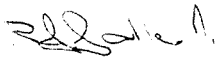
While not unsympathetic to this contention, a failure to account for PAYE deductions has always been regarded as serious. It exposes the employees to the possibility of a claim and effectively allows the company the use of its employees' money. The amount involved was

substantial. Consideration has previously been given by the Court to the appropriateness of penalties in cases of this kind. My attention was drawn to the unreported judgment of Davison C.J. in the case of Setter v. Furnishing Affair Limited and Setter v. Nichols (Wellington Registry M.425/82, M.428/82) judgment delivered 10 November 1982. In that case, prosecutions were brought because the comparatively small deductions made were accounted for at the end of the year instead of on a monthly basis. This had been accepted by the Department over a period of 2 years and the practise adopted, although wrong, had clearly resulted from ignorance. In the District Court, the learned District Court Judge had expressed the view that the prosecutions were in the circumstances possibly oppressive and had imposed the payment of costs only. The learned Chief Justice stressed the seriousness of the offences as indicated by the provisions of the Act and stated that in his opinion, even taking into account the mitigating facts, a penalty needed to be imposed and he in fact imposed a penalty of $10 on each of the charges.

In Woodley v. Rod Elmiger Limited (Gisborne Registry, unreported judgment of Wallace J., judgment delivered 17 February 1983), the respondent was convicted and discharged. The Crown appealed and Wallace J., following the decision already referred to, quashed the sentences imposed and in substitution imposed a fine of $25 in respect of each charge.

Following the comments expressed in those decisions, I could not find that the penalty imposed was unreasonably severe or inappropriate. I was informed that the appellant might be liable for the payment of penal tax under the separate provisions of the Act, but this is not a factor which can properly be taken into account when assessing penalty on a prosecution.

Having regard to the circumstances therefore, the appeal is dismissed.



Solicitors for Appellant: S.P.Williams Esq., Hamilton

Solicitors for Respondent: Crown Solicitor, Hamilton