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IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

Ap.18/86

**NOT
RECOMMENDED**

1688

BETWEEN GRAHAM ENNIS

Appellant

AND

DEPARTMENT OF INLAND REVENUE

Respondent

Hearing: 5 November 1986

Counsel: J E Macdonald for the Appellant
T C Brewer for the Respondent

ORAL JUDGMENT OF BISSON J

After a defended hearing in the District Court at New Plymouth on 12 June 1986 the learned District Court Judge on 4 July 1986 convicted Graham Ennis in respect of six charges laid by the Commissioner of Inland Revenue under s.416(1)(b) of the Income Tax Act 1976 alleging that he had wilfully made false returns of income derived in the six years commencing with the year ended 31 March 1977. Mr Ennis has appealed from those convictions and it is necessary in considering this appeal to refer briefly to some of the facts.

The appellant carried on a retail business in a shop in Stratford involving the sale of a variety of goods

such as tobacco and cigarettes, toys, magazines, stationery and china so that it was stock of a mixed nature. In the course of a tax investigation an assets accretion test was carried out and this revealed discrepancies which according to the judgment of the learned District Court Judge revealed a total income not returned over the period in question of \$20,301.53. Prior to the assets accretion test being conducted and in the course of the investigations into his returns of income the appellant had claimed to have a sum of cash available to him, the monies being received from his late parents. These monies were referred to as a cash hoard. Quoting from the judgment:

"He claimed that when his parents died substantial amounts of cash were left to him. He was very reluctant to estimate the total amount but gave Mr Duke a figure of between \$6,000 and \$8,000."

On 28 September 1981 the appellant called to see Mr Duke who was the tax inspector at his office and said that when his father died the appellant found \$5,000 in the safe at the shop, \$2,300 had come from his mother and \$2,700 from his father. When it was pointed out to him he had earlier given a different figure he said he was sure the amount of the hoard was not more than \$5,000 and that he had only \$300 left and that all the money had been used for his private purposes. He was asked to put this explanation in writing. He agreed to do so but failed to.

The investigation was later taken over by another inspector, Mr Smith, and at his first interview with the

appellant on 9 March 1983 the cash hoard was discussed. He asked Mr Ennis how much was in the hoard and he was told that Mr Ennis had received \$20,000 in an office safe on his father's death. Mr Smith asked whether the amount could have varied by \$5,000 either way but the appellant was emphatic a figure of \$20,000 was about right. According to Mr Smith he said he had only \$900 left from that hoard. Mr Smith naturally wished to enquire further into the matter and on 9 May 1983 interviewed the appellant and was shown the remains of the cash hoard which amounted to \$700 in ten dollar notes. He inspected the safe in which the money had been held and found there other monies close to \$1,000 which the respondent accepted as belonging to another member of the family and having no relevance to the investigation.

Another matter considered by the inspectors was the profit margins appearing from the annual accounts for the business of the appellant. Mr Duke found on analysis of the accounts that there was a fluctuation in the profit margins and he produced a schedule in which it gave figures showing a decline in the percentage markup from 1977 through to 1982 except for one year, 1980, when there was a marked increase. It was submitted both by Mr Duke and by Mr Smith on behalf of the respondent that these fluctuations would indicate that there had been suppressed sales. There was also some evidence that some interest received by the appellant had not been included in his returns of income so that the learned District Court Judge summarised the discrepancies

revealed by the assets accretion test as arising, according to the prosecution, from three reasons. Firstly, the non-return of interest. Secondly, the use of the cash hoard and thirdly suppression of sales. So far as the interest was concerned these amounts were not large and could have arisen from mistake and accordingly the learned District Court Judge did not take them into account in considering the charges as laid of wilfully making false returns.

In support of the theory that there was a cash hoard the appellant in the District Court pointed to the fact that the amount of the overall discrepancy was roughly equivalent to the top figure which he had put on the cash hoard. On the other hand, the respondent could rely on the fluctuating percentage markup figures as supporting suppressed sales and as an alternative counsel for the appellant submitted that the appellant could have been resorting to both methods to provide him with funds. Notwithstanding the varying amounts which had been given by the appellant and notwithstanding the various reasons or sources for this fund existing the learned District Court Judge does appear to have accepted as a fact that there was a cash hoard because he said when referring to the appellant being secretive about the fund existing possibly due to some misguided sense of loyalty and to preserve his father's memory:

"...suspicion as to how his father accumulated the large cash sum found in the safe after his death is bound to be accompanied by speculation as to the source of those

funds. In view of the Defendant's evidence the most logical and obvious explanation is the business formerly carried on by the Defendant's father. That, it appears was the most available immediate source for the cash hoard that was found and the fact that it was cash, would lead to the suspicion that cash sales had been suppressed and instead of being banked and returned in the usual way, had wound up in the secret safe."

That passage of the judgment does seem to refer quite definitely to a large cash sum being found in the secret safe after the appellant's father's death, notwithstanding that the learned District Court Judge considered the appellant as a witness cut a very poor figure when giving evidence and he found it impossible to accept much of his testimony.

The learned District Court Judge said:

"It was his (the appellant's) decision to give Mr Greensill (his accountant) the figure he did and from which the returns were prepared. He deliberately omitted to make any reference to the cash hoard which he had received from his father prior to his father's death. Whatever the amount of the cash hoard he used it for his own use and for the purposes of his business and as a result, returns were prepared which were plainly false. The returns always disclosed a lesser income than in fact the Defendant was enjoying and of course, with a lesser income returned the amount of tax he was required to pay was much less than was really appropriate having regard to his true position."

In an earlier passage of the judgment when the learned District Court Judge was again referring to the cash hoard he said:

"If there was a hoard then quite clearly the Defendant used it and when he used it, he did not disclose its existence or his use of that hoard to his accountant or anyone else. He deliberately misled his accountant as a result and his real income, as the assets accretion test demonstrates, was considerably greater than was the income returned to the department."

Mr Macdonald for the appellant has submitted that the learned District Court Judge erred in treating as income

monies taken by the appellant from the cash hoard and that as the learned District Court Judge had accepted the existence of a cash hoard and as it was common ground that the cash hoard was one of two factors, the other being suppressed sales, which could explain the difference between income assessed on an assets accretion test and income returned, the respondent had failed to negate an explanation given by the appellant which was consistent with his innocence and therefore had failed to discharge its onus of proof.

Mr Brewer for the respondent on the hearing of this appeal accepted very properly that there did appear to have been a cash hoard in existence and held by the appellant and that the learned District Court Judge had treated these monies as income in the hands of the appellant and to that extent he was bound to accept that the learned District Court Judge had misdirected himself in law.

In the two particular passages which I have quoted from the judgment in which the learned District Court Judge referred to the returns of income being deliberately false because they omitted any reference to monies used from the cash hoard I have no doubt that the learned District Court Judge was mistaken in his approach to this aspect of the case and erred in law. The learned District Court Judge treated the respondent's resort to a cash fund not derived by the appellant from his business but from his late father as if

such monies when used were income of the business, which monies should have been referred to by the appellant to his accountant and included in the income returns in respect of the appellant. That is clearly not the case. Monies inherited or acquired in this way were a capital asset which he gradually dissipated over the years. Unfortunately there was no finding by the learned District Court Judge as to the amount of the cash hoard which he felt had been established on the evidence nor was there any finding as to the suppressed sales in any year based on the fluctuation in the percentage markups. What the learned District Court Judge said in the end was and I quote:

"On the crucial point, I am satisfied that the returns were prepared from information deliberately supplied by the Defendant and that information deliberately omitted reference to other sources of funds which the Defendant was clearly using."

Mr Brewer submitted that notwithstanding the misdirection in law the learned District Court Judge was entitled to convict on the evidence as a whole. This Court is not in a position to determine when the learned District Court Judge referred to "other sources of funds", how much if any came from suppression of sales or whether the other sources of funds referred to related entirely to the cash hoard which may have been derived from other sources, that is from the appellant's late father or his late mother. If the learned District Court Judge had taken the view that he did not need to distinguish between the cash hoard on the one hand and

suppressed sales on the other, he was again wrong in law because while the former source of funds was not income the latter was. It is therefore necessary for findings to be made in those respects if possible on the evidence and if in the end the learned District Court Judge finds some difficulty in that regard he may take the view that the cash fund was sufficient to account for the deficiencies shown up in the assets accretion test or to such an extent that any amount by way of suppressed sales was as in the case of the interest omitted, small and either due to mistake or not proved beyond a reasonable doubt.

Accordingly the conviction and sentence in each case is quashed and the informations are remitted to the District Court for rehearing in the light of the judgment of this Court.

G. E. B. [Signature]

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