IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

NOT RECOMMENDED

AP.199/97

BETWEEN **ABLE PLANNING LIMITED**

Appellant

AND **COMMISSIONER OF INLAND REVENUE**

Respondent

Hearing: 10 October 1997

Counsel: *D V Weatherell,* Director of and for Appellant
C K Wood for Respondent

ORAL JUDGMENT OF GILES J

Solicitors:
D V Weatherell, 7 Premier Avenue, Pt Chevalier, Auckland, for Appellant
Meredith Connell, DX CP24063, Auckland, for Respondent

This is an appeal against sentence in relation to three charges which the appellant company faced relating to failure to file GST and income tax returns for the years ended 31 March 1994, 1995 and 1996. In each case the GST returns should have been filed by 7 July in the particular year. The returns of income should have been filed on various dates set out in the informations.

In the District Court the appellant company entered a plea of guilty through its director, Mr Weatherell, who explained the circumstances to the Presiding Judge. In all, fines totalling $500 with costs of $95 on each of the three informations were imposed. Maximum penalties, especially in relation to the GST offences, accumulate at $500 for each month of default. Bearing in mind that there were defaults for three, two and one year respectively, the maximum penalty amounted to $36,000. In relation to the failure to file income tax returns the maximum penalty available to the Learned District Court Judge was $2,000.

Notwithstanding the decision **In re G J Mannix** [1984] 1 NZLR 309 (CA) which indicates that a company cannot appear by a director - a decision I confess I have much difficulty with in the light of the New Zealand Bill of Rights Act 1990 - and general principles as to directors being alter egos of a company, I granted Mr Weatherell leave to appear for the appellant.

Before me, Mr Weatherell expressed the following concerns in relation to the offences:

(1) He submitted that he had been led to believe, as a result of discussions with officers of the Department in March, April and June 1997 (the latter being after he had received a summons in relation to these offences) that if he provided the returns the prosecution would not proceed.

disruption and emotional anxiety that always accompanies a marriage break up is a factor, it does not offer any real excuse in relation to the very aged default.

Insofar as the assurances that Mr Weatherell felt he had received, that filing the returns would result in the prosecution proceeding no further, I cannot help but observe that the first such assurance, assuming that such assurances were given (and there is no evidence on this because the issue was not tested in the lower Court), occurred in March and April 1997. Yet the returns were not made available until 29 August 1997, and then only in respect of two of the four years at that time in default. But more importantly, on or about 22 August 1997, the appellant's accountants, Strong & Co, conferred with IRD and were told, in no uncertain terms, that the proceedings would not be withdrawn and the prosecution would proceed. Mr Weatherell quite frankly acknowledged to me that he was aware of that. At various points in his submissions he expressed a concern that the Department "had it in for him", but I am satisfied that the Department was simply carrying out its statutory obligations in relation to these defaults and that the solicitor appearing had an obligation to fully inform the District Court Judge of the maximum penalties available - something to which Mr Weatherell took umbrage.

It is abundantly clear that the District Court Judge extended a great deal of both sympathy and leniency to the company, because fines of $100 to $250, in the context of maximum penalties available amounting to $38,000, cannot, by any stretch of the English language or my imagination, equate to a manifestly excessive penalty. I have explained to Mr Weatherell that my jurisdiction on appeal entitles me to intervene only if an injustice has been done by the imposition of a manifestly excessive sentence. I cannot reach that conclusion here. These fines were modest in the extreme. I can assure Mr Weatherell that I am quite satisfied that the submissions that he must have made to the Learned District Court Judge, no doubt as competently as

he has made them before me today, were obviously taken into account by the Judge in the Court below because, but for their acceptance, these fines would have to be regarded as manifestly inadequate, not manifestly excessive.

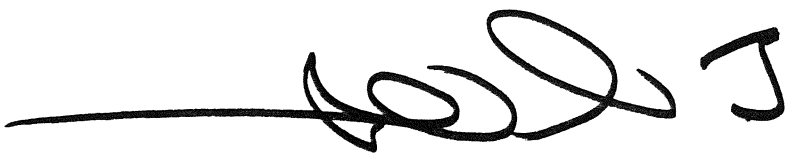
I would urge the company, and the directors, to embrace the philosophy "once bitten twice shy" and from here on out to file the returns quite religiously in terms of the time-scales required by law.

I accordingly dismiss the appeal.

Mr Wood was fully entitled to costs but, in his usual pragmatic and sensible way, having regard to the submissions made by Mr Weatherell, he indicated that he would not press that point too far. I trust the appellant understands that that is a further indication of a sympathetic approach from the Department and its counsel and should give him some reassurance that the Department is simply doing its job and does not have any on-going antagonism towards him.

I record that at the outset of the hearing Mr Weatherell sought leave to appeal against conviction. In the light of the guilty plea I declined to grant that leave. I am quite satisfied that I have done the company a favour in so declining because these are strict liability offences and the plea of guilty which was entered on 29 August 1997 was entirely responsible and appropriate.

Orders accordingly.



B H GILES J