IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR NO's 495-502/16
503-504/16
507-512/16

COLLECTOR OF REVENUE

v

TAV LIMITED
and
ELLENA TAVIONI

Date: 15 March 2017

Counsel: Mr A Mills for the Collector
Mr D McNair for the Defendant

SENTENCING NOTES OF HUGH WILLIAMS, CJ

[11:31:12]

[1] This is a sentencing in relation to a number of charges brought by the Collector of Revenue, first against Tav Limited ("Tav") and secondly against Ms Tavioni, the sole director of the company for aiding and abetting.

[2] The eight charges against Tav are that the company knowingly applied or permitted PAYE deductions to be made for purposes other than payment to the Collector of Revenue. The charges are 495/16 for one month in 2006; 496/16 for 8 months in 2007; 497/16 for 9 months in 2008; 498/16 for 10 months in 2009; 499/16 for 3 months in 2010; 500/16 for 8 months in 2011; 501/16 for 6 months in 2012; and finally 502/16 for 4 months in 2015. They total 48 monthly defaults over the period from 2006 to 2015.

[3] The maximum penalty on those charges is 12 months in jail – which is obviously inappropriate – or a $10,000 fine or both.

[4] Of those eight charges, seven are representative covering a number of months in the particular year.

[5] The informations against Ms Tavioni personally are for aiding and abetting Tav in applying or permitting PAYE deductions to be used other than for payment to the Collector. Initially, Ms Tavioni entered pleas of not guilty to those charges, by contrast with the company which pleaded guilty on 21 July 2016. However, on 10 March, at what was intended to be the commencement of the trial against Ms Tavioni, she vacated her plea and entered pleas of guilty.

[6] The maximum penalty on the charges against her are a fine ranging between $500 as a minimum and $10,000. The charges, 503/16 to 512/16, mirror the charges against the company with the one exception, that in 504/16 the charges relate only to 7 months in 2007, by contrast with the 8 months default on the part of the company in 496/16.

[7] At the commencement of the sentencing Ms Mills for the Crown applied to amend 504/16 to include the eighth month, November 2007. Objection was raised and upheld, so there is a dissonance between that pair of charges.

[8] The facts are that the company was incorporated on 7 August 1987 by Ms Tavioni who was then only about 19 years of age. Since that time it has operated as a clothing manufacturer with a number of outlets, including stores and business overseas.

[9] The company was audited on 20 April 2015 and it was discovered that gross wages during the occasions mentioned in the Informations of $933,101.71 had been paid from which PAYE deductions of $64,406.06 had been made. There had been no payment of any part of that sum to the Collector at that stage.

[10] Ms Tavioni was interviewed on at least two occasions relevant to these matters. She accepted that it was she who signed the wage cheques and the PAYE returns and accepted that the company had failed in its legal obligation to pay its employees' PAYE deductions to the Collector saying that they had been used for net wages and for payment to creditors.

[11] In June 2016 she herself paid $4,481.76 towards the unpaid PAYE deductions thus reducing the core debt to $59,924.30.

[12] Mr Forbes, a senior auditor for the Collector, in accordance with Justice Grice's direction, provided affidavits setting out, to the extent he was able to ascertain it, the financial position of the company.

[13] It is unnecessary to record all the detail but Mr Forbes' affidavit shows that Tav owes tax of something over half a million dollars. It is paying $500 per fortnight towards that debt but the payments are insufficient to reduce the core amount.

[14] Mr Forbes says that PAYE was paid late on three occasions in 2016 and there was a non-payment in March and the PAYE debt, including the penalties and extra tax, now amounts to $168,055.47. There is also turnover tax owing of nearly $20,000 for the period up to 2007 when that form of taxation was in force in the Cook Islands. There is VAT owing of something over a quarter of a million dollars. Since that time the company itself owes tax of, apparently, $67,563.55. Mr Forbes' opinion is that the company is probably trading while insolvent and that it is likely that the Collector will again issue a notice against the company under s 218 of the Companies Act 1955 and follow that a winding-up petition.

[15] Mr Forbes has done the best he can with the information available to him to set out the company's position but Ms Tavioni and the company have failed to comply with Justice Grice's direction, at the end of last year, that they provide details of the company's and her personal financial position. So that creates a difficulty in knowing what the financial position of the company and Ms Tavioni might be, a difficulty compounded by the fact that neither has provided personal tax returns since 2010.

[16] Mr Forbes also provided information of the efforts that the Collector has made over the period since about the year 2000 to ensure that Tav fully complied with its taxation obligations. Those efforts have included a number of interviews with Ms Tavioni, a previous issue of a s 218 Notice, civil proceedings which resulted in settlement and a compromise agreement to meet the arrears – an agreement which was not honoured – and other efforts on the part of the Collector to ensure that the company met its statutory obligations.

[17] For the Crown, Ms Mills makes the point that this is offending over a 10 year period which must be accepted as being intentional as shown by the plea of guilty to a charge of knowingly diverting the PAYE deductions. It is also repetitive offending which has resulted

in, what, in the Cook Islands, must be regarded as a large of sum of money not being paid. That, she submits, not only impacts on the Government's ability to provide the goods and services it provides and implement its programme, but it also jeopardises the position of each one of the company's employees – up to 26 at one stage – in that their taxation position is imperilled and could have been challenged by the Collector on the basis that they had not paid their tax.

[18] Naturally Ms Mills refers to an earlier decision of this Court, *Collector of Revenue v Coral Investments (2001) Limited & Others*[1] which has some factual similarities with the present cases, although those currently under consideration are more serious than the circumstances of the earlier matter.

[19] Ms Mills relies on New Zealand authority *James*[2] and *Easton*[3] to suggest that, in that country, at least imprisonment would be regarded as a starting point for the imposition of penalties on matters such as these. The New Zealand authority is of some interest but these and the *Coral Investments* matter are the first time it seems when informations have been issued for these offences in the Cook islands and accordingly there is a precedent value in *Coral Investments* and in this case, but less relevance should be accorded to the New Zealand position, at least at this stage of the jurisprudence.

[20] Mr McNair for both defendants draws attention to the history of the matter. He noted that Ms Tavioni entered into business at a very young age and has been successful over the years despite the fact that she has no particular business training. He submitted that Ms Tavioni's objective throughout the circumstances relevant to these charges has been to keep her employees on and to ensure that the 20-odd staff – 26 at some stages – remained in employment.

[21] Mr McNair makes the point that payments for goods shipped overseas by Tav on occasions have been spasmodic or did not arrive and the cash flow for the business fluctuates – all circumstances which one would accept as being part of the day to day vacillations of

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[1] Collector of Revenue v Coral Investments (2001) Limited & Others [CRs 390-394/16, 400-404/16, 395-399/16, 405-409/16], 13 March 2017, Hugh Williams CJ

[2] James v R [2010] NZCA 206, 13 May 2010

[3] R v Easton [2013] NZCA 677, 19 December 2013

business. Mr McNair makes the point that there is now a person full time employed by the company to deal with its accounts and financial matters. He submits that the fines that should be imposed in this case should recognise the restricted economy of the Cook Islands, the need to maintain employment and the desirability of the fines not being such as would force Tav out of business.

[22] Mr McNair submitted that only a minimum fine should be imposed.

[23] Mr McNair also suggested that there are no aggravating features in this matter bar the length and time over which the defaults have been occurring. He put forward the suggestion that Ms Tavioni was unaware of the details of the company's obligations despite the numerous interviews and enforcement actions taken by the Collector over the years and the discussions and agreements which have been reached between the parties. However it takes no deep knowledge of tax to recognise that there is a fundamental difference between tax obligations arising from a company's trading and turnover by contrast with an obligation simply to deduct tax from employees' salaries and pass it on to the Government.

[24] Mr McNair also submitted that Ms Tavioni was unaware of the consequences of being late or not paying PAYE and that she was never told that the various tax obligations of the company and herself were not grouped. That contrasts somewhat with the comment just made about the fundamental difference in the nature of the various tax obligations.

[25] Mr McNair also submitted that a mitigating feature in this case should be inaction by the Collector over the years. The response to that must be that, although this is the first time informations have been issued for failing to pay over PAYE, there have been numerous enforcement actions and numerous discussions by the Collector from which Ms Tavioni and the company could never have inferred that in some way their statutory tax obligations were not going to be enforced. Indeed it would be beyond the power of the Collector not to enforce at least the core obligations.

[26] When one comes to assess the appropriate amount of the fines to be imposed in these circumstances, there are a number of aggravating features. First, of course, is the number of offences and the fact that all bar the 2006 offences are brought representatively.

[27] There are 48 different months over the period of about 10 years when, PAYE has not been paid over, as a consequence of the deliberate decision to use the employees' money for other purposes. Also an aggravating feature is that there have been a significant number of efforts over the years by the Collector to ensure the company complied with its taxation obligations.

[28] Another feature that needs to be weighed is that, as with the *Coral Investments* matter, in a sense, the prosecution of Ms Tavioni is back to front in that she is charged with aiding and abetting the company to commit the offences. That normally results in secondary liability in criminal law, but here, where she is the sole director – the person who ran the company, organised its financial affairs, signed the PAYE returns and dealt with the wages – she effectively becomes the principal offender and the company's liability diminishes.

[29] Turning to the mitigating factors, there are the pleas – very early in the case of the company but very late in Ms Tavioni's case. In her situation little discount can be given for the fact of her pleas.

[30] There is the desirability of not imposing fines at a level which is likely to jeopardise the future of the business but, as already mentioned, it is difficult to make any assessment in that regard, given the dearth of financial information concerning the company or Ms Tavioni and the fact that there have been no tax returns filed for a number of years. The implication may be that the company and Ms Tavioni are capable of meeting whatever fines are imposed although not too much reliance could be placed on such an implication.

[31] A further factor is that the imposition of fines today would by no means be the end of the matter. There are substantial sums still owing by the company for tax of various varieties and for penalties and the threat of winding-up proceedings which, if liquidation ensues, would obviously throw the employees out of work. If the business terminates, that will result more from the company's other tax indebtedness than the fines.

[32] Mr McNair noted that about three months ago the government made an announcement that it would wipe all penalties owing on taxation matters. That is not a suggestion which can be taken into account in sentencing because whether or not the proposal will be implemented

and, if so, in what form, is completely unknown. If it eventuates it may benefit the company and Ms Tavioni but that must remain to be seen.

[33] There is further consideration as whether there ought to be a differentiation in penalty between the earlier offences and the later ones but further reflection suggests there is no particular justification for that – the failure to pay over the PAYE was just as deliberate in 2006 as it was in 2015.

[34] Totality is a matter of weight in these situations, particularly given that the sums imposed must add up to a considerable total. The legislature has directed that there be a minimum fine of $500 in relation to some of the offences. That in itself is a significant sum but here it is no more than a guidance as to the quantum of fines which ought to be imposed.

[35] Ultimately, the company, over a lengthy period and on a number of occasions, was deliberately managed so that it used other persons' money for its own purposes. That justifies a significant penalty and, in light of all of that, the amounts to be imposed on the company will begin at about double the minimum fine. So on:

a) 495/16, for the single month, the fine will be $1,000;
b) 496/16, for 8 months - $8,000;
c) 497/16, for 9 months - $9,000;
d) 498/16, for 10 months - the maximum of $10,000;
e) 499/16, for 3 months - $3,000;
f) 500/16, for 8 months - $8,000;
g) 501/16, for 6 months - $6,000; and
h) 502/16, for 4 months - $4,000.

Which totals $49,000.

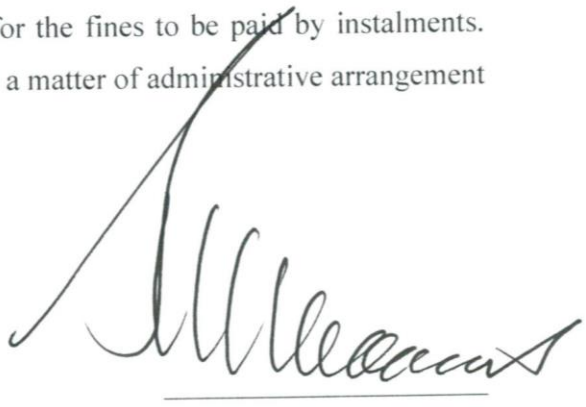
[36] As far as Ms Tavioni is concerned, given that hers was the directing mind which resulted in the company failing in its legal obligations on so many occasions over such a long period, it would be justifiable to double the fine for each monthly default. But the end result of that approach would infringe the totality principle and accordingly the decision is that she

should be fined per monthly default, with certain variations which will appear, at $1,500 per month. So on:

a) 503/16, for one default the fine will be $1,500;
b) 504/16, for 7 (not 8) defaults - $10,000;
c) 507/16, for 9 defaults - $10,000;
d) 508/16, for 8 defaults - $10,000;
e) 509/16, for 3 defaults - $4,500;
f) 510/16, for 8 defaults - $10,000;
g) 511/16, for 6 defaults - $9,000; and
h) 512/16, for 4 defaults - $6,000.

[37] If the arithmetic is correct, that makes the total fines payable by Ms Tavioni at $61,000 and the total amount payable by her and by the company at $110,000. That, of course, is a very substantial sum of money indeed particularly when set alongside the amounts still owing for tax.

[38] Mr McNair pressed for an order to be made for the fines to be paid by instalments. That, however, is beyond the Court's powers and to be a matter of administrative arrangement with the Registry whose role includes fines collection.



Hugh Williams, CJ