IN THE DISTRICT COURT
AT TAURANGA

CRI-2016-079-000404
[2018] NZDC 13244

BETWEEN	COMMISSIONER OF INLAND REVENUE Prosecutor
AND	DAVID JOHN BUISSON Defendant

Hearing: 11-13 and 16, 17 April 2018

Appearances: D Phillips for the Prosecutor
D Weaver for the Defendant

Judgment: 4 July 2018

RESERVED JUDGMENT OF JUDGE P G MABEY QC

Introduction

[1] The defendant faces three charges under s 143B(2) Tax Administration Act 1994 (TAA). That section provides:

> **143B Evasion or similar offence**
>
> …
>
> (2) A person who evades or attempts to evade the assessment or payment of tax by the person or another person under a tax law commits an offence against this Act.

[2] The charges faced by the defendant allege:

(a) CRN16079500080

From 26 April 2011 at Whangamata he evaded the assessment or payment of GST for the GST periods ended 30/09/04, 31/03/05, 30/09/05, 31/03/06, 30/09/06, 31/03/07, 30/09/07, 31/03/08, 30/09/08, 31/03/09, 31/03/11, 30/09/11, 31/03/12, 30/09/12, 31/03/13, 30/09/13, 31/03/14. [1]

(b) CRN16079500081

From 22 January 2010 at Whangamata he evaded the payment of PAYE for the PAYE periods between 01/04/08 and 31/03/09.

(c) CRN16079500082

From 7 September 2010 at Whangamata he evaded the assessment or payment of income tax for the income tax years ended 31/03/05, 31/03/06, 31/03/07, 31/03/08, 31/03/09, 31/03/10, 31/03/11, 31/03/12, 31/03/13 and 31/03/14.

[1] It will be seen from the particulars of this offence that there is no allegation for the GST periods 30/09/09, 31/03/10 and 30/09/10.

[3] All charges are brought as continuing offences. The maximum penalty for each is five years imprisonment and/or a fine of $50,000.00.

[4] The defendant was subject to two separate IRD audits. The first audit conducted by Ms Johal commenced in 2009 and ended during 2012. Her audit covered the 2005-2009 income years and six-monthly GST periods ending 31 September 2004 to 31 March 2009 inclusive.

[5] The second audit was conducted by Ms Smart who commenced her work in March 2013 and completed in August 2015. She was concerned with the 2010 – 2014 income years.

[6] During the audits and in Court the defendant said that he had received advice from persons who promoted an anti-tax philosophy with the effect that, upon their advice, he at all times held an honest belief that he had no obligation to pay tax. An issue that I will need to decide is whether the defendant in fact held such an honest belief or whether he knew full well of his obligations but chose to ignore them.

[7] At the heart of that analysis will be an assessment as to whether I consider the defendant to be an honest but gullible man or someone who has actively sought what he clearly knew was conveniently misleading and false advice that he chose to accept in the face of knowledge of his obligations.

The elements of the offence

[8] The prosecution must prove beyond reasonable doubt that the defendant:

(a) Had an obligation to pay tax.

(b) Knew of that obligation.

(c) Intentionally evaded meeting that obligation.[2]

[2] *R v G* [2013] NZCA 146.

[9] The prosecution need not prove dishonesty but more than a mere omission to pay is required.[3]

[10] In *R v G* at [21] the Court of Appeal said:

> Section 143B(2) is a catch-all provision which does not specify any particular act or omission but which makes it an offence to evade or attempt to evade the assessment or payment of tax either by the person who carries out the acts or omissions or another person. The assessment or payment of tax must be an obligation arising under tax law.

[11] At [28] the Court noted Australian Authority that: [4]

> … "evade" connoted the exercise of will in avoiding, whereas a mere failure to pay be by accident or mistake … evasion involved "something more than a mere omission or neglect to pay the duty. It involved … the intentional avoidance of payment in circumstances indicating to the party that he is or may be under some obligation to pay duty."

[12] Further at [29] referring to the words from McGregor J in *Taylor v Attorney General:*[5]

> … "evade" includes an element of intent, an intention to endeavour to avoid payment of tax known to be chargeable … differentiating evasion from a mere omission to pay.

[13] Mr Weaver raises various issues relating to the interpretation and application of specific provisions in the taxation legislation but on the issue of mens rea submits that the defendant, while wrongly advised, did not have the requisite *knowledge* of his obligations at the time and did not *intend* to evade the assessment or payment of tax. Mr Weaver says that the defendant honestly believed the advice about his tax obligations was correct.

[14] Mr Weaver also submits that the prosecution falls short on proof of the primary obligation to establish an actual tax liability for the 2005-2009 income years.

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[3] *Smith v R* [2013] NZCA 184 at [40] and [44].
[4] *Wilson v Chambers & Co Pty Limited* (1926) 38 CLR 131.
[5] *Taylor v Attorney General* [1963] NZLR 261 (SC).

[15] Having regard to the matters raised in evidence and in submissions it is appropriate for me to determine firstly, in relation to each charge, whether an obligation to pay tax existed and to then if necessary consider mens rea.

Obligation to pay – PAYE

[16] Mr Weaver submits that there was no obligation upon the defendant to pay PAYE between 1 April 2008 and 31 March 2009 and for that reason this charge (CRN16079500081) fails. He submits that there is no need for any consideration of the mens rea element of the offence.

[17] The essence of Mr Weaver's submission is that because the defendant did not deduct or withhold PAYE or pay net wages to his employees he was not liable to pay PAYE. Mr Weaver relies upon s RD4(1) of the Income Tax Act 2007 (ITA) in submitting that in the absence of an employer withholding PAYE the obligation for payment falls to the employee.

[18] Mr Phillips accepts that where a gross amount is paid to an employee, without deducting PAYE, the payment obligation falls to the employee but he says however that the defendant himself acknowledged in evidence that he did not know if he was paying gross amounts to his staff. He refers to the PAYE returns filed which appear to show the amounts paid were in fact net amounts.

[19] Mr Phillips submits that if net wages were not paid the defendant is nonetheless liable for PAYE by application of s 168 TAA.

[20] Section RD4 of the ITA provides:

> **RD 4 Payment of amounts of tax to Commissioner**
>
> Payments monthly or fortnightly
>
> (1) An employer or PAYE intermediary who withholds an amount of tax for a PAYE income payment must pay the amount to the Commissioner as follows
>
> (a) on a monthly basis, if they are an employer to whom section RD 22(3) or (4) applies:

(b) for 2 payment periods in a month, if paragraph (a) does not apply.

Liability when amount not withheld

(2) If some or all of the amount of tax for a PAYE income payment is not withheld under subsection (1), the employee in relation to whom the payment is made must—

(a) pay an amount equal to the amount of tax to the Commissioner by the 20th day of the month following that in which the PAYE income payment was made; and

(b) provide an employer monthly schedule to the Commissioner by the date described in paragraph (a).

When taxable activity ends

(3) Section RA 17 (Payment date when RWT exemption certificate expires) overrides subsection (1).

[21] Section RD21 provides:

RD 21 When amounts of tax not withheld or payment insufficient

Employees' obligations

(1) If, for any reason, some or all of the amount of tax for a PAYE income payment is not withheld at the time it is paid to an employee, the employee must—

(a) provide an employer monthly schedule with the relevant details; and

(b) pay the amount of the deficiency.

When person exempt or not liable to pay

(2) Subsection (1)(b) does not apply if the employee is exempt from paying the amount or is not liable for the amount of tax.

When payment less than amount of tax

(3) If the amount of money included in a PAYE income payment is less than the amount of tax for the payment, the employee must pay the amount of the deficiency to their employer or PAYE intermediary. If the employee does not pay the amount of the deficiency to their employer or PAYE intermediary, they must pay the amount to the Commissioner under section RD 4(2).

[22] Section 168 of the TAA provides:

168 Employer or PAYE intermediary failing to withhold or deduct tax or payments

(1) Where an employer fails to withhold or deduct an amount of tax or combined tax and earner-related payment in accordance with the employer's obligations under the PAYE rules and, where applicable, section 115 of the Accident Rehabilitation and Compensation Insurance Act 1992 or section 285 of the Accident Insurance Act 1998 or section 221 of the Accident Compensation Act 2001, the amount in respect of which default has been made shall constitute a debt payable by the employer to the Commissioner, and shall be deemed to have become due and payable to the Commissioner on the date on which under section RD 4 of the Income Tax Act 2007 the employer would have been required to pay to the Commissioner the tax or combined tax and earner-related payment.

(2) The right of the Commissioner to recover from the employer the amount in respect of which default has been made shall be in addition to any right of the Commissioner to recover that amount from the employee under the PAYE rules; and nothing in those rules shall be construed as preventing the Commissioner from taking such steps as the Commissioner thinks fit to recover that amount from the employer and from the employee concurrently, or from recovering that amount wholly from the employer or from the employee or partly from the employer and partly from the employee.

(3) Where any amount, including a penalty, recoverable in accordance with the PAYE rules from the employee is in fact paid by the employer, the amount so paid may be recovered by the employer from the employee.

(4) This section applies to a person instead of an employer if the person is acting as a PAYE intermediary for the employer in relation to an employee and a pay period, and the employer, for the pay period, has—

(a) paid to the person the salary or wages relating to the employee as required by sections RP 9 to RP 11 of the Income Tax Act 2007:

(b) provided the information required by the person as required by section RP 8 of that Act.

(5) For the purpose of applying this section to a person acting as a PAYE intermediary, references to an employer are to be read as references to a person acting as a PAYE intermediary.

[23] The above sections were considered by the Court of Appeal in *Pongi v R.* In that case the appellant had been convicted of offending against s 143A(1)(d) of the TAA which provides for an offence if a person: [6]

[6] *Pongi v R* [2012] NZCA 127.

> (d) Knowingly applies or permits the application of the amount of a deduction or withholding tax made or deemed made under a tax law for any purpose other than in payment to the Commissioner.

[24] The Court considered the effect of s 4A(2) of the TAA which relevantly provides:

> (b) A deduction is deemed to be made when a payment is made of the net amount of any source deduction payment.

[25] A source deduction payment includes the payment of salary or wages.

[26] In *Pongi* the Court was concerned with the adequacy of proof that the appellant had deducted PAYE or was deemed to have made that deduction.

[27] The elements of an offence under s 143A(d) differ from the charges faced by the defendant under s 143B(2) but the Court's analysis in *Pongi* remains relevant to the determination as to whether the defendant in this case had a liability to pay PAYE to the Commissioner.

[28] If the defendant had in fact deducted PAYE he had a clear liability to pay it to the Commissioner.

[29] If the defendant paid wages to his employees net of PAYE, but did not make an actual deduction he is deemed to have done so.

[30] I do not agree with Mr Phillips' submission that regardless of actual or deemed deductions s 168 creates a liability to satisfy this element of the charge.

[31] Section 168(1) provides for recovery of a debt to the Commissioner when an employer has failed to make deductions as required by the taxation rules. Section 168(2) enables the Commissioner to pursue both employer and employee concurrently.

[32] Section 168 does not conflict with or override the provisions of s RD4 which renders the employee liable for PAYE in the absence of an actual or deemed deduction by an employer.

[33] I am satisfied that the defendant can only have a liability to pay if he has made a deduction or has paid net wages such that he is deemed to have made a deduction.

[34] It seems clear that the defendant did not make a deduction but counsel conflict on whether the evidence would support a finding that he paid his staff on a net basis. If so the deduction is deemed and he assumes a liability to pay.

[35] Mr Phillips refers to the defendant's evidence that he did not know if he had paid his employees the gross amount shown in his PAYE returns. That evidence was in response to questions asked of the defendant as to the content of the returns filed. They, on the face of it, would suggest that PAYE had been calculated but the defendant was uncertain if that calculation was an effective acknowledgment that he paid net amounts.

[36] Mr Weaver cites the evidence of Ms Johal who conducted the audit relevant to this charge. Ms Johal said variously:

(a) The defendant advised her that he paid his employees in cash and did not deduct PAYE from their income.[7]

(b) The defendant wrote to her on 28 April 2011 stating affirmatively that PAYE returns for the relevant period were erroneous in creating an impression that he was withholding PAYE from his workers. He states "this is not the case whatsoever" and that he is correcting the former error by providing forms IR344 saying "for the record let me repeat that I hold no tax on your behalf that has withheld from the PAYE of any of my workers."[8]

(c) She replied to the defendant by letter dated 26 May 2011 advising that the IR344 forms had not been processed as there is no basis for the defendant to maintain that paying his workers in cash avoids taxation liability.[9]

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[7] NOE 11.
[8] NOE 44.
[9] NOE 48-49.

(d) It was her understanding that the defendant paid his workers cash without deducting withholding tax or PAYE.[10]

(e) She acknowledged that throughout her audit, which covered the period relevant to this charge, she found no evidence that the defendant had paid net wages to his workers.[11]

[37] In his evidence on this point the defendant said he did not make deductions and that the returns which showed deducted amounts were incorrect and that they were ultimately amended to show no deductions; *"there was never any deductions" "I know I didn't make deductions."*[12]

[38] To succeed on this charge the Commissioner must prove that there is an obligation to pay PAYE. That obligation is with the employer if there has been a deduction or a deemed deduction. If not, it falls to the employee.

[39] There is no satisfactory proof that the defendant did deduct PAYE and nor is there a deemed deduction as there is no satisfactory proof that net wages were paid. Section 168 TAA does not change the position.

[40] Thus, as a central element of the charge (obligation to pay) has not been established the charge fails and the defendant is acquitted.

Obligation to pay – income tax and GST y/e 31/03/05 – 09 (the first audit)

[41] Ms Johal's audit covered the fiscal years 31/03/05 – 09 and intervening GST periods. The defendant was subject to six month GST periods.

[42] It is not disputed that the defendant was registered for GST in his own name and filed GST and tax returns as a sole trader during the first audit period. However, on the advice of the late Mr Don Rae, who espoused an anti-tax doctrine, the defendant

[10] NOE 52.
[11] NOE 55.
[12] NOE 330-336.

established a bank account named "whanau trust" into which he received income and from which he made business overhead payments.

[43] Mr Rae's advice was that the money coming into the whanau trust bank account was exempt from all taxation obligations. The receipts into that bank account were categorised by the defendant as fundraising. Trade overhead payments were made from the bank account but no records were kept by the defendant. His position was that the revenue had no interest in monies coming and going through the account as Mr Rae had told him, and he had accepted, that the establishment of the whanau trust account was legitimate and no taxation considerations applied to it.

[44] Before considering any issue relating to the defendant's belief and whether it was honest or otherwise I must consider (as I did in relation to the PAYE charge) if the prosecution has established beyond reasonable doubt that a taxation obligation actually existed.

[45] Mr Weaver submits that there was no obligation and that it will not be necessary for me to consider the defendant's knowledge and intent. Mr Phillips submits there was an obligation and that Mr Weaver's submissions do not hold water.

[46] The evidence from Ms Johal and her associate Mr Wiltshier was that the defendant complied with his obligations to file returns and make payments in his own name as a sole trader. However they both said that documents unearthed during the audit in relation to the whanau trust clearly disclosed unreturned income which was in their view subject to both income tax and GST liability.

[47] Thus, as part of the audit process, they sought to interview the defendant and were able to do so on 13 May 2010.

[48] By this time Mr Rae was deceased and the defendant was being advised by Gordon Israel another promoter of the anti-tax philosophy. Mr Israel attended the interview on 13 May 2010.

[49] Ms Johal, Mr Wiltshier and a second investigator were present. The interview was recorded over a two hour period and was played in Court. A transcript was produced.

[50] Subsequent to the interview Ms Johal issued reassessments of the defendant's income tax and GST liability on the basis that the defendant, as advised by Mr Israel, accepted the income and expenditure through the whanau trust bank account was his.

[51] The defendant accepted that the whanau trust bank account, set up under the advice of Mr Rae, did not have the effect of excluding income from taxation liability and was no more than a second bank account into which he received personal income as a sole trader and made business payments which were legitimate overheads deductible from that income.

[52] However Mr Weaver raises a technical point which he says is a complete answer to the charge for the periods subject to the first audit. In short he says that the reassessments generated after the 13 May 2010 interview were unlawful.

[53] His submission is that unlawful reassessments cannot create a taxation liability and thus a central element to be proved by the Commissioner for the GST and income tax charges for the first audit periods (2005-2009) cannot be established and the charges in relation to those periods must fail.

[54] Mr Weaver asked me to discharge the defendant for those periods – a partial discharge in relation to CRNs ending 080 and 082 - with the effect that the Commissioner is thus limited to pursing those charges for the second audit period only.

[55] I must thus consider the validity or otherwise of his submission to determine if the Commissioner should be so limited in his pursuit of the GST and income tax evasion charges.

[56] In her evidence Ms Johal said that at the 13 May 2010 interview agreement was reached with the defendant that income deposited into the whanau trust [bank account] would be included in his personal income tax and GST returns.

[57] She wrote to the defendant on 19 May 2010 saying that:[13]

> *Given your agreement, the default assessments for the whanau trust will be reversed as the income will be personally assessed to you. At the interview both you and Mr Gordon Israel your advisor/support person agreed to provide the following … A proposal to settle your tax liability.*

[58] Mr Weaver submits that the agreement does not go so far as to provide a basis to issue the reassessments.

[59] Section 89C of the TAA imposes a mandatory obligation upon the Commissioner to issue a Notice of Proposed Adjustment (NOPA) before the Commissioner makes an assessment unless certain exceptions apply.

[60] Section 89C provides:

> **89C Notices of proposed adjustment required to be issued by Commissioner**
>
> The Commissioner must issue a notice of proposed adjustment before the Commissioner makes an assessment, unless—
>
> (a) the assessment corresponds with a tax return that has been provided by the taxpayer; or
>
> (b) the taxpayer has provided a tax return which, in the Commissioner's opinion, appears to contain a simple or obvious mistake or oversight, and the assessment merely corrects the mistake or oversight; or
>
> (c) the assessment corrects a tax position previously taken by the taxpayer in a way or manner agreed by the Commissioner and the taxpayer; or
>
> (d) the assessment reflects an agreement reached between the Commissioner and the taxpayer; or
>
> (db) the assessment is made in relation to a matter for which the material facts and relevant law are identical to those for an assessment of the taxpayer for another period that is at the time the subject of court proceedings; or
>
> (e) the Commissioner has reasonable grounds to believe a notice may cause the taxpayer or an associated person—
>
> (i) to leave New Zealand; or
>
> (ii) to take steps, in relation to the existence or location of the taxpayer's assets, making it harder for the Commissioner to collect the tax from the taxpayer; or

[13] NOE 33.

(eb) the Commissioner has reasonable grounds to believe that the taxpayer has been involved in fraudulent activity; or

(f) the assessment corrects a tax position previously taken by a taxpayer that, in the opinion of the Commissioner is, or is the result of, a vexatious or frivolous act of, or vexatious or frivolous failure to act by, the taxpayer; or

(g) the assessment is made as a result of a direction or determination of a court or the Taxation Review Authority; or

(h) the taxpayer has not provided a tax return when and as required by a tax law; or

(i) the assessment is made following the failure by a taxpayer to withhold or deduct an amount required to be withheld or deducted by a tax law or to account for an amount withheld or deducted in the manner required by a tax law; or

(j) the taxpayer is entitled to issue a notice of proposed adjustment in respect of a tax return provided by the taxpayer, and has done so; or

(k) the assessment corrects a tax position taken by the taxpayer or an associated person as a consequence or result of an incorrect tax position taken by another taxpayer, and, at the time the Commissioner makes the assessment, the Commissioner has made, or is able to make, an assessment for that other taxpayer for the correct amount of tax payable by that other taxpayer; or

(ka) the assessment corrects a tax position taken by the taxpayer in relation to a tax position taken by a look-through company in a return of income under section 42B, and the Commissioner and the company have completed the disputes process for that return of income and that tax position; or

(l) the assessment results from an income statement under Part 3A; or

(lba) the assessment is of a penalty under section 142H or 142I; or

(lb) the assessment extinguishes all or part of a taxpayer's tax loss in accordance with section 177C(5); or

(m) the assessment includes a calculation by the Commissioner of a tax credit identified in subparts MA to MF and MZ of the Income Tax Act 2007.

[61] It is common ground that none of the exceptions apply except, on the Commissioner's argument, s 89C(d) – *"the assessment reflects an agreement reached between the Commissioner and the taxpayer"*. The same argument may possibly invoke s 89C(c) also.

[62] Ms Johal expressly relies upon s 89C(d) for the issue of the reassessments.

[63] Mr Weaver denies the existence of a sufficient agreement and says that Ms Johal herself accepted that there was no adequate agreement with the defendant and that Mr Wiltshier accepts that also.

[64] It cannot be disputed that in the interview the defendant acknowledged the misguided advice from Mr Rae concerning the efficacy of the whanau trust account in avoiding taxation obligations and agreed that the account was personal to him and thus relevant to the assessment of his taxation position.

[65] Mr Weaver's submission is that for ss 89C(c) or (d) to apply a more detailed agreement is required.

[66] He says that a mere agreement to combine the two bank accounts goes part way only. His submission is that an assessment must be based upon an express agreement as to the amount of tax due and in the absence of such an express and explicit agreement a NOPA is required.

[67] In his evidence Mr Wiltshier appears to agree with that.

[68] He answered *yes* when asked if an assessment:

> *... normally reflects agreement on income, legitimately deductible expenditure and the net position and then the resulting tax liability? Does it normally reflect those things after a process of hammering it out?*[14]

[69] Mr Wiltshier went on to acknowledge that after the meeting with the defendant he was still waiting for further information on business expenditure paid out of the whanau trust account as he considered it was reasonable to assume that some of the payments going out of that account would represent deductible business overheads.

[70] He agreed that there was no agreement on those deductions but said that he considered the assessments issued were nonetheless legitimate because in the absence of that information from the defendant, despite repeated requests, he simply had no basis upon which he could calculate any such deduction.

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[14] NOE 131-133.

[71] I note that the Commissioner's own internal procedures set out in standard practice statement 15/01/01 says:

> *Inland Revenue can make an assessment only when all issues for the periods/years have been finalised. Where issues remain unresolved, the assessment will not be made until such time as all the outstanding issues are finalised. This is because the Commissioner cannot make a partial assessment. In this situation the disputes resolution process is to be used to resolve the remaining issues. All issues are to be taken into account when the assessment is finally made.*

[72] I am satisfied on Mr Wiltshier's evidence and upon what I heard in the recorded interview of 13 May 2010 that the only agreement made with the defendant was that monies coming into the whanau trust bank account were his. There was no agreement on the final tax position that resulted from the whanau trust bank account being amalgamated with his own personal bank account. To the contrary there were outstanding issues relating to that final calculation and the Commissioner was active in pursuing the necessary details.

[73] The fact that the defendant failed or refused to provide that information does not mean that an assessment can be made on the basis of an agreement. There was an outstanding unresolved issue.

[74] In my view, the only possible exceptions that might be arguable under s 89C are subs (c) and (d) but that depends upon a final position being reached. For the purposes of s 89C(c) the assessment cannot correct a position previously taken because the end result is not known.

[75] For the purposes of s 89C(d) there is simply no agreement to enable an accurate assessment to be issued.

[76] For completeness, I record that Mr Wiltshier accepted that s 89C(f) could not apply but was inclined to the view that exception 89C(eb) did apply. He suggested at one point that the assessment was justified on the basis that the defendant was involved in fraudulent activity but that view is entirely contrary to the defendant's acknowledgment at interview that Mr Rae had given bad advice and he wished to correct that by bringing the whanau trust bank account into his own affairs.

[77] The end result of my analysis of Mr Weaver's submissions is that I accept what he says about the absence of an agreement. Under s 89C the Commissioner should have issued a NOPA and did not do so and thus there is no properly assessed amount due by the defendant. To that extent the assessments issued after the interview on 13 May 2010 are unlawful.

[78] Mr Phillips responds with reliance upon s 114 of the TAA which provides:

> **114 Validity of assessments**
>
> An assessment made by the Commissioner is not invalidated—
>
> (a) through a failure to comply with a provision of this Act or another Inland Revenue Act; or
>
> (b) because the assessment is made wholly or partially in compliance with—
>
> (i) a direction or recommendation made by an authorised officer on matters relating to the assessment:
>
> (ii) a current policy or practice approved by the Commissioner that is applicable to matters relating to the assessment.

[79] Section 114 was considered by the Supreme Court in *Skinner v R.*[15]

[80] I find that s 114 is not available to Mr Phillips in opposing Mr Weaver's submission concerning non-compliance with s 89C.

[81] In *Skinner,* s 109 of the TAA was under consideration. That section provides:

> **109 Disputable decisions deemed correct except in proceedings**
>
> Except in objection proceedings under Part 8 or a challenge under Part 8A,—
>
> (a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
>
> (b) every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.

[82] The Supreme Court said at [20] that:

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[15] *Skinner v R* [2016] NZSC 101.

> … despite referring to the generic term "proceedings", s 109 should be interpreted as applying to civil proceedings only.

[83] At [28] the Court said further that:

> Another provision in Part 6 which can sensibly only apply in civil proceedings is s 114, which deals with the validity of assessments.

[84] I record that in his submissions Mr Phillips sought leave to respond further on Mr Weaver's submission that s 114 does not apply in these proceedings in the absence of "clear legal argument or case".

[85] However, further leave is not required. *Skinner* is clear in limiting s 114 to civil proceedings only as are the words of Justice Glazebrook in *R v Allan* commenting on s 109 that it would be a: [16]

> *A very startling proposition if the existence of a valid assessment precludes any challenge in criminal proceedings apply equally to s 114.*

[86] The statutory bar to challenging the validity of assessments is clearly designed to ensure that the dispute resolution processes are complied with without any collateral challenge but elements of offences to be established within the criminal context must be addressed in compliance with the Criminal Procedure Act and fundamental concepts such as the burden of proof.

[87] Mr Phillips responds further by saying that in any event: [17]

> *The validity of the assessments themselves has no bearing on the Commissioner's case, which is based on the defendant knowing that under the New Zealand Tax Laws he had tax to pay – which arose from income he earned within the periods covered by the first audit. This was notified to the defendant by notices of assessment and he took no steps to pursue his dispute rights under the TAA.*
>
> *The reassessments purpose in this prosecution operate as to the timing of the defendant's knowledge and that he had tax to pay and its consequent non-payment; and a calculation of the taxation applicable to the amounts the defendant failed to assess.*

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[16] *R v Allan* [2009] NZCA 439.
[17] Submissions para 107(d)(e).

[88] I agree with Mr Weaver's submissions that the Commissioner has failed to comply with s 89C and that s 114 has no application in criminal proceedings. However those matters do not resolve the issue as to whether the prosecution has proved beyond reasonable doubt that, for the purpose of these charges, the defendant had a liability to pay tax.

[89] Mr Phillips is correct that the Commissioner need not establish a particular amount due by a taxpayer when prosecuting for evasion. What needs to be proved is that there is a liability which was known and was intentionally evaded.

[90] It is one thing to establish that the Commissioner has failed to comply with certain mandatory procedures. It is another thing to assess if the taxpayer had an obligation to pay. I do not accept that the failure to issue a NOPA to the defendant in compliance with s 89C means that the defendant had no taxation or GST liability.

[91] I have found for the purposes of the PAYE charge (CRN ending 081) that there was no liability. That is because in the absence of an actual deduction or a deemed deduction liability transfers to the employee as a matter of law.

[92] The same cannot be said for non-compliance with s 89C. Non-compliance with section 89C does not exonerate the defendant from taxation liability and I find that the defendant did have taxation and GST liabilities for the 2005-2009 years.

[93] For that reason I will not limit the Commissioner in prosecuting these charges (CRNs ending 080 and 082) to the income periods subject to the second audit only.

Second audit – y/e 31/03/10 - 31/03/14 – income tax and GST

[94] The second audit period occurred during a time when the defendant was being advised by Timothy Meredith who had replaced Gordon Israel. Mr Meredith was another anti-tax practitioner and was the third consecutive practitioner the defendant had engaged for taxation advice.

[95] Mr Meredith advised that persons operating a business under the umbrella of a Maori incorporation were not subject to the New Zealand tax laws.

[96] For that reason, the defendant did not file returns for income tax, GST or PAYE and made no payments.

[97] As noted the charge relating to PAYE (081) is limited to the period 01/04/08 – 31/03/09 but the charges for GST and income tax (080) and (082) extend for the full period of the second audit cumulative upon the full period of the first audit.

[98] The defence offered in relation to the second audit period was that the defendant honestly and genuinely believed the advice from Mr Meredith and thus had no knowledge of his obligation to pay tax or intention to evade it. It was not suggested that for the second audit years there was no liability.

[99] In the absence of returns the Commissioner issued default assessments for the second audit period.

[100] I am satisfied that for the period of the second audit the defendant had clear taxation and GST liabilities and the fate of these charges will turn upon my assessment of mens rea.

Mens rea – GST and income tax

[101] Having established an obligation to pay, the prosecution must prove beyond reasonable doubt that the defendant knew of that obligation and intentionally evaded meeting it. For the reasons below I am more than satisfied that the defendant knew full well his obligations to pay GST and income tax during the entire period of the charges and that he intended to evade that obligation. He took active steps to do so and his failure to meet his obligations was more than a mere omission to pay.

[102] The defendant sought to persuade me that he had a genuinely held and honest belief that the advice that he was getting from Mr Rae, Mr Israel and Mr Meredith was correct and that he relied upon it in good faith.

[103] He said that he held an honest belief that he did not have any taxation obligations and it was for that reason he acted in the way he did.

[104] He relied upon the whanau trust advice from Mr Rae but having accepted from Mr Israel that that advice was incorrect he then went on to run his business through a Maori incorporation – all to the effect of avoiding tax. I do not accept that his belief was honest and that his actions were that of someone honestly acting upon professional advice which he was not only entitled to accept but which he did accept.

[105] One of the aids in determining credibility is to examine the inherent plausibility of evidence. I do not find it at all plausible that someone operating a business and who had in the past complied with known taxation obligations would accept as bona fide and genuine the advice of successive "practitioners" promoting an anti-tax philosophy.

[106] To the contrary I find that in the face of repeated advice from his accountant and the Inland Revenue Department of his obligations the defendant actively sought out so called taxation practitioners who could tell him what he wanted to know and that he effectively turned a blind eye to and intentionally ignored his true obligations.

[107] That conclusion is justified on the evidence I heard. Key aspects of that evidence (by no means an exhaustive summary) are:

- The defendant joined three separate and distinct anti-taxi regimes without an understanding of the mechanics of any of them and purely for the purpose of paying less tax.

- Despite advice from his accountant, who the defendant accepted was knowledgeable in taxation law, that he had a taxation obligation he chose to accept the advice of the anti-tax practitioners.

- He deliberately refrained from getting legal advice on his obligations because he was told by the anti-taxi group that lawyers and accountants would give him false advice concerning his obligations by saying he had to pay tax.

- He accepted advice from the anti-tax group that the Inland Revenue's purpose was to harass him and they would continue to do so by sending letters making demands for payment.

- He acknowledged receiving repeated advice from the Inland Revenue of his obligations to pay, referring to the applicable law, but chose to ignore that advice on the basis that the anti-tax group classified IRD actions as harassment.

- He said in all the circumstances he genuinely believed what he was being told by the anti-tax practitioners was true and that his purpose was to delay for as long as he could until such time as the anti-tax group had found the "final solution".

- In that regard he acknowledged that his advisors were yet to definitively formulate their theories upon which there was no taxation liability but had promised a "final solution" which would prove their advice to be correct and render the New Zealand taxation laws of no effect.

- He said that it never occurred to him that despite repeated information to the contrary that the anti-tax advisors may be wrong and that the Commissioner of Inland Revenue is right.

- The defendant said that he received advice, and acted upon it, that he should maintain a façade of legitimacy and pay some tax – yet he would have it that there was no obligation to make such payment. I consider that he accepted advice to maintain a façade of compliance or normality with the IRD is indicative of his willingness to accept any advice that suited his object of evading tax in the face of his knowledge of his liability to pay.

[108] I have been careful to retain an open mind until the conclusion of the case and until counsel's submissions have been received and considered. I am alert to the fact that some people may hold a genuine and honest belief which may on an objective analysis be entirely unreasonable.

[109] The so called anti-tax practitioners represent a fraction of society and promote clearly untenable philosophies. They are quite simply wrong. Nonetheless it may be possible for a person to accept advice from them and adhere to it in a genuine belief that it is correct. There may well be people who hold such an honest belief.

[110] However on my assessment of the defendant, having seen and observed him in Court and listened to his evidence and his explanations for his actions, I reject his evidence as untrue. I do not accept he held an honest belief. To the contrary he was doing everything he could to avoid paying tax in the knowledge of his obligations and sought advice that would suit his purposes. I do not consider him to be naïve or gullible. He is a person experienced in business who has knowledge of his obligations and has intentionally evaded them.

[111] The defendant took active steps to avoid those obligations.

- He deliberately withheld business documents in the form of invoices, bank statements and invoice books from Ms Johal during the first audit.

- He closed bank accounts and used a credit card to operate his business in an admitted attempt to defeat deduction notices issued by the Commissioner.

- His refusal to cooperate with the Commissioner and supply information as he said he would in the 13 May 2010 interview was in my view deliberately obstructive with the intention of avoiding assessment and payment of a known obligation.

- The defendant's failure to cooperate in the second audit conducted by Ms Smart is in my view further evidence of a deliberate attempt to avoid assessment and payment of his taxation liability.

- The defendant's inaction on receiving the default assessments issued after the second audit, failing to take steps to challenge the assessments and then ignoring his assessed obligations, again, in my view, is further evidence of an intention to evade both GST and income tax assessment and payments.

[112] I am satisfied beyond reasonable doubt that all of the elements to be proven in relation to the GST and income tax charges have been proven and the defendant is therefore convicted on those charges – CRNs ending (080) and (082).

Quantum for sentencing purposes

[113] Mr Phillips submits core tax liability for sentencing purposes is calculated as:

(a)	Income tax as reassessed in first audit, allowing subcontractor deductions from second audit.	$336,095.71
(b)	Agreed GST liability	$163,669.49
	Less payments received	($49,977.62)
		$277,698.31

[114] Mr Weaver accepts the GST figure but says that the core tax liability should be $160,813.85.

[115] Mr Weaver calculates a final liability figure for sentencing purposes as:

(a)	Core tax liability allowing for subcontractor deductions from first audit	$160,813.85
(b)	GST	$163,666.49
		$324,483.34
	Less taxation payments made	($49,977.62)
		$271,505.72

[116] Mr Weaver then says that further deductions are needed to remove from the calculations a number of years which are time barred under s 150A TAA. That approach is consistent with Judge Harding's pre-trial ruling.

[117] Mr Weaver says that calculations would need to be done to exclude GST for the six-monthly periods commencing 1 April 2004 and ending 31 March 2006 and income tax for the fiscal years ending 31 March 2005 and 31 March 2006.

[118] What separates the parties on the core tax calculation is a dispute as to the deductibility of subcontractor payments for the period covered by the first audit. Mr Phillips says that they are already covered and there would be a double deduction if they were used to reduce income received through the whanau trust bank account. Mr Gibson's thesis is that on a proper assessment it is clear that a further deduction is needed. Ms Smart would refuse that on the basis that all legitimate deductions have been included in the defendant's own returns filed during the first audit period.

[119] Frankly I cannot resolve that dispute on the information I have. Mr Weaver's submissions acknowledge the defendant's own evidence that the whanau trust was invoicing him for work done *"I am not sure but I expect so, yes"* but says a number of downstream issues arise.

[120] His concern is for double counting.

[121] If the subcontractor payments are not allowed then consideration must be given to what amounts to mere bank transfers which when taken into account would reduce suppressed income.

[122] Alternatively if the subcontractor payments are allowed that has the effect of reducing income.

[123] Mr Weaver's position is that there should be one or the other and that Mr Phillips' calculations are excessive.

[124] I will need further assistance from counsel on quantum.

[125] I agree with Mr Weaver that the statute barred periods by operation of s 150A should be excluded and calculations will need to be done for that purpose.

[126] I need Mr Phillips to respond to Mr Weaver's submission on double counting and in particular his point that if subcontractor payments are to be excluded from whanau trust income does he accept that the transfer of funds between the defendant's bank account and the whanau trust bank account need to be taken into account.

[127] The defendant is remanded on bail for sentence on 10 August 2018 at 10.00am. Counsel are to file submissions in advance addressing all issues including quantum. I call for a PAC report with a home detention appendix.

P G Mabey QC
District Court Judge