EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT MANUKAU

CRI-2016-055-001537
[2018] NZDC 11333

INLAND REVENUE DEPARTMENT
Prosecutor

v

GLENN WILLIAM ARCHIBALD
Defendant

Hearing:	11, 12, 13, 14, 15 December 2017 24, 26 April and 30 May 2018
Appearances:	K B Chin and K Lee for the Prosecutor Defendant appears in Person
Judgment:	30 May 2018

ORAL JUDGMENT OF JUDGE C S BLACKIE

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[1] Glenn William Archibald, is before the Court in respect of a number of charges which we might call income tax offences, laid under s 143(1)(b) and (f) and 147 Tax Administration Act 1994. Indeed, there are nine such charges under that section, which provides that:

> A person that commits an offence against the Act, that is the Tax Administration Act, if the person knowingly does not provide information (including tax returns and tax forms) to the Commissioner or any other person when required to do so by tax law and does so intending to evade the assessment or payment of tax by the person or any other person under a tax law.

[2] There are also two further charges laid under s 228 Crimes Act 1961 as it used to be and s 229A Crimes Act 1961 as it currently is, of using a document with intent to defraud. Those are representative charges.

[3] During the course of this decision I will be referring to two companies, both of which are operated by the defendant.

[4] The first, Electronic Taxation Office Limited which I will refer to as ETO; and the second, Papakura Promotions Limited which will be referred to as PPL.

[5] Dealing first with the charges of failing to file appropriate tax returns with intent to evade. There are a number of elements that need to be proved by the prosecution. The first is that the defendant, that is Mr Archibald, is required by tax law to provide tax returns to the Commissioner; secondly, that he did not provide that information when required; thirdly, that he did so knowingly; and finally, that he did so intending to evade the assessment or payment of tax by himself or any other person. For the sake of clarify, s 147 Tax Administration Act 1994 extends the offending to an employee, an agent or officer of a Body Corporate, if the offence was caused by an omission of, or through knowledge attributable to the employee, agent or officer. Clearly, Mr Archibald was an officer of the company ETO and had the responsibility of filing its tax returns.

[6] The requirement to provide income tax returns is imposed by statute, that is s BB2(1) Income Tax Act 2007. The definition of a taxpayer includes, as I have said, the principal agent or employee of any particular corporate institution or organisation that has a tax obligation. Section 33 Tax Administration Act 1994 provides the taxpayers shall furnish an income tax return setting out all tax or income, together with prescribed particulars to the Commissioner. The Act also sets statutory deadlines by which those tax returns are to be filed or provided.

[7] The charges that have been brought against the defendant require specific knowledge and the term "knowingly" has been defined in a number of cases, one of which is the *District Commissioner of Inland Revenue v Gordon*[1] and a quote from that case is appropriate to illustrate what is meant by "knowingly" it says:

> The offences are ones that contain the allegation that the acts forbidden by law were done "knowingly" and that is a mental state and an essential ingredient

[1] *District Commissioner of Inland Revenue v Gordon* [1989] 11 NZTC; 13 TRNZ 161.

> of the offence. The Judge may infer the mental state from the surrounding circumstances.

[8] The charges also require the ingredient of evasion. Evasion has been defined in the case of *Taylor v Attorney-General*[2] and more particularly at page 262. The decision notes the word "evade" may have several different meanings, but basically it involves the intentional avoidance of payment in circumstances indicating to the party that he or she may be under some obligation to pay. In that case they were referring to duty. The word "intention" that has a separate definition. The meaning of "intention" has been summarised in the text Principles of Criminal Law by *Simester and Brookbanks*:

> There is normally no need for an elaborate definition of intention in order to decide whether an actus reus was intended. A few particular cases may present difficulty but usually the analysis will be intuitively obvious. The general legal opinion is that "intention" cannot be satisfactorily defined and does not need a definition since everyone knows that it means, and particularly, it connotes a state of affairs which the party intended.

[9] Referring specifically to taxation cases there is a helpful decision from Wylie J in the case of *TRA M100*[3]. Wylie J makes the observation that:

> An objector must seek to avoid liability knowing that what he is doing is wrong and intending it nevertheless, or he must be recklessly careless as to whether or not he is wrong, mere inadvertence is not enough, an honest belief even if unreasonable provides a complete answer.

But he goes on to observe:

> The absence of reasonable ground may point strongly to the fact that the belief is not genuine.

[10] Turning now to the circumstances in this particular case in respect of the charges of failing to provide tax returns.

[11] ETO is a registered company and it had a client list held on Inland Revenue's first system. That showed that ETO was an active tax agency and had clients over the offending period, between 2000 and 2008. The statistics showed that ETO had been filing roughly 400 tax returns annually over that period. It is not disputed that ETO

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[2] *Taylor v Attorney-General* [1963] NZLR 261, 262

[3] *TRA M100* [1990] 12 NZTC 2622.

was in fact trading and was earning income. Therefore, it was required to file income tax returns by the due dates each year under the provisions of the Tax Act and the Tax Administration Act.

[12] Did the defendant provide the information required via tax returns over that period? The answer is clearly no, and that is an undisputed fact. Those tax returns for those periods are still outstanding to this day, 10 years later. Mr Archibald admitted that that was the situation during the course of the trial.

[13] The next question is, did the defendant knowingly fail to file these tax returns? Well the answer lies in the fact that he has extensive experience in financial matters, he has previously been employed by the Inland Revenue, he is the director of several companies and he provides accounting services to members of the public. Overall, he has approximately 50 years' experience as an accountant/tax accountant. He is therefore well versed in all tax practices, and given his wealth of experience and knowledge, he would have been well aware of the obligation to file the outstanding tax returns for ETO under the Tax Administration Act. He admits that as a director he was aware of his obligations and he was aware of his responsibility to file those returns. Although ETO filed GST returns over the offending period, which the defendant would have had to view or review and sign, he nevertheless failed to file the actual tax returns in respect of ETO sales and profits during that same period. It should be said, though, that ETO, through Mr Archibald, did file tax returns prior to the year 2000 and after the year 2008 when this offending first came to notice. Also, it has to be acknowledged that he filed tax returns in respect to other related companies during that period. ETOs bank statements clearly show that there were deposits by way of income during the offending period. The statements, though, provided an incomplete picture, as they were only available to the Inland Revenue and, therefore, to be exhibited to the Court for the years 2005 to 2008. Those statements clearly show that there was income and that there would therefore have been a liability in respect of taxation.

[14] During the hearing, a witness was called to give evidence, [the ETO employee], confirmed; firstly, that he was employed or had been employed by ETO and, secondly, he confirmed that the defendant was intimately involved with ETOs business. All

returns had to be approved by him before they could be filed. It was him that would have given his staff, including [the ETO employee], final instructions whether or not to file ETO returns.

[15] In his evidence, Mr Archibald said that he simply did not have the time. That can never be a defence to the charge, but what it does show is that he clearly had an understanding that the returns should have been filed. Also, during the course of the trial, Mr Archibald took the position that a responsibility lay with somebody else. He even suggested his wife, who is a co-director of ETO should have taken steps to file the tax returns, but there was no evidence at all that Mrs Anne Archibald had any effective control over the company and/or took an effective part in the administration and the affairs of the company. The evidence clearly establishes that the only representative of ETO who could have tended to and should have attended to the filing of the tax returns was the defendant, Mr Archibald himself. He clearly held himself out to be in that position because in all the discussions with the Inland Revenue Department. Between 2011 and 2012 it was he that made the assurances and the commitment that the tax returns that were still outstanding would be filed. He never suggested that the responsibility lay with anyone else, but having said that during the course of the hearing, he made the assertion that his son, Grant Archibald, who has never been and never was a director of ETO, may have had some responsibility for non-filing of ETOs tax returns.

[16] The next question that has to be considered is, whether the non-filing of these returns was intended to evade assessment or payment of tax either by Mr Archibald himself or by any other person? Unless a company files income tax returns it is difficult for the Commissioner to assess tax liability. So on that basis at least, there is the strong presumption that ETO intended to evade assessment of its liability to pay tax or alternatively, the actual liability to pay tax.

[17] The defendant, Mr Archibald, was aware that ETO was earning income. He was aware that he was required to file the tax returns. He made the conscious decision, in my view, not to file income tax returns and that suggests very strongly, that he was attempting at least to evade ETOs assessment and it follows, the payment of income tax. During the course of the investigation Inland Revenue investigators repeatedly

requested the defendant to file the outstanding returns and despite his assurances and constant updates about the progress of the work they were never filed. As a result, a default assessment was made for tax pursuant to the provisions of the Act for the offending period and that assessment gave rise to a figure of $1,043,455.71. That was an assessment drawn largely from the bank statements of ETO for the period August 2005 to 2012.

[18] Mr Archibald, on behalf of ETO and is the principal of ETO and the person that had all the legal liabilities to act in the affairs of ETO, took no steps to object or require any reassessment of the default, despite the fact that he would have had the ability to do so under the statutory provisions. So that amount is the deemed amount in respect of tax to be paid over the offending period.

[19] So, in my view, Mr Archibald, the defendant, knew that ETO as a company was required to file tax returns. It is a rudimentary and well known obligation of corporate entities. He knew that by not filing the tax returns the Inland Revenue could not make an assessment as to how much tax ETO had to pay and therefore, could not determine the company's tax position and liability. He knew this, having regard to:

(a) His vast experience as an accountant.

(b) His current role as a tax accountant.

(c) The filing of yearly returns both before and after the offending period.

(d) The filing of GST returns for ETO during the period.

(e) And the filing of income tax returns for all of his clients during the offending period.

[20] The inference is overwhelming that Mr Archibald's deliberate decision, not only at the time that these offences originated in the year 2000, but right through to today's date, not to file tax returns, knowing what he knew, knowing the responsibilities that he had as a tax accountant, that the inference to be drawn is that

he failed to do so in order to evade at least the assessment of tax, if not the actual payment of tax.

[21] I find the essential ingredients in respect of each of the charges that have been laid for the period under discussion 2000, 2008, under that particular section of the Tax Administration Act 1994; namely, s 143(b) and 147 to have been proved to the required standard beyond reasonable doubt and in respect of each of those charges, the defendant, Mr Archibald will be convicted.

[22] I return now to deal with the two remaining charges of intention to defraud.

[23] These charges arise out of GST payments or refunds made by or applied by or obtained by a separate entity of which Mr Archibald was the primary, if not the sole driver PPL, as I said before, Papakura Promotions Limited.

[24] The GST provisions of the Act, that is the Goods and Services Tax Act 1985 provide that every person who carries on any taxable activity may register for GST. A taxable activity is defined under the Act to mean any activity which is carried out continuously or regularly by a person whether or not for procuring a profit and involves or is intended to involve in whole or in part, the supply of goods and services to any other person for a consideration, and includes any such activity in the form of any business, trade, manufacture, profession, location, association or club. A person who is registered must therefore charge GST on supply of goods or services in the course and furtherance of the taxable activity which I have just described.

[25] The Act also provides that a registered person may claim deductions of input tax on goods and services purchased for the principal purpose of making taxable supplies. That is provided for under s 3A Goods and Services Tax Act 1985. Under s 19 of the Act a registered person is also registered with one of the following basis of accounting terms, invoice basis, payment basis and/or hybrid basis. If a person is registered on an invoice basis they may deduct the input tax for amounts where they have received an invoice whether or not, and this is important here, whether or not they have made payment on the invoice.

[26] Property Promotions Limited was a registered person, ETO is a registered person. A registered person must furnish a GST return with the Commissioner by the 28th of the following month after the end of each taxable period. There is an exception for the months of March and November when a slightly longer period can be provided for.

[27] The situation in this case was that Property Promotions Limited, the company owned and operated primarily by the defendant, was supposedly carrying out a taxable activity in providing services and promotions of various types in the Papakura area. As it transpired, no such promotions took place during the entire period of its existence between 1990 and its demise eventually in 2008. When I say "demise" it was placed in liquidation in 2008.

[28] There was in this case, a total mismatch in respect of the invoices that were provided to the company for services and the company's actual trading activities, and while the Act permits a degree of mismatching, it seeks to limit the nature and degree of such mismatching. A gross mismatch in timing may accordingly be relevant in assessing whether the application of the tax avoidance provisions, or as to whether the arrangement, as it pertained in this case, was void. Reference was made to the case of the *Inland Revenue Department v Gell*[4] as being a good example of inappropriate mismatch to obtain GST refunds, which is the allegation in this case. The charges in that case were pursuant to s 228B Crimes Act 1961, that is dishonestly using a document to obtain a pecuniary advantage, which is what is alleged here. The charges are analogous and the fact patterns in that case very similar to what is alleged in this case, and that Mr Gell provided one entity on a payment basis, invoices for services to the other entity on an invoice basis, and then claimed the GST refunds. There was no evidence in that case that the services were actually provided, at least to the degree that was claimed. The Judge in that case made the following points:

> Firstly, where one individual controls a number of related entities then that person must expect scrutiny when it comes to being able to establish their tax position and that particularly, where refunds or payments of government monies are involved it is necessary that the person is able to dot all the i's and cross all the t's.

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[4] *Inland Revenue Department v Gell* District Court Wellington, 21/05 2010 CRI-2010-085-530.

And further in that particular case, the Judge observed that:

> That the argument by Mr Gell that there was a prospect of a flow of monies which justified seeking the refunds was not available to him because the prospect relied on a range of matters outside his control and was nothing more than a punt and therefore, he was not justified in obtaining refunds.

[29] The charges themselves require further definition as they require a determination of a number of ingredients.

[30] Under the old s 228 the prosecution had to prove the dishonest using of a document with intention to obtain an advantage; whereas, under s 229A, as it now is, it is simply the dealing with documents with the intention to defraud. Nevertheless, a document had to be used. The word "use" is common enough and in this case, it would be broad enough to include where a person uses a document with intent to defraud if he does so either with that intent. The "use" is the direct handling of a document. The instruction to deal with a document in a particular way or suffice in respect to the word "use."

[31] As far as "document" is concerned it has been long determined that a GST return is a document which can be used for a pecuniary advantage.

[32] As far as the word "dishonestly" is concerned, it does have subjective considerations as to whether the taxpayer held a genuine belief, either expressed or implied and that must be determined from his point of view.

[33] But it has to be a genuine belief and if the Court determines that the evidence discloses that the belief is not genuine or reasonable, then it can find that particular dishonest purpose to be proved. Likewise, with a claim of right.

[34] As to obtaining, another ingredient to the charge, it really means that anything that can enhance a person's position, particularly a financial position and one which in this case constitutes an element of advantage. Obtain or retain for himself or herself or any other person.

[35] So those are the ingredients. I am now looking at more specifically at the topic which gave rise to most of the discussion at the hearing in respect of these charges, the question of GST on interest.

[36] ETO was providing accounting services to PPL. At a very early stage of the relationship between ETO and PPL, ETO rendered an invoice and it claims, although I have to say that proof thereof is somewhat vague, that non-payment of the account or the invoice would attract interest, penalty interest compounding. Whereas the amount initially was comparatively small, as the interest rate compounded over the years, indeed over 18 years, the amount of that invoice and any other subsequent invoice, appreciated considerably until the overall debt incurred through those invoices by PPL was some $787,494.47. Over the period 1990 to 2008 very few actual invoices for services were provided, and the ones that were produced to the Court were of comparatively minor amounts, that is in respect of services provided by ETO to PPL.

[37] PPL had no prospect of ever paying either the original invoices or the ever increasing amounts of interests because it had no trading activity, it was receiving no income and therefore, had no ability to reduce its liability to ETO, and this continued over all of those years. In the meantime though on a regular basis, indeed on the dates when GST had to be considered, invoices were manufactured by ETO to PPL not for services, but for the interest factor. Hence the need to determine the legal position of GST on interest. The first point to note is that interest is a financial charge and financial charges are not subject to GST; and further, the interest charged on overdue accounts is to be treated as an exempt supply. This is specifically provided in the statute, it is ss 3, 5 and 14 GST Act 1985.

[38] Just to break it down. What is meant by a financial service, such as a financial charge? That is defined in s 3 where it says. "For the purpose of this Act the term "financial services" means any one of the following activities, and for the purpose of this case, the payment or collection of any amount of interest." The Act also defines the meaning of supply and for the purposes of this case the amount charged for late payment of an account is treated as being consideration for a supply of services in the course of a furtherance of activity whether the amount is described as a fee, penalty or

charge, but and this is a big but, that subsection of s 5 does not apply to the extent that the amount is penalty or default interest, or a charge in the nature of penalty or default interest that is imposed under contract to supply goods or services, or any enactment. And further in the Act, s 14 confirms what is meant by "exempt supplies" when it says, "An amount is treated as consideration for an exempt supply is a penalty interest or default interest, or a charge in the nature of a penalty interest or default is imposed under the contract for supply of goods and services, or under any enactment." In effect what s 14(3) is saying that no GST is chargeable on default interest. That is not to say that it is not chargeable in respect of other types of penalty that may be provided in any contract for supply, but default interest is not such a supply and does not attract GST.

[39] Turning now to the affairs of PPL. Inland Revenue's system indicates that PPL was registered for GST as from 1 May 1991 on an invoice basis and it then filed GST returns compiled by the defendant, through ETO for 94 periods thereafter, claiming $787,494.47 in expenses. As I have said, those expenses were not in respect of any actual service provided by ETO, they were "expenses" that referred to the interest component the ever-increasing interest component which was the liability of PPL to apparently pay to ETO for its outstanding debt, that ever increasing liability, that snowballing liability that increased substantially every year on account of its compounding interest factor. So therefore, the tax invoicing requirements have not been met because tax invoicing is for a service not for an interest component.

[40] What was the result of this interest component, so called, in these invoices, so called, that the defendant was rendering to PPL? PPL sought a GST refund, the GST refund was duly paid by the Inland Revenue. That GST refund that was paid was not used in any way to reduce the company's indebtedness, that increasing indebtedness to ETO, it was utilised by Mr Archibald, the defendant, for personal activities or other activities related to enterprises which he had control. Indeed, some of the money by way of refund was paid directly to the defendant and/or his wife and family as shareholders drawings. This is drawings from a company that was increasingly in debt and by the time the matters came to the attention of IRD over $900,000.

[41] During the period which these GST returns were filed, these false returns, GST refunds were released totalling $84,147.18. As I have said, those refunds were not utilised by the company in respect of paying its debts, that is PPL, it was utilised by the defendant personally, by members of his family or by other enterprises in respect of which he had control.

[42] ETO were not entitled to render the invoices because they were fiction, PPL was not entitled to seek the GST refunds based on that fiction. Both companies were under the immediate control of the defendant, and in my view, the inference is overwhelming that the defendant embarked upon this course deliberately, with a view to fraudulently obtaining GST refunds through the agency of PPL and then personally benefitting therefrom.

[43] In my view, all the ingredients of the charges in respect of s 228 Crimes Act 1961, as it used to be and s 229A Crimes Act 1961 as it now is, have been proved, and in respect of those two representative charges covering the periods years 2000 to 2007, the defendant will be convicted.

[44] Mr Archibald, I have found the charges proved and the next step will be for the Court to impose the appropriate sentence, that is not something which I intend to embark on today, so you will be remanded to a future date, which I am told now will be 27 July 2018 at the Manukau District Court at 11.45 am for sentence.

[45] In the meantime, I am going to seek a pre-sentence report in respect of you and your affairs. I am going to request submissions from the prosecution, and if you want to make any submissions you will of course have the ability to do so before I determine what the ultimate sentence in respect of these charges are.

[46] I have to say that both of the charges carry with them a potential penalty of a substantial period of imprisonment.

C S Blackie
District Court Judge