

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

CRN 152 & 153/11

BETWEEN

ANDREW JOHN HAIGH

Informant

AND

JOHN YOUNG LIMITED

Defendant

Hearing: 20 July 2011

Counsel: Miss Henry for Informant
Miss Rokoika for Defendant

Sentence: 20 July 2011

SENTENCING NOTES OF C NICHOLSON J

- [1] The Defendant company, John Young Limited, pleaded guilty to two offences of failing to furnish tax returns. The first offence CRN 152/11 related to the 12 months of 2010, and the second information CRN 153/11 related to the two months of November and December 2009.
- [2] The maximum penalty for the offences are a fine of \$500 for each month of default in respect of a first conviction and a fine not exceeding \$1,000 per month for second and subsequent occasions after a first conviction.
- [3] Miss Henry for the Informant pointed out that the company was written to in March, April and September of 2010 requesting that the outstanding VAT returns be furnished, and in March of this year decided to lay the charges. The Defendant

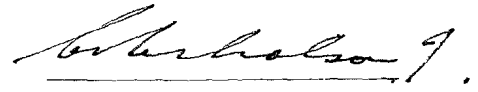
company then co-operated and filed the outstanding VAT returns. She pointed out that the offence of failing to file a VAT return is a strict liability offence and that, in order to promote a sense of responsibility and send a message to the public about the necessity to file VAT returns on time, a fine should reflect a specific and general deterrent aspect. She asked that the Court deal with the charges in time order of committal of the charges, namely the charge CRN 153/11 for the two months of 2009 first, and then for the other charge for the 12 months of 2010. She submitted that an appropriate fine in respect of the 2009 charge would be in the range \$250 to \$350 a month, and that for the information relating to THE 2010 failure, a fine in the range \$500 to \$650 a month.

- [4] For the Defendant company in mitigation Miss Rokoika pointed to the dire financial situation of the Defendant company and the struggle to keep it going. She also pointed out that, although the plea of guilty was not made when the matter was first called, it was indicated after there had been disclosure. She also pointed out that the company was making payment of \$500 per month to the collector of revenue in payment of outstanding VAT. She asked that the penalty be imposed, not upon the basis of time of committal as submitted by Miss Henry, but in the order of the information swearing.
- [5] It is clear that it is a strict responsibility and a heavy responsibility for people in business to make the appropriate returns to the Revenue Department and that the amount of tax payable to the State should not be regarded as a second priority and used in effect as ongoing finance for a company or business. However, the realities of life are that when people are in financial difficulty they tend to pay immediate pressing debts and commitments in order to keep their business going at the expense of paying the tax, and that seems to be the case here.
- [6] In an affidavit which a Director, Ms Young, swore she pointed out that their business, which is that of providing accommodation by way of tourist apartments in Rarotonga went into difficulties because of the recession in the period at the end of 2009 and last year income has been low. To keep their business afloat, because there was a mortgagee sale looming of the business, Mr and Mrs Roberts sold their home in New Zealand and put the money into the business. If they did not have their house to back them up they would have lost the business altogether. They do careful budgeting
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and she and her husband work two jobs in order to keep the business afloat. They will need to apply for a personal loan to cover the amount of any fines ordered by the Court. Heavy fines would mean that they could not afford to pay them and would most probably mean the closure of their business and their having to move away from Rarotonga. If the business were to fail, then it is problematical that even the secured creditors and the tax authorities would receive full payment of the debts, so it is in everybody's interests to keep the business going if at all feasible.

- [7] I accordingly take the financial situation of the Defendant into account in assessing appropriate fines because, to make them what would normally be imposed will be crippling to the extent of being self-defeating for all concerned. I consider that the fine should be assessed upon the basis of historic failure to file, and therefore I will treat the two months of 2009 first.
- [8] However overall I must bear in mind, as is the law, the totality principle of sentencing so as to make the end result commensurate with the seriousness of the offence balanced by the Defendant's circumstances. In this exceptional case of clearly two very hard working honest people who are trying to make a go of their business for everybody's sake, I think that the fines imposed should be minimal.
- [9] Accordingly, on the information CRN 153/11 I impose a fine of \$200, that being \$100 for each of the two months. In respect of the other information I impose a fine of \$2,400, being \$200 for each of the 12 months, making a total fine for the two charges of \$2,600. In addition I order the company to pay Court costs of \$30 on each information, making a total of \$60. That brings a total financial liability of \$2,660.
- [10] I point out that this is very much an exception and, had there not been the dire financial situation of the Defendant which in my view is not due to the fault of the Directors of the company, the fines would have been in the range as submitted appropriate by Miss Henry. But nevertheless, the overall interests of justice in my view require that there be a fine that the company can realistically meet and continue for the benefit of everyone.

[11] The fine and costs are to be paid by monthly instalments of \$221.60 with first payment on 1 August 2011.

A handwritten signature in black ink, appearing to read "C Nicholson J", written over a horizontal line.

C Nicholson J