COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO.2 OF 2004

BETWEEN:

GEORGE DANIEL

Defendant/Appellant

and

COMPTROLLER OF INLAND REVENUE

Complainant/Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Michael Bruney for the Defendant/Appellant
Mrs. Candia Carrette-George for the ComplainantRespondent

2006: April 4;
April 24.

JUDGMENT

[1] RAWLINS, J.A.: The main issue that this appeal raises is whether the appellant, a medical doctor, was liable to file and thereby furnish to the Comptroller of Inland Revenue, the complainant, an income tax return for the year 2000 pursuant to section 117 of the Income Tax Act.[1] A secondary issue is whether, in a trial to determine whether a person who is a defendant is so liable, the burden of proof

[1] Chapter 67:01 of the Revised Laws of Dominica, 1990, which will be referred to herein as "the Act".

shifts to a defendant at any stage. The questions, in the context in which they arose in this appeal, will be better appreciated against a brief background.

Background

[2] The appellant was charged on a complaint that was preferred by the complainant. The respondent stated that between 3rd April 2001 and 29th September 2003, the appellant failed to furnish to the respondent an income tax return for the income year 2000, as and when required under section 119(1)(a) of the Act. This provision makes it an offence where a person fails or neglects to furnish a return or document to the Comptroller of Inland Revenue as and when required under the Act. The appellant was convicted. On 29th October 2003, he was fined $500.00. This sum was to be paid by 15th December 2003, or, in default, serve 3 weeks in prison. The magistrate also ordered him to file the return for the year 2000 by 31st December 2003. The appellant appealed on the ground that the decision is unsafe and unsatisfactory.

[3] At the trial, only the acting Comptroller of Inland Revenue, Ms. Denise Edwards-Dowe, gave evidence on behalf of the respondent/complainant. She sought to call another witness, but the learned Magistrate did not permit that witness to give evidence because the person had sat in court while the complainant gave her evidence. I agree, however, with the suggestion by Alleyne CJ (Ag.), whose judgment I had the opportunity to read, that the proposed witness should still have been permitted to give evidence since this fact affects weight rather than admissibility.

[4] In her evidence, the acting Comptroller stated that the records at her Department show that the appellant is registered as a taxpayer with the Department. He is a self-employed doctor, who paid for a professional licence as such. He should have filed income tax returns by 2nd April 2001 for the income year 2000, but had failed to do so.

[5] In cross-examination, the witness stated, *inter alia*, that the appellant worked at the Global Medical Centre during the year 2000, although she did not see him work there. She did not know what income he earned during that year. She stated, further, that all self-employed persons are required to file or furnish income tax returns. She does not receive returns from all persons in Dominica, but she expects all persons who earn taxable income to file returns. According to the witness, taxable income is income that is not exempt from tax. Everyone who earns such income is liable to be taxed upon it, but self-employed persons such as the appellant must file returns whatever their income. The witness stated, on re-examination, that every person who earns taxable income, except employees with employment income of less than $15,000.00 per annum, is expected to file returns. Where there is no master/servant relationship, a person must file returns irrespective of the amount of income that the person earns.

[6] A no case submission was made on behalf of the appellant after the witness for the respondent/complainant gave her evidence. This submission was made mainly on the ground that the complainant's evidence did not disclose that the appellant was a person who was liable to furnish an income tax return under the provisions of the Act, because there was no evidence that he earned more than $15,000.00 during 2000. The learned magistrate overruled the no case submission. The appellant thereupon elected to give no evidence in his defence and was convicted on the charge and fined.

Reasons for Decision

[7] In her reasons for decision, the learned magistrate noted the submission by the appellant's Counsel that the appellant would only have been liable to file or furnish a return if he earned more than $15,000.00 during 2000, and, further, that the burden was upon the complainant to prove that the appellant earned more than that sum. Counsel for the appellant pointed out that the complainant had provided

no evidence to prove this. The learned magistrate considered these submissions in the light of sections 33(1), 47 and 66(5) of the Act, and, in addition, the definition of the word "employment" in section 2 of the Act.

[8] Section 33(1) falls under Division 1 of Part V of the Act. Part V is under the rubric "Ascertainment of Assessable Income". Division 1 is under the rubric "Gains or Profits Forming Assessable Income". Section 33(1) states:

"Subject to this Part, the assessable income of any person shall include the gains or profits from or by way of –

(a) any business;
(b) any employment;
(c) …"

[9] Section 47 of the Act, as amended, states that a resident individual is entitled to an allowance of $15,000.00 irrespective of the nature of his income.

[10] Section 66 of the Act falls under Part IX of the Act, which is under the rubric "Returns and Information". Section 66(5)(a) as amended, provides that a resident individual whose income accrues entirely from employment and does not exceed $15,000.00 during a year of assessment shall be relieved from the obligation to furnish an income tax return. As defined in section 2 of the Act "employment" means any employment in which the relationship of master and servant subsists or an appointment or office whether public or not and whether or not that relationship subsists.

[11] The learned magistrate found, correctly, that the appellant was a resident individual during the 2000 income year. She also found that the appellant was a self-employed individual in that year. She concluded her reasons for decision in the following terms:

> "It is clear that a self employed individual is not covered by the section [section 66(5)(a) of the Act]. The uncontroverted evidence is that the Defendant was self employed in 2000. From the evidence which the Defendant sought to illicit on cross-examination the Defendant's case is

that he made less than $15,000.00 in the income year 2000 and as such was exempt from filing returns for that year pursuant to section 66(5).

The law is that where a Defendant relies on an exception or exemption or proviso in an enactment creating an offence the burden of proving that exception, exemption etc is on the Defendant and proof is on a balance of probabilities: see R v Edwards (1975) QB 27 and R v Hunt (1987) A.C. 352.

It is my opinion that the Defendant did not discharge the burden of showing that he was not self employed and therefore not liable to file income tax returns for 2000. He was therefore found guilty of the charge of not filing income tax returns for 2000."

Was the appellant liable to furnish returns?

[12] When the appeal was argued before this court the parties agreed, correctly, that since the uncontroverted evidence was that the appellant was a self employed doctor, any assessable income would have accrued from "business" under section 33(1)(a) of the Act. The word "business" is defined in section 2 of the Act to mean:

> "…any business, profession, trade, venture or undertaking and includes the provision of personal services or technical and managerial skills and any adventure or concern in the nature of trade but does not include any employment."

[13] Accordingly, the appellant's liability to file or furnish income tax returns arose under section 66(2)(d) of the Act. This section provides that every person liable to furnish a return of income includes every person who derives any income from any source specified in section 33 of the Act irrespective of the amount of income. The Act contains no provision, which exempts self employed professionals who earn less than a specified income from furnishing, as section 65(5)(a) does in respect of persons whose entire income accrues from "employment". I agree with the learned Chief Justice that the uncontroverted evidence that the appellant worked as a self employed medical doctor during the 2000 income year raised a presumption that he derived some income from his profession during that year. The burden was on the appellant to rebut it, but he failed to do so.

[14] In the foregoing premises, I would dismiss the appeal. I agree with the terms of the directions and the order as to costs made by Alleyne CJ (Ag.).

Hugh A. Rawlins
Justice of Appeal

[15] ALLEYNE C.J. [AG.]: I have had the opportunity of reading the judgment of Rawlins J.A. in draft. I agree with his conclusion, and adopt his summary of the background to the case. I wish to add only a few thoughts.

[16] Section 66 of the Income Tax Act makes provision for the furnishing of income tax returns by every person liable to do so. Such return shall 'contain a calculation of the chargeable income,*if any,* disclosed therein'.[2]

[17] Subsections (2)(d) and (5) of the same section provide as follows:

> "(2) For the purposes of this section "every person liable to furnish a return of income" includes –
>
> (d) subject to subsection (5), every person who derives any income from any source specified in section 33 irrespective of the amount of the income.
>
> (5) Notwithstanding subsection (2) –
>
> (a) a resident individual whose income accrues entirely from employment and does not exceed fifteen thousand dollars during the basis period for a year of assessment; and
>
> (b) a non-resident person whose income accrued from sources situated in Dominica consists only of income to which the provisions of section 57 apply,
>
> shall be relieved of the obligation to furnish a return of income under subsection (1)."

[18] Section 33 defines the assessable income of any person as including income from or by way of any business[3], and business is defined as including any profession[4]. It is the evidence that the appellant was a self employed doctor

[2] Income Tax Act Chap. 67:01, section 66(1)(b).
[3] Section 33(1)(a).
[4] Section 2.

and had paid his professional licence as such. The learned Magistrate accepted that unchallenged evidence, and concluded that the appellant was not relieved of the obligation to file a return by the operation of section 66(5). I agree. On the evidence the appellant's income did not accrue entirely, or at all, from employment, but from 'business', i.e. his profession as a doctor in private practice. Nor was he a non-resident who could claim exemption under subsection (5)(b). Section 66(5) does not assist the appellant.

[19] It is a reasonable, indeed perhaps an inescapable inference, absent proof to the contrary, that a person who exercises his profession earns an income, even if not a profit, from it. It is perhaps worth noting that section 66(2)(d) of the Act goes out of the way to state that the amount of the income derived is irrelevant to the obligation to furnish a return. At the very least the fact of exercising a profession raises a presumption that the person doing so earns an income from it. In this connection I am fortified by the words of Lord Evershed M.R. in Pyrah v Annis & Co. Ltd[5]; "It suffices that, to my mind, on the material available the assumption which the judge made could fairly be made on the evidence." As in that case, so in this the opportunity was in the court below presented for the appellant, if he wished, to give evidence that he had earned no income in the relevant year, and on the facts which he could prove, to challenge the premises of the respondent's contention. As in that case, so in this, the appellant failed to do so. In the same case Birkett L.J. said[6] in relation to the same issue; "passages from the judgment made it plain that Vaisey, J., was in some little perplexity as to the paucity of the material in certain parts of the case. He did come to a conclusion, however, and I think that there was evidence on which he could do so". That is equally true in this case. I see no reason to interfere with the Magistrate's finding of fact.

[5] [1957] 1 All ER 196 at 201.
[6] At page 202.

[20] The short judgment of Rowlatt J. in the case of Tudor and Onions v Ducker[7] demonstrates that in income tax cases it is incumbent on the taxpayer to produce evidence in support of a challenge to an assessment made by the tax authority. See generally also Bi-Flex (Caribbean) Ltd. v Inland Revenue Board[8], and Alim Khan Juman v Inland Revenue Board[9]. I am of course conscious that this is not a case of an assessment, but of the furnishing of a return, but I can see no reason to apply different principles.

[21] In P.R. v Income Tax Commissioners[10] Blagden, Ag. C.J. referred to the "overall plan on which a Taxing Statute is designed" as summarised by Lord Dunedin in Whitney v I.R. Commissioners[11]. There are three stages; the declaration of liability, the assessment, and recovery. Lord Dunedin declared that "liability does not depend on assessment". This case concerns the first stage. The learned Acting Chief Justice, at page 156, declared "as a matter of principle that it is the duty of the court to give to the words of every sub-section and thus to the words of the whole ordinance their reasonable meaning".

[22] Section 66(1) of the Act provides that "every person liable to furnish a return of income in respect of any year of assessment shall furnish a return ... on or before 31st March following the end of the income year ..." .

[23] It seems to me clear that, in the absence of evidence that the appellant did not earn an income from his profession in the relevant year of assessment, he falls within the definition of a person liable to furnish a return. The witness for the respondent gave evidence, weak though it may have been, that the appellant is a self-employed doctor, that he worked as such at Global Medical Centre in 2000, and that he paid his professional licence as a doctor to the Inland Revenue. The appellant chose not to give evidence in rebuttal. It seems to me

[7] 8 T.C.591.
[8] (1990) 38 WIR 344 at 368.
[9] [1991] 39 WIR 414
[10] [1959] 2 WIR 140, at 155.
[11] [1926] AC at page 52.

unquestionable that there was *prima facie* evidence in support of the claim that he was liable to furnish a return, and had failed to do so. I am of the view that all relevant issues for proof of the charge had been established, and the Magistrate was right to convict.

[24] I would dismiss the appeal and affirm the conviction and sentence, order that the fine be paid within one week, in default three weeks in prison, and that the appellant file a return of income for the year 2000 within one month. I would also order the appellant to pay the respondent's costs of the appeal, in the sum of $1000.00.

[25] Incidentally, I have noted from the record that the learned Magistrate declined to allow a proposed witness for the respondent to give evidence on the ground that the witness had been present in court while the evidence of the acting Comptroller was being given. I do not know what if any impact this may have had on the case. I wish to take this opportunity to point out that the presence of a proposed witness in court during the time that another witness is giving evidence, while generally undesirable, is not a ground for excluding the evidence of that proposed witness, but may go to weight, which will be a matter for the court in the particular circumstances of the case and the magistrate's, judge's or jury's assessment of the witness. This question was addressed by this court in the case of Ken Baker v R[12], judgment delivered in January 2004.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal

[12] St. Vincent and the Grenadines Criminal Appeal No.12 of 2003.