IN THE COURT OF APPEAL OF NEW ZEALAND

CA468/2015
[2016] NZCA 187

	BETWEEN	MORRIS BURTON SUCKLING Appellant
	AND	THE QUEEN Respondent

Hearing: 12 February 2016

Court: French, Simon France and Ellis JJ

Counsel: Appellant in person
P D Marshall for Respondent

Judgment: 10 May 2016 at 10.00 am

JUDGMENT OF THE COURT

A The appeals against conviction and sentence are dismissed.

B The commencement of Mr Suckling's sentence of imprisonment is to be deferred until the earlier of:

(a) the determination of any application under s 80I of the Sentencing Act 2002 to the District Court for cancellation of that sentence and substitution of a sentence of home detention; or

(b) two months from the date of this judgment.

C Mr Suckling is granted bail on the following conditions:

(a) he is to reside at 2 Grand Oaks Drive, Palmerston North; and

(b) on the date that either:

(i) his application under s 80I of the Sentencing Act is declined; or

(ii) if no such application is made or remains undetermined, at the expiry of the two month period —

he is to surrender himself to the prison manager at Manawatu Prison.

REASONS OF THE COURT

(Given by Ellis J)

[2] Following a trial before Judge Atkins QC and a jury in the Palmerston North District Court, Mr Morris Suckling was found guilty of five charges of knowingly providing misleading income tax returns and 10 charges of evading the assessment or payment of GST. He was sentenced by Judge Lynch to one year's imprisonment, with leave to apply for home detention.[1] He now appeals against both conviction and sentence.

Background

[3] In one form or another, Mr Suckling has operated a seed-treating business from the late 1990s onwards. Initially, he did so through a company, Top Crop Seed Treating Ltd (TCSTL), which was registered for income tax and GST. TCSTL was wholly owned by Mr Suckling and his wife, Christine Suckling.

[4] In 2006, Mr Suckling and TCSTL were audited by Inland Revenue (IR). IR found TCSTL had been invoiced for services provided by Mr Suckling to the company. The invoices were issued by Mr Suckling on behalf of an entity called the Bamen Trust. TCSTL paid the amounts invoiced into a bank account operated by Mr Suckling and his wife, and claimed those amounts (which were described as "subcontractor payments") as deductions for income tax purposes.

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1 *R v Suckling* [2015] NZDC 14634 [Sentencing notes of Judge Lynch].

[5] The Bamen Trust was not registered with IR and did not account for the income it received from TCSTL, which, between 2002 and 2006, totalled $283,880. The Commissioner of IR issued default assessments in relation to this income. Mr and Mrs Suckling disputed those assessments on behalf of the Trust. During the ensuing disputes process, Mr Suckling maintained the amounts received represented "the reward for Morris's labour" and were not taxable. IR's position was that the "rewards" received constituted taxable income.

[6] The outcome of the disputes process was that Mr Suckling was found liable for the tax on the amounts received. The resulting tax debt led to his bankruptcy; he was so adjudicated on 21 September 2011.

[7] According to advice provided to IR by Mr Suckling in May 2009, TCSTL ceased to operate from April 2007, due to his health problems.[2] But Mr Suckling nonetheless continued to operate a seed-treating business on his own account under the name Top Crop Seed Treating (TCST).

[8] IR again formed the view that Mr Suckling received income from the TCST business he did not declare and that he also failed to file GST returns as required. In May 2013 the Commissioner registered Mr Suckling for GST and issued assessment notices for income tax and GST to Mr Suckling personally in relation to TCST's business activities between 2007 and 2012. The GST owing for the period 1 April 2007 to 31 March 2012 was assessed at $29,631.38 and the income tax owing for the period 1 April 2006 to 31 March 2011 was assessed at $76,587.13.

[9] On 26 June 2013 Mr Suckling initiated the statutory disputes process under pt 8A of the Tax Administration Act 1994 (TAA) by issuing a notice of proposed adjustment (NOPA). In it, he maintained the Commissioner's assessments were based on transaction records from bank accounts with which he had no connection. He said: [3]

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2 The company was struck off the register in August 2010.

3 The NOPA seeks to draw a distinction between the disputant, who is described as "The Person's Personal Representative" described as "Morris" and an "Estate" described as being Mr Morris Burton Suckling.

> The funds in question were given in consideration of the labour of a man, and not for any activity of the above Estate, yet none of the alleged "income" has been attributed to the man.
>
> The bank accounts in question were opened in the name of trusts, yet none of the alleged "income" has been attributed to any trust.

[10] He also disputed the Commissioner's power to register "the Estate" for GST without consent.

[11] Criminal charges against Mr Suckling were laid in August 2013.

[12] On 22 August 2013 the Commissioner issued a notice of response (NOR) rejecting Mr Suckling's NOPA. On 21 October 2013 Mr Suckling responded to this by letter in which he said TCST was a trust with which he had no association. He also advised, however, that he had "consulted" with the directors of the corporate trustee of TCST, who had advised that:

(a) they were prepared to accept GST should have been collected and accounted for;

(b) they were willing to consider "any reasonable request" that the trust account for funds received into its bank account for the purposes of income tax; and

(c) the actual figures in the NOR were not in dispute.

[13] On 4 April 2014 IR received an application for an Inland Revenue Department (IRD) number from a trust entity called Top Crop Seed Treating (the Trust). The application was signed by Mrs Suckling. The Trustee was said to be TCST Ltd.[4] The Trust was duly allocated an IRD number.

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[4] According to the trust deed the Trust was settled on "one quarter shekel weight (2.85 grams) 9999 pure gold", by a Panama-based settlor in favour of a Belize-based beneficiary trust, for "the promotion of the provision of support for the relief of poverty and/or education and/or health and/or the free exercise of religion and spiritual well-being and edification of the Beneficiaries". Discretionary beneficiaries are defined to include "such other living soul as the Trustees shall ... appoint" and exclude "Inland Revenue, the Commissioner of Inland Revenue, the Crown and any department or agency of any National or State Government".

[14] On 8 May 2014 the Trust registered for GST with a trade name of TCST Limited.

[15] On 12 May 2014 Mrs Suckling wrote to IR asking for the Trust's GST registration to be backdated to 1 April 2007. Mrs Suckling subsequently filed GST returns on behalf of the Trust for the back-dated period. These returns resulted in refunds accidentally being paid to the Trust until an account halt was put in place by IR.

[16] On 6 October 2014 income tax returns for the financial years 2008 to 2014 were lodged on behalf of the Trust. The returns showed income received by the Trust in the same amount as had been assessed to Mr Suckling but recorded that all the income each year had been distributed to a beneficiary of the Trust, the Sapphire Trust (Sapphire). Mrs Suckling subsequently advised that as Sapphire was domiciled in Panama it was not required to account in New Zealand for tax on the income it had received.[5]

The criminal proceedings and the trial

[17] It is important to record at the outset that Mr Suckling represented himself throughout in relation to the criminal proceedings. At various stages of the process both Judge Lynch and Judge Atkins expressed concern about this and urged Mr Suckling to obtain representation or to seek legal advice. On each occasion Mr Suckling advised either that he was content to represent himself or that he would seek or had sought advice.

Pre-trial issues

[18] In September 2014 Mr Suckling sought to have the charges against him dismissed pursuant to s 147 of the Criminal Procedure Act 2011 (the CPA) on the grounds that:

(a) the District Court lacked jurisdiction because Mr Suckling had challenged his tax liability under the TAA disputes process; and

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5 That position is not correct.

(b) there was no evidence of mens rea or knowledge on his part in relation to the charges and that liability for the tax lay with another party.

[19] The s 147 application was heard and rejected by Judge Lynch in a carefully reasoned decision dated 19 September 2014.[6]

[20] For the first ground, Mr Suckling relied upon s 109 of the TAA, which provides:

> Except in objection proceedings under Part 8 or a challenge under Part 8A,—
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> (a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
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> (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.

[21] Mr Suckling said that, because he had initiated the disputes process in relation to the correctness of the Commissioner's assessments,[7] s 109 meant the Commissioner could not properly rely on them in the criminal prosecution. He said if his position in the disputes process (that no tax was owed) was upheld it followed that no tax could have been evaded.[8]

[22] The second ground was summarised by Judge Lynch as follows:

> [27] Mr Suckling contends that the Crown will be unable to prove an intention on his part to evade the payment of income tax or GST and that his Notice of proposed adjustment … "conclusively establishes" his belief that any tax liability falls on the Trust, not him.

[23] After considering the relevant authorities (which we discuss later below) the Judge said (inter alia):

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6 *R v Suckling* DC Palmerston North CRI-2013-054-2295, 19 September 2014.

7 Assessments are "disputable decisions" as defined in s 3 of the Tax Administration Act 1994.

8 Mr Suckling's own articulation of this argument was recorded by Judge Lynch at [14] of his decision as follows:

> So the fact that the assessments upon which the present prosecution is founded are under dispute, should make those assessments unenforceable in any venue, including the criminal one. How can there be criminality surrounding an assessment which may not even exist? How can one person be charged with criminal offending if it turns out that he is not the liable party?

> [18] While Mr Suckling's argument has a degree of attraction, in my assessment it is misconceived. The Crown does not rely on the quantum identified in the Commissioner's assessment as an element of the offences Mr Suckling faces. Rather, the Crown relies on the invoices, bank statements and other evidence to be lead at trial. The assessments cannot be conclusive proof of the alleged offending, but are part of the procedural matrix. In relation to the income tax charges it is the returns filed by Mr Suckling which are produced and relied upon as evidence of their falsity, together with the other evidence the Crown contends supports their case that these returns were false, incomplete or misleading.
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> [19] Accordingly, the content of the assessments is not in issue at the trial. What is in issue is an allegation that Mr Suckling intended to evade the assessment or payment of income tax (the s 143B(1)) charges; and evade the assessment or payment of GST (the s 143B(2)) charges. Put simply, the Crown case is not about disputing the correctness or otherwise of an assessment by the Commissioner or the taxpayer (Mr Suckling's filing of the self-assessed income tax returns – IR3's – to IRD).

[24] Judge Lynch accordingly concluded s 109 did not preclude the pursuit of criminal tax evasion proceedings in circumstances where a defendant has disputed the underlying tax liability under the TAA.

[25] As far as the second ground of the s 147 application was concerned, the Judge applied an orthodox *R v Flyger* analysis and concluded that, notwithstanding the NOPA, the evidence proposed to be offered by the Crown at trial meant it could not be said a properly instructed jury could not reasonably convict Mr Suckling.[9]

[26] Subsequent to Judge Lynch's decision, but again prior to trial, Mr Suckling objected to the admissibility of some of the proposed Crown evidence, including an application by the Crown under s 130 of the Evidence Act 2006 for the production of documentation, namely New Zealand Company Office Records, bank account records, copy of a marriage certificate and birth certificates and invoices issued by various listed companies. In a minute dated 14 October 2014 Judge Smith deferred consideration of these objections to trial, "should [they] become relevant".[10]

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9 *R v Flyger* [2001] 2 NZLR 721 (CA).

10 *R v Suckling* DC Palmerston North CRI-2013-054-2295, 14 October 2014 at [3].

The trial

[27] The trial itself took place before Judge Atkins between 9 and 12 December 2014. During the trial Mr Suckling advanced further admissibility challenges, which were rejected in a ruling by Judge Atkins, who provided brief "interim" reasons which, he said, he proposed "to expand upon ... on the completion of the trial".[11]

[28] One of the submissions made by Mr Suckling was that the assessments were inadmissible on the grounds they were both under dispute and irrelevant. Judge Atkins endorsed Judge Lynch's finding that the fact the Commissioner had made the assessments was part of the general factual matrix but was not one of the elements of the offences charged, and accordingly did not have to be proved by the Crown.[12]

[29] Another of Mr Suckling's submissions was that the Commissioner's view that it was Mr Suckling who was the party liable to pay the tax was itself a "disputable decision", and could not be placed before the Court as an established fact. Judge Atkins' ruling records he had advised Mr Suckling that the Crown would have to satisfy the jury Mr Suckling is the person who had an obligation to pay tax, and that this was a matter that was contestable.[13]

[30] At the conclusion of the Crown case Mr Suckling made it clear he did not intend to cross-examine any of the Crown witnesses and that he did not intend to offer any arguments in response to the Crown closing. This was recorded by the Judge, who then adjourned the conclusion of the trial to the following day because he was concerned Mr Suckling be given some time to consider his position carefully.[14]

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11 *R v Suckling* DC Palmerston North CRI-2013-054-2295, 10 December 2014 [Ruling 1 of Judge Atkins] at [27].

12 At [21].

13 At [23]–[24].

14 *R v Suckling* DC Palmerston North CRI-2013-054-2295, 11 December 2014 [Minute 4 of Judge Atkins].

[31] When Court resumed the next day Mr Suckling confirmed he did not wish to address the jury. The Judge recorded Mr Suckling had indicated he had considered the position and had received some advice.[15] In the same minute, the Judge noted:

> [2] He asked me to have the jury look at a question relating to whether or not Mr Suckling had himself received any of the funds, it being his position that funds had not come to him personally but had come to a trust, and in support of this proposition he pointed to some bank statements which referred to trustees.
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> [3] I indicated to Mr Suckling that he had not cross-examined anybody as to the meaning of this, and particularly the leading Crown witness, and in the absence of any evidence it was hard to see how the use by a bank of the word "trustees" could alter anything. I gave him the opportunity to consider the position. He has done so and has indicated that it is still his wish not to address the jury.

[32] Neither the Crown in closing nor the Judge in his summing-up made reference to the assessments or their deemed correctness.

[33] On the afternoon of 12 December 2014 the jury entered guilty verdicts on all charges. But Judge Atkins then recorded he did not intend, at that point, to enter convictions because he wished (for reasons the Judge minuted) to give Mr Suckling the opportunity to obtain advice and to file further submissions on the admissibility issues that had been the subject of his earlier ruling.[16] He set a date by which those submissions (and submissions in response) were to be filed and said "the matter will be heard in full on 4 February".

[34] Both Mr Suckling and the Crown filed further submissions as directed. But in the meantime, Judge Atkins had fallen ill and was unable to deal with them. Matters were left in abeyance until 8 June 2015 when the file was referred to Judge Lynch who, by minute, recorded:[17]

> [4] It is clear from a reading of Ruling 1 and Minute 6 that the Judge wanted to firstly, better articulate Mr Suckling's argument which he had determined in Ruling 1, given that Mr Suckling intended to advance an appeal; and secondly, to expand on the reasons for the ruling as the Judge

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15 *R v Suckling* DC Palmerston North CRI-2013-054-2295, 12 December 2014 [Minute 5 of Judge Atkins].

16 *R v Suckling* DC Palmerston North CRI-2013-054-2295, 12 December 2014 [Minute 6 of Judge Atkins].

17 *R v Suckling* DC Palmerston North CRI-2013-054-2295, 8 June 2015.

> observed at [27] that he would at the conclusion of the trial. The Judge's intervening ill health has prevented the latter occurring.

[35] After expressing doubts as to whether the decision in *R v Ramstead* permitted further argument post-verdict in the circumstances of Mr Suckling's case,[18] the Judge said:

> [6] In any event, this matter was not a case, in my assessment, where a provisional finding as to admissibility was made, or a case where the Judge to spare the jury inordinate delay, put off an admissibility argument until after verdicts. The Judge made a ruling and was crystal clear about the result. In my assessment it follows that convictions must now be entered.
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> [7] Judge Atkins QC is unavailable and accordingly I enter the convictions following the jury's verdicts. I remand Mr Suckling for sentencing on Friday 24 July 2015 at 10.00 am and direct a sentencing report together with appendices. …

[36] Shortly afterwards, and prior to sentencing, Judge Atkins then issued a minute providing "context to what occurred".[19] His Honour went on to explain why he would have rejected the (new) arguments on admissibility put forward by Mr Suckling in his post-verdict submissions.

[37] On 24 July 2015 Mr Suckling was sentenced by Judge Lynch to one year's imprisonment with leave to apply for home detention.[20] Pending the determination of this appeal, however, he has remained on bail.

Conviction appeal

[38] The grounds upon which Mr Suckling appeals his conviction are:

(a) Judge Lynch's decision dismissing his s 147 application led him to believe he "was to be denied any meaningful defence before the District Court";

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18 *R v Ramstead* CA428/96, 12 May 1997.

19 *R v Suckling* DC Palmerston North CRI-2013-054-2295, 29 June 2015.

20 Sentencing notes of Judge Lynch, above n 1. At the time of sentencing Mr Suckling declined to consent to an electronically monitored sentence.

(b) for the reasons advanced by him in relation to the s 147 application, the District Court did not, in any event, have jurisdiction to hear the criminal charges;

(c) the jury was misled by the Crown as to his actual position in relation to the charges, which was that he was not the party liable to pay the tax assessed by the Commissioner; and

(d) he was not given a proper (post-trial) hearing on his challenge to the admissibility of the Crown's evidence.

[39] We will address each of these grounds in turn.

Mr Suckling's belief he "was to be denied any meaningful defence"

[40] We accept Mr Suckling's primary "defence" was that his engagement in the disputes process precluded the determination of the criminal charges. We also accept Judge Lynch's pre-trial decision rejected that argument. But, without more, this ground leads nowhere. That is because if Judge Lynch's decision was correct then this line of defence was not open to Mr Suckling. And if Judge Lynch was wrong then Mr Suckling should succeed on appeal. To the extent Mr Suckling failed to pursue other avenues of defence that may have been open to him, however, that was a matter of his personal choice (an issue we discuss further below).

The District Court lacked jurisdiction to hear the criminal charges

[41] This is Mr Suckling's principal ground of appeal. It confronts Judge Lynch's s 147 finding that s 109 and the parallel disputes process did not operate as a bar to the criminal proceedings.

[42] Before turning to consider the merits of this ground it is necessary briefly to outline the three relatively recent decisions of this Court that have dealt with the

operation of s 109 in the context of criminal proceedings.[21] Each of these decisions was considered by Judge Lynch in the course of his s 147 decision.

R v Smith

[43] Mr Smith and his wife were convicted on (inter alia) charges of knowingly failing to pay PAYE tax.

[44] The Commissioner had issued assessments that represented his view of the Smiths' correct tax position. The Smiths disputed these assessments but the disputes process was not complete by the time of their criminal trial. The Smiths' principal defence in relation to the PAYE charges was that they had no employees and therefore no obligation to account. They also unsuccessfully contended the Commissioner was required to prove the amount of PAYE tax owing and that he could not do so prior to the completion of the disputes process. The trial Judge had rejected this last proposition and directed the jury that s 109 required them to take the Commissioner's assessments as correct.

[45] Mr Smith's appeal against conviction was dismissed.[22] As far as the PAYE charges were concerned, the Court held it is only necessary for the Crown to prove that an amount of the PAYE deduction has been misapplied; it did not have to prove the precise amount of the deduction.[23] It is implicit in that finding that the Court considered there was no requirement to complete the disputes process prior to the related criminal trial. More specifically, and as far as s 109 was concerned, the Court said:[24]

> Turning to the second question, we are satisfied that the Judge was also right when she told the jury that the assessments before the jury were to be taken as correct. Even though Mr and Mrs Smith disputed those assessments by way of the objection process, on the evidence before the jury the Commissioner's assessments prevailed by virtue of s 109 of the Tax Administration Act. … Thus, for the purposes of s 143A(1)(d), the jury was obliged to use the Commissioner's assessments as the benchmark for

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21 The earlier decision of *Maxwell v Inland Revenue Commissioner* [1959] NZLR 708 (CA) does not appear to have been considered in any of the decisions referred to.

22 *R v Smith* [2008] NZCA 371, (2009) 24 NZTC 23,004.

23 At [15].

24 At [19] (emphasis added). This Court has described these comments as obiter in both *R v Allan* [2009] NZCA 439, (2009) 24 NZTC 23,815 at [57] and *Rowley v R* [2015] NZCA 233, (2015) 27 NZTC 22-011at [73].

> determining whether or not there had been a misapplication of PAYE deductions. *This was unlikely to have been an issue on the facts of this case because the focus of the defence case was on the proposition that the appellant did not have employees and therefore had no obligation to deduct PAYE from their wages.* It may be open to an accused person to argue that he or she paid the amount of PAYE that he or she believed was the correct amount (the amount deducted from employees' wages) and therefore did not knowingly fail to account for PAYE, even if the amount actually paid was less than the amount assessed. But that possibility does not need to be explored on the facts of this case.

[46] In declining Mr Smith's application for leave to appeal, the Supreme Court said: "There is no justification for giving the words of s 109 other than their plain meaning."[25]

R v Allan

[47] Mr Allan was found guilty of nine charges of aiding and abetting his company in knowingly failing to file GST returns intending to evade the payment of GST. The assessments issued by the Commissioner to Mr Allan's company could not be disputed because the company had gone into liquidation. For present purposes, the relevant issue was whether Mr Allan could evidentially take issue with the amount of the tax assessed as owing at sentencing in order to contest the amount of reparation payable. In other words, the question was whether s 109 meant the Commissioner's assessments were required to be taken as correct for the purposes of a reparation order. This potentially called into question the relationship between s 109 of the TAA and s 24(2) of the Sentencing Act 2002 (the SA), which provides the prosecutor must prove beyond reasonable doubt the existence of any disputed aggravating fact.

[48] This Court held s 109 should not have precluded Mr Allan from leading evidence at sentencing challenging the quantum of loss said by the Crown to have been suffered as a result of the offending.[26] More particularly, the Court said:

> [55] It would, however, be a very startling proposition if the existence of a valid assessment precludes any challenge in criminal proceedings. …
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> [56] In our view, however, the startling consequences set out above do not arise, as there is no conflict between s 24(2)(b) and (c) of the Sentencing

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25 *Smith v R* [2008] NZSC 110, (2009) 24 NZTC 23,176 at [4].

26 *R v Allan*, above n 24.

> Act and s 109 of the TAA. Reparation is concerned with loss. Mr Allan is thus not challenging the assessment. He is challenging the amount of the loss. The Crown must prove the extent of any loss beyond reasonable doubt under s 24(2)(b) and (c). Reparation is not a tax collecting mechanism. …
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> [57] We do not consider this Court's decision in *R v Smith* or the Supreme Court decision in *Smith v R* are authority to the contrary. The Crown accepts that in *Smith* the amount of tax owing was irrelevant for conviction purposes. There appears to have been no issue of reparation in that case and the specific amount of taxation owing does not appear to have been a particular focus at sentencing. The comments in the *Smith* decisions as to the effect of s 109 of the TAA, … are therefore obiter, or at least made in a context where there was no statutory requirement of proof beyond reasonable doubt under s 24(2)(c). We note that the Crown does not suggest that the existence of an assessment was sufficient to prove the existence of employees (the issue in *Smith* being failure to account for PAYE). Direct evidence of that was called on behalf of the Crown at the trial.

[49] The Court went to on to say that had it found a conflict between s 109 of the TAA and s 24(2) of the SA it would have been prepared to read down s 109.[27]

Rowley v R

[50] Messrs Rowley and Skinner were relevantly charged with knowingly providing false information in their tax returns. That information was also reflected in their self-assessments for income tax. At the time of trial the Commissioner had not yet issued reassessments and it was argued for the defendants that s 109 required their self-assessments to be taken as correct for the purposes of the criminal proceedings and that the supporting information contained in the returns must also therefore be deemed to be correct. In other words, the defendants wished to rely on s 109 as a defence.

[51] That argument was rejected by Kós J in the High Court,[28] with whom this Court later agreed. Speaking for the Court, Harrison J said:[29]

> [71] The purpose of s 109 is plain. It is designed to ensure that all disputes and challenges capable of being brought under the statutory procedure are pursued in that way and not by some other legal means. The reference to the dispute being "on any ground whatsoever" emphasises that the provision is directed to a challenge to the decision giving rise to liability to pay tax.

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27 At [59].
28 *R v Rowley* [2012] NZHC 1198, (2012) 25 NZTC 20-127.
29 *Rowley v R*, above n 24 (footnotes omitted).

> [72] However, the Crown's purpose in producing the returns at trial was not to call into question or challenge their accuracy. To the contrary, it was relying on the returns as evidence that the defendants had falsely declared income in a particular year. The returns were the tangible or objective benchmark against which falsity was to be measured — that is of a failure to declare what each defendant knew was assessable income. The Crown proved that the defendants' income was in fact much greater than that returned, as a table included in the judgment shows. The Crown's decision not to dispute the returns does not have the effect of foreclosing later reliance upon them as the appropriate basis for measuring falsity. As Mr La Hood submitted, proof of the charge of supplying false information did not require Kós J to determine whether the defendants' returns were correct.

[52] Leave to appeal has, however, since been granted by the Supreme Court on the s 109 issue. In its leave decision the Court said:[30]

> [14] The applicants seek leave to appeal in respect of these charges on two bases.
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> [15] The first relates to s 109 of the Tax Administration Act 1994. Under this section a "disputable decision" may be disputed only in objection or challenge proceedings and is otherwise "deemed to be … correct in all respects". The income tax returns in issue were assessments and thus "disputable decisions". On the argument of the applicants, it follows that they are deemed to be correct unless and until they are set-aside under the 1994 Act. On this basis, the applicant contends that it was not open to the Crown in the criminal proceedings to allege that the returns were not correct.
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> [16] We grant leave to appeal in respect of this ground. In addressing the appeal we will wish to consider arguments not only as to the particular approaches taken on this issue by Kós J and the Court of Appeal but also that favoured by the Court of Appeal in *R v Smith*.

Discussion

[53] In light of the recent grant of leave in *Skinner* it must be acknowledged the final word on the operation of s 109 in a criminal context is yet to come. However, we must decide Mr Suckling's case on the basis of the authorities as they presently stand.

[54] None of the above three cases is squarely on all fours with the present. Mr Suckling was charged both with knowingly providing misleading income tax returns (as in *Rowley*) and with evading the assessment or payment of GST (as in

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30 *Skinner v R* [2016] NZSC 7, (2016) 27 NZTC 22-040 (footnotes omitted).

Allan). There are, however, no self-assessments in play and the *Rowley* issue of a s 109 defence does not arise.

[55] Of the three cases it is *Smith* that is most analogous to Mr Suckling's. Like the Smiths, he has disputed his assessments under the TAA and that dispute remained unresolved at the time of trial. Mr Suckling's position in that dispute and his (unarticulated) position at trial was that he is not liable for the tax because the payment for his labour was made not to him but to another entity, the Trust, and it was the Trust, not him, that was required to account for GST. As in *Smith*, therefore, he disputes his liability to pay tax in its entirety, not simply the quantum of the tax that is deemed by the assessments to be owing.

[56] In any event, the essence of Mr Suckling's case is that if he prevails in his tax dispute he could not then be guilty of the criminal charges. His concern was that if the Commissioner's assessments were put in evidence and were deemed to be correct in the criminal proceedings he would be unable to advance his defence, namely that:

(a) the Commissioner had got the wrong taxpayer;

(b) the assessments were, therefore, necessarily wrong; and

(c) no misinformation had been provided and no tax had been evaded.

[57] He therefore submits s 109 required either that the disputes process be completed before the criminal proceedings could be pursued or that the assessments were not admissible in the criminal proceedings.

[58] We consider there are a number of fundamental difficulties with this position, for the reasons that follow.

[59] First, it must be acknowledged that if Mr Suckling were to prevail in his tax dispute he could not then be guilty of the criminal charges. But that does not mean the tax dispute had to be determined first. That is because s 109 did not, in this case, operate to preclude Mr Suckling from contending at trial that the income was received by another entity and that he was not therefore liable for the tax. As we

have noted, his position in that respect was precisely analogous with the defendants in *Smith* where, notwithstanding the Court's view that s 109 applied in criminal proceedings, the Smiths were not prevented from contending at trial that they had no PAYE liability at all because they had no employees.[31]

[60] Importantly, there is nothing in Judge Lynch's decision that suggests otherwise; the Judge simply held (correctly, in our view) that s 109 did not operate as a bar to the criminal proceedings. Moreover, the record shows the point was made quite clearly to Mr Suckling by Judge Atkins during the trial, when he advised him that whether or not Mr Suckling was the party liable to pay tax was contestable.

[61] The real problem for Mr Suckling is that, for whatever reason, he chose not to cross-examine the Commissioner's witnesses at trial and he chose neither to give nor to call evidence himself. Nor did he address the jury. The end result was that through no fault of the Court or the Commissioner the jury had no way of knowing what his defence was.

[62] Secondly, as this Court made clear in *Rowley*, the correctness or otherwise of the income tax assessments issued formed no part of the Commissioner's case in relation to the charges of providing false information.[32] The Commissioner did not rely on the assessments as proof of anything. It was open to Mr Suckling to contend the information provided was not false because the income was not received by him. Again, Judge Lynch did not hold s 109 would operate to prevent him from making that argument.

[63] And even in relation to the GST charges, the Commissioner did not seek to rely on the assessments she had issued as proof of their correctness and therefore of Mr Suckling's liability. Rather, she established by means of other evidence that Mr Suckling was operating a seed treatment business on his own account, that he met the statutory threshold for GST registration and that he failed to return any GST when he knew he was required to do so. It always remained open to Mr Suckling to

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31 *R v Smith*, above n 22.
32 *R v Rowley*, above n 24.

challenge any one of those propositions by cross-examination, by giving or calling evidence or even simply by explaining his case to the jury.

[64] We consider the assessments were properly admitted as a part of the relevant factual narrative but that they have no more relevance than that. Care must, of course, be taken that they are not given a probative significance beyond that role. In the present case they were given no inappropriate weight by either counsel or the Judge.

[65] Lastly, and for completeness, we record that our own assessment of Mr Suckling's intended defence was that it was fanciful, at best. The factual narrative we have set out earlier strongly suggests the Trust structure was an amateur contrivance created after the event (both after the assessments were issued and after the criminal charges were laid) in an attempt to disguise the simple and unsurprising fact that Mr Suckling received payment for the work he did for TCST.

Jury misled about Mr Suckling's position that he was not the liable party

[66] Mr Suckling contends the jury was misled by one of the Commissioner's witnesses because she did not refer in her evidence to the post-assessment events we have set out at [13] to [16] above. In this Court the witness filed an affidavit in which she said:

> At trial I gave evidence that the income I had identified as attributable to Mr Suckling's seed treating business had not been returned by him or any other entity. I interpreted that question as referring to the periods covered by the investigation up until the point at which charges had been laid. In hindsight, I should have responded by saying that, although the TCST Trust had recently filed GST returns (and unbeknown to me at that point, the income tax returns) that appeared to relate to this income, these returns still resulted in no entity accounting for the correct taxation liability in respect of the Top Crop Seed Treating business activity.

[67] We have no hesitation in accepting this explanation. In any event, the post-assessment events are more unhelpful to Mr Suckling than they are helpful. As we have just observed, there is a clear inference to be drawn that those events were an unsophisticated and after-the-fact contrivance, the sole purpose of which was to bolster (or create) his defence to the evasion charges.

[68] And in terms of what the jury knew about the position Mr Suckling was taking, the transcript makes it clear the jury was aware in general terms that he was disputing the assessments. To the extent it was not aware of the precise basis for the dispute (which, as we have said, we regard as wholly unmeritorious), that was as a result of the choices Mr Suckling had made about the conduct of his trial.

Failure to give proper (post-trial) hearing on admissibility challenge

[69] This ground of appeal relates to the post-trial events that we have set out at [33] to [36] above. That narrative does suggest Judge Atkins intended to have a further "full" hearing on the admissibility issues. It is not in dispute that such a hearing did not occur.

[70] That said, however, it is impossible to argue with Judge Lynch's analysis of the position in his minute of 8 June 2015. We can only record our agreement with the Judge that Judge Atkins did, indeed, finally determine the admissibility issues in December 2014 and that there was no jurisdiction to review or revisit them.[33] Judge Atkins was mistaken in suggesting he could or would do so. But in the absence of jurisdiction to do what Mr Suckling says should have been done, no question of a miscarriage of justice can arise.

Sentence appeal

[71] The cornerstone of Mr Suckling's sentence appeal is the submission Judge Lynch was wrong to use the assessments to determine the quantum of tax evaded, because "they were not conclusive evidence".

[72] In our view, this submission is also without merit. The Judge's sentencing notes makes it clear he did not rely on the assessments themselves but rather on the evidence of the IR investigator.[34] The fact the investigator's evidence supported the assessments is neither here nor there. And significantly, the Judge's notes also make

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[33] It did, however, remain open to Judge Atkins to give fuller reasons for his earlier decision.
[34] Sentencing notes of Judge Lynch, above n 1, at [6] and [7].

it clear Mr Suckling's submissions on sentencing did not advance any other basis for quantifying the loss to the Revenue.[35] On the contrary, he recorded:

> [12] Mr Suckling's submissions on sentencing do not advance matters. Mr Suckling invites a mistrial to be directed. It is a bit late for that, but in the alternate would accept a discharge without conviction, and if that was granted he would withdraw his appeal. All that illustrates that Mr Suckling would have benefitted from having counsel, which he steadfastly, or perhaps belligerently, refused to engage. There is no foundation for the course Mr Suckling advances.

[73] Again, we can only agree with the learned Judge.

[74] Although Mr Suckling also submits he was unfairly taken by surprise by the sentencing because he had expected to have a further hearing on the admissibility issues, that contention is not borne out by the chronology we have set out above. In short, on 8 June 2015 Judge Lynch advised Mr Suckling he would be sentenced on 24 July 2015. A pre-sentence report was sought and obtained. Mr Suckling had ample time to prepare.

Result

[75] The appeals against conviction and sentence are dismissed.

[76] Mr Suckling indicates that in the event his appeals do not succeed he wishes to apply to the District Court for cancellation of the sentence of imprisonment and substitution of a sentence of home detention. That option (under s 80I of the SA) was left open to him by Judge Lynch.[36] That intention raises an issue about the immediate effect of our decision, which would ordinarily require Mr Suckling to go to prison pending the resolution of any such application.

[77] Under s 100(1) of the SA the Court may defer the start date of a sentence of imprisonment for up to two months on humanitarian grounds. We consider it would be appropriate to exercise that power here. We say that in part because Mr Suckling is 70 years old and has not previously been incarcerated and also because it seems

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35 As we have noted above, this Court in *R v Allan*, above n 24, held s 109 did not operate to prevent a defendant from contending at sentencing that the quantum of loss suffered by the Commissioner was different from the amounts contained in the assessments themselves.

36 Sentencing notes of Judge Lynch, above n 1, at [17].

clear Judge Lynch would have imposed a sentence of home detention had it not been for Mr Suckling's determination to decline it as a matter of principle.

[78] Accordingly, we direct that the commencement of Mr Suckling's sentence of imprisonment is to be deferred until the earlier of:

(a) the determination of any application under s 80I of the Sentencing Act to the District Court for cancellation of that sentence and substitution of a sentence of home detention; or

(b) two months from the date of this judgment.

[79] In accordance with s 40 of the Bail Act 2000 we grant Mr Suckling bail on the following conditions:

(a) he is to reside at 2 Grand Oaks Drive, Palmerston North; and

(b) on the date that either:

(i) his application under s 80I of the Sentencing Act is declined; or

(ii) if no such application is made or remains undetermined, at the expiry of the two month period —

he is to surrender himself to the prison manager at Manawatu Prison.

[80] The two month period will expire on 10 July 2016.

Solicitors:
Crown Law Office, Wellington for Respondent