

115 A.D.2d 450

Supreme Court, Appellate Division,
First Department, New York.

The PEOPLE of the State
of New York, Appellant,

v.

Gerard LACAY and Fong
Mok, Defendants-Respondents.

Dec. 26, 1985.

Synopsis

The Supreme Court, New York County, Carol Berkman, J., granted People's motion for reargument of the Court's prior order dismissing indictments for crime of offering false instrument for filing in the first degree, but adhered to its prior determination. On appeal, the Supreme Court, Appellate Division, held that: (1) case law precedent forbidding criminal prosecution under statute for whose violation the legislative intent is to impose civil penalties only did not apply where taxpayers allegedly filed false sales and use tax returns, and (2) State had discretion to prosecute filing of false sales tax returns under broader statute of offering false instrument for filing.

Modified to reinstate indictments, and otherwise affirmed.

West Headnotes (3)

[1] Taxation  **Offenses and prosecutions**

Case law precedent forbidding criminal prosecution under statute for whose violation the legislative intent is to impose civil penalties only did not apply where taxpayers allegedly filed false sales and use tax returns, which is prohibited by [Tax Law § 1145\(b\)](#), which provides for criminal penalties and states that those penalties are in addition to any other penalties elsewhere prescribed. [McKinney's Tax Law § 1145\(b\)](#).

[5 Cases that cite this headnote](#)

[2] Criminal Law  **Election between offenses**

Existence of both specific statute and general statute proscribing same conduct does not prohibit the prosecution from electing which statute to proceed under.

[3] Criminal Law  **Particular Offenses**

State had discretion to prosecute filing of false sales tax returns under broader statute of offering false instrument for filing, [Penal Law, § 175.35](#), rather than specific [Tax Law § 1145\(b\)](#), which provides for criminal penalties for filing false sales and use tax returns. [McKinney's Penal Law § 175.35](#); [McKinney's Tax Law § 1145\(b\)](#).

[3 Cases that cite this headnote](#)

Attorneys and Law Firms

****337** R.A. Seranfini, Brooklyn, for appellant.

J. Karp, Brooklyn, for defendants-respondents.

****338** Before ***452** KUPFERMAN, J.P., and SULLIVAN, ROSS, KASSAL and ELLERIN, JJ.

Opinion

MEMORANDUM DECISION.

***450** Order, Supreme ***451** Court, New York County (Carol Berkman, J.) entered January 28, 1985 which granted the People's motion for reargument of the Court's prior order dismissing the indictments of the defendants, and, upon reargument, adhered to its prior determination, unanimously modified, on the law, to reinstate the indictments, and otherwise affirmed. Appeal from the Order, Supreme Court, New York County (Carol Berkman, J.), entered October 22, 1984 dismissed as superseded by the appeal from the order granting reargument.

The defendants, charged with filing false sales tax returns, were indicted for the crime of offering a false instrument for filing in the first degree ([Penal Law § 175.35](#)). The defendants moved to dismiss the indictments, challenging the ability of the State to prosecute them for this crime under the Penal Law since they claim that the Tax Law provides the exclusive basis

of punishment for filing false sales tax returns. The Supreme Court granted the motion and dismissed the indictments on this ground, relying on *People v. Valenza*, 60 N.Y.2d 363, 469 N.Y.S.2d 642, 457 N.E.2d 748. We find that *Valenza* is distinguishable from the case at bar, and accordingly we reinstate the indictments.

In *Valenza*, the Court of Appeals held that since Article 28 of the Tax Law provides an integrated scheme of civil penalties for failure to pay over or remit sales and use taxes, the State cannot maintain a criminal prosecution for such violations under another statute (in that case larceny under the Penal Law).

[1] The defendant in *Valenza* had failed to pay over sales taxes, which violates Tax Law § 1137(a) and is exclusively punishable by the civil penalties provided for in Tax Law § 1145(a) that subsection. In distinction, in the instant case the defendants allegedly filed false Sales and Use Tax returns, which is prohibited by Tax Law § 1145(b). This statute provides for criminal penalties, and in addition it explicitly states that its penalties are “in addition to any other penalties herein or elsewhere prescribed.”

Accordingly, the rationale of *Valenza* does not apply to this case. *Valenza* forbids criminal prosecution under a statute (Tax Law § 1145(a)) for whose violation the legislative intent is to impose civil penalties only (60 N.Y.2d at 369, 469 N.Y.S.2d 642, 457 N.E.2d 748). Here the statute involved does provide for a criminal penalty.

Furthermore, *Valenza* at p. 371–72, 469 N.Y.S.2d 642, 457 N.E.2d 748 disallows prosecution under an additional statute where Tax Law § 1145(a) provides an “integrated scheme” of civil penalties. Here, Tax Law § 1145(b) is not integrated but rather by its terms explicitly allows prosecution under laws “elsewhere prescribed”.

[2] [3] The existence of both a specific statute and a general statute proscribing the same conduct does not prohibit the prosecution from electing which statute to proceed under. (See *People v. Eboli*, 34 N.Y.2d 281, 357 N.Y.S.2d 435, 313 N.E.2d 746; *People v. Bergerson*, 17 N.Y.2d 398, 271 N.Y.S.2d 236, 218 N.E.2d 288.) Therefore, the State has discretion to prosecute the filing of false sales tax returns under the broader statute of offering a false instrument for filing (Penal Law § 175.35) rather than the specific Tax Law § 1145(b).

In so ruling, we note that in very similar cases, which have been decided since the Supreme Court's original determination in this action, the Second and Fourth Departments have also distinguished criminal prosecutions for filing false returns from the strictures of the Court of Appeals' holding in *Valenza*. (*People v. Walsh*, 108 A.D.2d 464, 489 N.Y.S.2d 933, *lv. app. granted* 65 N.Y.2d 989, — N.Y.S.2d —, 484 N.E.2d 689; *People v. Pisano*, 105 A.D.2d 1156, 482 N.Y.S.2d 593.)

All Citations

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