IN THE SUPREME COURT OF NEW ZEALAND

SC 60/2005
[2006] NZSC 19

BETWEEN	DONALD EUGENE ALLEN Appellant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 28 February 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: C T Gudsell for Appellant
R Ellis and K F Whitiskie for Respondent

Judgment: 30 March 2006

JUDGMENT OF THE COURT

A. The appeal is dismissed.

B. The respondent is awarded costs of $15,000 together with disbursements to be fixed if necessary by the Registrar.

REASONS

(Given by Anderson J)

[1] This appeal raises the question what steps need to be taken by a taxpayer in order to contest a tax assessment made by the Commissioner pursuant to s 106 Tax Administration Act 1994, when there has been a default in furnishing a return.

[2] In this case the taxpayer failed to furnish returns of income for the years 2000 and 2001. The Commissioner made assessments under s 106 and notified the

taxpayer on 8 April 2002. Under the scheme of the Act, discussed more fully below, the taxpayer had two months, that is until 7 June 2002, to invoke the statutory disputes procedure. On 15 July 2002 he filed a notice of claim in the Taxation Review Authority (TRA) challenging the default assessments. On 31 July he furnished income tax returns for the two years showing his income as nil. On that same date he issued a notice of proposed adjustment (NOPA) in respect of each assessment.

[3] The Commissioner applied to the TRA to strike out the notice of claim on the grounds that the Authority did not have jurisdiction to hear the claim. When the TRA declined to strike out, the Commissioner brought proceedings in the High Court for judicial review of that decision under the Judicature Amendment Act 1972.

[4] The High Court found for the Commissioner, set aside a decision of the TRA and struck out the proceedings in that Tribunal. The taxpayer then appealed unsuccessfully to the Court of Appeal.

[5] In this Court the taxpayer reiterated the argument that in the case of a default assessment the taxpayer is entitled to invoke the statutory procedures for contesting assessments simply by furnishing a return. The argument for the Commissioner is that the furnishing of a return does not in itself initiate the process but is, rather, a prerequisite to the use of that process by a defaulting taxpayer.

[6] The context in which the respective arguments are to be evaluated is Part 4A and Part 8A of the Act. The scheme of those Parts, in general terms, was to establish separately a disputes procedure (Part 4A) and a challenge procedure (Part 8A).

[7] The purpose of Part 4A is described in s 89A(1) in the following terms:

> **89A Purpose of this Part**
>
> (1) The purpose of this Part is to establish procedures that will—
>
> (a) Improve the accuracy of disputable decisions made by the Commissioner under certain of the Inland Revenue Acts; and

> (b) Reduce the likelihood of disputes arising between the Commissioner and taxpayers by encouraging open and full communication—
>
> > (i) To the Commissioner, of all information necessary for making accurate disputable decisions; and
> >
> > (ii) To the taxpayers, of the basis for disputable decisions to be made by the Commissioner; and
>
> (c) Promote the early identification of the basis for any dispute concerning a disputable decision; and
>
> (d) Promote the prompt and efficient resolution of any dispute concerning a disputable decision by requiring the issues and evidence to be considered by the Commissioner and a disputant before the disputant commences proceedings.

[8] The method by which the Part 4A purpose is advanced involves the issuing of a NOPA which may be disputed, within an appropriate response period, by a notice of response (NOR). This process may lead to the Commissioner and the taxpayer accepting the other's position, either affirmatively or by omitting to respond within an applicable response period. If the dispute is not resolved by the Part 4A procedure, the challenge procedure of Part 8A may be invoked by a "disputant" which in terms of s 3 means a person –

> (a) Who may issue a notice of proposed adjustment to the Commissioner; or
>
> (b) To whom the Commissioner issues a notice of proposed adjustment or an assessment; or
>
> (c) Who may challenge a disputable decision –
>
> under a tax law.

[9] Unlike the disputes procedure, which is in the nature of a negotiation process, the challenge procedure envisages litigation before a hearing authority, which may be either the TRA or the High Court. The litigation is initiated by the filing of proceedings in accordance with the Taxation Review Authority Regulations 1994 (or regulations made in substitution for those regulations) or in accordance with the High Court Rules, within a response period following the issue of the relevant notice of a disputable decision – ss 138B, 138C. The terms of those sections make it plain that there cannot be recourse to litigation unless the disputes procedure under

Part 4A has been followed to the extent as set out in the applicable subsection. The relevant provision in this case is s 138B(3) which we set out below:

> **138B When disputant entitled to challenge assessment**
>
> …
>
> (3) A disputant is entitled to challenge an assessment by commencing proceedings in a hearing authority if—
>
> > (a) the Commissioner rejects, within the applicable response period, an adjustment proposed by the disputant and does not subsequently issue an amended assessment; and
> >
> > (b) the disputant files the proceedings, in accordance with the Taxation Review Authority Regulations 1994 (or any regulations made in substitution for those regulations) or High Court Rules, within the response period of the written disputable decision from the Commissioner that the proposed adjustment will not be adjusted; and
> >
> > (c) for the purposes of paragraph (b), the written disputable decision from the Commissioner is not limited to the Commissioner's notice of response.

[10] The Commissioner's application to the TRA in this case was made under s 138H, which provides that the Commissioner may apply to a hearing authority to strike out a challenge commenced by a disputant if the Commissioner considers that the disputant has failed to comply with any of the requirements of s 89M (not relevant in this case) or s 138B.

[11] At issue is whether the taxpayer complied with the requirements of s 138B(3). In the present proceedings the taxpayer initially contended that, at least in the case of a taxpayer wishing to contest a default assessment, s 138B(3) does not require compliance with the dispute procedures. However, as the Court of Appeal held,[1] that contention is untenable because the term "adjustment proposed" in s 138B(3) clearly refers to a NOPA. The NOPA is an element of the disputes procedure as set out in Part 4A of the Act. And the references to "the applicable response period" in s 138B make sense only if read in light of the provisions of Part 4A. Indeed, if s 138B(3) were not read in light of the provisions of Part 4A, there would be no apparent time limits on the steps that must be taken by the

[1] (2005) 22 NZTC 19,473 at [31].

Commissioner and the taxpayer respectively, nor would there be any prescribed form for their dialogue to take.

[12] The taxpayer's primary submission in this Court was therefore that he in fact complied with the disputes procedure in so far as it relates to a taxpayer wishing to dispute a default assessment. His argument was anchored to subs (2) of s 89D, the first two subsections of which provide:

> **89D Taxpayers and others with standing may issue notices of proposed adjustment**
>
> (1) If the Commissioner—
>
> (a) Issues a notice of assessment to a taxpayer; and
>
> (b) Has not previously issued a notice of proposed adjustment to the taxpayer in respect of the assessment, whether or not in breach of section 89C,—
>
> the taxpayer may, subject to subsection (2), issue a notice of proposed adjustment in respect of the assessment.
>
> (2) A taxpayer who has not furnished a return of income for an assessment period may dispute the assessment made by the Commissioner only by furnishing a return of income for the assessment period.

[13] The taxpayer's argument is that since a defaulting taxpayer "may dispute the assessment made by the Commissioner only by furnishing a return of income for the assessment period", a taxpayer disputes the default assessment by virtue of the filing of a return. The Commissioner must then either accept the return as filed and issue an assessment or issue a NOPA. In either case the taxpayer may then issue a NOR and subsequently challenge before a hearing authority the assessment made by the Commissioner.

[14] Counsel for the taxpayer supported the essential argument by referring to the legislative history of s 89D. Part 4A of the Act was introduced by the Tax Administration Amendment Act (No 2) 1996. As then enacted, s 89D(2) provided:

> Where the taxpayer has not furnished a return in respect of the assessment period but wishes to dispute the assessment, the taxpayer may dispute the assessment only by furnishing a return in respect of that assessment period.

[15] However, when the Tax Administration Amendment Bill had been introduced into the House it contained no requirement in terms of s 89D(2) as ultimately enacted. What the Bill envisaged, therefore, was that a default assessment might be disputed in exactly the same way as any other assessment. The inference the appellant wishes the Court to draw from that change is that Parliament intended to vary the disputes procedure by permitting a defaulting taxpayer to initiate a dispute by furnishing a return.[2]

[16] It is the case, as counsel for the taxpayer submitted, that the evolution of the Bill into the 1996 Amendment Act indicates a legislative intention that a defaulting taxpayer should not be treated the same as a complying taxpayer in respect of the disputes procedure. That is to be inferred from the introduction of s 89D(2). But the question is whether it is to be inferred, also, that the Legislature intended the defaulter to be better off than a complying taxpayer. That issue arises because on this taxpayer's argument that furnishing a return in response to a default assessment initiates the disputes procedure, a defaulter would not be subject to the constraint of the limited period of two months in which a complying taxpayer may respond to an assessment. The defaulter would be subject to no time limit at all.

[17] Parliament could not have meant to give such preferential treatment to a defaulter. Indeed quite the opposite is to be inferred, namely that a defaulter must both meet its obligation to furnish a return and be subject to the same time constraint as complying taxpayers. In such a case, of course, the taxpayer's NOPA to the default assessment would be associated with the tax position indicated by the furnished return.

[18] We are reinforced in our view, as were the High Court and Court of Appeal, by the stipulation in s 89D(1) that that subsection, which permits a taxpayer to issue a NOPA, is subject to subs (2). Only by furnishing a return of income may a defaulter "dispute", in the sense of engaging in a dispute, by issuing a NOPA.

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[2] The particular subsection has been further amended: Taxation (Simplification and other Remedial Matters) 1998, s 26(1) and Taxation (Taxpayer Assessment and Miscellaneous Provisions) Act 2001, s 203(1). Both such changes are immaterial for present purposes.

[19] Counsel for the taxpayer submitted that the relevant Parliamentary context included speeches by some Members. For example, Mr Max Bradford MP who was Chair of the Select Committee which dealt with the legislation, commented to the effect that the Courts should use the report of the Finance and Expenditure Committee plus the appendices as a guide to what the House meant if the meaning of the legislation were not immediately clear in the text of it. But counsel did not point us to anything in the report which illuminates the question we are dealing with on this appeal.

[20] Counsel for the taxpayer also placed reliance on information given to taxpayers in pamphlets and similar publications by the Inland Revenue Department. He was able to point to three published in 1996, indicating both explicitly and inferentially that a taxpayer who receives a Default Assessment can only dispute the assessment by filing a return and cannot dispute the Default Assessment by issuing a NOPA. There were also IRD publications over a number of years informing taxpayers that upon the furnishing of a return after a default assessment, that assessment would be replaced by an "actual assessment". It was only after the decision of the High Court in the present case that the Department's publications stated that "where the taxpayer wants to dispute a Default Assessment through the disputes resolution process, the taxpayer must within the applicable response period file a Return and issue a NOPA".

[21] Given the elucidation of the law in the course of this litigation, a taxpayer who relied on the Departmental advice between 1996 and 2004, including the taxpayer in the present case, would have been misled by it. That is regrettable but we are not persuaded that the Departmental publications bear on the question of interpretation.

[22] The correct interpretation also disposes of another argument on behalf of the taxpayer, which is that s 89D does not require the taxpayer to issue a NOPA but merely provides that the taxpayer may do so. That argument leads nowhere. Of course there is no general obligation to issue a NOPA because there is no general obligation to dispute an assessment. If however a taxpayer wishes to dispute an

assessment the disputes procedure must be complied with and that involves the filing of a return and the issuing of a NOPA.

[23] We dismiss the appeal. Our reasons are substantially the same as those which persuaded the High Court to review the TRA decision on the strike out application and the Court of Appeal to dismiss the taxpayer's appeal. We need not therefore discuss the reasons given by those Courts, or the submissions on behalf of the respondent which essentially supported the reasons and results of the earlier judgments. The respondent will have costs of $15,000 and disbursements to be fixed if necessary by the Registrar.

Solicitors:
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Crown Law Office, Wellington for Respondent