IN THE SUPREME COURT OF NEW ZEALAND

SC 2/2006
[2006] NZSC 56

BETWEEN	JEFFREY GEORGE LOPAS AND LORRAINE ELIZABETH McHERRON Applicants
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Court: Elias CJ, McGrath and Anderson JJ

Counsel: G Pearson for Applicants
J H Coleman for Respondent

Judgment: 2 August 2006

JUDGMENT OF THE COURT

A. The application for leave to appeal is dismissed.

B. Costs are awarded to the respondent in the sum of $1,500.00.

REASONS

[1] The taxpayer applicants were sole partners in the Jeffrey George Lopas and Lorraine Elizabeth McHerron Partnership, which was registered for Goods and Services Tax ("GST") from 1 October 1992. The taxable activity of the partnership was forestry. By subsequent deeds of trust dated 20 September 1999, a Family Trusts Partnership was created, which was registered for GST from 1 October 1999.

[2] On 4 October 1999, the applicants applied to cancel the original partnership's GST registration effective from 30 September 1999, on the basis that its taxable supplies for the 12 months following 30 September would be less than $30,000.00. The standard deregistration form was completed, stating that the applicants would be

keeping business assets when registration ceased, including land with a cost price of $115,000.00.

[3] The Commissioner cancelled the applicants' GST registration, effective from 30 September 1999. The applicants took the view that s 5(3) of the Goods and Services Tax Act ("GST Act") deemed the land to be an asset of the taxable activity supplied at a time immediately before deregistration, and paid GST on the cost price of the property, being the lesser of cost or market value under s 10(8).

[4] On 8 October 1999, the applicants entered into an agreement for sale and purchase of the land at a price of $375,000.00, inclusive of GST (if any) to the Family Trust Partnership. In the surrounding circumstances it is clear that this sale was contemplated before the GST deregistration of the applicants.

[5] The Commissioner subsequently amended the applicants' GST deregistration from 30 September 1999 to 30 November 1999, resulting in output tax being payable on the sale price of $375,000.00, rather than the $115,000.00 previously envisaged.

[6] The applicants disputed the Commissioner's decision. The Taxation Review Authority found in favour of the applicants, holding that they were entitled to deregister for GST when they did.

[7] The Commissioner appealed to the High Court. Panckhurst J held that the sale of the property was not a cessation supply under s 5(3), but a termination supply under s 6(2), because there was an undoubted connection between the cessation of the taxable activity and the sale of the land. At the point of deregistration, beneficial ownership in the property had passed, and tax was payable under the general supply provisions rather than as a deemed deregistration supply.

[8] The applicants appealed to the Court of Appeal, on the basis that, at the date of deregistration, beneficial ownership had not passed. They submitted that they had done what the legislation both expressed and contemplated, and if the Commissioner had wanted to argue that there was such a transfer of beneficial ownership, this argument should have been put to the Taxation Review Authority, but it was not.

The Commissioner responded that the original decision was made on the basis of incomplete disclosure by the taxpayer and, if the Commissioner had been in possession of all the relevant facts at the outset, deregistration would always have taken effect from 30 November 1999. Because the scheme was already on foot to sell the land and thereby to cease all taxable activities within four days, the application to deregister should have been made under s 52(3), not s 52(1).

[9] The Commissioner cross-appealed on the correct interpretation of the statutory provisions in question, submitting that the "amount" referred to in s 52(1) relates to the figure of $30,000.00 in s 51(1), rather than the whole of that subsection (including the proviso). The applicants argued that the proviso was to be included as a matter of interpretation, and no inconsistency within the Act would be created by inclusion of the proviso in that way.

[10] The Court of Appeal accepted the Commissioner's arguments on the cross-appeal, finding that the reference to "amount" included only the figure of $30,000.00, not any exclusions to be found within the provisos to s 51(1). Also, the Court found that the applicants should have applied to be deregistered for GST under s 52(3), not s 52(1). The Commissioner was acting under a misapprehension when the applicants were deregistered the first time, and was entitled under s 13 of the Interpretation Act 1999 to re-exercise his discretion and to set a new GST deregistration date.

[11] Before dealing with the applicants' proposed argument in this Court, it is appropriate to outline the matters not in dispute between the parties. The applicants, in the Tribunal and Courts below, have always accepted that in principle the Commissioner has the power to change the date of deregistration. The issue between them is whether, on the facts of this case, such a change was permitted.

[12] The dispute in this case focuses on two grounds. The first is the difference between the parties as to whether the proviso to s 51(1) is incorporated in s 52(1). The applicants say that the proviso excludes the sale of the land from the calculation of the threshold for deregistration for GST, while the Commissioner says it does not apply in this case and that the land should have been included. The second is which

of s 52(1) or subs (3) applies to deregistration in this case. The applicants contend that the Court of Appeal was wrong to accept the Commissioner's arguments in the second dispute, because they were raised for the first time in that Court, and were not contained in the Commissioner's original Statement of Position.

[13] We regard the merit of the applicants' argument on the first ground as too weak to be the basis of a second appeal. We are also satisfied the Commissioner's argument in the Court of Appeal that the applicants were not eligible for deregistration was recorded in general terms in the Commissioner's Statement of Position. In those circumstances we are satisfied no miscarriage of justice arises in the present case such as would make it in the interests of justice for us to hear the proposed appeal.

[14] The Commissioner has also consistently maintained that the applicants should have disclosed their intention to on-sell the land in question, and that if they had done so they would not have been eligible to be deregistered on the date on which they were deregistered. In those circumstances, we do not see that a matter of general commercial significance arises in the appeal.

[15] Our overall conclusion is that there is no basis under the Supreme Court Act 2003 for us to allow the application for leave to appeal. It is accordingly dismissed.

Solicitors:
Duncan Cotterill, Wellington for Applicants
Crown Law Office, Wellington for Respondent