

IN THE SUPREME COURT OF NEW ZEALAND

**SC 22/2009
[2009] NZSC 36**

BETWEEN WESTPAC BANKING CORPORATION
 Applicant

AND THE COMMISSIONER OF INLAND
 REVENUE
 Respondent

Court: Blanchard, Tipping and McGrath JJ

Counsel: J A Farmer QC, R A Green and R B Lange for Applicant
 B W F Brown QC and R J Ellis for Respondent

Judgment: 8 April 2009

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay costs to the respondent of \$2,500 plus reasonable disbursements to be determined if necessary by the Registrar.**

REASONS

[1] This application for leave to appeal concerns a judgment of the Court of Appeal striking out a cause of action in tax litigation in which the applicant taxpayer, Westpac Banking Corporation, challenges the validity, as opposed to the correctness, of assessments of income tax on administrative law grounds. The other cause of action in the litigation challenges the correctness of assessments of liability for income tax of the applicant, in relation to certain structured finance transactions, which the Commissioner of Inland Revenue has treated as tax avoidance arrangements.

[2] In its judgment the Court of Appeal took the view that established principles in relation to applications for judicial review in tax cases should not be widened. Review was available of assessments that were not truly assessments at all and, in exceptional cases, which might have involved maladministration. The Court reached this decision notwithstanding provisions in tax administration legislation concerning functions and duties of the Commissioner, including protection of the integrity of the tax system on which the applicant relied.

[3] The applicant wishes to argue in an appeal to this Court that the Court of Appeal was wrong and the assessments in issue are invalid. The applicant's primary contentions are that the assessments were made despite inconsistent views within the Inland Revenue Department on whether the transactions amount to tax avoidance arrangements, are in breach of the applicant's legitimate expectations, and are not honest or genuine assessments at all. Rather, according to the applicant, they are the product of an abuse of assessment powers.

[4] As noted, the Court of Appeal recognised that, as well as cases where there is in law truly no assessment at all, there may be exceptional circumstances justifying judicial review. Bearing that in mind, we are satisfied that it is not reasonably arguable that the Court of Appeal's approach to the law, including its view of the effect of the policy of the legislation, was wrong.

[5] Furthermore, in applying these principles to the pleaded facts, the applicant's proposed appeal is not one that has any reasonable prospect of success. There is no basis in those circumstances for the argument that different views within the Inland Revenue department on tax liability of transactions of the kind in issue can preclude an assessment by an officer who honestly takes one of those views. Nor is there any other basis in the pleading for the argument that there is no true assessment at all.

[6] We are satisfied that it is not necessary in the interests of justice for this Court to hear the proposed appeal.

Solicitors:
Simpson Grierson, Auckland for Applicant
Crown Law Office, Wellington for Respondent