IN THE SUPREME COURT OF NEW ZEALAND

SC 114/2009
[2010] NZSC 136

BETWEEN	CONTRACT PACIFIC LIMITED Appellant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 3 August 2010

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: R B Stewart QC and G J Harley for Appellant
M S R Palmer and M Deligiannis for Respondent

Judgment: 16 November 2010

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs of $15,000 together with reasonable disbursements.

REASONS

ELIAS CJ, TIPPING, McGRATH AND WILLIAM YOUNG JJ

(Given by William Young J)

The case in a nutshell

[1] The appeal turns on whether the Commissioner of Inland Revenue (the Commissioner) was obliged by s 46 of the Goods and Services Tax Act 1985 (GST Act) to refund GST of $7,542,295.51 to Contract Pacific Ltd (Contract Pacific) as at 5 February 2001. Under s 46(1)(a) of the Act, the Commissioner must pay to the taxpayer GST refundable under s 20 within 15 working days of receiving a return, unless within that time he is not satisfied with the return and requests further information about it or gives notice that he intends to investigate the circumstances of the return. Contract Pacific's return was received by the Commissioner on 26 June 2000. On 10 July, within 15 working days, the Commissioner gave notice of intention to investigate the return. The effect of s 46(1)(b) is that once such notice is given within the specified time, there is no obligation to refund GST until the Commissioner has both determined that the amount is refundable and is also satisfied that the registered person has complied with the person's tax obligations (a conclusion on wider tax liability than may be entailed in assessing whether the GST is refundable).

[2] Contract Pacific argues that a further request for information by the Commissioner, made in January 2001, was not authorised by the Act and had the effect of making the refund payable. We do not accept that the request for information lay outside of the investigation process contemplated by s 46. But more importantly, since the Commissioner in the present case gave notice of investigation within 15 days of the receipt of Contract Pacific's return on 26 June 2000, the s 46(1)(a) obligation to make the refund within 15 days was overtaken by the exception in s 46(1)(b). The requirement to make a refund could not revive unless and until the Commissioner subsequently determined that the GST was refundable and that Contract Pacific had complied with its tax obligations. Since the Commissioner never so determined, the refund claimed never became payable.

Background

[3] Contract Pacific is an inbound tour operator (ITO). It sells New Zealand holiday packages to overseas wholesalers who on-sell them (via retailers) to tourists who enjoy the benefit of the holiday packages in New Zealand. Between July 1993 and April 1999, Contract Pacific charged GST on its supplies to customers (ie the overseas wholesalers) and accounted for the GST in its returns to the Commissioner. But other ITOs did not add GST to their charges and filed GST returns on the basis that supplies made to overseas wholesalers were "charged at the rate of zero percent" under the (former) s 11(2)(e) of the GST Act.

[4] A law change made it clear that with effect from May 1999, GST at the standard rate was payable on supplies made by ITOs to overseas wholesalers.[1] This amendment, however, did not address the correctness of Contract Pacific's earlier tax treatment of its supplies to overseas wholesalers.

[5] On 26 June 2000, Contract Pacific filed a GST return seeking a reassessment and refund of GST paid from July 1993 to April 1999. The core GST for this period was $7,353,396.94, but with adjustments for transactions within the relevant tax period and interest, the total amount for which a refund was sought came to $7,542,295.51.

[6] On 10 July 2000, the Commissioner wrote to Contract Pacific advising that it was withholding payment of the refund pending an investigation into the claim. A halt was placed on Contract Pacific's account in the Commissioner's computer system. The Commissioner then commenced an investigation. There was correspondence in October 2000. On 19 January 2001 the parties had a meeting at which the Commissioner requested further information about the claim. Contract Pacific provided the information in a letter dated 24 January 2001.

---

[1] See s 11(2A) of the Goods and Services Tax Act 1985 as inserted by the Taxation (Remedial Matters) Act 1999. The amendment came into force in September 1999 but the changes it made had effect from 20 May 1999.

[7] On 5 February 2001, the halt on the account automatically expired. The computer system generated and issued Contract Pacific with a notice of assessment and refund cheque for $7,542,295.51. The Commissioner realised the error and stopped payment on the cheque before it was presented for payment by Contract Pacific.

[8] Parliament then amended the GST Act retrospectively. The result was to provide that from 1 October 1986, supplies by ITOs to overseas wholesalers were subject to GST at the standard rate,[2] unless the Commissioner had, on or before 14 May 2001, paid a refund in relation to such a supply.[3]

[9] In the High Court proceedings, Contract Pacific sued the Commissioner on the cheque (with a reduction of $873,233.77 to allow for an agreed adjustment). In order to establish consideration for the cheque, Contract Pacific had to show that the amount of the cheque was refundable under ss 20(5) and 46 of the GST Act.[4] We will shortly refer in detail to these sections. As well, as a consequence of the operation of the retrospective amendments to the GST Act already referred to, Contract Pacific could succeed in its claim only if the sending to it of the cheque amounted to the payment of a refund.

[10] In the High Court, Duffy J found in favour of Contract Pacific and entered judgment against the Commissioner for $6,669,061.74.[5] The Court of Appeal set aside that judgment[6] and Contract Pacific now appeals to this Court.

---

2 Section 11(2A) as inserted by the Taxation (Taxpayer Assessment and Miscellaneous Provisions) Act 2001. The section has since been re-numbered as s 11A(2).

3 See s 241(6)(a) of the Taxation (Taxpayer Assessment and Miscellaneous Provisions) Act 2001.

4 See *Commissioner of Inland Revenue v Sea Hunter Fishing Ltd* (2002) 20 NZTC 17,478 (CA) at [25].

5 *Contract Pacific Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23,092 (HC). $6,669,061.74 was the amount entered in the sealing of judgment of 4 February 2009.

6 *Commissioner of Inland Revenue v Contract Pacific Ltd* [2009] NZCA 568, (2010) 24 NZTC 24,006.

Issues

[11] It follows from what we have said that the appeal raises two issues and that Contract Pacific must succeed on both if the appeal is to be allowed. Those issues are:

(a) as at 5 February 2001, was $7,542,295.51 refundable to Contract Pacific under ss 20(5) and 46 of the GST Act? And, if so,

(b) did the issuing of the cheque amount to the payment of a refund?

As is apparent we have resolved the first of these issues against Contract Pacific, with the result that there is no need to address the second issue.

The legislative provisions as to the Commissioner's obligation to refund tax

[12] Section 20(5) of the GST Act provides that where the total amount that may be deducted as input tax is greater than the aggregate output tax for the relevant taxable period, the Commissioner shall refund the excess pursuant to s 46.

[13] Section 46 of the GST Act provides:

> **46 Commissioner's right to withhold payments**
>
> (1) Subject to this section, if the Commissioner is required to refund an amount to a registered person under section 19C(8) or section 20(5) of this Act, the Commissioner shall refund the amount—
>
> (a) Except when paragraph (b) applies, not later than 15 working days following the day on which the registered person's return was received by the Commissioner; or
>
> (b) *The day after the working day on which the Commissioner—*
>
> *(i) Determines the amount is refundable, after first having—*
>
> *(A) Investigated the circumstances of the return in accordance with subsection (2); or*
>
> *(B) Reviewed the information requested in accordance with subsection (2); and*

> *(ii) Is satisfied that the registered person has complied with the person's tax obligations.*
>
> (2) If the Commissioner is not satisfied with a return made by a registered person, the Commissioner—
>
> (a) May investigate the circumstances of the return:
>
> (b) May request the registered person to provide further information concerning the return.
>
> ...
>
> (4) The Commissioner must give a request for information concerning a return under subsection (2)—
>
> (a) Within a period of 15 working days following the day on which the return is received by the Commissioner (in the case of an initial request for information); and
>
> (b) Within a period of 15 working days following the date of receipt of any information previously requested by the Commissioner (for subsequent requests for information).
>
> (5) The Commissioner must notify the registered person—
>
> (a) Of the Commissioner's intention to investigate the circumstances of the return under subsection (2); and
>
> (b) Of the Commissioner's intention to withhold payment under subsection (3)—
>
> within 15 working days following the day on which the return is received by the Commissioner. (emphasis added)
>
> ...

[14] It will be noted that in s 46(1)(b) there are two references to the state of mind of the Commissioner ("determines the amount is refundable ..." and "is satisfied ... "). We will refer to both elements as involving the Commissioner being "relevantly satisfied".

The competing positions of the parties

[15] For Contract Pacific, Mr Harley submitted that s 46 provides for the Commissioner to take three possible approaches under s 46(1)(b): to investigate, to

request information, or to do both.[7] But the Commissioner can take a particular approach only if the appropriate process has been followed. Thus, according to the submission, where the Commissioner has given notice only of a proposed investigation, it is not later open to him to request information of the taxpayer. A request for information is permitted only when made within the time limits provided for by s 46(4). If the Commissioner wishes both to investigate and to request information, he can only do so if he has, in a timely way, made both a request under s 46(4) and given notice under s 46(5). Since the Commissioner only gave notice under s 46(5), there was no authority (within the scheme of s 46) for his 19 January 2001 request of Contract Pacific for further information. On Mr Harley's argument, the Commissioner, by requesting information from Contract Pacific in a manner which did not comply with s 46(4), lost his authority to withhold the refund which was claimed. Thus, the refund cheque was properly payable as at 5 February 2001 and there was no lawful basis for stopping payment of it.

[16] The Commissioner's response to Mr Harley's argument is twofold. The request for information was part and parcel of an investigation of which timely notice had been given and therefore there was no departure from the scheme of the section. As well, and irrespective of this point, at no time had the Commissioner been relevantly satisfied so as to trigger refundability under s 46(1)(b).

The High Court judgment

[17] In the High Court, Duffy J held that the two limbs of s 46(2) operate together, and that in any investigation of a refund claim under s 46(2)(a), requests for further information from a taxpayer will engage s 46(2)(b).[8] Thus a request made under s 46(2)(b) must comply with the time limits prescribed in s 46(4). Accordingly, she held that the Commissioner's request for information from Contract Pacific in January 2001 was not made within the time limits provided for in s 46(4) and so was invalid.[9]

---

7 It is common ground that there is another possible option, not specifically provided for in s 46, namely to proceed directly to an assessment; see [22] below.

8 At [129]-[130].

9 At [133].

The judgment of the Court of Appeal

[18] The Court of Appeal decided the case on the basis that the Commissioner, having given timely notice of investigation, was entitled as part of the subsequent investigation to request information of the registered person.[10] On this basis there was no departure from the statutory scheme when the Commissioner requested information from Contract Pacific in January 2001. Accordingly, the Court of Appeal reversed the decision of Duffy J as to refundability.

Our approach

Overview

[19] As is apparent from what we have said, both the argument of Contract Pacific and the judgment of Duffy J proceed on the basis that:

(a) where notice has been given under s 46(5) but a request for information has not been made in a timely way under s 46(4), a later request by the Commissioner of the taxpayer for information is outside the investigation process envisaged by s 46; and

(b) such a request terminates the entitlement of the Commissioner to withhold payment despite neither the investigation being completed nor the Commissioner being relevantly satisfied.

[20] The Court of Appeal judgment only engaged with the first of these reasoning steps. On this point, we agree with the Court of Appeal that investigation as contemplated by s 46(1)(b) and s 46(2) can encompass requesting information from the taxpayer. More importantly, we also reject the second of the reasoning steps. It is common ground that the Commissioner gave a timely notice under s 46(5).[11] Section 46(1)(b) was thus the governing provision. The necessary corollary is that

---

10 At [37]-[38].

11 By the letter of 10 July 2000, see [6] above.

the s 46(1)(a) 15 working day time limit for a refund did not apply. Once the required statutory notice was given, no refund was payable until the Commissioner was relevantly satisfied. It is common ground that the Commissioner was never relevantly satisfied. Therefore the amount claimed never became refundable.

[21] Given the practical importance of the case we think it right to explain in a little more detail why we have reached these conclusions.

The scheme and purpose of s 46

[22] Section 46 is addressed solely to timing of payments rather than ultimate liability. Thus:

(a) If the Commissioner can make a prompt determination that the return is not accurate, he may issue an assessment denying any refund or approving only a smaller refund.[12] If such an assessment is made within 15 working days of receipt of the return, the refund claimed is not payable under s 46(1)(a). Counsel on both sides accepted that this was so even though this particular situation is not expressly provided for in s 46.

(b) Payment by the Commissioner of a refund in response to a GST return does not curtail his powers of investigation and assessment. If it later transpires that the taxpayer was not entitled to the refund, the Commissioner may recover the overpayment by the exercise of his powers of assessment and recovery.[13]

This is not to downplay the significance of the timing issues which are addressed by s 46. The way in which the GST system works is that after each taxable period a taxpayer makes a return bringing to account that person's outputs and inputs during that period, and then either pays a debit balance to the Inland Revenue Department

---

12 If the taxpayer disputes that assessment, he or she may challenge the assessment under Part 8A of the Tax Administration Act 1994.

13 *Commissioner of Inland Revenue v Sea Hunter Fishing Ltd* (2002) 20 NZTC 17,478 (CA) at [18].

or claims from it a credit balance.[14] Confidence in the GST system would be lost and great inconvenience potentially caused to businesses if the Department were routinely to delay making refunds of credit balances appearing in GST returns.[15] Therefore Parliament has put in place a control on the Commissioner's right to withhold a GST refund pending the conclusion of his review of a GST return. That is the function of s 46. Its policy is to require the Commissioner to act promptly in processing returns and paying refunds. But although there are good policy reasons why the Commissioner should refund GST promptly, the tax system would be subject to abuse if the Commissioner were required in all cases to pay first and investigate later.

[23] Section 46 seeks to balance the two policy considerations just referred to. It does this by providing a 15 day time limit within which the Commissioner must act under s 46(4) and (5), in default of which the Commissioner must make the refund sought. Under subs (1) the Commissioner must make a refund within 15 working days of receipt of the GST return unless para (b) of that subsection applies. It does not apply unless he adheres to the time limit(s) stipulated in subss (4) or (5). Where the time limits have not been adhered to, the fact that the Commissioner is not relevantly satisfied does not displace the obligation to make a refund. If the Commissioner does not act within the relevant time limits, he has put it beyond his power to rely on s 46(1)(b) to withhold payment**.** That was the conclusion reached in *Commissioner of Inland Revenue v Sea Hunter Fishing Ltd*[16] which both parties to the present appeal accepted as a correct statement of the law in circumstances where the Commissioner had not complied with any of the time limits.

Investigations and requests for information

[24] What is meant by an "investigation" is not defined in the GST Act. The word is to be taken to have its ordinary meaning and therefore to refer to a systematic inquiry into the circumstances of the GST return. It cannot sensibly be understood to

---

[14] *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2008] NZSC 116, [2009] 2 NZLR 359 at [16].

[15] *Commissioner of Inland Revenue v Sea Hunter Fishing Ltd* (2002) 20 NZTC 17,478 (CA) at [18].

[16] *Commissioner of Inland Revenue v Sea Hunter Fishing Ltd* (2002) 20 NZTC 17,478 (CA).

encompass anything less than the potential exercise of all or any of the wide powers given to the Commissioner under the Tax Administration Act 1994. There is, however, no mandated statutory process for the establishment of an investigation.

[25] The Commissioner may believe that all he requires is clarification of some matter in the return in question, and that the circumstances do not justify more than a request for further information. If so, it may be unnecessary for the Commissioner to go to the lengths of beginning an investigation, and certainly of invoking his statutory powers of inquiry. For this reason, s 46 makes direct provision for the consequences of the Commissioner requesting further information from the taxpayer.

[26] In this context it is important to recognise the role played by s 46(2). Although this subsection reads as an empowering provision (ie as authorising investigations and requests for information), s 46 is not the source of the Commissioner's relevant powers. Those powers are found in the Tax Administration Act, in particular in ss 16 to 19. And as noted, they can be invoked regardless of any failure by the Commissioner to comply with the time limits in s 46. Section 46(2) thus merely describes the processes which, if embarked on by the Commissioner in a timely way (ie within 15 working days, as stipulated by s 46(4) and (5)), displace what would otherwise be the default obligation under s 46(1)(a) to pay a claimed refund.

[27] The case for the appellant proceeded on the basis that investigations (under s 46(2)(a)) and requests for information (under s 46(2)(b)) are separate and discrete processes. This provided the foundation for the submission that the Commissioner deviated from the statutory scheme when, having given notice of investigation, he later requested information from the taxpayer. As is apparent, we do not accept the premises which underpin this argument and which are inconsistent with our view of the structure of s 46. But leaving all that aside, this particular submission is untenable on any commonsense approach to s 46.

[28] An investigation by the Commissioner of a return naturally encompasses asking the taxpayer about the return. A concept of investigation which did not permit the making of such obvious inquiries would be ludicrously strictured. In this

sense the request for information process is just a subset of the broader investigative process which is available to the Commissioner. For this reason it would be illogical to reason that the reference in s 46 to both processes means that they are entirely discrete. In this case, the greater includes the lesser; it does not exclude it. Where a notice under s 46(5) has been issued (as here), the Commissioner could, on counsel's argument, have resort to all other available means of inquiry, including requesting information from third parties, but could not ask the taxpayer any questions or seek from that person any documentation. If that argument were to be accepted, the Commissioner might, after 15 working days, lack the ability to seek from the most obvious source and possibly the only source – the taxpayer – information crucial for the completion of an investigation which had been notified within the time limit. That would be a most curious position. If such a consequence were really intended by the section, surely the legislature would have said so explicitly.

[29] It follows that once notice of investigation is given under s 46(5), later requests for information by the Commissioner cannot sensibly be regarded as subject to the s 46(4) time limits. This was essentially what the Court of Appeal concluded and we agree. As already noted,[17] however, there is a more fundamental reason for rejecting the argument advanced by Contract Pacific, a point to which we now turn.

When does the refund become payable where a request has been made under s 46(4) or notice has been given under s 46(5)?

[30] On the clear wording of the section, we see no escape from the conclusions that:

(a) where a timely request has been made under either s 46(4) or a timely notice has been given under s 46(5), the governing provision is s 46(1)(b); and

(b) the refund does not become payable until the point in time stipulated in s 46(1)(b) which is when the Commissioner is relevantly satisfied.

---

[17] See [20] above.

This was the interpretation adopted by Simon France J in *Riccarton Construction Ltd v Commissioner of Inland Revenue*,[18] where a timely s 46(4) request had been followed, more than 15 working days after the receipt of the return, by the Commissioner commencing an investigation. It is also a commonsense and practical approach to the section. Assume that the Commissioner makes a timely request for information under s 46(4) and the response does not allay his concerns. In such circumstances, the Commissioner can be expected to investigate the return. Where this happens, it is just the type of situation where the Commissioner should not be required, in the meantime, to pay the disputed refund.

[31] Mr Harley maintained that on this approach to the section, the request for information procedure is redundant and, as well, there is no point to the time limit for second and subsequent requests for information.

[32] Section 46(4) stipulates two 15 working day periods – the first in relation to the initial request and the second for any follow-up requests. If a timely request is not made initially, the consequence for the Commissioner is that the claimed refund becomes payable. But the corollary of our interpretation of the section is that there is no equivalent sanction if follow-up requests are not given within the second period.

[33] We recognise that this means that the specification of a time limit for follow-up requests may be of limited practical effect. But we do not see the request for information procedure as redundant. Indeed, in the sort of cases for which it is intended (routine inquiries), we assume that the Commissioner's staff will continue to employ it. And where they do, the statutory time limits for further requests will, in practice and by their exhortatory effect, ensure reasonable expedition.

[34] In any event, any awkwardness in the way the section might operate in marginal cases does not warrant the major departure from the text of s 46(1)(b) which Mr Harley's argument requires.

---

[18] *Riccarton Construction Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,191 (HC) at [39].

Disposition

[35] The appeal should be dismissed and the appellant ordered to pay the respondent costs of $15,000 together with reasonable disbursements.

BLANCHARD J

[36] I agree with the reasons given for the Court by William Young J. The argument made for the appellant that an investigation does not, for the purposes of s 46(2)(a), include the requesting of information from the taxpayer is unsustainable, as those reasons demonstrate.

[37] At the hearing I was inclined to think that the position might arguably be different if the Commissioner had made a timely request for information and later, outside the 15 day working period, invoked for the first time his broader investigative power. But, having reflected further, I am of the view that such an argument must also be rejected. In providing for the lesser investigative step of a request for information the legislature cannot sensibly be taken to have contemplated that if the response to a request revealed, perhaps unexpectedly, that a fuller investigation were needed, the Commissioner could embark upon it only at the cost of having to make a refund. If that were so, there would be little point in providing under s 46(2) for any step other than an investigation since the Commissioner would be at significant risk if he merely made a request and would be foolish to do so.

[38] Nor should it make any difference, it seems to me, that in the intervening period there may have been a further request for information. It is an oddity that s 46(4)(b) also provides a time limit within which a subsequent request should be made. But I am not persuaded that this is an indication that, despite compliance by the Commissioner with the time limit for a first request, a late subsequent request has the consequence that a refund must then be made.

[39] It has to be accepted that the section is poorly drafted. Necessarily, therefore it has to be given a remedial construction so that it can operate without producing perverse results which can never have been within the legislative purpose.

Solicitors:
Holland & Holland, Auckland for Appellant
Crown Law Office, Wellington for Respondent