IN THE SUPREME COURT OF NEW ZEALAND

SC 52/2011
[2012] NZSC 36

BETWEEN	LEWIS GAIRE HERDMAN THOMPSON Appellant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 1 March 2012

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

Counsel: G D Pearson, J K Scragg and C A Milner for Appellant
A C Beck, M Deligiannis and K I S Naik-Leong for Respondent

Judgment: 10 May 2012

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent's costs in the sum of $15,000 plus disbursements to be fixed, if necessary, by the Registrar.

REASONS

(Given by William Young J)

The appeal

[1] The Goods and Services Tax Act 1985 (the GST Act) came into effect on 1 October 1986. The appellant, Mr Gaire Thompson, duly became registered for GST purposes in relation to his then business activities which included the leasing of a property he owned at Rolleston, near Christchurch. He de-registered with effect from 30 November 1999 on the basis that his taxable supplies for the succeeding

12 months would be under the registration threshold (which was then $30,000).[1] Between December 1999 and September 2000 he disposed of the Rolleston property. This was pursuant to three sales, two of which were to an associated company. On the basis of his November 1999 de-registration, he did not account to the Commissioner of Inland Revenue for output tax on these transactions.

[2] The Commissioner subsequently cancelled the November 1999 de-registration and assessed Mr Thompson for output tax on the three sales.[2] As we will discuss, the process in relation to his challenges to the de-registration decision and assessments was not entirely straightforward. For present purposes, however, it is sufficient to say that he was successful before the Taxation Review Authority,[3] partially successful in the High Court,[4] which upheld his challenge to the assessment in relation to the most significant of the sales but dismissed the challenges to the other two assessments, and completely unsuccessful in the Court of Appeal,[5] which upheld all three assessments.

The facts

[3] We can most conveniently start the narrative in 1998. At that time Mr Thompson owned just over 200 hectares of land near Rolleston which he had acquired in 1979. It was leased out at a rental which, because it included rates, was in excess of $30,000. As we have noted, Mr Thompson was appropriately registered for GST and accounted for output tax on the rent (including rates) which he received. He filed returns on a six monthly basis with the tax periods ending on 31 January and 31 July. He was thinking of selling the Rolleston property to an associated company. This was for reasons which at least included taxation considerations. These were addressed in a letter of advice Mr Thompson received in July 1998 from an accountant specialising in tax.

1 Goods and Services Tax Act 1985, s 52(1).

2 There were also assessments in relation to rental receipts but these involve inconsequential amounts which had, in any event, been accounted for to the Commissioner by a party associated with Mr Thompson. They did not feature in the argument before us and there is no need to discuss them.

3 *Case X6* (2005) 22 NZTC 12,079 (TRA).

4 Thompson *v Commissioner of Inland Revenue* (2009) 24 NZTC 23,725 (HC) and see also *Commissioner of Inland Revenue v Thompson* (2007) 23 NZTC 21,375 (HC).

5 *Thompson v* Commissioner *of Inland Revenue* [2011] NZCA 132, (2011) 25 NZTC 20-041.

[4] The drift of the advice was that he should de-register for GST purposes while retaining his land. This would mean that he would have to pay output tax on the retained land but assessed only on its cost price.[6] If he later sold the land to an associated entity, a GST input tax credit could be claimed by that entity and he would not be required to account for output tax (because by then he would be de-registered). The tax adviser recommended a period of time (at least three months) between de-registration and the sale of land to an associated entity.

[5] Mr Thompson was entitled to de-register only if he could satisfy the Commissioner that his taxable supplies for the succeeding 12 months were not going to exceed the $30,000 registration threshold.[7] In relation to this, the adviser observed:

> In practical terms this would involve being able to support a market rental of less than $30,000 pa.

Associated with this was a later suggestion that a:

> ... rental valuation should be obtained to support a valuation of less than $30,000.

Unexplained was how such a valuation could be justified given that there was a lessee in place who was prepared to, and was, paying rent in excess of $30,000.[8]

[6] Not specifically addressed in this letter was the point that if the land which was being rented out was sold early enough in the following 12 month period, the rent derived from the property would be less than the $30,000 threshold. Since the letter envisaged a sale as soon as three months after de-registration, this seems an odd lacuna. Also not addressed specifically in the letter was the possibility that the proceeds of sale of the Rolleston land might have to be brought into account in

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6 As we will explain later, the output tax on retained assets which were acquired before the Goods and Services Tax Act came into effect can be calculated on cost price; see ss 5(3) and 10(8).

7 The Goods and Services Tax Act 1985, s 52(1).

8 When pressed in cross-examination in the High Court on a related point, Mr Thompson's position was that he thought that payments made to him by the tenant which were referable to rates were not relevant to the threshold. The letter of advice, however, correctly recorded that if such payments were being made they were included in Mr Thompson's taxable supplies. As well, the letter recorded both a current rental of $30,000 per annum and the need for a rental valuation of "less than $30,000". There was also a note, headed "Caution", advising that the Commissioner might look at "Mr Thompson's prior activities" in relation to the threshold assessment.

deciding whether taxable supplies for the succeeding 12 month period would exceed the threshold. At the time, it was distinctly arguable that the likelihood or probability of such sales was irrelevant to the entitlement to de-register.[9] On the other hand, it was also distinctly arguable that this was not the position, as the Court of Appeal was to hold seven years later in *Lopas v Commissioner of Inland Revenue*.[10] The letter of advice is thus somewhat incomplete.

[7] Mr Thompson did not immediately implement the advice but it plainly remained in his mind. His accountant kept him in touch with case law associated with tax disputes involving transactions between related parties. In a letter to his tenant of 29 December 1998 (in which he recorded rent for the Rolleston property which, including rates, continued to be in excess of $30,000), he referred to various options he had in relation to the land. In May 1999, he obtained a valuation of the rental at $29,000 (a step which was presumably a precursor to de-registration on the basis proposed in the July 1998 advice).[11] In the same month he was sent by his lawyer a copy of an article which suggested that the law might be changed to prevent input tax credit claims on transactions between associated parties.

[8] Events then took a slightly different course from that advised because in July 1999 a third party (a Mr Horsbrugh) began to show interest in acquiring part of the property. The resulting negotiations with Mr Horsbrugh over the succeeding months were all but finalised by 30 November 1999. Mr Thompson, however, also continued to envisage a sale to an associated company. We say this because on 29 September 1999 he wrote to his real estate agent saying that he was probably going to:

> sell the whole farm to my associated company to fix the GST problem and avoid me becoming a developer.

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9 It was arguable that this was the effect of s 51(1)(c).

10 *Lopas v Commissioner of Inland Revenue* (2006) 22 NZTC 19,726 (CA).

11 This valuation was not in the material before us so it is not clear to us how, if at all, it addressed rates. It does not appear to have referred to the actual rent being paid (which, including rates, exceeded $30,000) and on the basis of the cross-examination of Mr Thompson in the High Court, it is clear that there was no reference to comparable rentals.

[9] On 1 December 1999, Armagh Investments Ltd (a company associated with Mr Thompson) was registered for GST purposes.[12] On the basis of the evidence later given by Mr Thompson, it seems that this was in anticipation of that company later acquiring some or all of the Rolleston land. As well, and importantly, early in December, Mr Thompson completed an IRD form requesting de-registration with effect from 30 November 1999. This was on the premise that his supplies for the next 12 month period would not exceed $30,000, albeit that the basis for the diminution in taxable supplies as identified was not very congruent with Mr Thompson's actual intentions. The form referred to the sale of a property management business to Rutherford Mews Ltd (a company associated with Mr Thompson). But it gave no indication as to how or why the rental income would decrease and there was no indication that the land was going to be sold.

[10] Despite the cryptic nature of the information supplied by Mr Thompson, his request to be de-registered was accepted by the Commissioner in a standard form notification of 22 December 1999. This recorded cancellation of his GST registration with effect from 30 November 1999.

[11] This de-registration did not immediately affect the relationship between Mr Thompson and his tenant who continued to pay rent on a basis which included GST. And despite Mr Thompson knowing that, at the very best from his point of view, he would be required to account for output tax on the cost price of the retained assets, he did not do so in the return he filed for the tax period ending 31 January 2000.

[12] As we have noted, by September 2000, all of the Rolleston land was sold.

[13] The first of the sales was of about 49 hectares to a company associated with Mr Horsbrugh. The sale price was $461,250. This is the transaction which had been under consideration since July 1999 and with the negotiations all but finalised by 30 November 1999. A conditional contract was completed by the parties on 3 December 1999 and signed on 8 December 1999. The deposit was paid on 8 February 2000 and settlement occurred in June 2000. Consistently with the way

[12] This was pursuant to a request received by the Commissioner on 19 November 1999.

this transaction has been described to date, we will refer to it as “the Horsbrugh sale”, even though, as noted, the actual purchaser was a company.

[14] The next sale was of 15 hectares. The purchaser was Armagh (that is, the associated company we have mentioned). The agreement for sale and purchase is dated 31 March 2000 and it provided for a purchase price of $810,000. This was not paid but remained owing under an acknowledgement of debt, which was not executed until September 2000, although back-dated to 31 March 2000. The input tax credit claim by Armagh attracted the attention of the Commissioner and details of this transaction were sought on 11 April 2000.

[15] In June 2000, but only after being challenged by an Inland Revenue Department inspector as to why he was collecting GST while not registered, Mr Thompson took steps to “regularise” the position in respect of the rent he was receiving. He did this by retrospectively interpolating another of his companies between himself and the tenant. This company provided the tenant with GST invoices and accounted for the output tax to the Commissioner and to Mr Thompson for the net rent.

[16] Mr Thompson then sold the balance of the land to Armagh. This was pursuant to an agreement for sale and purchase of 29 September 2000 and was for a consideration of $2m. No money actually changed hands and payment was again effected by an acknowledgement of debt.

[17] The investigation into the first Armagh transaction eventually encompassed all three sales and the 30 November 1999 de-registration. It resulted in a decision by the Commissioner to reinstate Mr Thompson’s registration up until 31 January 2001 and assessments for output tax in relation to all three sales.

The critical statutory provisions

[18] Section 51(1) of the GST Act imposes a requirement to register for GST in relation to a taxable activity when supplies over a 12 month period exceed a specified threshold (which as we have noted was then $30,000). Those whose

supplies are less than the threshold may become (or remain) registered on a voluntary basis.

[19] Under s 52, the entitlement to de-register rests on a forward-looking assessment that the taxpayer's supplies for the succeeding 12 months will not exceed that threshold:

> **52 Cancellation of registration**
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> (1) Subject to this Act, every registered person who carries on any taxable activity shall cease to be liable to be registered where at any time the Commissioner is satisfied that the value of that person's taxable supplies in the period of 12 months then beginning will be not more than the [specified amount] ... .
>
> (2) Every person who, by virtue of subsection (1) of this section, ceases to be liable to be registered may request the Commissioner in writing to cancel that person's registration, and if the Commissioner is at any time satisfied, as mentioned in subsection (1) of this section, the Commissioner shall cancel that person's registration with effect from the last day of the taxable period during which the Commissioner was so satisfied, or from such other date as may be determined by the Commissioner, and shall notify that person of the date on which the cancellation of the registration takes effect.
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> (3) Every registered person who ceases to carry on all taxable activities shall notify the Commissioner of that fact within 21 days of the date of cessation and the Commissioner shall cancel the registration of any such person with effect from the last day of the taxable period during which all such taxable activities ceased, or from such other date as may be determined by the Commissioner:
>
> Provided that the Commissioner shall not at any time cancel the registration of any such registered person if there are reasonable grounds for believing that the registered person will carry on any taxable activity at any time within 12 months from that date of cessation. ...

[20] Business assets retained by the taxpayer at de-registration are subject to output tax pursuant to s 5(3). In the case of assets (such as the Rolleston land) which were acquired before 1 October 1986 (which is when the GST Act came into effect), output tax is calculated on the lesser of their cost price or open market value under s 10(8).

[21] The only other section we need to mention is s 6(2):

> **6 Meaning of term "taxable activity"**
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> ...
>
> (2) Anything done in connection with the commencement or termination of a taxable activity shall be deemed to be carried out in the course or furtherance of that taxable activity.

The *Lopas* decision

[22] The Court of Appeal in *Lopas* held that s 52(1) and 52(3) required an assessment of all likely taxable supplies and did not exclude any sales of the capital assets used in the running of the business which occurred as a result of the cessation or winding down of the business operation. In reaching this conclusion the Court held that s 51(1)(c), which had been thought previously by some to exclude such sales, was not applicable to de-registration. As to this, the Court commented:[13]

> Those de-registering are ... already in the GST net and are seeking to be removed from it. In such circumstances, there is no compelling reason to exclude any taxable supplies from the calculation that are *in contemplation* in the period after de-registration from the threshold calculation. Absent de-registration, such supplies (including those dealt with in s 6(2) of the GST Act) would be subject to GST.

[23] In *Lopas*, the taxpayers were, at the time of the purported de-registration, about to sell land from which they had carried on their business. The Court held that this meant that the anticipated proceeds of sale in the ensuing 12 months were necessarily going to exceed $30,000. On this basis, the Court held that the Commissioner was therefore right to cancel the de-registration and treat the sale as having occurred while the taxpayers were registered persons. In finding for the Commissioner, the Court said:[14]

> In this case, the sale to ... was *planned* at the time of the application for de-registration. Indeed, major steps had been taken by the parties in relation to the sale, even if beneficial ownership had not passed. It is an available inference, from the timing of the entry into the sale agreement on 8 [October] 1999, that the consummation of the sale was merely awaiting the de-registration. This means, in terms of the analysis above, that the level of taxable supplies in the 12 months following 30 September 1999 was clearly going to exceed the threshold.

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13 At [49] (emphasis added).
14 At [52] (emphasis added).

The Court had earlier said:[15]

> Where no sale is *planned* as at the date of de-registration and taxable supplies would otherwise be less than $30,000 in the next 12 months, the Commissioner would, in terms of s 52(1), have to be satisfied that de-registration was appropriate. Any subsequent sale would be a sale by an unregistered person and, in terms of s 51(1)(c), could not be taken into account for the purpose of calculating the threshold for registration.

The approaches taken in the courts below

[24] The case fell to be decided under s 138P of the Tax Administration Act 1994 which relevantly provides:

> **138P Powers of hearing authority**
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> (1) On hearing a challenge, a hearing authority may—
>
> (a) Confirm or cancel or vary an assessment, or reduce the amount of an assessment, or increase the amount of an assessment to the extent to which the Commissioner was able to make an assessment of an increased amount at the time the Commissioner made the assessment to which the challenge relates; or
>
> (b) Make an assessment which the Commissioner was able to make at the time the Commissioner made the assessment to which the challenge relates, or direct the Commissioner to make such an assessment.
>
> ...
>
> (2) If the challenge relates to a disputable decision that is not an assessment, the hearing authority—
>
> (a) Must not make or alter the disputable decision; and
>
> (b) May direct the Commissioner to alter the disputable decision to the extent necessary to conform to the decision of the hearing authority with the effect the hearing authority specifies.
>
> (3) ... the Commissioner must make or amend an assessment or other disputable decision in such a way that it conforms to the hearing authority's determination.

[15] At [51] (emphasis added).

The disputable decision in issue in the case is the Commissioner's decision to reinstate Mr Thompson's registration to 31 January 2001. The assessments in issue were the output tax assessments in relation to the three land sales.

[25] Mr Thompson's challenge to the re-registration decision was determined in March 2005 by Judge Willy, sitting as the Taxation Review Authority.[16] At the hearing before Judge Willy, the primary focus had been on likely rental turnover with the Commissioner apparently not being particularly strenuous in reliance on the proceeds of the proposed property sales. This may have been because in earlier litigation (in fact the first round of the *Lopas* case), Judge Willy had interpreted s 51(1)(c) in such a way as to render such proceeds irrelevant. Presumably anticipating the Judge's approach to s 51(1)(c), Mr Thompson defended his 30 November 1999 de-registration on the basis of his intention to sell the land. This was in terms which, in light of the course the litigation was to take later, were ironically firm:

> I did intend to transfer the land to companies, so I was sure that a few months after deregistration I would be transferring the Rolleston land to a company. Accordingly I was confident that I would be below the $30,000 threshold. I was close to the $30,000 threshold if I carried on as things were.
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> ...
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> If the [Horsbrugh sale] had not proceeded, the land would have been transferred to Armagh Investments Ltd, and accordingly [the rent would have] been below the $30,000 threshold regardless.

[26] Judge Willy concluded that the likely proceeds of the then proposed land sales did not form part of the anticipated future turnover for the purposes of s 52(1). He also found that given the probable effect of such sales as at November 1999, Mr Thompson's prospective rental receipts for the next 12 months were under the threshold. So he quashed the Commissioner's re-registration decision and reinstated the original de-registration. We note in passing that it is open to question whether these orders were precisely within his powers under s 138P, but nothing turns on the point.

16 *Case X6* (2005) 22 NZTC 12,079 (TRA).

[27] The Commissioner appealed against the decision of Judge Willy. By the time that appeal was dealt with, the Court of Appeal had delivered its *Lopas* judgment. Given *Lopas*, Miller J[17] allowed the Commissioner's appeal and directed that the rehearing, which was thus necessary, should be in the High Court and dealt with at the same time as the hearing of the challenges to the actual assessments. These assessments had been made after the hearing before Judge Willy, but before his decision, and were the subject of separate challenges which had been lodged in the High Court.

[28] Dobson J, at the subsequent High Court hearing,[18] understandably treated himself as bound by *Lopas*. But in doing so, he placed particular emphasis on the use by the Court of Appeal of the word "planned". This is apparent from the following extract from his judgment:[19]

> The second relevant point considered in *Lopas* is the stage a transaction needs to have reached, as at the date on which the taxpayer seeks to be de-registered, for it to be treated as part of the taxable activities of the GST-registered business. In *Lopas*, the facts enabled the Court to find that the sale of the land to the trusts partnership was planned at the time of the application for de-registration, with "major steps" having been taken in relation to the sale ([52]). The Court inferred that the consummation of that sale was merely awaiting the de-registration of the partnership. Because the transaction was "planned", it was treated as part of the activity of the registered entity.
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> Mr Beck suggested the Court of Appeal's test used "in contemplation" as another reflection of how advanced a transaction needed to be. Mr Pearson contested this, pointing out that the relevant passage in the Court of Appeal's reasoning did not go beyond the notion of the transaction being "planned". I accept Mr Pearson's point. The test requires a fact-specific assessment in each case. If the transaction is planned in a sufficiently choate way that it is to be seen as connected with the conduct of the business, even when it is being downsized, then it is to be accounted for, on its terms, as a part of the business. The Court of Appeal's approach suggests that an intention to sell will not be enough. Ascertainment of intention in the context of land acquired for the purpose of resale has proved somewhat fraught in income tax law. The rationale here is that if a registered person has plans, probably partly in place, at the time that person seeks to de-register, then the planned transaction will require de-registration to be deferred until the planned transaction has been accounted for on its terms.

17 *Commissioner of Inland Revenue v Thompson* (2007) 23 NZTC 21,375 (HC).
18 *Thompson v Commissioner of Inland Revenue* (2009) 24 NZTC 23,725 (HC).
19 At [56]–[57].

[29] Dobson J considered that the circumstances associated with the Horsbrugh transaction were indistinguishable from those in *Lopas*. It followed that Mr Thompson had not been entitled to de-register with effect from 30 November 1999 and the Commissioner had been correct to set aside that de-registration. On the other hand, the Judge concluded that the first Armagh sale had not been relevantly planned as at 30 November 1999. In relation to the second Armagh sale, he considered, for reasons we will come to shortly, that the relevant date was 31 July 2000 and he held that this sale was not, at that date, planned. His approach in relation to these sales is fairly captured by the following passage which directly addresses the second Armagh transaction:[20]

> It could be argued that there was a pattern of conduct, consistent with:
>
> - the comment in Mr Thompson's letter to the Christchurch real estate agent at the end of September 1999 that he was probably going to sell the whole farm to an associated company to fix the GST problem ([65] above);
> - the lapses of time permitted between completing the terms of the deal with Mr Horsbrugh's interests to create a distance between his de-registration, the first and subsequent transfers for the purposes of minimising liability for GST;
> - the first transfer to Armagh at the end of March 2000; and
> - the second transfer to Armagh some six months later.
>
> I am also conscious that this was an "internal" transaction, in that it occurred between associated parties so that there was no need for dialogue or negotiation between parties at arm's length. Accordingly, there was not the same opportunity for a document trail to develop identifying the genesis of the vendor's offer to sell and then settling on a price and negotiating other terms with an arm's length purchaser. Rather, the transfer is likely to have occurred at the maximum price justifiable to the IRD. The formality of an agreement was needed to prove its terms to the IRD, rather than to record the commitment between the parties to it.
>
> Notwithstanding all of that, I am satisfied that this third transaction was not "planned" as at 31 July 2000. Rather, it was a likely further step that would occur at some subsequent point in time, to complete the process by which Mr Thompson extricated himself from personal ownership of these assets. Its date and terms were by no means certain. Mr Thompson may well have chosen one of the different companies with which he was associated, rather than Armagh. The justifiable price may well have been fluctuating quite quickly. I accept that such suggestions are speculative. The point is that the requirement for a transaction to be "planned" in the sense used in *Lopas*

[20] At [96]–[98].

> contemplates something more choate and defined than the evidence establishes in respect of this third transaction, as at the end of July 2000.

[30] Despite Mr Thompson's success on the question whether the first Armagh sale was relevantly "planned" as at 30 November 1999, Mr Thompson was unsuccessful in relation to the associated assessment for output tax. This is because the Judge took the approach that with the setting aside of the 30 November 1999 de-registration and the Horsbrugh sale occurring in February (in terms of time of supply), the relevant tax period expired on 31 July 2000. Therefore, as the first Armagh sale took place during the same tax period, output tax was payable. On the other hand, on the approach of the Judge, his conclusion that the second Armagh sale was not "planned" as at 31 July 2000 meant that there could no justification for a later de-registration date with the result that output tax was not payable in relation to the sale.

[31] The Court of Appeal dismissed Mr Thompson's appeal in relation to the Horsbrugh and first Armagh sale transactions and allowed the Commissioner's appeal in relation to the second Armagh transaction. It agreed with Dobson J that the likely proceeds of the Horsbrugh sale had to be taken into account in relation to whether Mr Thompson was entitled to de-register on 30 November 1999. It also agreed with Dobson J that this meant that output tax was payable on the first Armagh transaction. More generally, the Court took the view that Dobson J had been wrong to focus on the words used in *Lopas* (and in particular, the word "planned") rather than the text of the statute but it did not appear to apply this conclusion directly to the Armagh transactions.[21] Instead, it primarily dealt with the case on the basis that at all material times Mr Thompson faced a dilemma which precluded the Commissioner being satisfied that his turnover would be less than the threshold:[22]

> We have already observed that the statutory test is not whether a transaction was planned, but whether the Commissioner had reason to be satisfied that no transaction taking all taxable supplies of the taxpayer over the $30,000 limit would occur. In the present case, the taxable supplies of Mr Thompson consisted of the leasing of the Rolleston farm. If he was to stop leasing the farm, there were a number of possible outcomes: one was that he would use

[21] This is addressed in the Court of Appeal judgment in [34] and [42]–[43] in terms which are ambiguous. Given our approach, there is no need for us to seek to resolve the ambiguity. Hence we have not reproduced in this judgment [34], [42] and the relevant part of [43].

[22] At [39]–[40].

> the farm himself, but one could expect that if he did so he would have farming related taxable supplies exceeding $30,000 in the ensuing year. Another was that he would sublease the farm, but this would still generate rent that could exceed $30,000 in the one year period. Another was that he could sell the farm, but that would itself be a taxable supply for well over $30,000. Perhaps the only way he could satisfy the Commissioner would be if he intended to keep the farm but stop using it for any business purpose.
>
> In fact, he intended that the leasing business would be carried on by an associated entity. The only way that could occur was by the transfer or sublease of the farm to that entity. Either seemed likely to generate taxable supplies over $30,000. So, given Mr Thompson's apparent intention that the leasing business would be carried on by another entity, there was no apparent basis on which he could satisfy the Commissioner, before the transfer of the Rolleston farm was completed, that his taxable supplies over the next year would not exceed $30,000. In those circumstances he could not satisfy the statutory test on 30 November 1999 and he would not have been able to satisfy it at any time before the first Armagh sale.

And then specifically in relation to the second Armagh sale:[23]

> Mr Thompson did not explain how he could cease earning rent income from the farm without subleasing or selling it. We consider he was not in a position to satisfy the Commissioner as at 30 November 1999, as at 30 July 2000, or at any time in between, that he would not have taxable supplies exceeding $30,000 in the forthcoming year.

The case in the Supreme Court

Overview of the argument advanced on appeal

[32] Mr Pearson accepted that proceeds of asset sales likely to occur in the 12 months following a contemplated de-registration might, depending on the circumstances, be required to be taken into account in assessing prospective turnover. So there was no challenge to the actual decision in *Lopas*. He argued, however, that this is so only in relation to sales which were "planned" at the time of de-registration. So in this respect he supported the approach taken by Dobson J.

[33] Mr Pearson accepted that the Horsbrugh sale was "planned" as at 30 November 1999 and thus he also accepted that the Commissioner was entitled to set aside the 30 November 1999 de-registration. It follows that Mr Thompson's liability to output tax on this transaction is no longer in dispute.

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[23] At [43].

[34] He argued that Mr Thompson's liability to remain registered should be assessed as at 9 February 2000. It will be recalled that the deposit on the Horsbrugh sale was received on 8 February 2000 which was thus the time of supply. Mr Pearson argued that as at 9 February 2000, neither of the Armagh transactions were, under *Lopas*, "planned" and the anticipated proceeds of sale were therefore irrelevant to whether Mr Thompson was entitled to de-register. He also argued that as at that date, the rent to be received over the next 12 months was less than the threshold. Although he accepted that the default position under s 52(2) is that de-registration occurs at the end of the tax period in which a request is made, he submitted that the de-registration date fixed by the Court should not be 31 July 2000 (which was the last day of Mr Thompson's tax period) but rather 9 February 2000 which is when, on this argument, Mr Thompson was no longer required to be registered.

[35] Mr Pearson also complained about the way in which the Court of Appeal dealt with rental issues. It will be recalled that the Court of Appeal saw Mr Thompson as being on the horns of a practically insoluble dilemma in that, at all material times, including as at 31 July 2000, his prospective turnover for the next 12 months was either going to exceed $30,000 in rent or as a result of such transactions as he would have to take to divest himself of that rent.

[36] Mr Pearson produced a schedule that showed that for the 12 months that followed 9 February 2000, the actual rent received, exclusive of GST, was $28,107.17. His broad position therefore is that from 9 February 2000 the Commissioner could (and should) have been satisfied that Mr Thompson's taxable supplies in the form of rent over the next 12 months were going to be less than $30,000. Although this argument was thus primarily built around his contention that the appropriate de-registration date was 9 February 2000, it was equally applicable (and in truth it is rather more cogent as we will explain) to the position as at 31 July 2000.

[37] Mr Pearson did not dispute the appropriateness of the Court of Appeal's dilemma approach in relation to 30 November 1999 and, as we have noted, he accepted that Mr Thompson's de-registration as at that date cannot stand. But on his

argument, once the land subject to the Horsbrugh sale was out of the rental picture, the prospective rental income was less than the threshold. So he denied that the dilemma postulated by the Court of Appeal had any applicability in relation to the Armagh transactions. He also maintained that the approach of the Court of Appeal in this respect did not reflect the way the case had been argued in that Court or the findings in relation to rent made by Judge Willy and Dobson J.

Overview of our approach

[38] The most important issue in the case is whether at the two possible de-registration dates postulated by Mr Pearson (namely 9 February and 31 July 2000), the proceeds of future land sales were required to be taken into account in assessing prospective turnover. For reasons which we explain, we are of the view that they were required to be taken into account and on the basis of this conclusion, the appeal must be dismissed.

[39] This, however, is not the way the case was dealt with by Dobson J and it is not precisely the way the case was determined by the Court of Appeal. In the latter Court, in particular, Mr Thompson lost his case for reasons which included prospective rental turnover. Given this and the careful and thorough arguments addressed to us by Mr Pearson, we propose to address the significance of the rental turnover before turning to the significance of the proceeds of future land sales. In doing so, we will assume, for the sake of argument, that anticipated proceeds of sale of the Rolleston land were not required to be taken into account. Finally, and for the sake of future cases, we will comment more generally on the application of the s 52(1) and (2) test.

Rental turnover

[40] We confess to finding the rent issue a little elusive. Given the context in which s 52(2) operates, prospective turnover should be assessed on the hypothesis that the taxpayer, by this stage, will be de-registered and thus will not be charging GST. By logical extrapolation it might be thought that the net rent payable by the tenant (that is, the rent without any GST component) provides the appropriate basis

for the assessment. In practice, the Commissioner assesses the value of supplies exclusive of GST, both for registration and de-registration,[24] an approach which we think must be right. To that extent, there is apparent force in Mr Pearson's argument. On the other hand, there is an obvious inconsistency when someone who is not registered charges and recovers GST.[25] In the exercise of the discretion as to the identification of the effective de-registration date, the Commissioner would be entitled to defer effective de-registration until the taxpayer has stopped charging GST or to a date when it is clear that this will happen. It will be recalled that despite his 30 November 1999 de-registration, Mr Thompson continued to recover from the tenant both the contractual (that is, net) rent and GST. So, as at 9 February 2000, Mr Thompson was charging GST on the rent.

[41] As discussed earlier,[26] Mr Thompson addressed the GST practicalities of his relationship with his tenant by issuing the tenant with GST invoices in the name of another company which, in June 2000, he retrospectively interpolated between himself and the tenant. If this retrospective interpolation is to be allowed for, the actual rent he derived for the 12 months following 9 February 2000 was the net rent (exclusive of GST) for which that company accounted to him personally and which was less than $30,000.

[42] It follows that by 31 July 2000, Mr Thompson had resolved the problem that the rent he had been receiving included GST. As a result of this and the Horsbrugh and first Armagh sales, it was by then clear that rental turnover for the following 12 months was going to be under the threshold. We are therefore persuaded that the Court of Appeal was wrong in its dilemma approach to de-registration as at 31 July 2000. There is, however, rather more difficulty in relation to Mr Pearson's argument for a 9 February 2000 de-registration date.

[43] Section 52(2) provides for what, in a sense, are two decisions. The first is the decision to cancel registration. This turns on an assessment of future turnover. We

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24 Inland Revenue Department *GST Guide: Working with GST* (IR375, July 2011) at 2.

25 At the time, this inconsistency was addressed by s 27(6)(a) of the Goods and Services Tax Act 1985 (this section is now repealed). For current guidance, see Inland Revenue Department *GST Guide: Working with GST* (IR375, July 2011) at 23.

26 See [15] above.

consider that, where called upon to do so, the hearing authority should make this decision as at the first date on which it could have been safely predicated (with the benefit of all relevant information) that supplies for the succeeding 12 months would be less than the threshold. The second decision is as to the effective date of de-registration. Under s 52(2) the default date is the last day of the then current tax period but the Commissioner can fix another date. In the absence of any contrary indication, the hearing authority could well depart from the default date in favour of the same date as that already discussed, namely the date on which it could first have been safely predicated that supplies for the succeeding 12 months would be less than the threshold.

[44] The reason why Mr Pearson contended for a 9 February 2000, and thus mid-tax period, de-registration date is to exclude from GST what would otherwise be a taxable supply (in the form of the first Armagh transaction) which was well over the threshold and which, as it turned out, took place less than seven weeks later. So the argument is rather artificial and not obviously meritorious. There is also the related point that as at 9 February 2000, Mr Thompson was in the course of the unsatisfactory implementation[27] of a doubtful tax plan,[28] and is thus not a very promising candidate for the favourable exercise of a discretionary judgment. In any event, the fact remains that Mr Thompson continued to collect GST from his tenant up until June 2000. We can see no justification for an effective de-registration date which precedes Mr Thompson's June 2000 regularisation of his GST affairs.

[45] The conclusion just reached means that at the very best for Mr Thompson, and just based on his likely rental turnover, he cannot obtain a de-registration date which precedes the time of supply in relation to the first Armagh transaction. The corollary of this is that on any approach to the issue we are about to come to, Mr Thompson is liable to output tax on that transaction, essentially for the reasons given by Dobson J and the Court of Appeal.

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27 See [9]–[11] above.

28 The view of the law the plan was premised on was wrong and, if fully informed, the Commissioner would have seen it as at least doubtful at the time. There are also the factors referred to in [5]–[6] above.

The relevance of the proceeds of future lands sales to the s 52(2) test

[46] On the approach favoured by Dobson J, and urged on us by Mr Pearson, the Commissioner must exclude from the s 52(2) assessment the proceeds of all future land sales, no matter how likely they were to occur, unless they had been "planned" in the specific sense adopted by Dobson J.

[47] We disagree. We think that the Judge misinterpreted the judgment in *Lopas*. Although that judgment used the word "planned", this was in the context of a sale which was planned at the time of de-registration. And, as is apparent from the passages from the judgment which we have set out earlier,[29] the Court of Appeal also used the words "in contemplation"; and this in a context which suggested that proceeds from sales which were contemplated at the time of de-registration should also be allowed for in the s 52(2) assessment. In any event, and more importantly, the reality is that the approach favoured by Dobson J does not give effect to the statutory language, a point which we see as being of controlling significance.

[48] Under s 6(2), asset sales "in connection with the ... termination of a taxable activity" are taxable supplies. The disposition by Mr Thompson of his Rolleston property was undoubtedly "in connection" with the termination of his taxable activity associated with the leasing of that property and Mr Pearson did not seek to argue to the contrary in relation to any of the transactions, including the second Armagh sale. Mr Thompson was thus only entitled to be de-registered if the Commissioner could be satisfied that for the period of 12 months following any postulated de-registration date, his turnover, including the possible proceeds of sales of the Rolleston property, would be less than the threshold.

[49] The evidence relevant to whether future land sales were required to be allowed for in assessing likely turnover in the 12 months following the various postulated de-registration dates[30] is as follows:

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29 See [22] above.

30 Being 30 November 1999, 9 February 2000 and 31 July 2000.

(a) the tax adviser's letter of July 1998 which postulated sale of the land to an associated entity three months after de-registration;

(b) the steps which Mr Thompson took to implement this advice (including getting a rental valuation);

(c) the letter of 29 September 1998 regarding Mr Thompson's intention to sell to an associated entity;

(d) the registration of Armagh for GST purposes in early November 1999;

(e) the slight change of direction associated with the Horsbrugh transaction, which was accommodated within the overall scheme of implementing the tax advice by Mr Thompson moving to obtain deregistration just as that transaction was assuming its final form;

(f) the incomplete explanation as to the GST situation provided by Mr Thompson when he applied for de-registration;

(g) the first Armagh sale; and

(h) Mr Thompson being "sure" as at November 1999 that he would sell the Rolleston land within a matter of months.[31]

[50] On any possible approach to the s 52(2) test, it could not be predicated as at 31 July 2000 that there would not be a sale of the balance of the land within the next 12 months. It follows that Mr Thompson was not entitled to be de-registered as at that date and that he has been rightly assessed for output tax on the second Armagh transaction. Similar reasons apply to the position at the other de-registration dates, which have at different times been contended for, being 30 November 1999 and 9 February 2000.

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31 This is what he told the Taxation Review Authority; see [25] above.

Application of the test under s 52(1) and (2)

[51] De-registration depends on the Commissioner being "satisfied" that taxable supplies for the next 12 month period will not be more than the threshold. We appreciate that as a result of *Lopas* and this judgment, de-registering taxpayers will usually take good care that retained assets are not disposed of until 12 months have elapsed from de-registration. For this reason, there normally will be, at the date of de-registration, a settled intention that there will be no relevant asset disposals for at least 12 months. And, in at least the general run of cases, it will be perfectly clear that other taxable supplies will not exceed the threshold. That said, a few comments may be of assistance should issues arise in the future as to the application of s 52:

(a) First and foremost, we consider that the section means what it says and that there is not much point in trying to paraphrase it.

(b) Secondly, the section requires the Commissioner to be satisfied as to a negative (that turnover will not exceed the threshold). This involves an objective, forward-looking assessment, not one controlled by hindsight.

(c) Thirdly, the test will not be satisfied when transactions which would result in the turnover being exceeded are either (i) being implemented at the proposed de-registration date or (ii) planned to occur (or contemplated as likely to occur) in the course of the succeeding 12 months.

(d) Finally, the test will probably be satisfied only where the taxpayer can show a settled intention that such transactions will not take place.

Disposition

[52] The appeal should be dismissed with costs.

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