IN THE SUPREME COURT OF NEW ZEALAND

SC 79/2015
[2016] NZSC 101

BETWEEN	BARRIE JAMES SKINNER Appellant
AND	THE QUEEN Respondent

SC 126/2015

BETWEEN	DAVID INGRAM ROWLEY Appellant
AND	THE QUEEN Respondent

Hearing:	9 June 2016
Court:	William Young, Glazebrook, Arnold, O'Regan and McGrath JJ
Counsel:	R M Lithgow QC and N Levy for Appellant (SC 79/2015) R C Laurenson for Appellant (SC 126/2015) H W Ebersohn, P D Marshall and M J Ferrier for Respondent
Judgment:	10 August 2016

JUDGMENT OF THE COURT

The appeals are dismissed.

REASONS
(Given by O'Regan J)

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False information in tax returns

[1] The appellants appeal against one aspect of a decision of the Court of Appeal dismissing their appeals against conviction and sentence for a large number of charges involving tax fraud.[1] The sole issue on the appeal is whether s 109 of the Tax Administration Act 1994 (TAA) precluded conviction on counts 101–110 of the indictment.[2]

[2] Counts 101–110 allege that Mr Rowley or Mr Skinner knowingly provided false information to the Commissioner of Inland Revenue (the Commissioner) in their personal tax returns for the years 2006–2010. Because the Commissioner did not formally dispute the tax returns, they were assessments as defined in s 3 of the TAA.[3] The falsity alleged by the Crown in relation to counts 101–110 was the failure of the appellants to include information in their tax returns for the relevant years concerning the personal benefit that they obtained by the transactions giving rise to the substantive frauds which founded earlier counts in the indictment on which they were convicted.

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1 *Rowley v R* [2015] NZCA 233, (2015) 27 NZTC ¶22-011 (Ellen France P, Harrison and Stevens JJ).

2 *Skinner v R* [2016] NZSC 7, (2016) 27 NZTC ¶22-040. Leave to appeal against other aspects of the Court of Appeal decision was declined. The applicants were charged with 93 counts of dishonestly using a document to obtain a pecuniary advantage (including four which were discharged during the trial); seven joint counts of wilfully attempting to pervert the course of justice; and each was charged separately with five counts of knowingly providing false information to the Inland Revenue Department (IRD) in their own income tax returns. Mr Skinner and Mr Rowley were convicted of 80 and 75 counts respectively of the charges of dishonestly using a document for a pecuniary advantage and all charges of wilfully perverting the course of justice and knowingly providing false information to the IRD.

3 The definition of "assessment" in s 3 of the Tax Administration Act 1994 includes "an assessment of tax made under a tax law by a taxpayer".

Proof of falsity of information in assessments

[3] Section 109 of the TAA provides:[4]

> **109 Disputable decisions deemed correct except in proceedings**
>
> Except in objection proceedings under Part 8 or a challenge under Part 8A,—
>
> (a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
>
> (b) every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.

[4] It was common ground that in proceedings to which s 109 applies, all parties are bound by it.[5]

[5] A "disputable decision" includes an assessment.[6] Both Mr Rowley and Mr Skinner filed tax returns for the income tax years 2006–2010 in which they declared assessable income that did not include the income the Crown said they derived from the frauds, and contained assessments that were consequentially understated. The term "particulars" in s 109(b) appears to refer to the information required to make the assessment which includes (among other things) the amount of assessable income and the amount of deductible expenses. The case against the appellants was that the assessments made in their tax returns and the particulars (the amount of income) were false.

[6] The Commissioner did not dispute the assessments filed by the appellants in the relevant years prior to the commencement of the prosecutions for knowingly providing false information in those returns. The appellants argue that s 109 applies to the assessments contained in the tax returns they made for the relevant years and deems those assessments and all of their particulars to be correct in all respects. If

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4 Although the word "deem" is used in s 109(b), the provision is not a deeming provision in the sense that it deems A to be B when it is not so in fact: see *Hawkes Bay Raw Milk Products Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR 218 (CA) at 224. "Deem" seems to add nothing to "taken as" in s 109(b).

5 This was established under a predecessor provision in *Macfarlane v Commissioner of Taxes* [1923] NZLR 801 (CA), discussed at [39] below.

6 Tax Administration Act, s 3.

they are correct in all respects, the argument goes, the Crown cannot prove that the appellants had provided false information in their returns.

[7] Although in the present case the claim of a statutory bar is mounted by the appellants, who were defendants, the impact of s 109 would, on the appellants' interpretation, adversely affect defendants in a case where the Commissioner did dispute the assessments by issuing a notice of proposed adjustment[7] and following the dispute procedures set out in Part 4A, or by exercising her special power under s 108(2) to amend assessments after expiry of the time bar. Section 108(2) empowers the Commissioner to amend an assessment if she is of the opinion that the tax return provided by a taxpayer is fraudulent or wilfully misleading or omits mention of income in respect of which a tax return is required to be provided. If the Commissioner had done this in the present case and the resulting assessments had been amended to include the amounts that the Commissioner says should have been included in the tax returns, that would mean the Crown could rely on the assessments as establishing the provision of false information, one of the ingredients that the Crown must prove in a prosecution for the offences.[8]

[8] If the appellants' argument is accepted, the defendant in such a prosecution would be constrained by s 109 from disputing the assessments, even if (as was the case in relation to the appellants) the defendant wished to argue by way of defence that the amount of assessable income contained in their tax returns was correct. Given the potential effect that this conclusion would have on the fair trial rights of a defendant, the arguments before us were largely predicated on the assumption that, if the interpretation suggested by the appellants in this case were adopted, it could be expected that the Commissioner would routinely reassess defendants before initiating a prosecution. As a result, much of the argument was directed to the impact this would have on the defendant's fair trial rights.

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7 Tax Administration Act, s 89B.

8 Section 143B(1)(c). For ease of reference we have used the term "Crown" when referring to the prosecuting agency in this case. The present cases were Crown prosecutions, but that will not invariably be the case in prosecutions for offences under the Tax Administration Act.

Elements of the offence

[9] The charges against the appellants that are relevant to the present appeal were charges under s 143B(1)(c) and (f) of the TAA, which provides that:

> (1) A person commits an offence against this Act if the person—
>
> …
>
> (c) knowingly provides altered, false, incomplete, or misleading information (including tax returns and tax forms) to the Commissioner or any other person in respect of a tax law or a matter or thing relating to a tax law
>
> …
>
> and does so—
>
> (f) intending to evade the assessment or payment of tax by the person or any other person under a tax law
>
> …

[10] As noted by Kós J in his decision dealing with an application by the appellants for discharge under s 347 of the Crimes Act 1961 in relation to these counts,[9] the Crown must prove five elements. These are:

(a) the defendant provided information to the IRD;

(b) the information was false;

(c) the defendant knew the information was false;

(d) the information was in respect of a tax law or matter or thing related to tax law; and

(e) the defendant intended to evade the assessment or payment of tax by himself under a tax law.

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9 *R v Rowley* [2012] NZHC 1198, (2012) NZTC ¶20-127 at [23] [High Court judgment].

[11] If the position taken by the appellants in relation to s 109 is correct, then the Crown in the present case would be unable to prove the actus reus of the offence, that each appellant had provided information that was false (element (b) above). As noted earlier, on the appellants' approach in a case where the Commissioner reassessed a defendant before commencing the prosecution, the new assessment would amount to proof of element (b), and a defence that the information provided by the defendant was not, in fact, false would not be able to be advanced.

Interpretations of section 109

[12] The appellants' case is that s 109 is clear in its wording, and cannot be interpreted so as to allow evidence questioning the correctness of an assessment to be advanced. The Crown's position is that s 109 does not apply in criminal proceedings or, if it does, it does not prevent the Crown from proving element (b) because, in so doing, the Crown is not calling into question the correctness of an assessment which can only be done by the Commissioner acting under her powers in the TAA, particularly Part 4A.

[13] We propose to evaluate the competing contentions of the parties by first considering the purpose of s 109, its statutory history and cases on s 109 and similar provisions. We will then consider the practical impact of a decision to adopt the interpretation the appellants advance and the implications in relation to the New Zealand Bill of Rights Act 1990 (Bill of Rights).

Purpose of section 109

[14] As s 5(1) of the Interpretation Act 1999 makes clear, the meaning of a statutory provision must be ascertained from its text and in the light of its purpose.

[15] Taken in isolation from its purpose, s 109 appears to apply in relation to any proceedings, whether criminal or civil. But when considered in the light of its purpose, the picture becomes clouded.

[16] The purpose of s 109 was stated by the majority in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* as follows:[10]

> It is clear that by means of s 109 Parliament was concerned to ensure that disputes and challenges capable of being brought under the statutory procedures were brought in that way and were not made the subject of any other formal proceeding in a Court or otherwise.

[17] *Tannadyce* was a case about the availability of judicial review of a decision of the Commissioner as an alternative to the challenge process set out in Part 8A. There is no discussion in the decision of the position that would apply in criminal proceedings. But the articulation of the purpose highlights the emphasis on the function of s 109 as being designed to channel proceedings contesting the accuracy or legality of an assessment or other disputable decision into the procedural framework of Part 4A and Part 8A of the TAA.[11] That prevents collateral challenges or proceedings that are not subject to the same procedural requirements and time limitations as those prescribed in Part 4A and Part 8A.[12]

[18] That purpose is, of course, one directed at civil proceedings touching on the correctness or otherwise of an assessment.

[19] Counsel for the Crown, Mr Ebersohn, argued that the purpose identified in *Tannadyce* was the only purpose of s 109. The section has no purpose in relation to criminal proceedings. The Crown is not required to quantify the tax liability of a defendant in a criminal prosecution and there was no need for it to dispute the correctness of the assessments of the appellants in the present case. The focus of the criminal prosecution is the falsity of the information set out in the tax returns.

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[10] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [53] per Blanchard, Tipping and Gault JJ. In their minority judgment, Elias CJ and McGrath J at [33] said s 109 "shields from the High Court's supervisory jurisdiction 'disputable decisions', one meaning of which is 'assessments'".

[11] The majority in *Tannadyce* criticised the judgment under appeal in that case for not giving enough weight to the purpose of s 109: at [67].

[12] Section 109 also refers to Part 8, which deals with the objection procedure that applied to disputable decisions made before Part 8A was inserted into the Tax Administration Act. Part 8 has no relevance to the present appeal.

[20] Neither appellant suggested any purpose for s 109 in criminal proceedings and we agree with Mr Ebersohn that it has none. This supports the contention that, despite referring to the generic term "proceedings", s 109 should be interpreted as applying to civil proceedings only.

Statutory scheme

[21] Section 109 must be read in its statutory context. So we now turn to consider the statutory scheme of the TAA.

[22] Mr Ebersohn said that the focus on civil proceedings in s 109 is supported by its place in the scheme of the TAA. Section 109 appears in Part 6 of the TAA, which is headed "Assessments". The provisions in the TAA dealing with criminal proceedings appear in Part 9, which is headed "Penalties". Part 9 deals with both civil penalties (ss 139A–142G) and criminal penalties (ss 143–148). A number of other provisions in Part 9 deal with both civil and criminal penalties. One of these, s 149A, provides for the standard of proof and onus of proof applicable in proceedings relating to penalties. It provides:

> **149A Standard of proof and onus of proof**
>
> (1) The standard of proof in civil proceedings relating to the imposition of penalties is the balance of probabilities.
>
> (2) The onus of proof in civil proceedings—
>
> (a) relating to evasion or similar act to which section 141E applies or to obstruction rests with the Commissioner:
>
> (b) relating to any other matter or thing rests with the taxpayer.
>
> (3) The standard of proof in criminal proceedings relating to the imposition of penalties is beyond reasonable doubt.
>
> (4) The onus of proof in criminal proceedings relating to any matter or thing rests with the Commissioner.
>
> (5) The standard of proof for the purposes of an application for a court order under section 17A is the balance of probabilities.
>
> (6) The onus of proof for the purposes of an application for a court order under section 17A rests with the Commissioner.

[23] Section 149A(2)(a) provides that the onus of proof in civil proceedings seeking shortfall penalties (civil penalties) rests with the Commissioner. It is not expressed to be subject to s 109 (but equally, s 109 is not expressed to be subject to s 149A: they are, on the face of it, simply inconsistent with each other). As Mr Ebersohn pointed out, it would be surprising if in a case involving a criminal prosecution the actus reus could be proved by the Commissioner by simply presenting an assessment that differed from the tax return filed by the taxpayer when in proceedings seeking civil penalties the Commissioner must prove the evasion to the civil standard of proof.

[24] More importantly, s 149A(4) makes it clear that the onus of proof in criminal proceedings rests with the Commissioner. There is no doubt that the impact of adopting the interpretation of s 109 for which the appellants contend would jar against s 149A(4). That is because, if the Commissioner can simply reassess the taxpayer and the prosecutor can then present the Court with an assessment differing from the tax return as conclusive proof of one element of the offence under s 143B(1)(c), that is hardly requiring the Crown to discharge an onus of proof to the criminal standard as s 149A(4) contemplates.

[25] Both ss 109 and 149A were inserted into the TAA by the same amending Act.[13] Both the appellants and the respondent saw this as significant, but for different reasons. The appellants said it could be assumed that a drafter dealing with provisions covering civil and criminal proceedings would be alert to the need to specify "civil" proceedings in s 109 if that section was intended to be limited to such proceedings. The respondent argued that the drafter cannot have meant s 109 to apply in criminal proceedings because he or she also drafted s 149A(4), which would clearly contradict s 109, if s 109 applied in criminal proceedings.

[26] The significance of s 109 being located in Part 6 of the TAA is supported by a consideration of other provisions in Part 6, which are for the most part limited in scope to civil proceedings. Many provisions in Part 6 cannot sensibly be interpreted other than in the context of civil proceedings. Examples are ss 108 and 108A, which provide for a time bar on when the Commissioner may reassess a taxpayer.

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[13] Tax Administration Act (No 2) 1996.

Generally this is a four year period. This can be contrasted with the time bar relating to the commencement of criminal proceedings which appear in ss 150A and 150B. Section 150A provides for a 10 year time bar for the commencement of criminal prosecutions for offences of the kind at issue in the present case.

[27] Section 108(2) provides for an exception to the four year time bar in cases of fraudulent returns and in certain circumstances where income is omitted from a return. Ms Levy, who presented the argument for Mr Skinner, argued this could be seen as a criminal provision located within Part 6. We are, however, satisfied that s 108 is civil in nature because it allows the Commissioner to activate the civil process under the TAA to reassess a taxpayer notwithstanding that the four year period has been exceeded, and it applies not only in cases of fraud but also in cases of omissions that are not fraudulent in character.

[28] Another provision in Part 6 which can sensibly only apply in civil proceedings is s 114, which deals with the validity of assessments. Similarly, s 94A deals with shortfall penalties and provides the method of assessing a taxpayer for shortfall penalties. This can be contrasted with the provisions in Part 9 dealing with criminal proceedings, which require the filing of a charging document. The criminal proceedings are then dealt with under the procedures set out in the Criminal Procedure Act 2011.

[29] We accept that these indicators from the scheme of the TAA support the proposition that s 109, despite its broad language, was not intended to apply to criminal proceedings. However, this is not unequivocal support because there are other provisions in Part 6 that refer to all proceedings in a context where that term appears to encompass both criminal and civil proceedings. Section 110, which provides that the production of a copy of certain tax documents will be sufficient evidence of the original, and which applies in all proceedings, is an example.

Statutory history

[30] Section 109 is the successor to statutory provisions dating back as far as 1900. There are old authorities to the effect that a predecessor version of s 109 did not apply to criminal proceedings,[14] but counsel for Mr Rowley, Mr Laurenson, argued that those authorities relied on the particular wording of the predecessor section and cannot be applied to s 109 as it now appears in the TAA. In order to evaluate that submission, it is necessary to trace the statutory history in some detail.

[31] Section 22(5) of the Land and Income Assessment Act 1900 was the first enactment providing that an assessment was conclusive and could not be challenged except by way of objection proceedings.[15] The precise wording of the provision is not important for present purposes.

[32] A similar provision appeared in the Land and Income Assessment Act 1908 which replaced the 1900 Act.[16] A differently worded provision appeared in the Land and Income Tax Act 1916, which replaced the 1908 Act. Section 18 of the 1916 Act provided:

> Except in proceedings on objection to an assessment in accordance with the provisions hereinafter contained, no assessment made by the Commissioner shall be disputed in any court or in any proceedings either on the ground that the person so assessed is not a taxpayer or on any other ground; and, except as aforesaid, every such assessment and all the particulars thereof shall be conclusively deemed and taken to be correct, and the liability of the person so assessed shall be determined accordingly.

[33] This was the first time that the words "and the liability of the person so assessed shall be determined accordingly" had appeared in the provision.

[34] An identical provision appeared in the Land and Income Tax Act 1923, which replaced the 1916 Act.[17]

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14 See below at [40]–[47].

15 The previous provision stated that an assessment "shall be received as *prima facie* evidence of the facts therein mentioned": Land and Income Assessment Act 1891, s 22(1).

16 Land and Income Assessment Act 1908, s 20(5).

17 Land and Income Tax Act 1923, s 18.

[35] The 1923 Act was repealed and replaced by the Land and Income Tax Act 1954. Section 26 of the 1954 Act was, with one immaterial change, the same as the provisions that had appeared in the 1916 and 1923 Acts.

[36] Section 27 of the Income Tax Act 1976, which replaced the 1954 Act, was also in essentially the same form as its predecessor, with one change that is immaterial for present purposes. The relevant parts of the 1976 Act were then replaced by the TAA.

[37] Section 109 of the TAA as originally enacted was very similar to the provision it replaced. It provided as follows:

> **109 Assessments deemed correct except in proceedings on objection–**
>
> Except in proceedings on objection to an assessment under Part 8, no assessment made by the Commissioner for the purposes of the Income Tax Act 1994 shall be disputed in any Court or in any proceedings (including proceedings before a Taxation Review Authority) either on the ground that the person so assessed is not a taxpayer or on any other ground; and except in proceedings on objection, every such assessment and all the particulars of the assessment shall be conclusively deemed and taken to be correct, and the liability of the person so assessed shall be determined accordingly.

[38] Section 109 as originally enacted was replaced by the current s 109 in 1996.[18]

[39] A decision of the Court of Appeal interpreting s 18 of the Land and Income Tax Act 1916 established the proposition that the requirement that assessments be challenged only in objection proceedings applied to both the Commissioner and to taxpayers.[19]

[40] As mentioned earlier, there is authority for the proposition that predecessor versions of s 109 did not apply in criminal proceedings. In *Maxwell v Inland Revenue Commissioner*, McCarthy J refused to allow reliance by the Commissioner

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[18] Tax Administration Amendment Act (No 2) 1996, s 30, which came into force on 1 October 1996.

[19] *Macfarlane*, above n 5, at 810 per Stout CJ, and at 822–823 per Stringer J. At 835, Salmond J took the opposite view. The view that the Commissioner was constrained by the predecessor to s 109 was followed by Barrowclough CJ in *Kirkpatrick v Commissioner of Inland Revenue* [1962] NZLR 493 (SC) at 496–497.

on s 26 of the 1954 Act for the purposes of a criminal proceeding.[20] McCarthy J said:[21]

> [Counsel for the Commissioner's] contention is that the Commissioner having fixed in his assessments the taxpayer's assessable income for the years in question, it is not open to the appellant now in these proceedings to contend that those fixations are incorrect and that the assessments being produced, the Court must adopt the figures arrived at by the Commissioner as being, in fact, the returnable income of the appellant for the relative years. In other words, he argues that it is no longer open to the taxpayer to deny that his income over those years was anything other than that decided by the Commissioner.
>
> On the face of it, this submission appears to be so contrary to general principle, and so serious in its consequences, that I hesitate at the outset to accept it. (There is some evidence which points to there being an objection lodged by the taxpayer against the assessments; but what course it has taken is obscure, and so I propose for the moment to treat the assessments as final.) It has to be remembered that the Commissioner is empowered to assess in such a figure as he determines, and then the onus is cast upon the objecting taxpayer to show that that assessment is wrong (s. 32). There have been, no doubt, cases where a taxpayer has been unable to discharge that onus, though if the onus were the other way the Commissioner would not be able to establish his assessment. To treat the Commissioner's assessment, then, as binding in all its details, and in all cases, upon an accused in a criminal charge in the manner contended here is so contrary to the spirit of our criminal jurisprudence that I would require to be compelled by the clearest language before I would do so. As I read the section, it does not so compel me. I read it as being directed and restricted to the enforcement of a monetary liability to pay tax and I take the dominant words of the section, so far as interpretation is concerned, to be the final words,
>
> > and the liability of the person so assessed shall be determined accordingly.
>
> This view receives support from an observation of Smith J. in *L. Marks, Morrin, and Jones Ltd. (In Liquidation) v. Louis Marks* [1931] N.Z.L.R. 756; [1931] G.L.R. 279, where he says that "the object of this section, as appears from its concluding words, is to determine the liability of the person who has been assessed for tax" (*ibid.*, 762; 282). This was not a criminal case. It was an action between two taxpayers to determine tax incidence as between themselves and so the effect of the section in criminal charges was not in issue. The observation is quoted only to point to the weight which that learned Judge placed on the concluding words of the section.

[41] The reference in the quotation above to "the Commissioner having fixed in his assessments" reflects the fact that, at the time, the Commissioner was required to assess taxpayers.[22] Now, taxpayers are required under s 92 of the TAA to assess

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20 *Maxwell v Inland Revenue Commissioner* [1959] NZLR 708 (SC).

21 At 711–712.

22 Land and Income Tax Act 1954, s 17.

themselves, so the "disputable decision" to which s 109 refers may be, in a case where the Commissioner has not sought to vary the taxpayer's assessment, the assessment made by the taxpayer in his or her tax return.

[42] McCarthy J noted that his approach differed from that taken in an earlier decision of the Supreme Court in *Kibby v Oborn*.[23] In *Kibby v Oborn*, Gresson J had expressed the view that an assessment was conclusive for the purposes of a prosecution under s 149(b) of the Land and Income Tax Act 1923 of wilfully making false returns of income because of the application of s 18 of that Act (a forerunner of s 109 of the TAA). McCarthy J said he considered that expression of view by Gresson J was a dictum in which he was unable to concur and which he preferred not to adopt.[24]

[43] Mr Laurenson highlighted the fact that McCarthy J had derived support from the observation of Smith J in *L Marks, Morrin and Jones, Ltd (in liq) v Louis Marks* that the object of the section appeared in the concluding words "the liability of the person who has been assessed for tax".[25] He emphasised that those words no longer appear in s 109.

[44] The decision of McCarthy J in *Maxwell* was followed in *Gideon Trading Co Ltd v Commissioner of Inland Revenue*.[26] In that case, Hutchison J preferred the view taken by McCarthy J in *Maxwell* to that taken by Gresson J in *Kibby v Oborn*.

[45] In *Gideon*, Hutchison J said:[27]

> I find myself in agreement with McCarthy J. [in *Maxwell*] and in respectful disagreement with the learned Judge in *Kibby's* case. The word "proceedings" will take its meaning from the context. In a certain context it may, of course, include summary prosecutions; but, in the context in which it appears in this section, particularly having regard to the words, "and the liability of the person so assessed shall be determined accordingly", I think that it means proceedings for the determination and enforcement of a liability to pay tax. The proceedings in which the convictions were entered were not directed to that purpose, but were punitive.

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23 *Kibby v Oborn* SC New Plymouth, August 1952.

24 *Maxwell v Inland Revenue Commissioner*, above n 20, at 712.

25 At 712, citing *L Marks, Morrin and Jones, Ltd (in liq) v Louis Marks* [1931] NZLR 756 (SC) at 762.

26 *Gideon Trading Co Ltd v Commissioner of Inland Revenue* [1961] NZLR 440 (SC).

27 At 444.

[46] Hutchison J also gave as a further reason the fact that s 18 of the 1923 Act applied only to proceedings between the Commissioner and the person on whom the assessment was made. In a criminal prosecution, the proceedings were proceedings between an informant and the taxpayer. Even if the informant were the Commissioner, that would not always be the case, and thus it could be argued that this provided another reason for not applying s 18 of the 1923 Act in criminal proceedings. However, Hutchison J did not express a concluded opinion on that additional reason.[28]

[47] *Maxwell* and *Gideon* are, therefore, authority for the proposition that the predecessor sections of s 109 did not apply in criminal proceedings. But, as Mr Laurenson correctly pointed out, both *Maxwell* and *Gideon* place some importance on the fact that the section being interpreted included the concluding words "and the liability of the person so assessed shall be determined accordingly".

[48] Those words did, of course, appear in s 109 as it appeared in the TAA when enacted. But they are missing from the version of s 109 inserted by the 1996 amendment to the TAA.

[49] If the appellants' argument is correct, that would mean that the decision of Parliament in 1996 to express s 109 in different terms from the section it replaced, including the omission of the concluding words from the pre-1996 version of the provision, signalled an intention by Parliament to reverse the decisions in *Maxwell* and *Gideon* and extend the ambit of s 109 to criminal proceedings.

[50] There are, however, no indications in the select committee report preceding the extensive amendments made to the TAA in 1996 indicating that that was Parliament's intention.[29] It seems more likely that the omission of the concluding words was simply a reflection of the fact that they were redundant because, whether s 109 says it or not, a party whose liability for income tax has been quantified in an

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[28] At 444.

[29] Taxpayer Compliance, Penalties, and Dispute Resolution Bill 1995 (119-2) (select committee report). In *Tannadyce*, above n 10, Elias CJ and McGrath J traced the legislative process leading up to the 1996 amendment in some detail (at [18]–[25]) and expressed the view that there was no significant change in the post-1996 version of ss 109 and 114 of the Tax Administration Act from the predecessor provisions in the 1976 Act.

assessment that is not subject to challenge is liable to pay the Commissioner the amount that has been assessed.[30]

[51] As mentioned earlier,[31] Ms Levy argued that, since ss 109 and 149 were inserted into the TAA by the same amendment Act,[32] it was reasonable to expect that the drafter would have been alive to the distinction between civil and criminal proceedings and to the differing onus of proof for criminal as against civil proceedings. She said this meant the drafter could be taken to be aware that the use of the generic term "proceedings" in s 109 would be seen as encompassing both civil and criminal proceedings.

[52] We do not accept that the drafter's intention can be deduced from these clues. It seems to us that if the drafter's (and Parliament's) intention was to effect a change in s 109 so as to extend its scope to criminal proceedings, that would have been signalled by explicit wording in s 109 referring to criminal proceedings. We consider that the omission of the concluding words of the old s 109 in the new s 109 in 1996 did not signal any change of purpose and, in particular, did not signal an intention by Parliament to extend the ambit of s 109 to criminal proceedings.

Cases on the current section 109

[53] The Crown also relied on the decision of the Court of Appeal in *R v Allan*.[33] In that case, Glazebrook J, delivering the decision of the Court, said that it would be "a very startling proposition if the existence of a valid assessment precludes any challenge in criminal proceedings".[34] The decision in *R v Allan* followed a decision of the Court of Appeal delivered the year before in *R v Smith*.[35]

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30 Income Tax Act 2007, s BB1 and Tax Administration Act, s 15B(c).
31 At [25] above.
32 Tax Administration Amendment Act (No 2) 1996.
33 *R v Allan* [2009] NZCA 439, (2009) 24 NZTC 23,815.
34 At [55].
35 *R v Smith* [2008] NZCA 371, (2009) 24 NZTC 23,004.

R v Smith

[54] In *R v Smith*, Mr and Mrs Smith had been convicted of a number of counts of knowingly failing to pay PAYE tax, an offence under s 143A(1)(d) of the TAA. The defendants had not filed returns for this tax, and the Commissioner issued a default assessment. It was not an element of the offence that the Crown prove the amount of PAYE that was unpaid, but the trial Judge had directed the jury that the Commissioner's default assessment must be taken to be correct, and the Court of Appeal upheld this, saying that s 109 applied. This is what the Court said:[36]

> Turning to the second question, we are satisfied that the Judge was also right when she told the jury that the assessments before the jury were to be taken as correct. Even though Mr and Mrs Smith disputed those assessments by way of the objection process, on the evidence before the jury the Commissioner's assessments prevailed by virtue of s 109 of the Tax Administration Act which provides that, except in specified situations (which did not apply), "no disputable decision may be disputed in any Court … on any ground whatsoever". An assessment of tax is a "disputable decision". Thus, for the purposes of s 143A(1)(d), the jury was obliged to use the Commissioner's assessments as the benchmark for determining whether or not there had been a misapplication of PAYE deductions. This was unlikely to have been an issue on the facts of this case because the focus of the defence case was on the proposition that the appellant did not have employees and therefore had no obligation to deduct PAYE from their wages.

[55] This Court dismissed an application for leave to appeal against the Court of Appeal's decision in *R v Smith*.[37] The leave panel of this Court that dealt with Mr Smith's application for leave observed: "There is no justification for giving the words of s 109 other than their plain meaning".[38] The appellants argued that we should adopt that statement. We do not consider it to be an authoritative statement given it was made in a leave judgment in circumstances where the Court had not heard full argument as we have in the present case. Nor was s 109 germane in that case because the prosecutor did not have to establish the amount of unpaid PAYE tax as an element of the offence and did not, in fact, rely on s 109.

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36 At [19].
37 *Smith v R* [2008] NZSC 110, (2009) 24 NZTC 23,176.
38 At [4].

R v Allan

[56] The facts of *R v Allan* were that a company owned by Mr Allan imported goods and sold them in New Zealand. After filing GST returns for the first nine months after the company's incorporation, he did not file GST returns for another 18 months. Shortly after filing an overdue GST return the company went into voluntary liquidation. Mr Allan was prosecuted for aiding and abetting the company to knowingly fail to file GST returns and was convicted after a jury trial. He was sentenced to imprisonment for one year and ordered to pay substantial reparation.

[57] In the Court of Appeal, counsel for Mr Allan argued that there should have been a disputed facts hearing under s 24(2)(b) of the Sentencing Act 2002 to establish the amount of GST that was actually payable by the company. Counsel for the Crown said that Mr Allan was precluded from challenging the amount of GST assessed by the Commissioner on the company because of s 109 which, the Crown argued in that case, applied in both civil and criminal proceedings.

[58] This led the Court of Appeal to reassess its decision in *R v Smith*. It noted that the comments made in *R v Smith* were obiter, or at least made in a context where the amount of tax in issue was not something the Crown was required to prove beyond reasonable doubt.[39] This contrasted with the situation in *R v Allan* where, if a disputed facts hearing had been held, the Crown would have been required to prove the amount owing beyond reasonable doubt. The Court found that there was no actual conflict between s 24 of the Sentencing Act and s 109 of the TAA because reparation under the Sentencing Act was concerned with loss and Mr Allan's challenge to the amount of the loss did not involve challenging the assessment itself, which meant that s 109 was not engaged.[40]

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39 *R v Allan*, above n 33, at [57].
40 At [56].

[59] The Court then continued:

> [59] If we are wrong and there is a conflict between s 109 of the TAA and s 24(2)(b) and (c) of the Sentencing Act, then we would have held that s 24(2)(b) and (c) requiring proof beyond reasonable doubt, being specific to the sentencing process, prevails over the general provision in s 109 of the TAA. Alternatively, we would have read down s 109 in the way [counsel for Mr Allan] suggested: that it applies to civil and not criminal proceedings. As Professor Jim Evans notes in "Reading Down Statutes" in Bigwood (ed) *The Statute: Making and Meaning* (2004) at 123, it is legitimate to read down a statute in certain circumstances. Such reading down of statutes is not unusual. Even Scalia J in *Green v Bock Laundry Machine Co* (1989) 490 US 504 read in the word "criminal" in the context of the Federal Rules of Evidence regarding the impeachment of witnesses in order to avoid an absurdity.
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> [60] It can also be noted that a distinction is drawn in the TAA itself between civil and criminal proceedings. While the standard of proof in civil proceedings relating to the imposition of penalties is the balance of probabilities (s 149A(1)), the standard of proof in criminal proceedings relating to the imposition of penalties is beyond reasonable doubt (s 149A(3)). Similarly, the TAA draws a distinction between the onus of proof required in civil and criminal proceedings. While the onus of proof in civil proceedings rests with the taxpayer (with the exception of proceedings of proceedings relating to evasion or a similar act, or obstruction), the onus of proof in criminal proceedings rests with the Commissioner. This can be seen to demonstrate that Parliament intended to draw a distinction between civil and criminal proceedings, even in taxation matters.

[60] We agree with and adopt this reasoning.

Other authority

[61] In *R v Clarke*, the Court of Appeal interpreted the general appeal provision in the Judicature Act 1908 (s 66) in a manner that has some similarities to the present case.[41] Section 66 gives the Court of Appeal jurisdiction to hear and determine appeals from "any judgment, decree, or order" of the High Court. Mr Clarke was charged with a criminal offence and was refused bail by a High Court Judge. There was no right of appeal under the appeal provisions dealing with criminal matters in the Crimes Act.[42] Mr Clarke argued that the generic wording of s 66 did not exclude judgments dealing with criminal matters and that the Court of Appeal could therefore deal with an appeal in his case. The Court of Appeal disagreed, endorsing a number

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41 *R v Clarke* [1985] 2 NZLR 212 (CA).

42 There is now a right of appeal against a refusal of bail: Bail Act 2000, sub-pt 3 of pt 3.

of earlier authorities to the effect that s 66 related to civil matters only, despite its broad wording.[43]

[62] There are obvious similarities between that case and the present case. In *Clarke*, the Court determined that the broad language should be interpreted as applying only to civil proceedings because there were provisions in another Act dealing with criminal appeals. In the present case, it can be argued that interpreting s 109 as applying only to civil proceedings is justified because the onus of proof in criminal proceedings is dealt with in the TAA itself, rather than in another Act. If anything, this makes the case for a narrow interpretation of s 109 in the present case stronger than the case for such an interpretation of s 66 of the Judicature Act in *Clarke*.[44]

Practical considerations

[63] Mr Ebersohn said if the interpretation of s 109 for which the appellants contend is adopted, that would mean that the criminal proceedings for offences under s 143B of the TAA could be substantially delayed while civil proceedings dealing with any dispute about the correctness of an assessment were concluded. If the Commissioner had simply reassessed Mr Skinner and Mr Rowley in this case, it would have then been open to them to challenge those assessments and there would have been an obvious argument that the civil proceedings should be dealt with in advance of the criminal proceedings.

[64] Mr Ebersohn pointed to s 149 of the TAA, which deals with the imposition of civil and criminal penalties. Section 149(1) makes it clear that a taxpayer may be liable for both a civil penalty and a criminal penalty. Section 149(4) empowers the Commissioner to assess and impose civil penalties after a taxpayer has been prosecuted whether or not the prosecution is successful. So it contemplates the possibility that the civil proceedings will follow the criminal proceedings.[45]

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[43] For example, *ex parte Bouvy (No 3)* (1900) 18 NZLR 608 (CA); and *R v Geiringer* [1977] 1 NZLR 7 (CA).

[44] *R v Clarke* was affirmed by this Court in *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [12] per Elias CJ, Blanchard and McGrath JJ, at [51] per Tipping J and at [54] per Eichelbaum J.

[45] There is no provision expressly providing for the converse, that is, prosecuting after civil penalties are imposed, though that does not appear to be prohibited either.

However, if the Commissioner is forced to reassess prior to the criminal proceedings, a case could then be made for the criminal proceedings to be deferred until after the civil proceedings resolving a defendant's challenge to the Commissioner's assessment have been disposed of.

[65] Hearing the civil proceedings before the criminal trial would carry the risk of interfering with the fair trial rights of the defendant. As he or she would have the burden of proof in the civil proceedings,[46] he or she would be required to disclose information supporting his or her position and, in effect, disclose his or her defence to the criminal charge in advance of the trial. In a different context, these risks led the Court of Appeal to uphold the adjournment of civil proceedings until after criminal proceedings were completed in *Commissioner of Police v Wei*.[47] In that case, the civil proceedings were applications by the Commissioner of Police for asset forfeiture orders under the Criminal Proceeds (Recovery) Act 2009.

[66] Kós J recorded that the IRD's preferred practice is to amend an assessment (triggering the civil process for disputes in the TAA) after the outcome of the criminal process is known.[48] This accords with the appropriate order as outlined in the *Wei* case. The Commissioner is allowed to do this because the time limits in ss 107 and 108 of the TAA do not apply by virtue of ss 108(2) and 108A(3). The express exceptions to these time bar provisions appears to be designed to facilitate the conduct of criminal proceedings before civil proceedings.

Bill of Rights

[67] As mentioned earlier, if the Commissioner had reassessed the appellants before their trial, they would have been prevented from advancing a defence that the actus reus of the offence was not made out because their tax returns correctly stated their incomes and their liability for income tax. Such an outcome would have been inconsistent not only with the burden of proof provided for in s 149A(4) of the TAA, but also the appellants' rights under s 25 of the Bill of Rights. These include the right to a fair hearing (s 25(a)), the right to be presumed innocent until proven guilty

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46 Tax Administration Act, s 149A(2)(b).
47 *Commissioner of Police v Wei* [2012] NZCA 279.
48 High Court judgment, above n 9, at [6].

according to law (s 25(c)) and the right to present a defence (s 25(e)).[49] The Commissioner's administrative act in reassessing the appellants would have, in effect, deemed an element of the offence to be met contrary to the Crown's obligation to prove it.

[68] Mr Laurenson and Ms Levy downplayed the significance of a defendant being deprived of the ability to argue that the actus reus of the offence is not made out. They argued that this did not prevent a defendant from mounting an effective defence. This was because the falsity of the assessment or particulars simply amounted to inaccuracy of the information and the essential criminality arose from the awareness of falsity and the intention to evade tax.[50] While a defendant could not defend a charge by saying "my tax return and the particulars in it are, in fact, correct", he or she could say he or she believed that to be the case (based on the factual support for the belief). That would negate both awareness of falsity and intention to evade.

[69] Whether the restriction on the defence that could be advanced in these circumstances can be said to "prevent" a defendant from mounting a defence or just to limit his or her options, may be a matter of debate. We do not think it is one that needs to be resolved. The reality is that s 109, if interpreted as the appellants argue it should be, would obviate the need for the prosecutor to prove beyond reasonable doubt an essential element of the offence and restrict the defendant's available defences. We see that as unduly impinging on the right to a fair trial. We do not consider Parliament would have intended this. Interpreting s 109 as applying only in civil proceedings is therefore the preferred interpretation in terms of s 6 of the Bill of Rights.

[70] Similar concerns about a provision that limited the defendant's ability to advance his defence were expressed in the judgments of this Court in *Morton v R*.[51] Morton dealt with the application of s 49 of the Evidence Act 2006. Section 49(1) provides that evidence of the fact a person has been convicted of an offence is

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49 As noted in *R v Allan*, above n 33, at [55], where the Court explains how the onus of proof is reversed.

50 *R v Gill* (1999) 19 NZTC 15,526 at 15,530.

51 *Morton v R* [2016] NZSC 51.

admissible in a criminal proceeding and is conclusive proof that the person committed the offence. Section 49(2) provides that, in exceptional circumstances, a judge may permit a party to offer evidence tending to prove the person convicted did not commit the offence. Mr Morton faced a retrial for being a party to sexual violation by others. His defence was that he reasonably believed the complainant consented to the sexual activity with his co-defendants. The co-defendants had been convicted of sexual violation. Evidence of their convictions conclusively established (under s 49) that she had not consented. He wished to call evidence from the co-defendants that supported his case that he reasonably believed in her consent, but that evidence also tended to prove actual consent and therefore confronted the conclusive proof provision in s 49(1). A majority of this Court found there were exceptional circumstances and found that Mr Morton should be permitted to lead evidence from his co-defendants.

[71] *Morton* was decided shortly before the hearing in the present case and had not been addressed in the parties' submissions. We gave counsel an opportunity to make submissions on it after the hearing and they did so. For the Crown, Mr Ebersohn argued that if s 109 were interpreted in the manner preferred by the appellants, the concerns expressed by the majority in *Morton* would arise in cases such as the present: the inability to dispute an assessment is similar to the inability to dispute the commission of an offence for which evidence of a conviction is adduced. Counsel for the appellants disputed this.

[72] While we see some parallels between the problem that arose in *Morton* and the situation that could arise in cases under s 109 as interpreted by the appellants, we do not think *Morton* assists us with the interpretive exercise we face in the present case.

Conclusion

[73] We conclude that s 109 does not apply to criminal proceedings.

Alternative argument

[74] That conclusion makes it unnecessary for us to address the respondent's alternative argument, which was relevant only if it had been determined that s 109 did apply in criminal proceedings. The argument is that a prosecution under s 143B(1)(c) and (f) does not involve the defendant's assessment being "disputed in a court", and does not therefore bring s 109 into play. That argument is based on the proposition that the actus reus that the Crown must prove is that the information provided by the defendant in his or her tax return is false, not that the assessment itself or any particular of the assessment is false. We express no view on the correctness or otherwise of that proposition.

Result

[75] The appellants' appeals are dismissed.

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