IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA162/2019
[2020] NZCA 112

BETWEEN	PETER WILLIAM MAWHINNEY AS TRUSTEE OF THE DOUG VESEY TRUST Appellant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing:	25 February 2020
Court:	Miller, Dobson and Moore JJ
Counsel:	Appellant in person R L Roff and HCJ Salisbury for Respondent
Judgment:	23 April 2020 at 2.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the Commissioner costs for a standard appeal on a band A basis, with provision for one counsel, and usual disbursements.

REASONS OF THE COURT

(Given by Miller J)

[1] This appeal raises a small point of tax administration law. It is whether the Commissioner, in the unusual circumstances of this case, is deemed by law to have accepted a Notice of Proposed Adjustment (NOPA) issued by the appellant.

In the High Court, Peters J answered this question in the negative.[1] We agree with her, and generally for the same reasons which we will state briefly.

The narrative

[2] It is first necessary to record the chronology. It begins with a GST return filed on 5 November 2008, in which the appellant claimed a refund of $625,000 for the purchase of a property.

[3] On 16 April 2013 the Commissioner issued a Notice of Assessment disallowing the refund in full. It seems the Commissioner's position was that the claim to a refund was fraudulent. For that reason the assessment was issued without first triggering dispute procedures under the Tax Administration Act 1994 (the TAA).[2]

[4] An assessment is a disputable decision,[3] but the taxpayer who wishes to contest it must initiate a dispute within four months.[4] On 30 March 2015, long outside that response period, the appellant issued a NOPA challenging the assessment.

[5] Had the NOPA been issued within time, the Commissioner would have been required to issue a Notice of Response (NOR) within two months,[5] failing which the Commissioner would be deemed under s 89H(2) to have accepted the adjustment contained in the NOPA. But the NOPA was out of time, and so of no effect. Section 89D(5) states that:

> **89D Taxpayers and others with standing may issue notices of proposed adjustment**
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> …
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> (5) For a notice of proposed adjustment issued under this section to have effect, the notice must be issued within the applicable response period.

[6] The TAA allows the Commissioner to excuse the late issue of a NOPA in exceptional circumstances. The Commissioner does so under s 89K(1) by issuing a

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1 *Mawhinney v Commissioner of Inland Revenue* [2019] NZHC 553, (2019) 29 NZTC 24-006.
2 Tax Administration Act 1994, s 89C(eb).
3 Section 3.
4 Section 89AB(4)(b).
5 Sections 89G and 89AB(2).

notice "stating" that the NOPA "is to be treated for all purposes under this Part [4A] as if it had been given within the applicable response period".[6] If the Commissioner decides not to issue such notice, she must issue a "refusal notice" within one month of the taxpayer's NOPA.[7]

[7] The appellant's NOPA invoked s 89K. By letter of 29 April 2015 the Commissioner issued a refusal notice.

[8] Section 89K(6) also allows the taxpayer to challenge a refusal notice by bringing proceedings in the Taxation Review Authority within two months of the notice. The appellant did so on 9 July 2015. The Authority has jurisdiction to reverse the Commissioner's decision.[8]

[9] On 24 February 2016 relevant provisions of the Taxation (Annual Rates for 2015–2016, Research and Development, and Remedial Matters) Act 2016 came into effect. They included a provision designed, according to the commentary to the Bill to the Act, to clarify uncertainty in the law, which might otherwise mean that the Commissioner be "required to issue a substantive response to a dispute that may not have a procedural basis".[9] The legislation inserted a new s 89AC, which provides:

> **89AC Response period when initiating notice filed late**
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> When the initiating notice is a notice of proposed adjustment referred to in section 89AB(2) or a statement of position referred to in section 89AB(5), and the disputant issues the initiating notice outside the applicable response period but the notice is treated as being issued within that period, the response period for the response to the initiating notice is a 2–month period beginning on the earlier of—
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> (a) the day on which the Commissioner issues a notice in favour of the disputant in accordance with section 89K(1):
>
> (b) the day on which a challenge to the Commissioner's refusal under section 89K(4) is finally judged successful by the Taxation Review Authority or by a court, or the day on which the Commissioner concedes.

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6 Section 89K also applies to certain other documents.
7 Section 89K(4).
8 Section 138P(2).
9 Todd McClay *Taxation (Annual Rates for 2015–2016, Research and Development, and Remedial Matters) Bill; Commentary on the Bill* (Inland Revenue, February 2015) at 96.

It will be seen that the legislation expressly postpones the response date to a NOPA where the taxpayer challenges a decision of the Commissioner to refuse to deem a late NOPA valid. The concern evidently was that the Commissioner might otherwise be required to respond to a NOPA which was out of time, and so ineffective, in anticipation that it might later be deemed timely under s 89K.

[10] On 5 May 2016 the Authority issued a decision holding that a) the Commissioner's assessment was valid and b) the NOPA was out of time and c) the Commissioner ought not to have refused to accept the NOPA out of time.[10] The Authority "set aside" the Commissioner's decision. In consequence the NOPA was deemed for all purposes to have been issued within time.

[11] The Commissioner issued a NOR on 28 June 2016, within two months of the Authority's decision.[11] Statements of position were issued, and a challenge proceeding was commenced. The appellant might have contested the merits of the original assessment in that proceeding but curiously elected not to do so. Rather, the sole issue for determination was whether the Commissioner was deemed to have accepted the NOPA because the NOR was out of time, not having been issued within two months of the NOPA.[12]

[12] The Authority held against the appellant in a decision issued on 29 January 2018, reasoning that s 89AC applied; further, even if it did not apply, the NOR was issued within time under the legislation as it stood before s 89AC was enacted.[13] Peters J upheld that decision in the judgment under appeal.[14]

The appeal

[13] The same issues are raised on appeal. The appellant, represented by Mr Mawhinney as trustee, says that s 89AC may not be given retrospective

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10 *Trustees of the Doug Vesey Trust v Commissioner of Inland Revenue* [2015] NZTRA 04.
11 Tax Administration Act, s 89AC.
12 Section 89H(2).
13 *Trustees of the Doug Vesey Trust v Commissioner of Inland Revenue* [2018] NZTRA 01 at [28] and [48].
14 *Mawhinney v Commissioner of Inland Revenue*, above n 1.

application, for to do so would be to deprive it of a right to which it was entitled under the pre-amendment legislation.

Discussion

[14] On its face s 89AC took effect on 24 February 2016, before the Authority revived the appellant's NOPA. The question is whether the amendment ought to be interpreted to exclude this case, and others like it, where a taxpayer's NOPA had already been issued but was late, and hence ineffective.

[15] Mr Mawhinney invoked ss 7 and 18 of the Interpretation Act 1999. Section 7 provides than an enactment does not have retrospective effect, but s 4 gives it the status of a presumption by providing:

> **4 Application**
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> (1) This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless—
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> (a) the enactment provides otherwise; or
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> (b) the context of the enactment requires a different interpretation.
>
> (2) The provisions of this Act also apply to the interpretation of this Act.

[16] Section 18(1) provides that "[t]he repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty".

[17] This Court explained in *Foodstuffs (Auckland) Ltd v Commerce Commission* that the general approach to retrospectivity strikes a balance between giving effect to reforms and protecting vested rights, if any, that are put in jeopardy by the new legislation:[15]

> [20] We turn now to the wider context and to principle. As in this case, counsel and the Courts will resort to those matters and relevant authority when faced with difficulties in applying interpretation legislation. The common law concerning non-retrospectivity and related interpretation legislation have both

[15] *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA).

> long recognised the need to strike a balance between giving effect to Parliament's will, aimed at changing the law and introducing new policies, on the one hand, and, on the other, to protecting, for reasons of justice and fairness, positions already established under the old law. In terms of the second matter, Courts and legislatures alike have stated the principle of non-retrospectivity and have protected legally recognised interests — such as rights, titles, immunities, duties, liabilities — which ''exist'' or have ''vested'' or ''accrued''. If the general law lacks means or procedures to recognise, enforce or sanction those legally recognised interests, Courts and especially legislatures may also recognise and save the continued effect of the procedures that supported those interests … But if, broadly speaking, no existing, vested or accrued legal interests are put in jeopardy the new manifestation of Parliament's will is to be given full effect.

[18] This Court further held in *Crown Health Financing Agency v P* that the law adopts a general principle that the presumption against retrospectivity applies to substantive rights but not those that are procedural in nature, unless a contrary intention is expressed in the legislation itself.[16]

[19] The Court recognised that the distinction between substantive and procedural rights is not always easy to draw. Sometimes reforms of a procedural character may operate to destroy substantive rights.[17] To similar effect is the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* to which Mr Mawhinney drew our attention:[18]

> … these expressions "retrospective" and "procedural," though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g., because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g., because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.

[20] It cannot be doubted that the legislation in this case preserved the appellant's substantive right to have its claim to a GST refund determined on the merits. Mr Mawhinney did not suggest otherwise. He argued rather that what the appellant lost was the right to invoke s 89H(2), under which the Commissioner is deemed to accept an adjustment contained in a NOPA when she fails to reject it within time.

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16 *Crown Health Financing Agency v P* [2008] NZCA 362, [2009] 2 NZLR 149 at [189]. The case was appealed to the Supreme Court but leave was not granted on the question of retrospectivity.

17 *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

18 *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC) at 558–559.

[21] This argument is wholly without merit, for two reasons. First, s 89AC is plainly procedural in nature. There is no good reason to limit its application to disputes commenced after it came into force, because it does not deprive taxpayers of the substantive right to have their tax liabilities determined on the merits.

[22] Second, s 89AC achieves no more than what is plainly implicit in the scheme of the TAA. The Commissioner was not required to file a NOR by 30 April 2015. At that date her obligation to do so or face the consequences had not been triggered, for the appellant's NOPA was late and of no effect.[19] The much later decision of the TRA excused the taxpayer's failure to file its NOPA in time. It would be remarkable if the legislature intended that a decision relieving the taxpayer of the consequences of its own failure to act within time should deny the Commissioner the right to contest the taxpayer's claim. It is no answer to this to suggest, as Mr Mawhinney did, that the Commissioner might apply to the High Court to extend time under s 89L, since she was never in default.

[23] For these reasons the appeal must fail.

[24] We will not discuss the question whether the same result would be achieved under the legislation as it stood prior to amendment. Peters J held that it did,[20] and it will be apparent that we agree that a purposive interpretation must be given to the words in s 89K "for all purposes".

Disposition

[25] The appeal is dismissed

[26] There is no reason to allow costs to lie where they fall, as Mr Mawhinney suggested. The appellant must pay the Commissioner costs for a standard appeal on a band A basis, with provision for one counsel, and usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondent

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19 Tax Administration Act, s 89D(5).
20 *Mawhinney v Commissioner of Inland Revenue*, above n 1, at [40].