IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-000949
[2023] NZHC 460

	BETWEEN	GRAHAM HERBERT TAYLOR Appellant
	AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: (on the papers)

Judgment: 9 March 2023

JUDGMENT OF VENNING J

This judgment was delivered by me on 9 March 2023 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Crown Law, Wellington
Copy to: Appellant

[1] This file has been referred to me as duty Judge to be dealt with on the papers. The appellant, Graham Herbert Taylor, seeks to appeal a decision of Judge G M Harrison delivered in the District Court on 24 February 2022.[1] The appeal was filed out of time. Leave of the Court is required for Mr Taylor to pursue the appeal.

Procedural background

[2] The Inland Revenue Department obtained a judgment against Mr Taylor on 11 March 2020 for $496,948.87. The judgment was obtained by default. Mr Taylor subsequently applied to the District Court to set aside the judgment. He argued he had not been served with the proceedings and was unaware of them. He relied on his poor state of health and as the Judge categorised it "a general concern about the operation of the Inland Revenue Department".

[3] In his decision the Judge noted that the proceedings had been served on Mr Taylor by way of substituted service in September 2019. He considered Mr Taylor had adequate time before the judgment was entered in March 2020 to have filed any defence he may have had. The Judge also considered himself to be bound by s 109 of the Tax Administration Act 1994 (TAA), so that there was no jurisdiction for him to deal with Mr Taylor's challenge.

[4] Following the delivery of Judge Harrison's decision on 24 February 2022 (which on its face appears to be an oral judgment at which Mr Taylor appeared), Mr Taylor filed papers with this Court purporting to appeal that decision. Although some of the papers were dated 7 March 2022 by Mr Taylor the notice of appeal document is noted as not being received by the High Court until 29 April 2022. Mr Taylor requires leave to bring the appeal out of time.

[5] A number of procedural appearances have followed in this Court relating to Mr Taylor's application for leave. On 10 February 2023, Moore J issued a minute in which he confirmed that Mr Taylor's application for leave would be dealt with on the

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1 *Commissioner of Inland Revenue v Taylor* DC Auckland CIV-2016-404-002079, 24 February 2022.

papers and in accordance with Mr Taylor's submissions dated 27 October 2022. Mr Taylor represents himself and apparently resides in Australia.

Principles

[6] The principles to apply on an application for leave were set out by the Court of Appeal in *My Noodle Ltd v Queenstown Lakes District Council*.[2] They were more recently discussed by the Supreme Court in *Almond v Read*.[3] In *Almond v Read* the Supreme Court noted the principles and approach as:

> [38] The ultimate question when considering the exercise of the discretion to extend time under r 29A is what the interests of justice require. That necessitates an assessment of the particular circumstances of the case. Factors which are likely to require consideration include:
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> (a) *The length of the delay.* Clearly, the time period between the expiry of the appeal date and the filing of the application to extend time is relevant. But in a case where there has been a slip-up and the appeal date has been inadvertently missed, how quickly the applicant sought to rectify the mistake after learning of it will also be relevant. Obviously, the longer the delay, the more the applicant will be seeking an "indulgence" from the court and the stronger the case for an extension will need to be.
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> (b) *The reasons for the delay.* It will be particularly relevant to know whether the delay resulted from a deliberate decision not to proceed followed by a change of mind, from indecision, or from error or inadvertence. If from a change of mind or from indecision, there is less justification for an extension than where the delay results from error or inadvertence, particularly if understandable.
>
> (c) *The conduct of the parties, particularly of the applicant.* For example, a history of non-cooperation and/or delay by an applicant may be relevant.
>
> (d) *Any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome*. Again, the greater the prejudice, the stronger the case will have to be to justify the grant of an extension of time. Where there is significant delay coupled with significant prejudice, then it may well be appropriate to refuse leave even though the appeal appears to be strongly arguable.
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> (e) *The significance of the issues raised by the proposed appeal, both to the parties and more generally*. If there is a public

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2 *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 224.
3 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 (footnotes omitted).

interest in the issues, the case for an extension is likely to be stronger than if there is no such interest.

[39] We accept that the merits of a proposed appeal may, in principle, be relevant to the exercise of the discretion to extend time. This is because there will be occasions on which the court will risk facilitating unjustifiable delaying tactics on the part of dilatory or recalcitrant litigants if it does not consider the merits. There are three qualifications to this principle, however:

(a) There will be some instances in which the merits or otherwise of a proposed appeal will be overwhelmed by other factors (such as the length of the delay and the extent of the prejudice to the respondent or others) and so will not require consideration.

(b) As we have already indicated, the merits will not generally be relevant in a case such as the present where there has been an insignificant delay as a result of a legal adviser's error and the proposed respondents have suffered no prejudice (beyond the fact of an appeal). As we noted above, r 29A differentiates between cases where the respondent consents to the extension and those where it does not, giving the Court broader powers in the former case. In cases of this type, respondents are generally best advised to consent to an extension to enable the appeal to be determined promptly. The delay which has occurred in final determination of this case could have been avoided had the respondents given their consent and has been to no one's benefit. A respondent who does not consent in such a case runs the risk of an adverse costs award.

(c) Consideration of the merits of an appeal in the context of an application to extend time must necessarily be relatively superficial. In this connection, we agree with the observations of the Court of Appeal of England and Wales in *R (Hysaj)*, to the effect that the court should firmly discourage much argument on the merits and should reach a view about them only where they are obviously very strong or very weak. Moreover, any assessment of the merits must take place against the background of this Court's description of the nature of a general appeal in *Austin, Nichols*. Accordingly, a decision to refuse an extension of time based substantially on the lack of merit of a proposed appeal should be made only where the appeal is clearly hopeless. An appeal would be hopeless, for example, where, on facts to which there is no challenge, it could not possibly succeed, where the court lacks jurisdiction, where there is an abuse of process (such as a collateral attack on issues finally determined in other proceedings) or where the appeal is frivolous or vexatious. The lack of merit must be readily apparent. The power to grant or refuse an extension of time should not be used as a mechanism to dismiss apparently weak appeals summarily.

Analysis

[7] I consider the factors discussed by the Supreme Court.

Length of the delay

[8] The time for Mr Taylor to appeal as of right expired within 20 working days of the decision being given, which was 24 March 2022. Mr Taylor's appeal was 23 working days out of time. It is not a particularly long delay.

The reasons for the delay

[9] The delay was not due to any slipup or inadvertence on Mr Taylor's part. Mr Taylor appears to rely on his medical issues to explain the delay. Mr Taylor's reference to his health issues is general. The Court notes that one of the documents he prepared was dated 7 March, so he was apparently able to work on the appeal shortly after he received the decision. There is not an adequate explanation for Mr Taylor's failure to file a notice of appeal in time. However, I accept that Mr Taylor intended to pursue an appeal.

Conduct of the parties, particularly of the appellant

[10] Mr Taylor had to be served by substituted service in the District Court. His documents in this Court are rambling, discursive and unfocused.

Prejudicial hardship to the respondent

[11] There is no particular prejudice to the Commissioner in this case, other than the additional cost associated with the ongoing proceedings before this Court. Any grant of leave will further delay the Commissioner in enforcing the judgment. The Commissioner has a statutory obligation to recover tax.

Significance of the issues raised

[12] There are no significant issues raised in Mr Taylor's papers.

Merits

[13] In *Almond v Read*[4] the Supreme Court expressly confirmed that a decision to refuse an extension of time based substantially on the lack of merit of a proposed appeal should be made only where the appeal is clearly hopeless. The Court considered an appeal would be hopeless where, on the facts to which there is no challenge, it could not possibly succeed, where the Court lacks jurisdiction or where there is an abuse of process, or where the appeal is frivolous, or vexatious. The lack of merit must be readily apparent.

[14] The present case meets those criteria. Section 109 of the TAA provides:

> **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
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> (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.

[15] In *Golden Bay Cement Company Ltd v Commissioner of Inland Revenue*[5] the Court of Appeal confirmed that once an assessment has been made its correctness can only be challenged in proceedings under the TAA. A disputant subject to various requirements is entitled to challenge an assessment by commencing proceedings in the hearing authority.[6] A hearing authority is defined in s 3 of the TAA as a Taxation Review Authority or the High Court. Judge Harrison was correct to find in his decision that s 109 of the TAA applied and as a result there was no defence to the claim by the Commissioner.

[16] In *Maqbool v Commissioner of Inland Revenue*[7] this Court confirmed that it has no jurisdiction to entertain an argument as to the validity of the assessment which was subject to a judgment in the District Court. Section 109 applies to the Court on appeal as much as it does to the District Court.

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4 *Almond v Read*, above n 3.
5 *Golden Bay Cement Company Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665.
6 Tax Administration Act 1994, s 138B.
7 *Maqbool v Commissioner of Inland Revenue* (2007) 23 NZTC 21,561.

[17] The short point is that this is a case where the Court lacks jurisdiction. The District Court was quite correct to find Mr Taylor cannot succeed on the merits because of s 109 of the TAA. The purported appeal is properly described as hopeless.

Result

[18] The appeal is dismissed with costs to the Commissioner on a 2B basis.

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Venning J