IN THE COURT OF APPEAL OF NEW ZEALAND

CA253/04

	BETWEEN	JEFFREY GEORGE LOPAS AND LORRAINE ELIZABETH MCHERRON Appellants
	AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 16 November 2005

Court: Glazebrook, Hammond and William Young JJ

Counsel: C E Bibbey and G Pearson for Appellants
J H Coleman and G R Withers for Respondent

Judgment: 30 November 2005

JUDGMENT OF THE COURT

The cross-appeal is allowed and the appeal is dismissed. There is no order for costs in this Court or in the High Court.

REASONS

(Given by Glazebrook J)

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Introduction

[1] The issue before this Court is whether the Commissioner of Inland Revenue was entitled to amend the date of cancellation of Mr Lopas and Ms McHerron's GST registration from 30 September 1999 to 30 November 1999. The significance of the alteration is to impose a GST obligation on the taxpayers arising out of their sale of a property on 8 October 1999.

[2] The Taxation Review Authority (TRA) held that the Commissioner's decision to amend the date of the cancellation of the GST registration was unlawful and of no effect. The Commissioner appealed to the High Court, which held that the amended date was lawful. The taxpayers now appeal to this Court against that decision. The Commissioner cross-appeals regarding the correct legal construction of s 52(1) of the Goods and Services Tax Act 1985 (GST Act).

The facts

[3] The taxpayers were registered for GST purposes on 1 October 1992 as the sole partners in the Jeffrey George Lopas and Lorraine Elizabeth McHerron Partnership (the Partnership). The taxable activity of the Partnership was forestry. The Partnership accounted for GST on a six-monthly payment basis. In its first GST return for the period ended 31 March 1999, the Partnership claimed an input tax credit on a purchase of property at Little River.

[4] On 4 October 1999 the Partnership applied to the Commissioner to cancel its GST registration effective from 30 September 1999, on the basis that its taxable supplies for the next 12 months would be less than $30,000. The application form prepared by the Partnership's accountant stated that the Partnership would be keeping some of its business assets when registration ceased, namely land valued at $115,000 inclusive of GST, being the lesser of cost or open market value.

[5] The Commissioner cancelled the Partnership's GST registration from 30 September 1999. The taxpayers took the view that s 5(3) of the GST Act deemed the Little River land, being an asset of the taxable activity, to be supplied by the Partnership in the course of its taxable activity at a time immediately before cessation of the registration. They considered that s 10(8) deemed the consideration to be the lesser of cost or market value. As a consequence, the Partnership's return for the period ended 30 September 1999 returned GST output tax on $115,000, which was the cost price of the land.

[6] On 8 October 1999, the taxpayers entered into a sale and purchase agreement with the Jeffrey Lopas Family Trust and Lorraine McHerron Family Trust Partnership (the Trusts Partnership) to sell the Little River property for $375,000. Possession was to be given on 1 November 1999 and the purchase price was to be satisfied by a mortgage back to the vendors. The purchase price was based on a registered valuer's report which had been updated in June 1999 and which valued the land at $375,000.

[7] The Jeffrey Lopas Family Trust and Lorraine McHerron Family Trust were created by deeds of trust dated 20 September 1999. The respective trustees were Reynolds Valley Farm Limited, which was incorporated on 17 August 1999, and Reynolds Valley Farm No 1 Limited, which was incorporated on 20 September 1999. The directors and shareholders of both companies were the taxpayers. On 5 October 1999 the Commissioner received an application to register the Trusts Partnership for GST purposes from 1 October 1999.

[8] We note that an application had been made on 26 July 1999 in the name of the Trusts Partnership to the Banks Peninsula District Council for permission to

subdivide the land. Mr Lopas had advised the Council in a letter of 30 August 1999 that "the property has been transferred recently from our personal ownership to trust ownership. This change may not yet be recorded on the title." On 13 October 1999, the Council gave its approval to the subdivision.

[9] The Commissioner became aware of the sale to the Trusts Partnership. He considered that the sale of land to the Trusts Partnership was an action done in connection with the termination of a taxable activity and that s 6(2) of the GST Act applied to deem the sale to be a supply carried out in the course or furtherance of the taxpayers' taxable activity. As a consequence, he considered that output tax became payable on the $375,000 purchase price. That being so, the Commissioner was of the view that the taxpayers made taxable supplies of more than $30,000 in the relevant period.

[10] In light of the additional information, and after an opportunity had been provided for the taxpayers to respond, the Commissioner amended the Partnership's GST de-registration date from 30 September 1999 to 30 November 1999. The Commissioner's decision to amend the de-registration date was disputed. In due course the dispute was the subject of a hearing before the TRA on 24 February 2004.

The relevant statutory framework

[11] We now set out the provisions of the GST Act that applied at the relevant time. Section 51 defines those persons who are liable to register under the GST Act. It provides:

> **51 Persons making supplies in course of taxable activity to be registered**
>
> (1) Subject to this Act, every person who, on or after the 1st day of October 1986, carries on any taxable activity and is not registered, becomes liable to be registered—
>
> (a) At the end of any month where the total value of supplies made in New Zealand in that month and the 11 months immediately preceding that month in the course of carrying on all taxable activities has exceeded $30,000 (or such larger amount as the Governor-General may, from time to time, by Order in Council declare):

Provided that a person does not become liable to be registered by virtue of this paragraph where the Commissioner is satisfied that the value of those supplies in the period of 12 months beginning on the day after the last day of the period referred to in the said paragraph will not exceed that amount:

(b) At the commencement of any month where there are reasonable grounds for believing that the total value of the supplies to be made in New Zealand in that month and the 11 months immediately following that month will exceed the amount specified in paragraph (a) of this section:

Provided that any such person shall not become liable where the Commissioner is satisfied that that value will exceed that amount in that period solely as a consequence of—

(c) Any cessation of, or any substantial and permanent reduction in the size or scale of, any taxable activity carried on by that person; or

(d) The replacement of any plant or other capital asset used in any taxable activity carried on by that person…

[12] Section 52 stipulates when a taxpayer is no longer liable to be registered for GST purposes. It provides as follows:

52 Cancellation of registration

(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 amount specified for the purposes of section 51(1) of this Act.

(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.

(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. …

[13] When registered persons de-register, they must pay output tax on any assets relating to the taxable activity which are still held at the point of de-registration. This is because s 5(3) of the GST Act creates a deemed supply of those assets at a time immediately before that person ceases to be a registered person. Section 5(3) defines the meaning of the term "supply" as follows:

> **5 Meaning of term 'supply' –**
>
> …
>
> (3) For the purposes of this Act, where a person ceases to be a registered person, any goods and services then forming part of the assets of a taxable activity carried on by that person shall be deemed to be supplied by that person in the course of that taxable activity at a time immediately before that person ceases to be a registered person, unless the taxable activity is carried on by another person who, pursuant to section 58 of this Act, is deemed to be a registered person.

[14] At the relevant time, the GST Act allowed taxpayers to elect to pay output tax on the basis of either cost price or market value at the point of de-registration. Section 10(8) provides as follows:

> **10 Value of supply of goods and services –**
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> …
>
> (8) Where goods and services are deemed to be supplied by a person under section 5(3) or section 21(1) of this Act, the consideration in money for that supply shall be deemed to be the lesser of—
>
> (a) The cost of those goods and services to the supplier, including any input tax deduction claimed in respect of the supply of those goods and services to that supplier:
>
> (b) The open market value of that supply.

[15] Following a 1997 review, Parliament amended s 10(8) in 2000 to ensure that market value was the sole valuation criteria applying to de-registration. The matter was discussed in the Commissioner's Tax Information Bulletin Vol. 12 No. 12 December 2000, which explained the reason for the amendment in the following way at 5 - 6:

> Registered persons may apply to deregister if their taxable activity ceases or the value of their taxable supplies falls below the registration threshold. Any goods and services forming part of the assets on hand at the time of deregistration are deemed to be supplied as part of the taxable activity.
>
> GST was previously payable on the lesser of the cost or open market value of assets held by the registered person immediately before opting out of the GST base. However, this created an anomaly between assets sold immediately before deregistration and assets sold after deregistration. If the person values the assets held at deregistration at cost, a lower GST liability arises in relation to assets that have appreciated in value. Therefore, GST must now be paid on the basis of the market value of goods and services retained on deregistration.
>
> Goods and services retained at the time of deregistration that were acquired before 1 October 1986, the date GST first came into effect, will continue to be valued at the lower of cost or open market value.

[16] Also pertinent to this case is s 6(2), which reads as follows:

> **6 Meaning of term 'taxable activity' –**
>
> …
>
> (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.

Decision of the TRA

[17] In a judgment dated 14 May 2004, the TRA held that the taxpayers were entitled to have their GST registration cancelled on 30 September 1999, with the result that output tax was correctly calculated on the cost price of the land.

[18] The TRA rejected the Commissioner's submission that the taxpayers were under a duty to disclose the sale of the Little River land to the Trusts Partnership for $375,000 in their application for de-registration. The TRA considered that there was no ambiguity in s 10(8) as it stood in 1999. At the point of de-registration, the taxpayers kept the land on which they had been carrying on their taxable activities. On de-registration, the land is deemed to be a taxable supply. According to s 10(8), the consideration for that supply is deemed to be the lesser of the cost of the goods and the open market value of that supply.

[19] In the TRA's view, the Commissioner's argument proceeded on a misunderstanding of the obligations of the taxpayers in filling out the application to cancel their GST registration. Given that, as a matter of law, the taxpayers were entitled to value the retained assets at cost and pay GST on the value of that deemed supply, they were not under a duty to tell the Commissioner that, after cancellation of registration, they would be selling the land to third parties in an arms length transaction. There was, therefore, no basis upon which the Commissioner could defer the date of de-registration until after the sale so that output tax would have to be paid on the $375,000 market value of the land.

[20] Accordingly, the TRA concluded that the Commissioner's decision to amend the date of the cancellation of the taxpayers' GST registration from 30 September 1999 to 30 November 1999 was unlawful and of no effect.

Judgment of the High Court

[21] The Commissioner appealed to the High Court against the decision of the TRA. In a judgment dated 3 November 2004, Panckhurst J held that the Commissioner was correct to amend the de-registration date to 30 November 1999.

[22] Panckhurst J first considered whether the sale of the land by the taxpayers to the Trusts Partnership on 8 October 1999 was a termination supply in terms of s 6(2) or a cessation supply in terms of s 5(3). Panckhurst J held that s 6(2) applied, as the sale was something done in connection with the termination of the Partnership's taxable activity of forestry. There was an undoubted connection between the sale and termination of the taxable activity, as the land was acquired for the purposes of the taxable activity, forestry, and its sale reflected the fact that the taxpayers were winding down that activity. The sale was deemed, therefore, to be carried out in the course or furtherance of that taxable activity. Pursuant to s 8(1), there was a supply of land which attracted GST by reference to the value of that supply, namely $375,000.

[23] The Judge considered that, on this analysis, there was no scope for s 5(3) also to apply to the sale transaction. If, at the time of cessation of the registration, the

land formed an ongoing part of the assets of the Partnership, then a deemed supply would occur immediately before de-registration. But, in Panckhurst J's view, there was not a deemed cessation supply because an arrangement was already in existence for the sale of the land in circumstances which fell squarely within s 6(2).

[24] That did not, in Panckhurst J's view, mean that the s 51(1)(c) proviso is irrelevant to the determination under s 52(1) of whether a registered person is entitled to cancel their registration. Indeed, he accepted that s 51(1) as a whole is relevant to the assessment of eligibility to cancel a GST registration. A deemed cessation supply will not, therefore, impact upon the monetary calculation of whether their supplies for the next 12 months will exceed $30,000. However, on the facts of this case, there was no deemed cessation supply, but rather a termination supply.

[25] Panckhurst J did not accept Counsel's hypothetical example that a land sale occurring ten months after de-registration might cause the Commissioner to amend the date of de-registration. Section 6(2) will not apply where a sale is arranged after de-registration but within the 12 month period, as there will be no sale in connection with the termination of the taxable activity. He accepted that the hypothetical example would give rise to a deemed cessation supply in terms of s 5(3). At the point of de-registration the land, as an asset of the taxable activity, would remain in the legal and beneficial ownership of the taxpayer. Here, that was not the case. While the taxpayers remained the legal owners of the land, the arrangements they had already put in place conferred beneficial ownership upon the newly-formed family trusts.

[26] Panckhurst J held that, in light of the additional information, the Commissioner was correct when he amended the de-registration date to 30 November 1999. He allowed the appeal and made an order setting aside the decision of the TRA and confirming the Commissioner's decision.

Submissions of the parties on the appeal

Taxpayers' submissions

[27] Mr Pearson, who presented the argument on the appeal for the taxpayers, submitted that there was no factual foundation for Panckhurst J's finding that beneficial ownership of the Little Rivers land had been transferred before de-registration. The Agreed Statement of Facts records the date of the agreement to sell as 8 October 1999 and the de-registration date as 30 September 1999. The Statement says nothing of any action by which the beneficial ownership transferred before 8 October 1999. Plainly, in Mr Pearson's submission, the letter written by Mr Lopas to the District Council saying that the property had been transferred before 30 August 1999 was an incorrect statement which cannot create a transfer of beneficial ownership.

[28] Mr Pearson submitted that, if the Commissioner wished to advance an argument that there was a disposition of the beneficial interest in the property before de-registration, it was necessary to do so as a disputed issue of fact before the TRA. That was not done. He submitted, therefore, that the possibility of a transfer prior to de-registration was not open as an issue. In any event, Mr Pearson submitted that the GST Act focuses on "supplies" (provided for by s 9 of the GST Act) as triggering a GST response, not on transfers of beneficial interest or on some intention to transfer. In his submission, anything other than actual supplies triggering a GST response creates serious uncertainty in respect of what should be a clear cut and simple tax compliance function.

[29] It was submitted that the taxpayers in this case did what the legislation both expressed and contemplated. There had been no supply before de-registration. The taxpayers were entitled to de-register as, not taking into account any sale of the land, their taxable supplies were to be less than the threshold in the relevant period. Upon de-registration the taxpayers were required to account for GST in accordance with s 5(3) and s 10(8) which they did. Mr Pearson submitted that there was, therefore,

no basis for the Commissioner to alter the date of the cancellation of the taxpayers' GST registration.

Commissioner's submissions

[30] Mr Coleman, for the Commissioner, submitted that it was lawful for the Commissioner to change the date on which he cancelled the taxpayers' GST registration to 30 November 1999. In his submission, s 13 of the Interpretation Act 1999 allows the power in s 52(2) to be exercised a second time. Section 13 provides:

> The power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once.

[31] Mr Coleman submitted that the original exercise of power under s 52(2) was in error because a highly relevant fact was not disclosed. The statutory test was, therefore, incorrectly applied. If all the facts had been made available to the Commissioner prior to the first exercise of his power, he would have specified 30 November 1999 as the date of cancellation. In Mr Coleman's submission, this is a genuine case of error and not a case of the decision-maker merely having changed his or her mind.

[32] Mr Coleman's next submission was that there was no possibility of "favourable treatment" on these facts for the taxpayers. He submitted that, even if the taxpayers had advised the Commissioner that on 8 October 1999 they were ceasing to carry on all taxable activity, they would not have been able to rely on s 10(8) on these facts. In his submission, there was a scheme on foot, as at 4 October 1999 when the de-registration form was submitted, to sell the land immediately and thereby cease to carry on all taxable activity within four days. The taxpayers, therefore, should have applied under s 52(3) of the GST Act, rather than s 52(1), to have their registration cancelled.

[33] If the taxpayers had done so, they would not have been able to obtain "favourable" tax treatment because s 52(4) requires a taxpayer to provide the Commissioner with the date on which the person ceased to carry on all taxable

activities. All taxable activity of either grazing or forestry ceased on 8 October 1999 due to the sale of the land. The Partnership's cancellation would have taken effect from the end of the period during which all taxable activities ceased, namely 30 March 2000, or, in any event, on some other date after the sale of the land. In these circumstances, s 6(2) would have applied to the sale.

Submissions of the parties on the cross-appeal

Commissioner's submissions

[34] In support of the cross-appeal, Mr Coleman submitted that, on an ordinary and grammatical construction, the words used in s 52(1) of the GST Act refer to the figure of $30,000 specified in s 51(1) rather than to the whole of that subsection. He emphasised that the only "amount" specified in s 51(1) at the relevant time was $30,000. The word "amount" is used four times in s 51(1) and each time the word is used it is, in Mr Coleman's submission, clearly referring to the $30,000 figure. It was submitted that it would be absurd if the word "amount" bore different meanings in ss 51(1) and 52(1).

[35] Mr Coleman submitted further that the proviso in s 51(1)(c) does not relate to de-registration, but to situations where there is no liability to register in the first place. The proviso begins "Provided that any such person shall not become liable [to be registered] where…" It was submitted that s 51(1) is directed to when a person is liable to register for GST purposes and not to the converse situation of when they are able to cancel their registration. In addition, in Mr Coleman's submission, importing the whole of s 51(1) into s 52(1) would produce an inconsistency between ss 6(2) and 51(1)(c) of the GST Act.

[36] Mr Coleman submitted that the s 51(1)(c) proviso makes sense in policy terms in the context of deciding whether an entity is liable to enter into the GST net. It would be pointless forcing a taxpayer into the GST system, which is premised on a turnover of $30,000, when this threshold is exceeded only by virtue of a one-off event which will of itself mean that there are no further taxable supplies, or only

supplies at a much reduced rate, to be made in the future. Conversely, when the issue is whether a taxpayer may move out of the GST regime, there is, in Mr Coleman's submission, no such obvious policy need for the provisos.

[37] Mr Coleman submitted, therefore, that the Judge was wrong to conclude that s 52(1) of the GST Act referred to the whole of s 51(1) rather than just to the figure of $30,000.

Taxpayers' submissions

[38] Ms Bibbey presented the taxpayers' submissions on the cross-appeal. She submitted that the Commissioner's argument misapprehends the ordinary meaning of s 52(1) and is neither consistent with the language nor the scheme of the legislation. In her submission, the cross-reference in s 52(1) refers to the whole of s 51(1). It was submitted that, if the intention were otherwise, the monetary amount of $30,000 would have been specified in s 52(1). Further, in her submission, the words used are neither synonymous nor consistent with saying "the monetary sum referred to in s 51(1)".

[39] Ms Bibbey pointed out that s 52(1) refers to s 51(1) in its entirety. Under the rules of statutory interpretation, a reference to a section includes any proviso in that section. In Ms Bibbey's submission, s 51(1) must be read as a whole. That subsection does not simply specify a figure. Rather, one must look to the paragraphs and provisos to determine whether the amount of taxable supplies reaches the registration threshold. Although paragraph (a) expresses the threshold value of supplies as being $30,000, the two provisos to s 51(1) remove certain supplies from this calculation. Since s 51(1)(c) directs taxpayers not to take into account any cessation supplies when calculating whether the taxable value of supplies exceeds $30,000, "the amount specified for the purposes of s 51(1)", as set out in s 52(1), excludes cessation supplies.

[40] Ms Bibbey submitted that a purposive approach should be adopted to the interpretation of the GST Act. In her submission, the amount for the purposes of both ss 51(1) and 52(1) must be the same, as the evident purpose of the

cross-reference in s 52(1) is that the same taxable activity will have the same treatment whether for the purposes of registration or de-registration. She submitted that the amount of a trader's taxable supplies cannot simultaneously be both below the threshold for registration in s 51(1) and above the threshold for de-registration in s 52(1). In her submission, Parliament intended there to be consistency between the liability to register and the ability to de-register.

[41] Ms Bibbey submitted further that this construction does not create an anomaly between ss 6(2) and 51(1)(c). Either there is a pre-de-registration supply and s 6(2) deems such to be part of the taxable activity or assets are held at the point of de-registration and s 5(3) deems such to be supplied at that point. Where s 5(3) applies, any post de-registration sale of the same assets becomes irrelevant as the assets are deemed to have been supplied previously. Further, in Ms Bibbey's submission, the legislation plainly and unambiguously provides that, if there is a deemed supply under s 5(3), then the s 10(8) concession allowing an output tax return at cost price is available.

[42] Ms Bibbey's next submission was that the Commissioner's position is not consistent with producing sensible and principled results for the basic compliance function of de-registration. She submitted that the Commissioner is seeking to introduce unnecessary and inappropriate uncertainty into clear legislation. In Ms Bibbey's submission, if the proviso in s 51(1)(c) does not apply, a person holding assets after de-registration could never be certain that the de-registration date would not be revisited if assets were sold within 12 months. Taxpayers faced with potential shortfall penalties would not apply under s 52(1) for fear that they might dispose of assets within 12 months and have their de-registration date amended. Virtually any post-de-registration sale would be in connection with the termination of a taxable activity as a matter of fact.

[43] Conversely, in Ms Bibbey's submission, s 5(3) is designed to provide certainty. Where a taxpayer is de-registered, there is a sensible and workable regime whereby a deemed taxable supply takes place immediately before the date of de-registration. Hence any assets retained by the taxpayer which may or may not be

sold after de-registration are subjected to output tax at the point of de-registration and not at the time of later sale.

[44] Ms Bibbey submitted further that the Commissioner's interpretation is at odds with his earlier policy statements. These statements had referred to the different treatment of taxpayers who sold before de-registration, and were therefore required to pay output tax based on market value, and those who sold after de-registration, and could pay output tax based on the lesser of market or cost value – see the "anomaly" discussed in the TIB referred to above at [15]. However, in Ms Bibbey's submission, this is only an anomaly in the sense of an overt legislative choice evident on the face of s 10(8).

[45] Accordingly, Ms Bibbey submitted that the cross-appeal should be dismissed as the interpretation of s 52(1) adopted by the taxpayers is consistent with both the words used and the scheme of the Act.

Discussion

[46] We deal first with the cross-appeal as the outcome of the appeal is dependent on the cross-appeal being dismissed.

[47] In our view, the phrase "the amount specified for the purposes of section 51(1) of this Act" refers to the $30,000 (or any substituted figure) set out in s 51(1)(a). The Commissioner's case would certainly be stronger if s 52(1) had referred to the "monetary sum set out in s 51(1)(a)" but the word "amount" in this context would normally be read as a reference to a monetary sum. There is only one monetary sum specified in s 51(1) and the reference must be to that sum. This is reinforced, as pointed out by Mr Coleman, by the fact that the word "amount" is also used a number of times in s 51(1) and that it clearly refers to the monetary sum set out in s 51(1)(a).

[48] We consider that it would be straining the meaning of the word "amount" to suggest that it imports not only the monetary sum set out in s 51(1)(a) but also the methods of calculating the amount in a particular case, including the exclusions

contained in s 51(1)(c) and (d). If that had been the intention we would have expected that to have been done explicitly. We do not consider that the fact that the full reference is to the "amount specified for the purposes of section 51(1)" changes that position. The registration threshold set out in s 51(1) can be increased by Order in Council. The terminology in s 52(1), and in particular the word "specified", merely recognises that the s 51(1)(a) sum may change.

[49] The words of a provision must be construed in accordance with their purpose but we do not see any compelling policy reason for holding that the purpose of the reference to s 51(1) in s 52(1) must have been to ensure the same thresholds for registration and de-registration. Indeed, we accept Mr Coleman's submission that there are in fact plausible policy reasons for there to be a difference between the thresholds for registration and those for de-registration. It would defeat the purpose of having a threshold if unregistered persons were brought within the GST net at the very point they were ceasing a taxable activity. Those de-registering are, on the other hand, 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.

[50] We also accept the Commissioner's submission that, when the total cessation of a taxable activity is intended, taxpayers should apply for de-registration under s 52(3) and not s 52(1). If that had been done in this case, then de-registration would have been deferred until after the cessation of the activity and thus any sales made in the course of ceasing the taxable activity would have been subject to s 6(2). We agree with Mr Coleman's submission that this reinforces the conclusion that the reference in s 52(1) to the "amount specified" in s 51(1) does not import the exclusion contained in s 51(1)(c). There is, on this interpretation, symmetry within s 52 itself.

[51] We do not consider that this interpretation of s 52(1) introduces the types of uncertainties postulated by Ms Bibbey. 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.

[52] In this case, the sale to the Trusts Partnership 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 December 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.

[53] In his initial cancellation decision, the Commissioner was operating under the erroneous impression that taxable supplies would be under the threshold. It was thus appropriate, in terms of s 13 of the Interpretation Act, that he re-exercise his discretion and set a new GST registration cancellation date once he was in possession of the full facts.

[54] We are conscious that the taxpayers may, in this case, not have sold the land to the Trusts Partnership (at least at the time they did) had they known that the value of supplies in connection with the cessation of their taxable activity were to be taken into account in calculating the $30,000 threshold. The fact that the taxpayers were acting under a misapprehension as to the law (or the fact that this may perhaps have been shared by the Commissioner - see at [15] above) cannot, however, affect the interpretation of s 52(1) or the outcome of the appeal and cross-appeal.

Result and costs

[55] For the above reasons, the cross-appeal is allowed and the appeal is dismissed.

[56] In accordance with this Court's judgment of 15 August 2005 and, on the basis of the agreed position of the parties, there will be no order for costs in this Court or the High Court.

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