IN THE COURT OF APPEAL OF NEW ZEALAND CA 174/96


BETWEEN BNZ FINANCE LIMITED

Appellant

AND HARRY GRAHAM HOLLAND

First Respondent

AND JOHN DAVID NASH

Second Respondent

Coram Richardson P
Keith J
Blanchard J

Hearing 6 August 1996

Counsel G J Harley, B A Howe and G Clarke for Appellant
F B Bolwell and J Underwood for Respondents

Judgment 6 August 1996

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JUDGMENT OF THE COURT DELIVERED BY RICHARDSON P

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In an oral judgment delivered in the High Court at Wellington on 25 July Doogue J ordered a stay until further order of the High Court of judicial review proceedings instituted by BNZ Finance Limited against the Commissioner of Inland Revenue and a senior officer of the department.

**The factual background**

BNZ Finance Deposits Limited ("Deposits") was a wholly owned subsidiary of the parent BNZ Finance Ltd. In 1988 Deposits invested in certain redeemable

preference shares and debentures. It treated the dividends and interest as non-assessable income. The Commissioner's assessments against it in respect of the 1989 to 1992 income years were made on the basis that the company had no liability for income tax in respect of income derived from investments. On or about 1 September 1994, and along with a number of other subsidiaries of BNZ Finance Ltd, Deposits was dissolved under s 335A of the Companies Act 1955, the Inland Revenue Department having on 13 April 1994 recorded that it had no objection to the dissolution of the companies, including Deposits. That step was taken to avoid having to reregister those non-operating companies under the new companies legislation and generally to reduce the amount of administration required within the BNZ Finance group of companies.

Subsequently, on 31 March 1995, the Commissioner purported to make amended assessments for the 1989 and 1990 years against Deposits, treating the dividends derived as assessable income. Those "assessments" against a no longer existing company could have no legal effect. The Commissioner now claims in his correspondence and the pleadings that he is entitled to assess the parent company, BNZ Finance Ltd, attributing the income of the 1989 to 1992 years of Deposits to the parent company's 1995 year. The Commissioner is invoking s 276 of the Income Tax Act 1976. BNZ Finance Ltd asserts that s 276 confers no such power and, further, that the time bar under s 25 also precludes any such assessment, at least in respect of the 1989 and 1990 years incomes.

**The proceedings in the High Court**

The proceedings are concerned with the Commissioner's stated intention to make an assessment for some $8.7 million of income tax against BNZ Finance Ltd in respect of the 1995 year.

The company seeks a declaration to the effect that the purported exercise of the statutory assessment power would be unlawful and ultra vires. It applied under s 8 of the Judicature Amendment Act 1972 for an interim order restraining the Commissioner from making the proposed assessment pending final resolution of the judicial review proceedings.

The Commissioner filed notice of opposition to the interim order sought and applied to have the substantive proceedings struck out. Doogue J declined the striking out application. He concluded that the proposed exercise of a statutory power was reviewable under the Judicature Amendment Act and, if it ultimately transpired that the Commissioner's proposed assessment was carried into being and found unlawful, it could result in declarations of the kind sought by the applicant in these proceedings. There is no appeal against that refusal of the striking out application.

However, relying on the recent decision of this court in *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* (1996) 17 NZTC 12,580, the Judge took the view that it would be inappropriate to permit the present case to proceed unless and until an assessment is made by the Commissioner which attracts the objection process, in which event it might be that the present proceeding could properly be consolidated with any proceedings brought in conformity with the objection process in relation to the assessment. It would only be appropriate to permit the present case to proceed, he said, if the attack upon the intended decision of the Commissioner to issue an assessment could be shown to be wrong not because of any reason of law in terms of statutory interpretation, but wrong in such a way that the decision was inevitably a nullity or could be attacked under some other head such as wrong process, abuse of power or the like.

The statutory consequence of the issue of a notice of assessment is that the taxpayer must pay one half, which is the non-deferrable portion of the tax in dispute. Given the general importance of the jurisdictional issue, the delays involved if the challenge to the lawfulness as distinct from the correctness of the proposed assessment is determined along with the objection proceedings in the case stated, and the immediate financial consequences for the taxpayer, particular urgency was sought for the hearing of the appeal.

**Restraining the threatened abuse of statutory power**

By s 4 of the Judicature Amendment Act 1972 an application for review may be made to the High Court "in relation to the ... proposed or purported exercise ... of a statutory power", as well as to the actual exercise of statutory power. It is not necessary to wait until a body or person does something outside its jurisdiction before seeking relief. In the great case of *Dyson v Attorney-General* [1912] 1 Ch 158 the Court of Appeal rejected the Crown argument that the proper course was to ignore a demand for information by the Commissioners of Inland Revenue and then dispute the validity of the demand when sued for the penalty for non-compliance, rather than to seek a declaration that the demands were unlawful. Declaration, prohibition and injunction are important remedies preventing bodies from acting unlawfully. So too, s 4 directly contemplates investigation of and protection against threatened abuse of statutory power. Prevention is often better than cure.

In this regard s 4 reflects the public interest in restraining those entrusted with statutory powers from acting outside their jurisdiction. Finally, the intention to make an assessment does not have the presumption of validity which attaches to an apparent assessment until such time as the apparent assessment is declared invalid. Against that background it is a very strong step to stay the proceeding and insist that the applicant

wait until the statutory body or officer has committed a possibly unlawful act before allowing the judicial review jurisdiction to be exercised.

In *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* the taxpayer challenged the validity of a purported amended assessment, both in judicial review proceedings and in objection proceedings. It was in that context that, while considering and determining the judicial review proceeding, this court stated that the challenge could and should have been pursued by the objection procedure and that in such a case the two sets of proceedings should have been consolidated. That is not this case. The Commissioner has not yet purported to assess. The statutory objection procedure is not yet available. There is no case stated. There is nothing in the *Golden Bay Cement Co* case, and nothing in the income tax legislation, to require the judicial review proceedings to be stayed until a case stated has been filed. That, in turn, would involve successive steps of purported assessment, objection, refusal of objection, request for a case stated, and the stating of the case, taking in all, it is said, some six to twelve months.

**The proposed exercise of statutory power: conclusions**

It appears that the argument in the High Court did not emphasise the distinction we have drawn between challenges to "assessments" and to the proposed exercise of statutory powers. However, Ms Bolwell for the Commissioner also submitted that it was not desirable to have a different approach to staying judicial review proceedings pre- and post-assessment. That may be so, but the income tax legislation itself draws that distinction in providing assessment and objection procedures and prohibiting the disputing of "assessments" outside the objection procedures. The legislation confers no such protected status on the proposed exercise of statutory power.

For these reasons we consider that Doogue J erred in his approach to the stay issue in the circumstances of this case. Sufficient has been said in the course of submissions to satisfy us that there is a serious argument as to the validity of the proposed recourse by the Commissioner to s 276, and further, if out of time, it would "not be lawful" in terms of s 25 for the Commissioner to assess the company. It is not a proper case for a stay.

The appeal is allowed, the stay order is quashed, and the matter is remitted to the High Court. On the approach he took, Doogue J did not have to determine the company's application for interim relief. This court does not have original jurisdiction to grant or refuse interim relief and we express no views as to the merits of the application if it is pursued. Unless and until interim relief is granted under s 8 the Commissioner is free to exercise his assessing and other powers under the Act in relation to this matter.

Both counsel made submissions on the due functioning of the tax system, including in that regard the important provisions of ss 6 and 6A of the Tax Administration Act 1994 and the need for speedy resolution of disputes. They also reviewed the desirability and practicability of identifying and determining the discrete validity issues said to be likely to occupy only one hearing day and to be capable of expeditious timetabling and determination, whether in judicial review proceedings or as a separate question in case stated proceedings. Those matters will all be relevant considerations under s 8.

Costs on the appeal are fixed in the sum of $3,500 together with all reasonable disbursements as fixed by the Registrar if necessary. Costs to be payable depending on the eventual outcome.

Solicitors
Russell McVeagh McKenzie Bartleet & Co, Wellington, for appellant
Crown Law Office, Wellington, for respondents