

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-000968

IN THE MATTER OF the Companies Act 1993 Section 290

BETWEEN CIVIL AND MARINE DIESEL LIMITED
 Applicant

AND THE COMMISSIONER OF INLAND
 REVENUE
 Respondent

Hearing: 29 June 2009

Counsel: M W Tolhurst for applicant
 J S Ridling for respondent

Judgment: 29 June 2009

ORAL INTERIM JUDGMENT OF ASSOCIATE JUDGE ABBOTT

Solicitors:
Citylaw, PO Box 6086, Auckland for applicant
Inland Revenue Department, PO Box 33 150, Auckland for respondent

[1] The applicant Civil and Marine Diesel Limited (“CMDL”) has applied to set aside a statutory demand served on it by the Commissioner of Inland Revenue (“the Commissioner”).

[2] The demand is for \$19,475.55 for unpaid GST, and for late filing penalties and interest (the late filing penalties are in respect of both GST and income tax).

[3] There has been a lengthy history to this dispute, with an earlier statutory demand having been issued but withdrawn. The essence of the problem appears to be that CMDL has been late in filing both GST and income tax returns, the Commissioner has issued default assessments, and interest has accrued on the default assessment.

[4] CMDL says that there have been errors in the past in the filing of GST returns, but the nature of its business is such that in any period the input and output tax should offset. Similarly, it says that it does no more than pass on goods to an associated company at cost, and does not generate any profit on which to pay any income tax.

[5] At the outset of the hearing counsel for the Commissioner advised that GST returns are now up to date, and as a consequence there are no longer any default assessments. However, the Commissioner still seeks late filing penalties (both in respect of GST and income tax) and interest in respect of the default assessments from the period they were issued until they have been reversed. Counsel for CMDL informs me that one of the key issues, and reasons for dispute on this application, is the imposition of interest on the now reversed default assessments.

[6] I have come to a tentative view, having read the papers, and had discussion at the outset of the hearing with counsel, that the Commissioner is fully entitled to claim later filing penalties, but there appears to be a basis for CMDL’s contention

that the charging in interest on the reversed default assessments, even if arising out of a statutory entitlement, is an unreasonable position. Counsel for the Commissioner informs me that the Commissioner has a discretion in this respect, but the case officer from whom he receives instructions is not available today to ascertain whether or not it may be possible to waive all or part of the interest charged.

[7] I have indicated to counsel today that if this matter proceeds it seems likely that the Commissioner would be able to establish that late filing penalties are in fact due, and that could be sufficient to sustain the statutory demand. However, I can also understand CMDL's position and consider that it ought to have an opportunity to approach the Commissioner in relation to waiver of the interest component. I also take into account that although solvency is not a ground on its own for setting aside a statutory demand (there can be other factors which come into play), and in any event there is no evidence as to solvency before me, it seems likely that if the statutory demand stands CMDL may be able to establish that it is solvent in defence of an application for liquidation.

[8] In light of all of these matters I have discussed with counsel whether the parties should take time to resolve this dispute without taking Court time now for this hearing and the need for a final judgment on this application. Counsel are agreed that this course ought to be taken, and on that basis I am prepared to adjourn today's application part heard. Whether or not it will need to be resumed will depend on the outcome of the parties' discussions. I wish to make it clear, however, that in taking this course I can see no basis at this stage for CMDL to resist payment of penalties for late filing. It seems clear from the evidence on the file that it is in default in that respect, and the Commissioner clearly has an entitlement and, indeed, an obligation, to enforce the tax statutes and require proper and timely filing of returns even if the taxpayer believes that there will ultimately be no tax payable. That is not a matter for the taxpayer to determine on its own behalf.

[9] This application is adjourned part heard. It is to be listed in the in the statutory demand list at 11:45am on 21 August 2009 for further directions. I have given counsel an indication as to the likely outcome as to costs, if the parties are able to settle the balance of the application, but I intend making no order in that respect at this point.

Associate Judge Abbott