

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

**CIV-2008-404-4370**

BETWEEN

JAMES HEWITT PRICE  
Judgment Debtor

AND

THE COMMISSIONER OF INLAND  
REVENUE  
Judgment Creditor

Hearing: 14 October 2009

Appearances: Judgment Debtor in person  
C Wood for Judgment Creditor

Judgment: 19 October 2009 at 5 pm

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**RESERVED JUDGMENT OF ASSOCIATE JUDGE H SARGISSON  
(Application to set aside Bankruptcy Notice)**

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*This judgment was delivered by me on 19 October 2009 at 5 pm pursuant to  
Rule 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

*Date .....*

*Solicitors:  
J Price, 174 Settlement Road, Papakura  
Meredith Connell, PO Box 2213, Auckland*

[1] Mr Price seeks an order setting aside the bankruptcy notice served on him by the Commissioner of Inland Revenue.

[2] The bankruptcy notice is based on a judgment of the District Court against Mr Price for the judgment sum of \$255,370.54 in respect to unpaid tax for the years ended 31 March 2000 to 2006, plus penalties and interest. The tax debt it relates to is based on self assessments in returns that Mr Price himself filed for the income years ended 31 March 2000 to 31 March 2005, and a default assessment of \$1,420.02 for the income year ended 31 March 2006. The judgment was issued on 6 November 2007 and it stands following Mr Price's unsuccessful application to the District Court to have it set aside.

[3] On 11 August 2008 Mr Price filed and served his application to have the bankruptcy notice, served on him on 28 July, set aside. The application was filed within the statutory timeframe and is opposed by the Commissioner, who filed documents in opposition on 24 September 2009.

[4] There is no dispute that in terms of the judgment against him Mr Price is liable for the amount claimed in the bankruptcy notice and has not complied with the demand in the notice to pay it. In this respect, Mr Price acknowledged openly and frankly at the hearing that he is simply unable to do so. Nevertheless, he seeks an order that would have the effect of relieving him of the obligation to comply with the bankruptcy notice and the consequences of non-compliance.

[5] The issue that arises for determination is whether Mr Price has shown that he has some proper basis for the order he seeks under the relevant statutory provision that gives this court power to set aside a bankruptcy notice. The provision is s 17 of the Insolvency Act 2006, the relevant parts of which states:

**17 – Failure to comply with bankruptcy notice**

- (1) A debtor commits an act of bankruptcy if –
  - (d) **the debtor has not**, within the time limit specified in subsection (4), -
    - (i) complied with the requirements of the notice; or

(ii) **satisfied the court that he or she has a cross claim against the creditor.**

- (7) In subsection (1)(d)(ii), cross claim means a counterclaim, set-off, or cross demand that –
- (a) is equal to, or greater than, the judgment debt or the amount that the debtor has been ordered to pay; and
  - (b) the debtor could not use as a defence in the action or proceedings in which the judgment or the order, as the case may be, was obtained.

[Emphasis added]

[6] As Mr Price has not complied with the requirements of the bankruptcy notice it is for him to satisfy the court that he has a cross claim that operates under s 17(7). It is trite law that any cross claim must be one that could not be raised in the District Court proceeding, usually for legal reasons, **and** that it must be genuinely triable.

[7] Mr Price raises several grounds in his application, none of which raises a cross-claim, much less a cross-claim that might operate under s 17.

[8] Together with a ground that refers to the history of his dealing with Inland Revenue Department that is described at great length in his supporting affidavit, Mr Price raises the following two grounds:

- (a) I have an arguable defence to the judgment creditor's claim for which judgment has been given against me;
- (b) It is just and equitable that the bankruptcy notice be set aside.

[9] These grounds do not assist Mr Price. There is no jurisdiction for the Court to set aside the bankruptcy notice on the broad basis that the judgment debtor has a defence to the claim for which judgment has been given. Nor does jurisdiction exist to set aside a bankruptcy notice on just and equitable grounds. That jurisdiction only arises in respect of subsequent bankruptcy applications.

[10] However, given that Mr Price was self represented and without the benefit of legal advice I extended to him the opportunity at the hearing to raise any matters he wished to rely on to satisfy the court that he might have an arguable cross claim

against the Commissioner. While Mr Price stressed he does not accept he is liable for the unpaid tax debt that gave rise to the judgment on which the bankruptcy notice is based, he candidly acknowledged at the hearing that he does not pursue any cross-claim. Indeed, he said he understands that he does not have a cross-claim, which is consistent with the view advanced in the submissions for the Commissioner. That view is plainly correct and one which I will come back to.

[11] Essentially what Mr Price raised is a plea that:

- a) He is not liable for the tax debt, because the assessments it is based on are incorrect;
- b) He accepts the assessments were based chiefly on his own returns and are largely consistent with his own calculation of tax in the returns, but he was forced to make the returns in circumstances where vital financial documentation had been lost through theft;
- c) He accepts that he did not follow the statutory NOPA (notice of proposed adjustment) procedure or challenge the assessments under Part s 8 and 8A of the Tax Administration Act 1994, but he did not know about the relevant procedure in time to avail himself of it;
- d) He is now in a position where he is able to establish that the tax assessments he made were not correct and that they do not take into account allowable losses incurred by one of his companies that would extinguish his personal tax liability. In the last year he has located the necessary papers to prove that the assessment was not correct;
- e) The fair and equitable course would be to give him the opportunity to demonstrate to the Commissioner what the correct assessment of tax is.

[12] Whether Mr Price has new material that will enable him to demonstrate that the tax assessments were not correct is a matter for him to raise with the

Commissioner under s 113 of the Tax Administration Act 1994. Mr Price has already sought a correction on behalf of one of his companies, Apex Pharmaceuticals (NZ) Limited, to claim expenses and losses not previously claimed in the relevant income years 1992 and 1993. The Commissioner was not persuaded however that there was any substance to Mr Price's arguments. If Mr Price now has material that indeed shows the relevant tax assessments for him were not correct and he is able to present his arguments in a coherent and succinct way, then he could reasonably anticipate that it would be dealt with in a considered way. However, any argument that Mr Price may have for claiming that there is a case to correct his personal tax assessments is not an available ground for setting aside the bankruptcy notice. Unless and until the Commissioner is satisfied that there is a case to correct the assessments, there is no basis for this Court to go behind the District Court's judgment when dealing with the question whether there are grounds to set aside the bankruptcy notice.

[13] In the case of the other claims Mr Price raised, putting aside the question whether they have any substance, they could not assist him to advance a cross claim to challenge a tax debt under the Insolvency Act. Significantly, r 5.61(1) – (2) of the High Court Rules prohibit a defendant advancing any set off or counterclaim in proceedings where the Crown is seeking to recover taxes, as in this case. Rule 5.61(2) states:

In a proceeding of any nature by the Crown, a defendant is not entitled to advance any set-off or counterclaim arising out a right or claim to payment in respect of any taxes, duties, or penalties.

[14] Further, section 109 of the Tax Administration Act also applies. It states:

**109 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
- (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.

## **Result**

[15] For the above reasons, Mr Price's application to set aside the bankruptcy notice is declined.

[16] As Mr Price's application has failed, the Commissioner is entitled to an order for costs. I make an order for costs in favour of the Commission on a 2B basis together with disbursements to be fixed by the Registrar.

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Associate Judge Sargisson