

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 32/2020
[2020] NZSC 81

BETWEEN PETER WILLIAM MAWHINNEY AS
TRUSTEE OF THE DOUG VESEY TRUST
Applicant

AND COMMISSIONER OF INLAND
REVENUE
Respondent

Court: Glazebrook, O'Regan and Williams JJ

Counsel: Applicant in person
R L Roff and J B Y Cheng for Respondent

Judgment: 11 August 2020

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$2,500.**
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REASONS

Introduction

[1] This application for leave to appeal concerns the Tax Administration Act 1994 (TAA). The applicant seeks leave to appeal the Court of Appeal's decision holding that the Commissioner of Inland Revenue is not deemed to have accepted the applicant's notice of proposed adjustment (NOPA),¹ as well as aspects of a separate decision of the Taxation Review Authority (TRA).²

¹ *Mawhinney v Commissioner of Inland Revenue* [2020] NZCA 112 (Miller, Dobson and Moore JJ) [CA judgment].

² *Trustees of the Doug Vesey Trust v Commissioner of Inland Revenue* [2015] NZTRA 04.

Background

[2] In November 2008, the applicant filed a goods and services tax (GST) return claiming a \$625,000 refund for the purchase of a property. In April 2013, the Commissioner issued a notice of assessment disallowing the refund on the ground that it was fraudulent.

[3] In March 2015, the applicant issued a NOPA challenging the assessment. Had the NOPA been issued in time, the Commissioner would have been required to issue a notice of response (NOR) within two months of the NOPA.³ Failure to do so would mean the Commissioner would be deemed under s 89H(2) of the TAA to have accepted the NOPA. But the NOPA was two years out of time,⁴ and so the applicant applied under s 89K of the TAA to invoke the Commissioner's discretion to treat the NOPA as if it had been lodged in time.

[4] In response, the Commissioner issued a refusal notice in April 2015.⁵ The applicant then challenged the Commissioner's refusal notice by bringing proceedings in the Taxation Review Authority.⁶

[5] In the meantime, in February 2016, certain amendments to the TAA came into force.⁷ They inserted a new s 89AC to explicitly govern timeframes for the Commissioner to file a NOR where the taxpayer's NOPA is accepted out of time. Section 89AC provides that where a taxpayer's late NOPA is accepted under s 89K, the two months within which the Commissioner must issue a NOR begins on the day the final decision is made to treat the NOPA as if it were in time, not the day the NOPA was issued.

[6] On 5 May 2016, the TRA ruled (among other things) that the applicant's NOPA was out of time, but that the Commissioner should have treated it as if it were in time

³ Tax Administration Act 1994, s 89AB(2).

⁴ Notices of proposed adjustment are to be issued within four months of the initiating notice: s 89AB(4)(b).

⁵ Section 89K(4).

⁶ Section 89K(6).

⁷ Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Act 2016, ss 257 and 258.

under s 89K (first TRA decision).⁸ Within two months of that decision, on 28 June 2016, the Commissioner issued the applicant a NOR responding to the applicant's NOPA.

[7] A challenge proceeding was then commenced. The sole argument advanced was that the Commissioner should be deemed to have accepted the applicant's NOPA of March 2015 because she failed to issue the NOR within two months of the date of the NOPA.

[8] The TRA held that the new s 89AC applied to this case even though it had not been enacted when the applicant lodged the NOPA (second TRA decision).⁹ The Commissioner's NOR was in time. She was therefore not deemed to have accepted the applicant's NOPA.¹⁰ If it were wrong on that point, the TRA also held that the Commissioner's NOR was in time under the law as it stood prior to the amendments.¹¹

[9] The applicant's appeals to the High Court and Court of Appeal were both dismissed.¹² Both Courts agreed that the new s 89AC applied to the applicant's NOPA, and that even under the old law, time for the two-month deadline ran from the date of the TRA's decision, not the date of the late NOPA.¹³ In particular, the Court of Appeal held that:

- (a) section 89AC is plainly procedural and does not deprive taxpayers of the substantive right to challenge the merits of their tax liabilities;¹⁴
- (b) section 89AC achieves no more than what is plainly implicit in the scheme of the TAA;¹⁵ and

⁸ *Trustees of the Doug Vesey Trust v Commissioner of Inland Revenue*, above n 2, at [50] and [76].

⁹ *Trustees of the Doug Vesey Trust v Commissioner of Inland Revenue* [2018] NZTRA 01 (Judge Sinclair).

¹⁰ At [28].

¹¹ At [48].

¹² *Mawhinney v Commissioner of Inland Revenue* [2019] NZHC 553, (2019) 29 NZTC 24-006 (Peters J) [HC judgment]; and CA judgment, above n 1.

¹³ HC judgment, above n 12, at [26]–[40] and [49]–[50]; and CA judgment, above n 1, at [17]–[24].

¹⁴ CA judgment, above n 1, at [21].

¹⁵ At [22].

- (c) the Commissioner was not required to file a NOR within two months of the date of the applicant's NOPA because at that time the NOPA was late and of no effect.¹⁶

First TRA decision

[10] The applicant wishes to challenge certain findings made in the first TRA decision. That decision was not appealed to either appellate court below. Accordingly, this aspect of the application is in substance an application for leave to appeal directly from the TRA to this Court.

[11] This Court does not have jurisdiction to entertain an appeal directly from the TRA.¹⁷ Even if it did, we do not consider that the proposed appeal meets the leave criteria under ss 74 and 75 of the Senior Courts Act 2016.

Second TRA decision and subsequent appeals

[12] We treat the rest of the application as one for leave to appeal the Court of Appeal's decision.¹⁸

Submissions

[13] First, the applicant submits that the effect of s 89K(1) is that where a NOPA is treated as if it were in time under that section, it is deemed to have been in time from the date it was issued. This is because the section provides that the Commissioner is to issue a notice stating that the NOPA is to be treated "for all purposes under this Part" as if it were in time. The applicant submits the Court of Appeal erred because its interpretation only treated the NOPA as if it were in time for "some purposes", and this has resulted in a substantial miscarriage of justice.

¹⁶ At [22].

¹⁷ See Senior Courts Act 2016, ss 70, 75 and 65 definition of "New Zealand court". See also Taxation Review Authorities Act 1994, s 5.

¹⁸ CA judgment, above n 1.

[14] Second, the applicant submits that as trustee, he has been denied natural justice under the New Zealand Bill of Rights Act 1990 due to delays on the part of the Commissioner.

[15] Third, the applicant submits that a substantial miscarriage of justice may occur unless the appeal is heard because it was “legally impossible” to challenge the Commissioner’s assessment disallowing the GST refund due to her reliance on the truncated procedure in s 89C(eb).

[16] Finally, the applicant submits that the new s 89AC does not have retrospective effect, and that this is a question of general commercial significance.

Our assessment

[17] The arguments referring to legal impossibility and the Bill of Rights Act were not raised in the TRA or the Courts below. We note that in the TRA, the applicant confirmed the challenge was limited to the sole issue of deemed acceptance under s 89H of the TAA.¹⁹

[18] In any case, nothing raised by the applicant suggests that the analysis of the TRA and the Courts below was wrong. The Court of Appeal applied settled law to the case and the applicant has not identified any grounds for challenging the Court’s decision.

Result

[19] The application for leave to appeal is dismissed.

[20] The applicant must pay the respondent costs of \$2,500.

Solicitors:
Crown Law Office, Wellington for Respondent

¹⁹ *Trustees of the Doug Vesey Trust v Commissioner of Inland Revenue* TRA 005/17, 30 August 2017 at [1].