

CASE SUMMARY

Risk of double recovery due to potential enforcement action by Inland Revenue does not prevent profit forfeiture orders under proceeds of crime regime

Decision date: 30 May 2025

CSUM 25/11

CASE

***Commissioner of Police v Masonic Limited and others* [2025] NZCA 205**

LEGISLATIVE REFERENCES

Companies Act 1993, sch 7 cls 1(2)(aa), (d), (g), (ga) and 1(5);

Criminal Proceeds (Recovery) Act 2009 (CPRA), ss 3, 5, 6, 7, 28, 33-35, 50, 50C, 53, 55, 67, 83

Goods and Services Tax Act 1985, s 43

New Zealand Bill of Rights Act 1990, 21

Tax Administration Act 1994 (TAA), ss 6A, 143, 143A, 143B, 157, 169, 177C

Court of Appeal (Civil) Rules 2005, r 45

High Court Rules 2016, r 5.61

CASE LAW REFERENCES

Cheah v Commissioner of Police [2020] NZCA 253

Commissioner of Police v Cheng [2023] NZHC 606

Commissioner of Police v Nabawi [2021] NZHC 2413

Commissioner of Police v Snook [2018] NZHC 2537

Erceg v Balenia Ltd [2008] NZCA 535

Fuati v Jin [2023] NZCA 165

Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh [1998] 3 NZLR 171 (CA)

Li v Commissioner of Police [2022] NZHC 514

Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1) [2006] NZSC 59, [2007] 2 NZLR 1

R v Cheng [2018] NZDC 3344

R v Pedersen [1995] 2 NZLR 386 (CA)

R v Waya [2012] UKSC 51, [2013] 1 AC 294

Re Diplock [1948] Ch 465 (CA)

Rodriguez v Commissioner of Police [2020] NZCA 589

Solicitor-General v Beckham [2015] NZHC 2816

Solicitor-General v Rhodes HC Auckland, CIV-2007-404-3773, 16 February 2010

Zhou v Commissioner of Police [2023] NZCA 137

LEGAL TERMS

Benefit, significant criminal activity, tax evasion

Summary

The Court of Appeal granted the COP's appeal, agreeing with the COP and CIR that where tax has been evaded and not subsequently paid to the CIR, the tax evader has benefited from significant criminal activity, and a profit forfeiture order should be made. The court rejected the view that the CIR's ability to recover unpaid tax means there can be no benefit to the offender.

Impact

The decision reemphasises the wide definition of benefit in terms of the CPRA and profit forfeiture orders. The decision ensures tax evaders are unable retain the proceeds of tax evasion simply because the CIR may later recover the outstanding tax. The decision protects

the integrity of the tax system by promoting voluntary compliance and ensuring that the chance for persons to profit from tax evasion is eliminated.

Facts

In 2016 a restraining order was obtained by the CoP over properties and funds that were linked to the alleged methamphetamine dealing of Thomas Cheng and the alleged tax evasion and money laundering by Thomas' father, William Cheng (Mr Cheng) and Thomas' mother in law, Niyoh Chew Hong (Ms Hong). Ultimately, the value of restrained assets included properties and bank accounts worth approximately \$20 million.

The CIR had assessed income tax and GST liabilities for 11 other respondents (all NZ companies or Singaporean limited liability partnerships) on the basis of rental payments received from the properties owned by each respondent. Rental payments had gone into the bank accounts of Mr Cheng and Worldwide Models Limited. Mr Cheng is the authorised signatory on the company's account. None of the 11 respondents disputed the assessments of their tax liability which before interest and penalties amounted to \$1,679,246.33.

In March 2023 Cooke J determined the COP's application for profit forfeiture orders in relation to the total sum of \$20,102,053.22. The application insofar as it related to Mr Cheng and Ms Hong was founded on allegations of tax evasion and money laundering. It was not alleged that they were involved with the significant drug dealing in which Thomas Cheng had been engaged. Cooke J granted the profit forfeiture claim relating to Thomas Cheng's drug dealing offending. In relation to the other respondents, Cooke J found that there was a significant criminal activity of tax evasion, but not in relation to money laundering.

The tax liability by the time of the forfeiture hearing had increased to \$11,443,457.36 due to penalty and interest provisions under the TAA. However, the potential benefit of the tax evasion in the proceeding was assessed at \$1.6 million on the basis that the interest and penalties were not a benefit derived from the offending itself. Rather, they were penalties faced by the respondents for their tax evasion.

Although Cooke J found that the respondents had been involved in the significant criminal activity of tax evasion, he concluded that the respondents had not profited from that activity on the basis that the CIR is:

... in a position to recover all the unpaid tax, as well as significant penalties and interest in a way that eliminates any benefit from this offending.

Issues

The only issue on appeal was whether the possibility of successful enforcement action by the CIR means a tax evader has not benefitted and therefore precludes a forfeiture order being made under s 55 of the CPRA.

Decision

The court granted the COP's appeal and ordered profit forfeiture against the respondents in the sum of 1,679,246.33.

The court considered that the High Court erred in finding there was no benefit from tax evasion because of potential recovery by the CIR.

The court held that the CPRA is "a penal scheme designed to reduce the opportunity for a criminal to benefit from significant criminal offending and to deter others from engaging in similar offending." The scheme is designed to be harsh and "[o]ver-recovery is not generally a reason to reduce the amount of a penalty order." Parliament emphasised the need to eliminate "the chance for criminals to profit from their actions, and sometimes thoroughly extirpating any chance of gain will mean over-recovery."

The court rejected the High Court's conclusion that the ability for the CIR to "recover unpaid tax means there is no benefit and therefore precludes a forfeiture order under s 55" of the CPRA. The court noted that:

... it is by no means certain that the CIR will recover the outstanding tax. As noted above, the CIR is (broadly) an ordinary civil litigant subject to the ordinary difficulties of civil enforcement.

The court considered that benefit in the sense that the CPRA uses it can be temporary – a respondent who obtains additional money for a short time period, even if they later are forced to disgorge it and pay penalties, has still benefitted from their criminal action. The court stated that the "[m]ere availability of funds, even if they do not amount to a net increase, is a benefit in the terms of the CPRA."

The court recognised that double recovery by two different government departments could be disproportionate but that this was not the case here, and they were not aware of any to date. In this case, the respondents had not paid any of the tax debt and were opposing enforcement action by the CIR. The court ultimately found that "[u]nless and until the CIR recovers the outstanding tax, the respondents retain the benefit of significant criminal activity." The court noted that it would only be the last \$1.6m recovered that would constitute double recovery.

The court said that the High Court's approach would suggest that tax evasion could never, on its own, engage the CPRA as there would always be the potential for recovery by the CIR. They did not think that this was correct.

The court did not say what would happen in a case of true double recovery, leaving that to be determined in a case where double recovery is directly at issue. The court noted that, despite being given the opportunity during the hearing, the taxpayers had not consented to payment of the funds sought by the COP to the CIR, and that they have structured their affairs in a way that has in theory placed them at risk of double recovery by the Crown, but that did not require remedy. The alternative of no recovery for the Crown and a significant gain for delinquent taxpayers would be contrary to the purposes of both statutes. The court found it significant that the risk relates to a small percentage of the total tax debt - \$1.6 million of \$11.4 million outstanding as at 2023.

About this document

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