Inland Revenue
Te Tari Taake

CASE SUMMARY

Court of Appeal upholds High Court decision that clarifies when Commissioner's Notice of Response is due following s 89K decision

Decision date: 29 April 2020

CSUM 20/03

Case

Peter William Mawhinney as Trustee of the Doug Vesey Trust v Commissioner of Inland Revenue [2020] NZCA 112

Legislative References

Goods and Services Tax Act 1985

Tax Administration Act 1994, ss 89AB, 89AC, 89D(5), 89H(2), 89K, 138P

Taxation Review Authorities Act 1994, s 26A

Interpretation Act 1999, ss 7, 18

Legal terms

Deemed acceptance; response period

Summary

The Commissioner's Notice of Response ("NOR") was filed within two months of the decision by the Taxation Review Authority ("the Authority") that the Commissioner should have accepted the Doug Vesey Trust's ("Trust") Notice of Proposed Adjustment ("NOPA") out of time pursuant to s 89K of the Tax Administration Act ("TAA"). The Court of Appeal upheld the finding of Peters J that the Commissioner's NOR was filed in time and there was no deemed acceptance of the Trust's NOPA.

Impact

The judgment makes it clear the Commissioner's NOR is not required until two months after the conclusion of s 89K challenge proceedings. There is no valid NOPA until the hearing authority determines that the Commissioner should have accepted a taxpayer's NOPA out of time. The Commissioner is not required to issue a "protective" NOR in these circumstances.

Facts

A GST return was filed by the Trust on 5 November 2008 for the period ended 31 October 2008, claiming a refund of $625,000.

On 16 April 2013, the Commissioner issued a Notice of Assessment (NOA) in respect of that return. She assessed the refund due for the period as "nil".

In order to be within the four month response period the Trust was required to issue a NOPA in response by 16 August 2013. A NOPA was not issued until 30 March 2015 but was accompanied with a request under s 89K that the Commissioner accept the NOPA out of time.

By letter dated 29 April 2015, the Commissioner notified the Trust that she refused to accept the NOPA and that, as a consequence, the Trust was deemed to have accepted the Commissioner's NOA.

In May 2016 the Authority held that the Commissioner ought to have not refused the Trust's late NOPA and set aside the Commissioner's refusal. The Commissioner then issued a NOR within two months of the Authority's decision.

This led to the second hearing before the Authority. The Trust argued that the Commissioner's NOR was out of time and, by s 89H(2), the Commissioner was deemed to have accepted the Trust's NOPA and must refund the GST claimed.

Amendments to ss 89AB and 89AC of the TAA came into force on 24 February 2016 (amendments).

The Authority held the amendments applied and were determinative of the issues. Peters J upheld that decision. The Trust appealed that decision to the Court of Appeal.

Issues

Whether the Commissioner's NOR was issued in or out of time. That depends on when the Commissioner's two-month response period started to run – from 30 March 2015 as the appellant claims, or from May 2016 as the Commissioner claims and as the Authority and High Court held.

The Trust argued that s 89AC may not be given retrospective application, for to do so would be to deprive it of a right to which it was entitled under the pre-amendment legislation.

Decision

The Court stated that on its face, s 89AC took effect on 24 February 2016, before the Authority revived the Trust's NOPA. The question is whether the amendment ought to be interpreted to exclude cases where a taxpayer's NOPA had already been issued but was late, and hence ineffective.

The Court referred to the Court of Appeal decision in *Foodstuffs (Auckland) Ltd v Commerce Commission* which held that the general approach to retrospectivity strikes a balance between giving effect to reforms and protecting vested rights, if any, that are in in jeopardy by the new legislation, [2002] 1 NZLR 353 (CA).

The Court then referred to the Court of Appeal decision in *Crown Health Financing Agency v P* which held that the law adopts a general principle that the presumption against retrospectivity applies to substantive rights but not those that are procedural in nature, unless a contrary intention is expressed in the legislation itself, [2008] NZCA 362.

The Court stated that it cannot be doubted that the legislation in this case preserved the Trust's substantive right to have its claim to a GST refund determined on the merits and noted the Trust did not dispute this.

The Trust's argument was that what it lost was the right to invoke s 89H(2), under which the Commissioner is deemed to accept an adjustment contained in a NOPA when she fails to reject it within time. The Court found this argument wholly without merit for two reasons:

- First, s 89AC is procedural in nature. Therefore there in no good reason to limit its application to disputes commenced after it came into force, because it does not deprive taxpayers of the substantive right to have their tax liabilities determined on the merits.

- Second, s 89AC achieves no more than what it implicit in the scheme of the TAA. The Commissioner was not required to file a NOR by 30 April 2015. At that date her obligation to do so or face the consequences had not been triggered, for the appellant's NOPA was late and of no effect. The much later decision of the TRA excused the taxpayer's failure to file its NOPA in time. It would be remarkable if the legislature intended that a decision relieving the taxpayer of the consequences of its own failure

to act within time should deny the Commissioner the right to contest the taxpayer's claim.

About this document

Case summaries are brief notes of decisions made by the Taxation Review Authority, the High Court, Court of Appeal, Privy Council, and the Supreme Court. These summaries do not set out Inland Revenue policy, nor do they represent our attitude to the decision.