

CASE SUMMARY

Company restored to the Register and Commissioner of Inland Revenue granted an extension to issue Challenge Notice

Decision date: 12 June 2020

CSUM 20/07

Case

Commissioner of Inland Revenue v Waheedullah Faghriyar and Attorney General on behalf of the Registrar of Companies [2020] NZHC 1256

Legislative References

Companies Act 1993 s329

Tax Administration Act 1994, Part 4A ss 89D, 89G, 89KP

Legal terms

Restoration of company, undischarged claim, challenge notice extension, exceptional circumstances

Summary

The First Respondent, Waheedullah Faghriyar, and the company Discount Tyres and Mechanical Services Limited (“Discount Tyres”) initiated the statutory disputes procedure under Part 4A of the TAA (“the dispute”) with the Commissioner of Inland Revenue (“the Commissioner”) while a criminal prosecution against the First Respondent (“the criminal case”) was already on foot. The Commissioner held the dispute in abeyance until the criminal case was concluded in order to protect the First Respondent’s fair trial rights causing an approximately two-year delay before the dispute could be restarted. Due to the delay, the Commissioner would not be able to issue a challenge notice concluding the dispute within the statutory time bar of four years. While the criminal case was on foot Discount Tyres was struck off the Companies Register (“the Register”).

Accordingly, the Commissioner applied under section 329 of the CA for Discount Tyres to be reinstated on the Register and under section 89L(1B) of the TAA to extend the time for issuing a challenge notice past the four-year time bar. The Commissioner’s applications were not opposed and were granted by the Court.

Impact

This decision is significant to the Commissioner because it shows that the Court accepts that an “undischarged claim” covers the Commissioner merely having a dispute under Part 4A of the TAA, meaning the Commissioner can apply to restore a struck off company to the Register even in circumstances where she has not yet filed legal proceedings with the Courts but has a statutory claim to recover unpaid tax.

This decision is also significant because it shows that the Court has upheld the Commissioner’s recently adopted approach of delaying civil disputes while criminal proceedings remain extant in to protect a defendant’s fair trial rights in those criminal proceedings as constituting an “exceptional circumstance” under section 89K of the TAA.

Facts

The First Respondent was the sole shareholder and director of Discount Tyres. After the First Respondent and Discount Tyres failed to file income and GST returns between the 2008 to 2015 years, the Commissioner issued default assessments.

On 12 February 2016, the First Respondent and Discount Tyres initiated the dispute by issuing notice of proposed adjustments (“NOPA”) to the Commissioner’s default assessments. This was followed by the Commissioner issuing notices of response (“NOR”). The First Respondent and Discount Tyres rejected the Commissioner’s NOR.

The criminal case was on foot when the First Respondent and Discount Tyres initiated the dispute. The Commissioner held the dispute in abeyance for the period between 24 May 2016 to 14 December 2018 when the criminal case had concluded.

On 8 July 2016, Discount Tyres was struck off the Register while the criminal case was in progress.

The dispute recommenced with two facilitated conferences being held on 19 May 2019 and 16 August 2019. The facilitated conference stage was not concluded. The Commissioner filed this application before the four-year time bar expired on 11 February 2020.

Issues

The key issues the Court needed to decide in order to grant these orders were whether:

- Any grounds are met under section 329 of the CA allowing the Court to use their discretion to restore a company to the Register;
- It was appropriate to bring a section 89L(1B) of the TAA application to the Court by way of originating application;
- The Commissioner has applied for an extension to issue a challenge notice after the expiration of the four-year time bar within the four-year time bar;
- The Commissioner's decision to hold the dispute in abeyance causing delay amounted to "exceptional circumstances" warranting an extension to the four-year time bar pursuant to section 89P of the TAA.

Decision

Restoration application

The Court granted the Commissioner's application to restore Discount Tyres to the Register.

The Court held that the Commissioner had an undischarged claim against Discount Tyres for unpaid income tax and GST as a result of her issuing default assessments. (Accordingly, it was not necessary for the Court to determine the alternative ground for restoration, namely the "just and equitable" ground. Even if the Court was required to consider this ground, the Court held it would be equally "just and equitable" to grant the restoration order sought).

The Court accepted that an undischarged claim included an incomplete dispute under Part 4A of the TAA.

The Court held that a person who has a contestable claim against a company but who has not yet started proceedings has standing and a ground to apply for restoration on the basis that they have an undischarged claim against the company.

Leave to commence originating application

The Court granted the Commissioner's application to commence an application under section 89L(1B) of the TAA by originating application.

Extension to section 89P four-year time bar

The Court granted the Commissioner's application to issue challenge notices to the First Respondent and Discount Tyres beyond the four-year time bar under section 89P of the TAA.

The Court accepted that the Commissioner filed the application within the four-year time bar period.

The Court concluded that the dispute being held in abeyance for approximately two and a half years to protect the First Respondent's fair trial rights in criminal proceedings amounted to "exceptional circumstances" pursuant to the definition in section 89L(3) of the TAA.

About this document

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