

## CASE SUMMARY

# CIR v Tower City Holdings Ltd

Decision date: 31 August 2020

**CSUM 20/10**

## CASE

**The Commissioner of Inland Revenue v Tower City Holdings Limited [2020]  
NZHC 2239**

## LEGISLATIVE REFERENCES

Companies Act 1993, ss 241(2), 241(4), 194, 131, 135, 137, 246

Tax Administration Act 1994, parts 4A and 8A

High Court Rules 2014, r 5.61

## LEGAL TERMS

liquidation, winding-up, interim liquidation, GST, income tax

## Summary

The Commissioner applied for an order under s 241(4) of the Companies Act ("CA1993") placing the defendant company ("Tower") into liquidation on a number of grounds, including the company's inability to pay its debts, its failure to keep proper accounting records and breaches of various directors' duties. The defendant company unsuccessfully argued that the order should not be made.

## Impact

The result indicates that the Court will at least sometimes be willing to grant a liquidation order where some of the debt is subject to dispute, so long as the Commissioner can establish she has standing as a creditor and can make out one or more of the grounds for liquidation in s 241(4) of the CA 1993. What is still unclear is whether the Commissioner would have been (or will be in future cases) successful in establishing standing to bring the claim when all of the debt in question is the subject of dispute.

## Facts

### Background – Tower's tax debt

The Commissioner commenced an audit of Tower (a property development company) in 2015, and in May 2017 made default assessments in respect of income tax for the tax years ended 31 March 2014 to 31 March 2016. Only the assessment for the 2016 year resulted in a liability to pay tax. The assessed income tax of \$4,084,478.22 related to the sale of three properties in Auckland. The Commissioner also assessed Tower for an evasion shortfall penalty of \$3,063,358.70.

A default assessment was also made in May 2017 in respect of GST for the period ended 31 July 2016, resulting in GST to pay of \$273,913.04, relating to the sale of another Auckland property. An evasion shortfall penalty of \$205,434.78 was assessed for failing to declare the sale for GST purposes.

The total amount of the assessments came to \$7,627,184.74.

Tower issued NOPAs in respect of the assessments, and the Commissioner issued NORs. The dispute reached conference stage and then stalled during the process of organising a date for a facilitated conference.

In March 2019, Tower filed two income tax returns for the tax years ending 31 March 2017 and 31 March 2018. The 2017 return declared \$46,331 to pay, which was due to be paid by

7 February 2018 but was not paid. Tower also filed GST returns in March 2019, covering five GST periods. One return, for the period ended 31 December 2017, assessed GST to pay of \$286,885.27, which was due to be paid by 28 February 2019, but was not paid.

After the audit began, Tower transferred a number of properties out of its ownership, without applying any of the proceeds to its tax debts. The Commissioner was particularly concerned about the nature of some of the property transactions, which did not appear to be arms-length commercial transactions between bona fide third parties, and with the dissipation of the proceeds to Tower's director and to two other individuals involved with the management and control of the company (both had at times also been directors). For this reason, the Commissioner made the application for the appointment of interim liquidators as well as the liquidation application.

### **Liquidation application and the application for the appointment of interim liquidators**

The Commissioner filed an application to place Tower into liquidation in July 2019. At the same time, she filed a without application for an order under s 246 of the CA 1993 appointing interim liquidators to Tower, which was granted. (*Commissioner of Inland Revenue v Tower City Holdings Ltd* [2019] NZHC1577)

In granting the application for the appointment of interim liquidators, Associate Judge Andrews concluded that the Commissioner's application would in all probability succeed. The Court agreed with the Commissioner's submission that the dispute raised by Tower was not genuine, but rather a delaying tactic. There was also a portion of the tax that was self-assessed and not subject to any dispute. Further, there was no prejudice to Tower's ability to pursue its dispute, as the Commissioner's application expressly sought to preserve Tower's dispute and/or challenge rights under Parts 4A and 8A of the Tax Administration Act 1994 ("TAA").

The grounds under s 241(4) of the CA 1993 upon which the Commissioner based her liquidation claim were:

Tower was unable to pay its debts, not only because it was insolvent, but because the wilful actions and conduct of those with control and management of Tower were preventing it from paying its debts (s 241(4)(a)); *Commissioner of Inland Revenue v Tower City Holdings Limited* [2020] NZHC 2239.

Tower had persistently or seriously failed to keep proper accounting records (s 241(4)(b));

Tower's directors had in a serious or persistent way failed to comply with duties relating to Tower under the CA 1993, specifically their duties under s 131, 135 and 137 (s 241(4)(bb)); and

It was just and equitable that Tower be placed into liquidation by the Court.

## Issues

Preliminary question – Did the Commissioner have standing to claim as a “creditor” of Tower?

Was the liquidation proceeding vexatious, and/or an abuse of process?

Had the Commissioner shown that Tower had persistently or seriously failed to comply with s 194 of the CA 1993 ?

Had the Commissioner shown that Tower was unable to pay its debts?

Did Tower have a genuine and substantial argument that there were GST set-offs which did or may exceed any amount owing to the Commissioner?

Had the Commissioner shown that Tower’s directors had, in a persistent and/or serious way, failed to comply with duties relating to Tower under ss 131, 135, and/or 137 of the CA 1993?

Had the Commissioner shown that it would be just and equitable to put Tower into liquidation?

## Decision

### ***Did the Commissioner have standing to claim as a “creditor” of Tower?***

The Court held that the Commissioner was a creditor of Tower, based on Tower’s two self-assessed returns showing an indebtedness of \$333,216.27, and did not require leave (as a prospective or contingent creditor would have done) to bring the claim.

### ***Was the liquidation proceeding vexatious, and/or an abuse of process?***

This became an issue because counsel for Tower submitted that the claim had been brought for vexatious or ulterior motives, namely:

- so that the Commissioner could avoid determining Tower’s GST returns and/or making refunds to Tower;
- to obtain information about third parties,
- to deny Tower its rights to dispute and/or challenge the Commissioner’s application under the TAA.

The Court found that there was no basis for any of the allegations of abuse of process.

***Had the Commissioner shown that Tower had persistently or seriously failed to comply with s 194 of the CA 1993?***

The Court found that there was “no doubt” that the Commissioner had shown that Tower had seriously and persistently failed to comply with its obligations under s 194 of the CA 1993 (being the obligation to keep proper accounting records).

The Court concluded that satisfying this ground was sufficient for the Commissioner to be entitled to a liquidation order, and that there was no sound basis on which it should exercise its discretion against making an order. The liquidation order was therefore made on the basis of this ground having been established.

***Had the Commissioner shown that Tower was unable to pay its debts?***

Having determined that a liquidation order would be granted on the previous issue, the Court considered that there was strictly no need to address this issue, but recorded that, if necessary, it would have found for the Commissioner on this issue.

***Did Tower have a genuine and substantial argument that there were GST set-offs which did or may exceed any amount owing to the Commissioner?***

Again, an answer was not strictly required, but had an answer been necessary, the Court’s answer would have been “no”. It was not disputed that Tower owed the self-assessed amounts of tax, and r 5.61 of the High Court Rules 2016 precludes any set-off against that debt.

***Had the Commissioner shown that Tower’s directors had, in a persistent and/or serious way, failed to comply with duties relating to Tower under ss 131, 135, and/or 137 of the CA 1993?***

Again, no answer was required, and with respect to this issue the Court considered it “neither necessary nor appropriate to embark on an analysis of the performance of the directors, in a number of complex transactions, in order to make findings on whether they discharged their respective duties under ss 131, 135, and 137 of the Act (and to the extent that they did not, whether their defaults can be characterised as “persistent” or “serious”, so as to justify the making of a liquidation order).”

***Had the Commissioner shown that it would be just and equitable to put Tower into liquidation?***

Again, the Court considered there was no need to address this issue, as the need for a liquidation was clear on the issue of serious and persistent breach of s 194 of the Act, and “nothing useful would be added by making findings on the question of whether the circumstances are also caught by the broad “just and equitable” jurisdiction in s 241(4)(d) of the Act.”

## About this document

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