

CASE SUMMARY

High Court dismisses Commissioner's application for an extension of time to issue challenge notice.

Decision date: 16-March-2022

CSUM 22/01

CASE

CIR v Parore [2022] NZHC 488

LEGISLATIVE REFERENCES

Tax Administration Act 1994, ss 89 H, 89L(1B), 89L(2B), 89L(3), 89P

High Court Rules 2016, r 19.5

LEGAL TERMS

Originating application

Extension of time

Exceptional circumstance

Fair trial rights

Delay

Prosecutorial misconduct

Summary

The Commissioner applied and was granted leave to commence a proceeding under s 89(1B) of the TAA by way of originating application. She sought an order, in accordance with s 89L(2B), for an extension of time for issuing a challenge notice to Mr Parore.

The Commissioner sought an extension of time because the civil tax disputes procedure she instituted was deferred in June 2018 while criminal proceedings against Mr Parore ran their course. The Commissioner submitted that this was an “exceptional circumstance” under s 89L(3) which prevented her from issuing a challenge notice to Mr Parore within the four-year time limit in s 89P.

Harvey J declined the application, on the basis that it would be inappropriate for the Commissioner’s own prosecutorial misconduct to be accepted as an “exceptional circumstance” to justify an extension of time.

Impact

This decision is confined to the facts of its case. Despite the finding at [53] “I do not accept that the ground argued by the Commissioner, that the need to delay the progression of the civil dispute to protect the taxpayer’s fair trial rights, amounted to a qualifying event or circumstance in the context of s 89L(3)”, it seems the Judge made that finding on the facts of the case and is not saying that it could never amount to a qualifying circumstance.

Facts

Mr Parore is a real estate agent. He was adjudicated bankrupt in 2009 and discharged in 2014. During (and after) his bankruptcy, he continued to work as a real estate agent. For the years 2012 to 2017, the Commissioner contended that Mr Parore failed to pay GST and had not filed income tax returns. Mr Parore took the view that the returns during the period of his bankruptcy were the responsibility of the Official Assignee.

In 2018, the Commissioner commenced a civil tax dispute procedure against Mr Parore. The proceedings were deferred in June 2018 when the Commissioner advised Mr Parore that he would also be subject to criminal prosecution. Charges were formally laid some 14 months later. The criminal proceedings were unsuccessful as the District Court found that Mr Parore’s fair trial rights had been compromised irreparably. This was due to the Commissioner commencing civil proceedings concurrently and compelling Mr Parore to disclose information during the civil proceeding; and then deferring those proceedings to commence a criminal

case against him in reliance on that disclosed information. The Commissioner subsequently appealed that decision and it was dismissed in December 2021.

The Commissioner sought an order, in accordance with s 89L(2B), for an extension of time for issuing a challenge notice to Mr Parore, on the basis that the deferral of the civil procedure (due to the criminal proceedings) was an “exceptional circumstance” which prevented her from issuing challenges to Mr Parore within the four year time limit in s 89P.

Issues

The principal issue for consideration before Justice Harvey was:

- Whether the application for an extension of time for issuing a challenge notice, essentially in order to enable the Commissioner to recommence the civil tax dispute process, should be granted.

To determine the above issue, the Court had to take into account whether an “exceptional circumstance” under s 89L(1B) existed that prevented the Commissioner from issuing a challenge notice within the four-year prescribed time frame.

As a procedural issue, Justice Harvey also considered whether it was appropriate to commence the proceedings by way of originating application.

Decision

Mode of application – Originating application

Leave was granted for the proceedings to be brought by way of originating application. Rule 19.5 of the High Court Rules 2016 sets out that the Court may, in the interests of justice, permit any proceeding not mentioned in rr 19.2 to 19.4 to be commenced by originating application. As there was no prescribed form for the application in either the TAA or the High Court Rules, it was accepted that an originating application was the appropriate procedure for “just, speedy, and inexpensive determination” of the issues.

Whether the application for an extension of time for issuing a challenge notice should be granted?

In order to determine whether or not an “exceptional circumstance” existed in order for the extension of time to be granted, Justice Harvey broke the issue down into three questions:

Was there a qualifying event or circumstance?

Does the qualifying event or circumstance provide a reasonable justification for the delay?

Should the Court exercise its residual discretion?

On the first question, Justice Harvey found that “the situation that has unfolded in this case could not properly be described as a qualifying event or circumstance to provide the relief that the Commissioner is seeking”. On the contrary, Harvey J found that the delays in the matter were largely a consequence of the Commissioner’s own actions and that she had breached Mr Parore’s fair trial rights “from the outset” at [62]. In short, Harvey J was of the view that the need to delay the progression of the civil dispute to protect Mr Parore’s fair trial rights, did not amount to a qualifying event or circumstance in the context of s 89L(3) of the TAA.

On the second question, Justice Harvey emphasised that the 14 month delay in advising Mr Parore that he would be subject to criminal prosecution and formally laying the charges was a decision by the Commissioner that contributed to the delay. Harvey J noted that even if he accepted that the “parking” of the civil proceedings while the criminal proceedings advanced was a qualifying circumstance, once the stay of the proceedings concluded on 13 December 2021, there was no justification for the Commissioner not having concluded matters within the four-year time frame. He found that:

“This is a situation where, if the Commissioner had acted promptly following Wylie J’s decision in December 2021, a disclosure notice could have been issue prior to 2022 and Mr Parore compelled to respond by February 2022 pursuant to the two-month statutory timeframe. This would have provided the Commissioner with enough time, acting promptly, to issue a statement of position and a challenge notice before 1 March 2022. I find little attraction to the submission that this was not done because the Commissioner does not take steps during December, the start of the holiday period.” at [68].

Finally, on the third question, Justice Harvey found that he did not need to exercise his residual discretion as he was not satisfied that the Commissioner identified qualifying exceptional circumstances; and even if the circumstances the Commissioner identified did qualify, he did not accept that they constituted a reasonable justification. He said:

“The remedy is disproportionate at this late stage of a lengthy process. I also consider that little would be gained by allowing the extension of time, and in any event, doing so would further penalise Mr Parore for the Commissioner’s apparent ill-handling of this case. As has been said, it would be inappropriate for the Commissioner’s own prosecutorial misconduct – regardless of fault – to now be accepted as an “exceptional circumstance” justifying an extension of time.”¹

As such, the Commissioner’s application under s 89L(1B) of the TAA for an extension of time was declined.

About this document

These are brief case summaries, prepared by Inland Revenue, of decisions made by the Taxation Review Authority, the District Court, the High Court, the Court of Appeal or the Supreme Court in matters involving the Revenue Acts. For Taxation Review Authority matters, names have been anonymized. The findings of the court described in a case summary will no longer represent current law where the matter has been successfully appealed or subsequent amended legislation has been enacted.