

TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTOTANGA WHAKATAU Ā-TURE > WHAKAWĀ

Disputable decision and employer registration requirements

Decision date | Te Rā o te Whakatau: 24 September 2021

Issue date | Te Rā Tuku: 8 March 2022

TDS 22/04

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Subjects | Ngā kaupapa

TAA: disputable decision, NOPA requirements, employer registration; income tax: PAYE obligations.

Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

CCS	Customer and Compliance Services, Inland Revenue
Commissioner or CIR	Commissioner of Inland Revenue
ITA	Income Tax Act 2007
NOPA	Notice of proposed adjustment
TAA	Tax Administration Act 1994
TCO	Tax Counsel Office, Inland Revenue
TNOPA	Notice of proposed adjustment issued by the Taxpayer

Taxation laws | Ngā ture take

All legislative references are to the Tax Administration Act 1994 (**TAA**) unless otherwise specified.

Facts | Ngā meka

1. The Taxpayer is an incorporated company. It sent a request to Customer and Compliance Services, Inland Revenue (**CCS**) to be registered as an employer via its MyIR account.
2. CCS sent a letter to the Taxpayer advising that its registration request could not be approved until further information was provided to verify the company's status as an employer and the time that it first began to employ staff.
3. CCS did not receive the information requested and as a result sent a further letter to the Taxpayer to inform it that its registration request had been denied. CCS also advised that they still required the information, and their request was being made pursuant to the Commissioner's information gathering power in s 17B. The Taxpayer did not, however, provide any of the information.
4. The Taxpayer issued a notice of proposed adjustment (**NOPA**) disputing the decision of the Commissioner to deny the registration request.

Issues | Ngā take

5. The main issues considered in this dispute were:
 - whether CCS's decision to decline the Taxpayer's request to be registered as an employer was a disputable decision;
 - whether the NOPA issued by the Taxpayer (**TNOPA**) met the requirements of ss 89F(3)(b) and 89F(3)(c);
 - whether CCS's decision to decline the Taxpayer's registration request was correct;
 - whether the Taxpayer was required to meet any PAYE obligations it may have.

Decisions | Ngā whakataau

6. The Tax Counsel Office (**TCO**) decided that:
 - CCS's decision was a disputable decision that the Taxpayer was entitled to challenge by issuing a NOPA.
 - Although the TNOPA was brief and lacking in detail, it would meet the requirements of s 89F(3)(b) and (c) as it contained sufficient information from which the Taxpayer's position can be inferred.
 - CCS had the discretion to decline the Taxpayer's registration request and that discretion was exercised correctly.
 - CCS's decision to decline the Taxpayer's request did not mean that the Taxpayer was exempted from meeting any obligations that it may have under s RA 5 of the Income Tax Act 2007 (**ITA**) and the PAYE rules.¹

Reasons for decisions | Ngā take mō ngā whakataau

Issue 1 | Take tuatahi: Disputable decision

7. CCS argued that the Taxpayer was not entitled to initiate the statutory disputes process by issuing a NOPA because their decision was not a "disputable decision" as defined in s 3. The Taxpayer argued that CCS's decision was a disputable decision for the purposes of that definition.

¹ Defined in s RD 2(1) of the ITA.

8. The term “disputable decision” is relevantly defined in s 3 to mean an assessment or a decision of the Commissioner under a tax law.² A decision that cannot be challenged under Part 8A is, however, excluded from the definition. Relevantly, a matter by which a provision in the PAYE rules is left to the discretion, judgment, opinion, approval, consent, or determination of the Commissioner cannot be challenged under Part 8A and is not a disputable decision.³
9. For the purposes of the definition of “disputable decision”, the word “decision” is defined in s 3 to include the making, giving, or exercising of a discretion, judgment, direction, opinion, approval, consent, or determination by the Commissioner.
10. This dispute involved an issue concerning the meaning of the words “under a tax law” in the definition of “disputable decision”. The meaning of an enactment must be ascertained from its text and considering its purpose.⁴ The purpose of the definition of “disputable decision” is to define the types of decisions for which taxpayers have challenge rights and dispute rights. Specifically, the definition confers challenge rights and dispute rights on a taxpayer if a decision is “made under a tax law” and the decision affects the taxpayer.
11. On one view, CCS’s decision to decline the Taxpayer’s registration request was not made under a tax law because there is no provision that deals with employer registration and the specific laws that CCS considered does not confer decision-making powers on the Commissioner. However, it is considered that this is an overly restrictive interpretation of the words “under a tax law” because it produces an outcome that is inconsistent with the purpose of the definition of “disputable decision”. That is, the interpretation would deny a taxpayer dispute and challenge rights in relation to decisions that affect a taxpayer. In the present dispute the relevant decisions are whether a taxpayer is an employer and whether it has withholding, payment and filing obligations and, consequentially, whether it is entitled to be registered as an employer.
12. For this reason, it is considered that a broader approach to the interpretation of the words “under a tax law” is appropriate and useful guidance for this is provided by the decision in *Australian National University v Burns* where similar wording was considered.⁵ The issue in that case was whether a decision to dismiss a professor came within s 3 of the Administrative Decisions (Judicial Review) Act 1977 being “a

² A “tax law” is defined in s 3 to be a provision of the Inland Revenue Acts of which the TAA is one.

³ Section 138E; s RD 2(1) of the ITA

⁴ Section 5(1) of the Interpretation Act 1999. See also *Commerce Commissioner v Fonterra Co-operative Group Ltd* [2007] NZSC 36 and *CIR v Alcan New Zealand Limited* (1994) 16 NZTC 11,175, at 15, 17 and 24.

⁵ *Australian National University v Burns* (1982) 43 ALR 25.

decision of an administrative character made ... under an enactment". In dealing with this issue the Full Federal Court agreed with Fox J who said in *Evans v Freimann* that the word "under" in the context of the Judicial Review Act, connotes "in pursuance of" or "under the authority of".⁶

13. When CCS decided that the Taxpayer was not an employer and that it did not have withholding, payment and filing obligations they interpreted and applied tax laws to the Taxpayer. CCS's conclusions about how the laws applied to the Taxpayer were the basis on which they made their decision to decline the Taxpayer's request. It is considered that this means CCS's decision was a decision made "under" a tax law in the first sense of that word discussed in *Australian National University v Burns*. In reaching this conclusion it is considered material that the laws were specific, identifiable tax laws that affected the Taxpayer because they were applied for the purpose of determining whether the Taxpayer was an employer and whether it had withholding, filing and payment obligations under the PAYE rules. Further, CCS's decision also affected the Taxpayer in a practical sense because it resulted in the Taxpayer being denied access to Inland Revenue's MyIR employer registration platform. It is considered that in these circumstances CCS's decision was made in pursuance of the tax laws that they applied to the Taxpayer. As such, CCS's decision to decline the Taxpayer's registration request, and the prior decisions upon which it was based, were decisions made under tax laws for the purposes of the s 3 definition of "disputable decision".
14. A decision to refuse an employer registration request is not a matter that is mentioned in the PAYE rules. Consequently, CCS's decision to reject the Taxpayer's registration request is not a matter that a provision in the PAYE rules left to the discretion, judgment, opinion, approval, consent, or determination of the Commissioner. Furthermore, CCS's decision that the Taxpayer was not an employer and that it did not have withholding, payment and filing obligations is not excluded from challenge under Part 8A. This is because the provisions that CCS applied do not leave these matters to the discretion, judgment, opinion, approval, consent, or determination of the Commissioner. Instead, they apply independently of any action of the Commissioner.
15. Consequently, CCS's decision to decline the Taxpayer's application was a disputable decision for the purpose of the definition of "disputable decision" in s 3. CCS gave notice of the decision to the Taxpayer in their letter and the notice affected the Taxpayer because it concerned the Taxpayer's obligations under the PAYE rules, and it resulted in the Taxpayer's registration request being declined. Consequently, the

⁶ *Evans v Freimann* 35 ALR 428 at 436; 3 ALD 326 at 333

Taxpayer was entitled to issue a NOPA under s 89D(3) for the purpose of disputing CCS's decision to decline its registration request.

Issue 2 | Take tuarua: NOPA requirements

16. The requirements that a NOPA must meet are set out in s 89F. If the TNOPA does not meet those requirements, the Taxpayer will not have initiated the statutory disputes process in Part 8 of the TAA as the first step in that process is the issuing of a valid NOPA. The Taxpayer followed the procedure set out in s 89D(3) for initiating a dispute by issuing the NOPA. The validity of the TNOPA was raised by CCS.
17. The Court of Appeal in *Alam and Begum* set out the approach to be taken when the validity of a taxpayer's notice of response (**NOR**) is disputed.⁷ From this decision it is concluded:
 - The Commissioner does not have the statutory power to determine the validity of a NOR by rejecting it on the ground that it is non-compliant.
 - The Commissioner may take a view on whether the NOR is compliant, but that will not "determine" the validity of the NOR.
 - The validity of a NOR can only be determined by the TRA or a court.
18. The High Court has held that the approach taken in *Alam and Begum* also applies where the validity of a taxpayer's NOPA is disputed.⁸
19. Based on *Alam and Begum* and *Riccarton Construction Limited v CIR*, it is considered that if CCS forms the view that a NOPA issued by a taxpayer is invalid then CCS should still proceed with the dispute as if the document is valid. If the dispute proceeds to challenge stage, the Commissioner may contest the validity of the disputes document before the TRA or a court. Therefore, despite forming the view that the TNOPA is invalid, CCS followed the correct approach by continuing with the present dispute. If the dispute proceeds to challenge stage, the Commissioner may contest the validity of the TNOPA before the TRA or a court.
20. Although the TNOPA is very brief and lacking in detail, it could be seen to meet the requirements of s 89F(3)(b) on the grounds that it contains sufficient information from which the Taxpayer's position can be inferred. Ultimately, however, the issue as to whether or not the TNOPA meets the requirements of s 89F(3)(b) and (c) is a matter for the TRA or a court to decide.

⁷ *Commissioner of Inland Revenue v Alam and Begum* [2009] NZCA 273; (2009) 24 NZTC 23,564.

⁸ *Riccarton Construction Limited v CIR* (2010) 24 NZTC 24,191 (HC) at 24,202.

21. Furthermore, although there are grounds upon which a court might conclude that the TNOA does not meet the requirements of s 89F(3)(b) and (c), it is considered that a court would be unlikely to dispose of this dispute on this basis. The dispute has now progressed to a point where the parties' arguments are reasonably clear and well defined. Therefore, if this matter were to proceed to court, it could be decided by assessing the merits of the parties' arguments. This is the approach taken by TCO in considering this dispute.

Issue 3 | Take tuatoru: Declining employer registration

Onus and standard of proof

22. The onus of proof in civil proceedings⁹ is on the taxpayer, except for shortfall penalties for evasion or similar act, or obstruction.¹⁰ The taxpayer must prove that an assessment is wrong, why it is wrong, and by how much it is wrong.¹¹
23. The standard of proof in civil proceedings is the balance of probabilities.¹² This standard is met if it is proved that a matter is more probable than not. Whether the Taxpayer has discharged the onus of proof is considered in this issue.

Allegations of impropriety

24. The Taxpayer contends that CCS acted vexatiously and in bad faith when they declined its registration request. An allegation of bad faith is best addressed in the challenge process before the TRA or the courts. Any defects in the Commissioner's actions or procedures can be addressed by the TRA or a court if a dispute proceeds to challenge stage.¹³ Therefore, as stated by the High Court in *Dandelion Investments Ltd v CIR*,¹⁴ the proper course for challenging the assessment is not to attack the method by which the Commissioner made it but to provide the TRA or

⁹ Challenge proceedings (ie, the proceedings that would follow if a dispute proceeds to a Taxation Review Authority or a court) are civil proceedings.

¹⁰ Section 149A(2).

¹¹ *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA); *Beckham v CIR* (2008) 23 NZTC 22,066 (CA).

¹² Section 149A(1) of the TAA; *Yew v CIR* (1984) 6 NZTC 61,710 (CA); *Birkdale Service Station Ltd v CIR* (1999) 19 NZTC 15,493 (HC); *Case X16* (2005) 22 NZTC 12,216; *Case Y3* (2007) 23 NZTC 13,028.

¹³ *Tannadyce Investments Ltd v CIR* [2011] NZSC 158, (2011) 25 NZTC 20-103.

¹⁴ *Dandelion Investments Ltd v CIR* (1996) 17 NZTC 12,689 (HC). This approach was expressly approved by the Court of Appeal in *Dandelion Investments Ltd v CIR* (2003) 21 NZTC 18,010 (CA) at [62].

court with the evidence and arguments necessary for it to deal with the matter in the manner the taxpayer contends.

Correctness of CCS's decision

25. The TAA confers specific powers on the Commissioner which enable the Commissioner's delegates to do a range of things while conducting the Commissioner's administrative functions and responsibilities under the Inland Revenue Acts. There are, however, no provisions in the Inland Revenue Acts that deal specifically with employer registration. As such, there is no provision that confers a power on the Commissioner to review employer registration applications and to decline them if she considers it appropriate to do so.
26. The absence of an express provision of this nature is not by itself a reason for concluding that the Commissioner does not have the power to review and decline employer applications in appropriate cases. At the time CCS declined the Taxpayer's request, s 34(2) of the State Sector Act 1988 (**SSA**) provided that the Commissioner had all the powers necessary to carry out the statutory functions, responsibilities, and duties imposed on the Commissioner under any Act. Therefore, in determining whether CCS were empowered to decline the Taxpayer's request, it is necessary to ask whether CCS's review of the Taxpayer's application was the carrying out of a statutory function, responsibility or duty imposed on the Commissioner under any Act. If it was, it will be a task that the Commissioner was empowered to carry out as such a power is necessary to enable the task to be performed.
27. Section 6A charges the Commissioner with the care and management of the taxes covered by the Inland Revenue Acts. This involves a general duty of administering the Inland Revenue Acts and, as the PAYE rules are a part of the Inland Revenue Acts, the Commissioner has a statutory duty to administer the PAYE rules. Furthermore, in doing so the Commissioner must act in accordance with s 6 and use her best endeavours to protect the integrity of the tax system.
28. The PAYE rules contain provisions that require employers to withhold tax from PAYE income payments and pay the tax to the Commissioner. They also contain rules that require employers to provide employer income information to the Commissioner. Information published on Inland Revenue's public website indicates that the purpose of the employer registration platform is to facilitate employers meeting these obligations. In this regard, the platform enables registered employers to provide employer income information to Inland Revenue,¹⁵ to receive

¹⁵ <https://www.ird.govt.nz/employing-staff/payday-filing>

employer related information from Inland Revenue,¹⁶ to make payments to Inland Revenue,¹⁷ and to access and review payment and filing information recorded in their PAYE accounts.¹⁸

29. As the purpose of the employer registration platform is to facilitate employers meeting their obligations under the PAYE rules, activities undertaken by CCS in the administration of the platform are activities carried out in the performance of the Commissioner's statutory duty to administer the PAYE rules. It follows that a decision to review a registration application to ensure that the person who made the application is an employer is a task carried out in the administration of the platform. For this reason, it is considered this was a task which CCS, as the Commissioner's delegates, were empowered to perform by s 34(2) of the SSA.
30. As the purpose of Inland Revenue's employer registration platform is to facilitate employers meeting their obligations under the PAYE rules, it is appropriate that access to the platform is restricted to employers. As noted, an employer is a person who pays or is liable to pay a PAYE income payment. Although CCS repeatedly asked the Taxpayer to provide information that would substantiate its claim that it is an employer, the Taxpayer has not done this. The Taxpayer argues that CCS have no power to require the provision of such information because they do not have the power to decline an employer registration request. However, for reasons noted above, it is considered that this is not correct. Further, pursuant to s 17B, CCS may require a person to provide information that they consider necessary or relevant and CCS elected to exercise that power in relation to their information request issued to the Taxpayer.
31. Ultimately, however, the issue as to whether CCS were correct to decline the Taxpayer's registration request does not turn on s 17B. As the onus of proof is on the Taxpayer, it must prove that it is an employer if it wishes to successfully dispute CCS's decision. It is considered that the Taxpayer's failure to provide any evidence to show that it pays or is liable to pay a PAYE income payment means it has not done this.
32. For this reason, it is considered that CCS's decision to decline the Taxpayer's registration request was correctly made and no evidence of impropriety by CCS has been provided by the Taxpayer.

¹⁶ <https://www.ird.govt.nz/employing-staff/register-as-an-employer>

¹⁷ <https://www.ird.govt.nz/managing-my-tax/make-a-payment/ways-of-paying>

¹⁸ <https://www.ird.govt.nz/employing-staff/payday-filing/paying-deductions-to-inland-revenue>

Issue 4 | Take tuawhā: PAYE obligations

33. Section RA 5 of the ITA provides that a person who pays a PAYE income payment must withhold an amount of tax from the payment and pay the tax to the Commissioner under subpart RD of the ITA. There is no provision in the ITA or the TAA which provides that a person may be exempted from these obligations. Therefore, if the Taxpayer pays a PAYE income payment, it must meet the obligations set out in s RA 5 and subpart RD of the ITA.
34. The Taxpayer argues that CCS's refusal to accept its registration application has made complying with its PAYE obligations impossible. However, it is considered that this is incorrect. If the Taxpayer pays a PAYE income payment the appropriate course is for the Taxpayer to calculate the amount of tax to be withheld from the payment and to withhold the amount when the payment is made. The Taxpayer calculates the amount of tax to be withheld by applying the provisions in subpart RD of the ITA that apply to the PAYE income payment. Similarly, the Taxpayer determines the date that it is required to pay the tax to the Commissioner by applying s RD 4 of the ITA. Inland Revenue's public website lists the payment methods available to the Taxpayer for this purpose. They include internet banking, credit card, debit card and direct debit.¹⁹ The website also publishes details of the account that the withheld amounts must be paid into.²⁰
35. Therefore, if the Taxpayer has withholding and payment obligations under the PAYE rules it is able to meet those obligations by calculating an amount of tax to be withheld, withholding the tax, and then paying the tax into the Commissioner's bank account. It is considered that the Taxpayer does not require access to an employer account in MyIR to do any of these things. Further, Inland Revenue publishes an "Employer's guide" which is available to assist the Taxpayer in meeting these obligations.
36. If the Taxpayer pays PAYE income payments, it will also be required to provide employer income information to the Commissioner. The Taxpayer determines the information that it is required to provide and the times at which it must be provided by applying s RD 22 of the ITA and ss 23E to 23H and s 23J.
37. During the first 6 months of employing people, an employer may provide employer income information in a paper format. After that time, the employer is required to provide the information electronically unless it comes within the non-electronic group in s 23F(91). Therefore, if the Taxpayer is an employer, it may at some time be required to provide employer income information electronically. For this

¹⁹ <https://www.ird.govt.nz/managing-my-tax/make-a-payment/ways-of-paying>

²⁰ <https://www.ird.govt.nz/managing-my-tax/make-a-payment/ways-of-paying/paying-electronically>

purpose, the Taxpayer may require access to an employer account in MyIR.²¹ It is considered that in such a case, the appropriate course would be for the Taxpayer to provide details of the PAYE income payments it is making, and for CCS to provide the Taxpayer with an employer account in MyIR. Alternatively, the Taxpayer may choose to provide details of the PAYE income payments it is making to CCS at an earlier time if it wishes to obtain all the advantages of being registered as an employer in MyIR.

38. The Taxpayer argued that CCS does not have the power to reverse their decision to decline its registration request. However, it is considered that this is not correct. CCS have the powers necessary to carry out the Commissioner's functions under the Inland Revenue Acts. Those functions include registering a person as an employer if the person is, in fact, an employer, regardless of whether or not CCS may have declined a previous registration application that the person made.

²¹ The Taxpayer would be required to provide its employer income information via Inland Revenue's employer platform or through payroll software.