EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT ROTORUA

CIV-2014-063-000509
[2016] NZDC 20012

BETWEEN	COMMISSIONER OF INLAND REVENUE Plaintiff
AND	RONALD MAXWELL WILSON Defendant

Hearing: 15 September 2016

Appearances: P Courtney for the Plaintiff
K Badcock for the Defendant

Judgment: 25 October 2016

RESERVED JUDGMENT OF JUDGE P W COOPER
[On application to set aside judgment]

The application

[1] This is an application by the defendant to set aside a judgment given on 17 June 2015 in favour of the plaintiff in the sum of $137,303.10. Judgment was sealed by the Court on 25 August 2015.

The claim

[2] The claim was in respect of GST, late penalties and interest.

[3] Proceedings in respect of the claim were filed by the plaintiff on 2 December 2014. The proceedings were served on the defendant on 24 January 2015.

[4] The defendant did not file a statement of defence and the plaintiff sought judgment by default by way of formal proof pursuant to r 15.9 District Courts Rules 2014.

[5] Affidavits of Dianna Hutchison in support of the application for formal proof were filed. The matter was listed for a formal proof hearing on 25 May 2015. Although in terms of r 15.9(2), notice is not required to be given to the defendant (he not having filed a statement of defence), notice was sent to the defendant to the date of hearing.

[6] On 25 May 2015, the defendant appeared in person at the hearing. The defendant asserted that he had not been served with the proceedings and disputed the amount claimed. The proceedings were adjourned to 17 June 2015 with His Honour Judge Menzies directing that further copies of the papers be provided to the defendant and if necessary, the process server be available to give evidence on 17 June 2015. There was proof of service of the proceedings on the defendant by way of an affidavit of service of Stephen Johnson, sworn on 29 January 2015.

[7] On 27 June 2015, Mr Badcock appeared for the defendant. The defendant conceded that the proceedings were properly served on him. Mr Badcock sought a further adjournment to see whether settlement could be reached between the parties. This was declined and judgment was entered for the plaintiff as sought by default by formal proof.

[8] On 15 June 2016 (some 12 months later), the defendant applied to set aside the judgment; asserting that he has a substantial ground of defence that he can now prove but was unable to do so prior to judgment being entered.

The law

[9] Initially the Commissioner's position was that the judgment entered was a final judgment and not amenable to an application to set it aside. However, as mentioned earlier, the judgment was a judgment by default by way of formal proof

pursuant to r 15.9 District Courts Rules. Such a judgment may be varied or set aside in terms of r 15.10, which provides:

> "Any judgment obtained by default under rule 15.7, 15.8, or 15.9 may be set aside or varied by the court on such terms as it thinks just, if it appears to the court that there has been, or may have been, a miscarriage of justice."

[10] The overriding consideration is the interests of justice; *Russell v Cox*[1]. In the context of r 15.10, this will generally involve the Court considering:

(a) Whether the defendant's failure to file a statement of defence was excusable;

(b) Whether the defendant has a substantial ground of defence;

(c) Whether the plaintiff would suffer irreparable injury if judgment was set aside.

[11] The stumbling block for the defendant on the present application is that he simply does not have a defence to the plaintiff's claim.

[12] The defendant's tax liability in this case arises out of a GST debt owed by a trust of which the defendant was a trustee. His liability for the unpaid GST debt of the trust arises by virtue of s 57 Goods and Services Tax Act 1975. In 2003, the core tax amount of GST owed by the defendant was $17,693.65. This amount has remained unpaid since July 2003 and with the addition of penalties and interest, the liability increased over the 12 year period until judgment to a sum of $137,303.10 (including costs).

[13] Section 109 Tax Administration Act 1994 provides:

> "**109 Disputable decisions deemed correct except in proceedings**
>
> Except in objection proceedings under Part 8 or a challenge under Part 8A,—
>
> (a) No disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and

[1] *Russell v Cox* [1983] NZLR 654

(b) Every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects."

[14] So in relation to the core tax liability of the defendant, the defendant has no defence to a claim.

[15] The interest component of the defendant's liability arises from s 120D Tax Administration Act which provides:

"**120D Liability to pay interest**

(1) A taxpayer is liable to pay interest on unpaid tax to the Commissioner in accordance with this Part.

(2) The Commissioner may recover interest payable on unpaid tax as though it were tax (of the same type as the unpaid tax) payable by the taxpayer."

[16] Section 120I provides:

"**120I No right to object to interest**

(1) A taxpayer may not object to or challenge the imposition of interest payable under this Part."

[17] Mr Badcock, for the defendant, accepts that the defendant cannot challenge the amount of core tax liability or the interest liability of the defendant. He accepts that the quantum of the claim is properly calculated in terms of the Act. The defence raised by the defendant is that it is not fair for the Commissioner to seek to recover the amount claimed in this case, particularly in relation to interest, because IRD "sat on its hands" for six years before bringing its claim. Mr Badcock refers to s 6 Tax Administration Act which provides:

"**6 Responsibility on Ministers and officials to protect integrity of tax system**

(1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.

(2) Without limiting its meaning, the integrity of the tax system includes—

(a) Taxpayer perceptions of that integrity; and

(b) The rights of taxpayers to have their liability determined fairly, impartially, and according to law; and

(c) The rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and

(d) The responsibilities of taxpayers to comply with the law; and

(e) The responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and

(f) The responsibilities of those administering the law to do so fairly, impartially, and according to law."

[18] In particular, counsel refers to s 6(2)(b) and submits that although the Commissioner has determined the defendant's liability "according to law", IRD has not acted "fairly".

[19] I should mention that Ms Courtney, on behalf of the Commissioner, does not accept that "IRD sat on its hands". She submits that there was a lengthy period where IRD was endeavouring to resolve all of the defendant's outstanding tax issues of which this liability formed one part.

[20] First of all, I note in passing that an argument that a government official has not acted fairly in the administration of the law is not a matter for the District Court. By a backdoor means the defendant is asking the District Court to judicially review an administrative action. Judicial review is outside the jurisdiction of the District Court and has very limited application in relation to tax liability. But in any event, the argument has no merit. "Fairly" in the context of s 6 Tax Administration Act does not relate to a taxpayer's subjective concepts of fair play which might be seen to impact unfairly on the taxpayer. The Commissioner is required to act lawfully and carry out his lawful duties fairly and impartially between taxpayers. In this broad sense, the Commissioner is required to act fairly and impartially and in every case he must act "according to law".

[21] In assessing the defendant's liability for core tax penalties and interest, the Commissioner is doing exactly what the law requires.

[22] Although not specifically related to s 6 Tax Administration Act, Judge Barber in *TRA No 95/086*[2] made some analogous comments in the context of a case where a taxpayer considered that the Commissioner had acted unfairly and took umbrage at a situation where he had been reassessed and required to pay substantially more tax than an earlier assessment. The taxpayer referred to the IRD slogan at the time, "It's our job to be fair". Judge Barber said this:

> "A lay person can be forgiven for thinking that it is unfair for [the Commissioner] to behave as if he were accepting the taxpayer's return of income levy tax accordingly, and then months later when the taxpayer has ordered his affairs on the basis of that assessment resile from it and claim substantially more tax. The Common Law would allow for no such outcome but the tax law, not only allows for it, but requires the Commissioner to rectify what he considers to be an error in an earlier assessment.
>
> Part of the resentment this engenders in affected members of the public is the use of the slogan which appears to be designed to persuade the public that the Commissioner will act fairly in all cases. There is nothing fair or unfair about the imposition and collection of tax. It is merely that sum which the Parliament considers it should exact from the income earning members of the public in order to pay for the cost of providing the goods and services which it thinks appropriate. The Commissioner's role in that process is not to act fairly, it is to act lawfully by taking from each taxpayer no more and no less than is that person's lawful obligation to pay.
>
> …
>
> If by his slogan –'it's our job to be fair', the Commissioner means no more than he will carry out his lawful duties fairly and impartially between taxpayers then it goes without saying. If however it is intended to suggest that in those cases where the application of the law can, by an appeal to abstract concepts of fair play, be seen to bear unfairly on a taxpayer, and the Commissioner will somehow relieve that unfairness, then the slogan is misleading. As this and other like cases suggest it is in this latter and misleading sense that some taxpayers interpret the slogan. Where that happens it is unfortunate and leads to unnecessary distress and avoidable litigation."

[23] The defendant has no defence to the claim and the application to set aside judgment must fail.

[24] This application appears to have been brought not because of any defence that the defendant has to the claim, but rather in response to an appeal the Commissioner has brought against a judgment of Associate Judge Christiansen in the

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[2] *TRA No 95/086* (1996) 17 NZTC 7,534

High Court in proceedings [2016] NZHC 87 of 22 April 2016. This was an application to set aside a bankruptcy notice and for an order approving proposed terms of payment of the judgment debt.

[25] At paragraphs [4] and [5] of his judgment, Judge Christiansen says:

> "[4] Mr Wilson says he has offered to repay the judgment debt in full but the Commissioner's refuses to accept his proposed terms of payment. He seeks the Court approval of his offered terms of payment of the judgment debt of $137,303.10.
>
> [5] Mr Wilson does not dispute the assessments which form the basis of the judgment entered but his position is that the law entitles him to seek to have the bankruptcy notice set aside and for his payment proposal to be approved."

Conclusion

[26] The application to set aside judgment is refused.

P W Cooper
District Court Judge