

New Zealand Stock Exchange v Commissioner of Inland Revenue; The National Bank of New Zealand Limited v Commissioner of Inland Revenue

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Judgment abstract: New Zealand Stock Exchange v Commissioner of Inland Revenue; The National Bank of New Zealand Limited v Commissioner of Inland Revenue

(1991) 13 NZTC 8,147

Judicial Committee of the Privy Council, 1991.

Judgment: 1 Jul 1991.

Income tax — Tax investigations — Demand for information and copies of documents — Commissioner attempting to obtain information from commercial sources without identifying specific individuals — Whether Commissioner entitled to records of commercial service providers in order to identify individuals for purposes of income tax compliance — Whether privacy of individuals breached — Whether Commissioner confined to requests for information about a specific taxpayer — Inland Revenue Department Act 1974 — sec 17(1).

This was an appeal by the taxpayers from a judgment of the Court of Appeal reported at [\(1990\) 12 NZTC 7,259](#).

Two separate actions against the Commissioner were joined by consent. In both cases, the Commissioner had served notices on the taxpayers under sec 17(1) of the Inland Revenue Department Act 1974. In the case of the New Zealand Stock Exchange, certain individual members were asked to provide information on a fixed number of their “largest” clients while in the case of the bank, information was sought on all persons who had dealt in commercial bills through the bank since 1986. Neither notice identified a particular taxpayer who was the subject of the Commissioner’s inquiries, nor was there any reference to a belief by the Commissioner that a particular taxpayer’s affairs should be investigated. The taxpayers issued proceedings asking the High Court to rule on the validity of the notices. The High Court held that sec 17(1) did not authorise the Commissioner to request information concerning individual names and addresses of persons who constituted a class. The Commissioner appealed to the Court of Appeal.

The Court of Appeal quashed the orders made in the High Court and held that the Commissioner was entitled to demand information about taxpayers from commercial organisations without identifying particular taxpayers.

The issue for consideration before the Judicial Committee of the Privy Council was whether the Commissioner had any power under sec 17 of the Inland Revenue Department Act to require information except in respect of a named individual whose tax affairs were under investigation.

For the taxpayers it was submitted that the scope of sec 17(1) should be limited so that the Commissioner was confined to requests for information about a specific taxpayer. The reasons advanced for the insertion of the proposed limitation were, first, that the Commissioner was seeking information which was confidential and, secondly, that the Commissioner was imposing on sharebrokers and bankers an onerous burden of research and report.

Held: taxpayer’s appeal dismissed (judgment delivered by Lord Templeman).

1. Although sharebrokers or bankers may resent the time and expense incurred in complying with a notice from the Commissioner requiring information about their clients, the Commissioner was

entitled to require information concerning a class of unidentified possible taxpayers for the purpose of enabling his statutory functions to be carried out.

2. The court can only interfere if satisfied that in making a particular requirement, the Commissioner exceeded or abused his powers. (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Clinch v Inland Revenue Commissioners* [1974] QB 76 cited.)

3. The principle of confidentiality was abrogated by sec 17 of the Act.

4. Confidentiality between banker and customer must be broken if the Commissioner was to obtain the information to enable him to carry out his statutory functions of assessing and collecting tax.

5. Every taxpayer was protected by the secrecy obligation imposed on the Commissioner.

6. The exercise of the powers conferred on the Commissioner by sec 17 was not unreasonable for the purposes of sec 21 of the New Zealand Bill of Rights Act 1990.

[Headnote by the CCH Tax Editors]

GP Barton QC, RA Dobson and RJ Cullen for the appellants.

JJ MacGrath QC, GD Pearson and A Satterthwaite for the Commissioner.

Before: Lord Keith of Kinkell, Lord Brandon of Oakbrook, Lord Templeman, Lord Oliver of Aylmerton, and Sir Robert Megarry.

Judgment of the court delivered by Lord Templeman

By sec 9 of the *Income Tax Act* 1976 of New Zealand, as amended (“the 1976 Act”) a taxpayer defined by sec 2 as a person chargeable with income tax, shall for the purposes of the assessment and levy of income tax furnish to the respondent Commissioner in each year a return or returns in the prescribed form or forms setting forth a complete statement of all the assessable income derived by him during the preceding year together with such other particulars as may be prescribed.

Assessable income as defined by sec 2 as income of any kind which is not exempted from income tax. By sec 19 of the 1976 Act:—

“(1) From the returns made ... and from any other information in his possession the Commissioner shall in and for every year, and from time to time and at any time thereafter as may be necessary, make assessments in respect of every taxpayer of the amount on which tax is payable and of the amount of that tax.”

By sec 21:—

“If any person makes default in furnishing any return, or if the Commissioner is not satisfied with the return made by any person, or if the Commissioner has reason to suppose that any person, although he has not made a return, is a taxpayer, he may make an assessment of the amount on which in his judgment tax ought to be levied and of the amount of that tax, and that person shall be liable to pay the tax so assessed, save in so far as he establishes on objection that the assessment is excessive or that he is not chargeable with tax.”

By sec 27, except in proceedings on objection to an assessment under the 1976 Act:—

“... no assessment made by the Commissioner shall be disputed in any Court or in any proceedings ... and ... every such assessment and all the particulars thereof shall be conclusively deemed and taken to be correct, and the liability of the person so assessed shall be determined accordingly.”

By sec 34:—

“(3) Where, in relation to a person being a taxpayer and to any assessment the tax assessed in which has become due and payable, any amount of deferrable tax is unpaid and any amount of tax that is not deferrable tax is unpaid, each such amount of unpaid tax may be recovered by the Commissioner as a separate debt arising from a separate cause of action.”

By sec 38 and 39 income tax shall be payable by every person on all income derived by him during the year for which the tax is payable and shall be assessed and levied on the taxable income of every taxpayer at such rate or rates as may be fixed from time to time.

Thus income tax at a stipulated rate is levied for the benefit of the community on the assessable income of every taxpayer and it is the duty of the Commissioner to see that such income is assessed to tax and that the tax is paid.

By accident or design, a taxpayer may default in his obligation to furnish a return or to disclose all his assessable income. In order to discharge his duty of assessing and recovering tax on all taxable income the Commissioner must discover the names of taxpayers and the respective sources and amounts of their assessable income. By sec 17(1) of the *Inland Revenue Department Act 1974* (“the Act of 1974”):—

“Every person ... shall, when required by the Commissioner furnish in writing any information and produce for inspection any books and documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts ...”

By sec 2 and the First Schedule, the Inland Revenue Act mentioned in sec 17(1) includes the 1976 Act.

If a person trades or deals in shares or commercial bills, profits thereby generated may constitute taxable income. In order to determine whether taxable income had been generated and to discover the relevant taxpayers, the Commissioner required information which would disclose to the Commissioner names of taxpayers who had bought and sold shares or bills and which would disclose sufficient detail to enable the Commissioner to assess those taxpayers in respect of assessable income generated by dealings in shares and commercial bills. Under sec 17 of the Act of 1974 the Commissioner therefore required some members of the Stock Exchange to produce a list of their largest clients and details of their purchase and sale of shares. The Commissioner also required the appellant bank and some other banks to produce the names and details of bank customers who had bought and sold or obtained the fruits of commercial bills.

In these proceedings the appellant, the New Zealand Stock Exchange, acting in the interests of its members, and the appellant bank, acting in the interests of banks generally, sought and obtained from *Jeffries J* a declaration against the Commissioner. As it emerged, the real issue was whether under sec 17 of the Act of 1974 the Commissioner had any power to require information except in respect of a named individual whose tax affairs were under investigation. The Court of Appeal (*Richardson, Somers, Casey, Bisson and Hardie Boys JJ* in *C of IR v New Zealand Stock Exchange*; *C of IR v National Bank of NZ Ltd* (1990) 12 NZTC 7,259) quashed the order of *Jeffries J* in *New Zealand Stock Exchange v C of IR*; *The National Bank of NZ Ltd v C of IR* (1990) 12 NZTC 7,068. The appellants now appeal to Her Majesty in Council.

Their Lordships would be content to adopt the comprehensive judgment of the Court of Appeal which was delivered by *Richardson J* but, in deference to the full and careful argument advanced before the Board by Mr Barton on behalf of the appellants, they will deal fully with the arguments put forward.

As *Richardson J* pointed out, sec 17 is expressed in the widest terms. The appellants seek to imply in sec 17 a limitation whereby the Commissioner may only require information:—

“Where the Commissioner has a specified taxpayer in mind in respect of whom there is a serious question in mind as to the tax liability of that taxpayer.”

It is impossible to insert that limitation as a matter of statutory construction. The limitation could only be inserted as a matter of policy by a process of judicial legislation on the grounds that Parliament could not have intended to confer on the Commissioner a power so wide as not to be subject to such a limitation.

Two reasons are suggested for the insertion of the proposed limitation, first, that the Commissioner is seeking information which is confidential and, secondly, that the Commissioner is imposing on sharebrokers and bankers an onerous burden of research and report.

If the Commissioner, exercising his undoubted powers under sec 17(1) of the Act of 1974, requires the bankers of a specified taxpayer under investigation to produce information about that taxpayer's activities, then the confidentiality which attaches to the relationship between banker and customer must be broken. The whole rationale of taxation would break down and the whole burden of taxation would fall only on diligent and honest taxpayers if the Commissioner had no power to obtain confidential information about taxpayers who may be negligent or dishonest. In recognition of the fact that confidential information cannot be concealed from the Commissioner, the Act of 1974 imposes stringent restrictions on the Commissioner. Section 13 requires every officer of the Inland Revenue to maintain and aid in maintaining the secrecy of all matters relating to the 1976 Act and other taxing statutes and requires every officer of the Department of Inland Revenue to make a statutory declaration of fidelity and secrecy. There are other provisions which are designed to secure and do secure the secrecy of information obtained by the Commissioner about the affairs of every taxpayer. There is no distinction between the secrecy and confidentiality which attach to an identified taxpayer and a non-identified taxpayer. Confidentiality must be broken if the Commissioner is to obtain the information to enable him to carry out his statutory functions of assessing and collecting tax. Every taxpayer is protected by the secrecy obligation imposed on the Commissioner. If the appellants' argument is correct, confidentiality does not assist the taxpayer who makes an honest return of his income or the dishonest taxpayer who is under investigation by the Commissioner but assists the dishonest taxpayer who conceals both his identity and his liability to tax from the Commissioner.

The appellants relied on the decision of the Court of Appeal in *C of IR v West-Walker* (1953) 10 ATD 337 [1954] NZLR 191. In that case the Commissioner sought information about a taxpayer from his solicitor and the court held that the solicitor was entitled to withhold information to which the common law legal professional privilege attached. The Commissioner was entitled to ask but the solicitor was entitled to decline to answer without the consent of his client. In the present case the appellants deny the right of the Commissioner to ask for the required information. Under the common law, but not under other systems of law, legal professional privilege forms a defence to a claim for information because as *Fair J*, citing Lord *Halsbury*, said in the *West-Walker* case at ATD p 240; NZLR p 204:—

“For the perfect administration of justice, and for the protection of the confidence which exists between the solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production.”

The court in *West-Walker* held that, in the absence of any express provision in the Income Tax Acts abrogating the principle of legal professional privilege, that principle excused the solicitor from supplying privileged information to the Commissioner. That case is of no assistance in the present case where it is manifest and is conceded that the principle of confidentiality was abrogated by sec 17 of the Act of 1974.

The appellants referred to Australian authorities. None of those authorities dealt directly with the present point at issue and all concerned statutory provisions in forms different to that of the New Zealand Act. In *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Limited* 79 ATC 4039 (1979) 143 CLR 499 the High Court of Australia dealt with the power conferred by statute on the Commissioner to require any person to attend and give evidence “concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto”. *Mason J* said at ATC p 4,053; CLR p 536:—

“It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this he may need to make wide-ranging inquiries, and to make them long before any issue of fact arises between him and the taxpayer. Such an issue will in general, if not always, only arise after the process

of assessment has been completed. It is to the process of investigation before assessment that sec. 264 is principally, if not exclusively, directed.”

The appellants also relied on the Canadian case of *James Richardson & Sons Ltd v Minister of National Revenue* 84 DTC 6325. In that case *Wilson J* giving the judgment of the Supreme Court of Canada held that a general power conferred on the Minister of National Revenue by sec 231 of the taxing statute to require from any person any information for any purposes related to the administration or enforcement of the Act only enabled the Minister to require information concerning a specified taxpayer. But in that case sec 221 of the Act expressly authorised the making of regulations “requiring any class of persons to make information returns respecting any class of information required in connection with assessments under this Act”. The court held that the express power in sec 221, a power which had not been exercised, limited the general power conferred by sec 231. If the Minister wished to seek information regarding a class of persons then he must obtain a regulation under sec 221. *Wilson J* also relied on the earlier Canadian decision of *Canadian Bank of Commerce v Attorney General of Canada* 62 DTC 1014 [1962] SCR 729 but in that case the Minister asked for information concerning a particular alleged taxpayer. That case is of no assistance in deciding whether in the present case the Commissioner is entitled to information concerning a class of possible taxpayers.

Mr Barton, on behalf of the appellants, sought to pray in aid the *New Zealand Bill of Rights Act* 1990, which affirmed *inter alia* in sec 21 that:—

“Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.”

Their Lordships are content to assume that in the present case the Commissioner is seeking to search the property or correspondence of taxpayers. Having regard to the secrecy provisions of the Act of 1974 and to the fact that in the interests of the community the Commissioner is charged with ensuring that the assessable income of every taxpayer is assessed and the tax paid, the “search” involved in the application of sec 17 of the Act of 1974 cannot be said to be unreasonable. A similar conclusion was reached by the Supreme Court of Canada in *McKinlay Transport Limited et al v The Queen* 90 DTC 6243 under the *Canadian Charter of Rights and Freedoms*. In that case there was an elaborate consideration of “different expectations of privacy in different contexts” (p 6249) but their Lordships are content simply to decide that the exercise of the powers conferred on the Commissioner by sec 17 of the Act of 1974 is not, for the purposes of sec 21 of the *New Zealand Bill of Rights Act*, “unreasonable”.

The appellants also contended that in the present case the Commissioner had exceeded or abused the powers conferred on him by sec 17 of the Act of 1974 by making demands on sharebrokers and bankers which were onerous and expensive to obey. In the case of sharebrokers they were asked to supply lists of their largest clients together with details of their share dealings through the sharebroker. Bankers were asked to identify investors with them in commercial bills and to give details of each investment, cost and realisation. One sharebroker complained that he was asked for information over a twelve month period and that he only had information over an eleven month period because of a merger which had taken place. There is no doubt that sharebrokers and bankers have or ought to have the information which the Commissioner has requested. The Commissioner has demonstrated that he is prepared to modify his requirements to meet any particular genuine difficulty.

In *Clinch v Inland Revenue Commissioners* [1974] QB 76 the British Inland Revenue Commissioners sought information which was described by the recipient as a “fishing” or “snooping” exercise. Similar complaints were made in the present case. In *Clinch v IRC* (at p 87) *Ackner J* was unmoved by this emotive language but (at p 92) had no doubt that if the particulars sought went substantially beyond that which was required for the purposes of enabling the Commissioners to carry out their statutory functions “so that they could be properly described as unduly oppressive or burdensome ... a court would be entitled to intervene ... One of the vital functions of the courts is to protect the individual from any abuse of power by the executive, a function which nowadays grows more and more important as governmental interference increases”. Of course in New Zealand every sharebroker or banker will understandably resent the receipt

of a notice from the Commissioner requiring information about the clients of the sharebroker or the banker. Every sharebroker or banker will resent the time and expense incurred in complying with the notice. But the Commissioner must carry out his functions of ensuring that assessable income is assessed and that the relevant tax is paid. Section 17 of the Act of 1974 requires information to be produced which the Commissioner "considers necessary or relevant". There is nothing in the point that the Commissioner wisely did not require every sharebroker and every banker to disclose information about all his clients and customers.

The court can only interfere if satisfied that in making a particular requirement the Commissioner exceeded or abused his powers; see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 and *Clinch v Inland Revenue Commissioners* [1974] QB 76. In the present case the Court of Appeal decided that as a matter of principle and construction the Commissioner was entitled to require information concerning a class of unidentified possible taxpayers. The court declined to speculate on the circumstance which might lead to interference by way of judicial review. Their Lordships agree with the Court of Appeal and find nothing in the evidence deduced in the present case which could justify judicial review.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. The appellants must pay the costs of the Commissioner before the Board.