

BEFORE THE TAXATION REVIEW AUTHORITY

TRA 009/17

[2018] NZTRA 06

IN THE MATTER OF The Income Tax Act 2007, and the Tax
Administration Act 1994

BETWEEN XXX
First Disputant

TRA 010/17

XXX
Second Disputant

AND THE COMMISSIONER OF INLAND
REVENUE
Defendant

On the Papers

Decision: 12 July 2018

**DECISION OF JUDGE AA SINCLAIR AS
TAXATION REVIEW AUTHORITY**

[on interlocutory application for an order for provision of (any) settlement agreement
and related order.]

Introduction

[1] The first and second disputants have filed a notice of interlocutory application dated 4 April 2013 seeking the following orders:

- (i) That copies of any executed agreements between the defendant and [named taxpayers] in respect of any settlement of the issues raised in matters TRA 011/17 and TRA 012/17 be provided by the defendant to the disputants.

- (ii) That either the defendant or the Taxation Review Authority (TRA) confirms that matters TRA 011/17 and TRA 012/17 have now been discontinued or withdrawn and advise the basis for that discontinuance or withdrawal.¹

collectively referred to as “the information”.

Grounds for the application

[2] Proceedings were originally issued under TRA 009/17, TRA 010/11, TRA 011/17 and TRA 012/17 by Commercial Management Limited (CML) as tax agent for each of the disputants. Subsequently, the individual taxpayers named as disputants in TRA 011/17 and TRA 012/17 (the taxpayers) appointed a lawyer to separately represent them and withdrew their authority from CML to act as their tax agent.

[3] The disputants contend that these four proceedings are interlinked, and that they cannot ascertain with any accuracy what items are still at issue in their own proceedings if they do not know what concessions have been agreed to between the defendant and the taxpayers, what arrangements have been made and the terms of any settlement agreement including any monetary payment(s). Further, they submit that it would be demonstrably unfair for the defendant to have knowledge of the details and terms of any such agreement(s) and for the disputants to be denied this information which may have a direct impact on the issues raised in their own proceedings.

[4] In addition, the disputants say that they had significant input into the notices of claim filed in TRA 011/17 and TRA 012/17. Regardless of whether the first order sought is granted, they contend that there should not be any reason why they cannot be informed of the discontinuance or otherwise of the proceedings under TRA 011/17 and TRA 012/17.

¹ The application also sought an order that the Commissioner state who or what entity has the benefit of the statutory immunity pursuant to s 99(4) of the Income Tax Act 1976 and/or s GA 1(6) of the Income Tax Act 2007 in respect of the reassessment of the first disputant. This order is no longer sought.

[5] The disputants rely in support of their application on Rule 8.7 of the District Court Rules 2014 (DCR); s 6 and 81(3)(a)(iii) of the Tax Administration Act 1994 (TAA); ss 27 and 29 of the New Zealand Bill of Rights Act 1990 (NZBORA); and s 6 Principle 11(e)(iv) of the Privacy Act 1993 (PA 93). They also rely on *BNZ Investments Limited v Commissioner of Inland Revenue* and *Chesterfield Preschools Limited v Commissioner of Inland Revenue*.²

Opposition to application

[6] The Commissioner opposes the making of the orders sought and says that she is prohibited by law from providing the information requested by the disputants because:

- (i) Section 81 of the TAA does not permit the Commissioner to disclose the information sought by the disputants in the application;
- (ii) It is not reasonably necessary for carrying into effect the Inland Revenue Acts that the information sought in the application be disclosed, as the information sought is irrelevant to the correctness of the disputants' assessments (s 81(3)(a)(i) of the TAA);
- (iii) The disputants have no standing to receive the information sought in the application;
- (iv) The disputants cannot establish that nondisclosure of the information sought in the application will breach the NZBORA.
- (v) The information sought under the application cannot be disclosed under the PA 93.

² *BNZ Investments Limited v Commissioner of Inland Revenue* (2010) 24 NZTC 23,997 and *Chesterfield Preschools Limited v Commissioner of Inland Revenue* (No 2) 24 NZTC 23,148.

[7] I propose to consider the application addressing these arguments.

Application of Section 81?

Legal Issues and Parties' Positions

[8] The Commissioner and her officers have responsibilities in relation to the collection of taxes and other functions under the Inland Revenue Acts, to at all times, use their best endeavours to protect the integrity of the tax system. The “integrity of the tax system” includes 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. It also includes the responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers.³

[9] Section 81(1) of the TAA provides that the Commissioner must maintain, and must assist in maintaining, the secrecy of all matters relating to the Inland Revenue Acts, and must not communicate any such matter to any person except for the purpose of carrying into effect those Acts.⁴ It is well established that conduct by the Commissioner of any litigation in the exercise of her functions, powers and duties is an activity within that purpose.⁵

[10] Section 81(3)(a)(i) of the TAA provides that the Commissioner shall not be required to produce in any court or tribunal, any book or document or to divulge or communicate to any court or tribunal, any matter or thing coming under the Commissioner’s notice in the performance of her duties, “except when it is necessary to do so for the purposes of carrying into effect the Inland Revenue Acts”. The

³ TAA s 6(2)(c) and (e).

⁴ The other exception is under s 81(1B) of the TAA but that is not applicable in this case.

⁵ *Westpac Banking Corporation Ltd v Commissioner of Inland Revenue* 920080 23 NZTC 21,896 at [54] following *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 (CA) and *Commissioner of Inland Revenue v E R Squibb & Sons (New Zealand) Limited* (1992) 14 NZTC 9,146(CA). For completeness, it is noted that s 81(1) has been amended by the insertion of s 81(1B) since *Westpac* was decided by the Supreme Court. Section 81(1B), now permits disclosure where the communication is for the purpose of executing or performing a duty of the Commissioner, or for the purpose of supporting the execution or performance of such a duty. The Commissioner must consider that the communication is reasonable having regard to the relevant purpose and listed factors.

disputants submit that this exception to the Commissioner's statutory privilege applies in this case, and that the Commissioner is required to disclose the information sought.

[11] As noted above, the disputants also rely on the decisions in *BNZ Investments Limited v Commissioner of Inland Revenue* and *Chesterfield Preschools Limited v Commissioner of Inland Revenue*.⁶ As neither of these decisions are relevant, I propose to refer to them only briefly. In *BNZ Investments Limited* the High Court granted an Australian law firm's application to search, inspect and copy statements and transcripts of evidence of expert witnesses on the basis of the principle of open justice. The disputants submit that while their application is not for court documents, it is for copies of documents which the defendant is "more likely than not to hold and which may not be included in the standard discovery processes as it is well known that most agreements entered into between the Commissioner and any taxpayer contain a confidentiality clause". In *BNZ Investments Limited* there was no objection by the Commissioner to the firm's request for the documents. This request was made to the High Court Registrar and the application of s 81 was not in issue.

[12] In *Chesterfield Preschools Limited*, the High Court found that the late disclosure of notes written by an officer of the Commissioner had a significant outcome in favour of the plaintiff as the notes corroborated the plaintiff's arguments and put the plaintiff in a stronger position against the Commissioner. However, this was an application for judicial review and not challenge proceedings. The late disclosure was taken into account as a factor by the Court in determining the application in the plaintiff's favour.

[13] In opposition to this application, the defendant contends that it is not reasonably necessary to disclose the information sought in order for the Commissioner to be able to defend the correctness of the assessments in the challenge proceedings brought by the disputants. Accordingly, she says that disclosure of the information is not reasonably necessary to carry into effect the

⁶ Above n 2.

Inland Revenue Acts, and therefore she is not permitted to disclose the information under s 81(3) of the TAA.

Relevance of information sought?

[14] As noted above, the disputants contend that they cannot ascertain with any accuracy what items are still at issue in their own proceedings if they do not know the terms of any settlement between the defendant and the taxpayers and in particular, what (if any) concessions have been agreed, what arrangements have been made, and what monetary payment(s) have been agreed. They further assert that they will be at a disadvantage if the information is known to the defendant and not to them.

[15] The disputants and taxpayers were each separately assessed by the Commissioner. Separate adjudication reports were subsequently completed and separate challenge proceedings were commenced. There is some overlap between the claims and I note that there was some discussion at an early directions hearing as to whether all four claims would be heard together but this did not proceed following the change of representation for the taxpayers.

[16] The primary issue in TRA 009/17 and TRA 010/17 is whether the disputants were involved in a tax avoidance arrangement which is void as against the Commissioner, pursuant to s BG 1 of the Income Tax Act 2007 (ITA 07) and therefore should be reconstructed pursuant to s GA 1 of the ITA 07. Since the change of representation, the defendant and the disputants have agreed on the essential issues of fact and law in the disputants' challenge proceedings, and on the consolidation of the claims, in a joint memorandum dated 9 March 2018.

[17] In addition, the parties have completed standard discovery in accordance with Rule 8.7 of the District Court Rules 2014. The obligation to discover does not extend to include documents (which may or may not exist) of individuals who are not parties to the proceedings and on matters that are not in issue in the proceedings. Furthermore, as the disputants appear to recognise, if there was such an obligation,

any settlement agreement between the defendant and the taxpayers would likely be privileged and not available for inspection in any case.

[18] In many ways, this application has the character of a fishing exercise. I am not satisfied that the production of the information sought by the disputants (if it exists) is reasonably necessary to carry into effect the Inland Revenue Acts. In reaching this view, I particularly take into account the disputants' own acknowledgment that the information sought has no bearing on the correctness of the Commissioner's assessments.

[19] The obligation on the Commissioner to maintain the confidentiality of taxpayers' tax related information is recognised as fundamental to maintaining the integrity of the tax system. In the present case, it is up to the disputants to identify the issues which they will need to address at the hearing.⁷ The fact that they may face some uncertainty in preparing for trial as a consequence of not knowing the terms of any settlement agreement reached between the defendant and the taxpayers, is not a sufficient ground for an application under s 81 of the TAA requiring disclosure by the defendant of any such agreement.

Conclusion

[20] Accordingly, I find that the exception in s 81(3)(a)(i) of the TAA does not apply, and that the Commissioner is correct in maintaining confidentiality in the information sought.

Authorisation to receive information related to challenge proceedings?

[21] In their application, the disputants also request that either the defendant or the TRA provide information with regard to any discontinuance/withdrawal of the proceedings issued on behalf of the taxpayers under TRA 011/17 and TRA 012/17.

⁷ I observe that it appears from the affidavits filed in support of this application that the disputants have a clear understanding of the factual matrix and matters in issue.

[22] The information sought relates to other taxpayers and for the reasons discussed above, the defendant is prevented from supplying such information by the operation of s 81 of the TAA.

[23] The procedure for challenge proceedings before the TRA is designed to maintain the confidentiality of the disputants bringing those proceedings. The hearing of a challenge before an Authority shall not be open to the public.⁸ Further, reports of matters and the Authority's decisions must not contain the name of the disputant or any other particular likely to identify the disputant, unless the Authority considers that omission of the particular will affect the usefulness or value of the report.⁹

[24] In the present case, the disputants are not parties to either of the proceedings under TRA 011/17 or TRA 012/17. Instead, the disputants say that they had a significant input into the preparation of the Notices of Claim and for that reason, the information should be available to them. I agree with the defendant that this involvement does not give the disputants a right to receive any information about these proceedings and the proceedings remain confidential to the parties.

[25] The tax agent for the taxpayers was CML not the disputants. The taxpayers subsequently instructed their own lawyer and a notice of change of representation was filed in the Tribunals Registry and served on the defendant. CML was removed as tax agent, and in addition, the taxpayers' lawyer sent an email to the defendant and the TRA, stipulating that CML and its representatives, are not authorised to receive any information about the taxpayers' proceedings.

[26] Accordingly, I am satisfied that the disputants (and CML) are not entitled to receive any information relating to the proceedings issued under TRA 011/17 and TRA 012/17.

⁸ Section 16(4) of the Taxation Review Authorities Act 1994.

⁹ Regulation 36 of the Taxation Review Regulations 1998.

Application of New Zealand Bill of Rights Act 1990?

[27] The disputants rely on ss 27 and 29 of the NZBORA in their application but I agree with the defendant that it is unclear what the disputants' arguments are relating to these provisions. This is not an application for judicial review. By way of general comment, I do not see any basis on which the disputants can contend that the Commissioner has not observed the principles of natural justice in refusing to disclose the information sought where she has complied with the requirements of s 81 of the TAA, and also with the wishes of the taxpayers.

Application of the Privacy Act 1993?

[28] The personal information sought relates to the taxpayers who are not parties to the proceedings under TRA 009/17 and TRA 010/11. The disputants contend that disclosure of the information can be made in reliance upon s 6 of the PA 93 and in particular, Privacy Principle 11(e)(iv). This Principle states that an agency that holds personal information shall not disclose the information to a person or body or agency "unless the agency believes on reasonable grounds that non-compliance is necessary for the conduct of proceedings before any court or tribunal".

[29] However, importantly in this case, s 7(2) of the PA 93, provides that nothing in Principle 6 or Principle 11 derogates from any provision that is contained in any other Act of Parliament that imposes a prohibition or restriction in relation to the availability of personal information. As discussed above, s 81 of the TAA clearly imposes such a restriction on the Commissioner. In these circumstances, I am satisfied that the Commissioner cannot make disclosure to the disputants of the information sought under Principle 11(e)(iv).

Decision

[30] For the reasons detailed above, the application by the disputants for orders for disclosure of the information set out in paragraph (1) of this decision, is dismissed.

Allen A. Smith
Judge AA Sinclair
Taxation Review Authority

