

NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS ACT 1996

IN THE MATTER

Mr X
Applicant

AND

IN THE MATTER

Professional Conduct Committee
Respondent

**DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED
ACCOUNTANTS
26 November 2010**

Hearing: 26 November 2010

Tribunal: Mr RJO Hoare (Chairman), Prof D Macdonald, Mr P Scott and Ms
Angela Hauk-Willis (lay member)

Legal Assessor: Mr B Corkill QC

Counsel: Mr M Reed QC for the Professional Conduct Committee
Mr T Smith [Crown Law] for Mr X and for the Commissioner of
Inland Revenue

BACKGROUND

This is an application for a permanent stay of proceedings.

The Tribunal received submissions from Mr Smith representing both the Commissioner of Inland Revenue and the member (Mr X), and from Mr Reed for the Professional Conduct Committee (the PCC). (The Tribunal note that Mr X is represented by Crown Law arranged under an indemnity given by the Commissioner of Inland Revenue.)

The Legal Assessor's advice had been provided to counsel in advance of the hearing, which resulted in further submissions from Mr Smith and Mr Reed.

Upon application by counsel for the member, the Tribunal ordered that this application be heard in private and granted an interim suppression of the member's identity.

THE CHARGES

The application for a permanent stay of proceedings arose from the charges laid against the member which were:-

THAT in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 21.30 you are guilty of:

- (1) *breaching the Code of Ethics of the Institute, specifically:*
 - (a) *the Fundamental Principle of Quality Performance [particular (a)]*
 - (b) *and/or Rule 9 – Due Care and Diligence [particular (a)]*
- (2) *breaching Rule 21.3(d) of the Institute's Rules [particular (b)]*

IN THAT in your role as a Chartered Accountant employed by the Inland Revenue Department as the Area Investigations Manager ultimately responsible for Mr Y, the case manager responsible for Company A:

- (a) *Despite correspondence from Mr Z dated 23 November 2007, you failed to identify and/or address the following errors made by Mr. Y:*
 - i. *Mr Y issued an agreed adjustment form in August 2007 which required a response within two weeks (when the IRD's best statement practice recommends at least 28 days), thereby allowing the taxpayer insufficient time to respond; and/or*
 - ii. *Mr. Y departed from Standard Practice Statement Inv-251 in that he required the taxpayer, in his letter dated 20 November 2007, to submit a formal notice of proposed adjustment when IRD was required, in the circumstances, to prepare this document; and/or*
- (b) *You failed to attend the final determination hearing before the Professional Conduct Committee on 18 May 2010, despite being required to do so by the Professional Conduct Committee.*

LEGAL ASSESSOR'S ADVICE REGARDING SECTION 81

For this application to succeed the member must establish that section 81 of the Tax Administration Act ["Section 81"] precludes a reasonable defence by the member.

Section 81 and the exceptions were summarised for the Tribunal by the legal assessor in the following terms:-

It is necessary for the Tribunal to have a clear understanding of the scope, and issues relating to, the application of section 81. I turn therefore to an analysis of the section.

It relevantly provides:

"81. Officers to maintain secrecy –

- (1) Every officer of the Department-
- (a) Shall maintain and aid in maintaining the secrecy of all matters relating to -

(i) The Inland Revenue Acts, including all Acts (whether repealed or not) at any time administered by or in the Department; which come to the officer's knowledge, and shall not, either while the officer is or after the officer ceases to be an officer of the Department, communicate any such matters to any person except for the purpose of carrying into effect the Acts referred to in subparagraphs (1), (ii) and (2)(a) or any other enactment imposing taxes or duties payable to the Crown ...

- (3) *Without limiting the generality of subsection (1), no officer of the Department shall be required to produce in any Court or Tribunal any book or document or to divulge to any Court or Tribunal any matter or thing coming under the officer's notice in the performance of the officer's duty as an officer of the Department, except when it is necessary to do so for the purpose of-*

- (a) *Carrying into effect -*

(i) *The Inland Revenue Acts, including all Acts, whether repealed or not, at any time administered by the Department" (emphasis added)*

Sections 6 and 81:

In BNZ Investments Ltd,⁵ the Court stated: "There are, however, important new provisions in the Tax Administration Act which form part of the context against which section 81 must now be read. Section 6 was replaced and section 6A inserted shortly after the Act came into effect. These changes were proposed by an organisational review of the Department chaired by Sir Ivor Richardson. The purpose of section 6 is to incorporate protection of the integrity of the tax system in terms that clearly define what is sought to be protected." (emphasis added)

Accordingly, as the Supreme Court stated, the other provisions in the Tax Administration Act bearing on secrecy are those which appear in Part 2 headed "Commissioner and Department", and in particular section 6:

"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."
(emphasis added)

18. *Compliance with professional obligations may, in a particular case, be relevant to the question of whether an officer has acted "fairly, impartially or according to law". An issue of compliance with professional obligations could therefore be viewed by the Tribunal as a matter going to "the integrity of the tax system". If so it is to be considered as part of the context against which section 81 is to*

be interpreted.

The exception:

19. Turning to section 81 itself, if it does apply (noting that the PCC states that there are acts and omissions on the part of the member that are not caught by the section at all), it would then be necessary to consider whether the exception referred to in section 81 applies. Is a defence of disciplinary proceedings, involving the professional obligations of the member when acting as an officer of the Department, to be regarded as "carrying into effect the Inland Revenue Acts"?

DECISION

This case raises important public interest issues regarding the application of the Code of Ethics to the several hundred Institute members employed by the Commissioner.

For this application to succeed the member must establish that section 81 of the Tax Administration Act ["Section 81"] precludes a reasonable defence by the member. This, in turn, requires that the subject matter of the charges falls outside the exceptions which are permitted under the Act.

The PCC say that:

- a satisfactory defence may be available to the member without breaching section 81 at all or, in the alternative (without hearing the evidence we cannot determine whether a satisfactory defence might be available);
- the subject matter of the charges is analogous to the exceptions detailed in the various cases - in that they are integral to the administration of the tax system.

The applicant maintains that:-

- these are proceedings to which, unlike the case precedents tabled, the Commissioner is not a party; and:-
- these matters relate to the personal relationship between NZICA and the member and thus do not bear on the administration of the tax system.

We are influenced by the use of the indemnity given to Mr X, and by the decision in Knight v CIR - in particular, the following passages:

- Cooke P where he said -

"An enquiry into alleged maladministration or proceedings seeking a remedy for maladministration involve, I think, a carrying into effect of the Acts, no less than would the granting of an injunction or declaration to prevent future maladministration."

- and Hardie Boys J where he said -

"The Commissioner is a statutory officer whose duties, and the duties of whose staff, derive from the Inland Revenue Acts. Whatever they do, unless plainly beyond the bounds of their statutory duties, may properly be said to be done for the purpose of carrying the Acts into effect."

The Tribunal sees the charges in this case as falling squarely within these interpretations.

Accordingly, the application for a permanent stay of proceedings is declined.

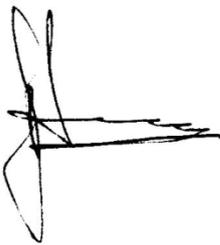
COSTS

Costs are reserved and all or any issues relating to costs can be dealt with at the substantive hearing.

PUBLICATION

By consent the hearing was held in private. Given that the issues in this case are of public interest, the Tribunal proposes to publish this decision in the Journal and on the Institutes' web-site with suppression of the identities of the applicant and all other parties mentioned in the charges and particulars.

If counsel wish to be heard on this matter, they should file their submissions within seven days of the receipt of this decision (3 December 2010). *No submissions were received.*

A handwritten signature in black ink, appearing to read 'R J O Hoare', written in a cursive style.

R J O Hoare
Chairman
Disciplinary Tribunal