THE LIMITATION ON JUDICIAL REVIEW IN *TANNADYCE*: HAS THE SUPREME COURT GONE TOO FAR?

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In this article, James Coleman considers the implications of the Supreme Court's recent decision regarding the commencement of judicial review in a tax context.

At the end of 2011, the Supreme Court issued its decision in *Tannadyce Investments Ltd v Commissioner of Inland Revenue; Commissioner of Inland Revenue v Tannadyce Investments Ltd* (2010) 24 NZTC 24,341. The Court has changed the law as to when judicial review may be commenced in a tax context. It has done so without having heard argument on the point. This absence of argument was largely because no issue was taken by either party in the litigation at the lower levels regarding whether there is any need for the legal tests to be different. Rather, the litigation proceeded on settled principles of law, with the only issue being the application of those principles to the facts.

BACKGROUND

The facts of the *Tannadyce* case were that a stand-off developed between the taxpayer (Tannadyce) and the Commissioner (CIR). The CIR required Tannadyce to file its outstanding income tax returns; however, Tannadyce responded that it could not do so until the CIR returned to it documents that were allegedly held in the CIR's possession, and that it was allegedly not returning to the taxpayer. The importance of these withheld documents was that without them, according to the taxpayer, it was unable to prepare its accounts and thus unable to file its outstanding returns.

An attempt to settle this stand-off was brokered by the Ombudsman, with the company being able to use the assets accretion method to justify the figures in the outstanding returns. The figures in the returns eventually filed were so far from what the CIR considered to be reasonable that assessments were raised for different amounts. Those assessments were not disputed and Inland Revenue moved to collect the debt by issuing a statutory demand. Tannadyce sought to stop the CIR proceeding with the statutory demand by issuing review proceedings challenging the assessments on which the demand was based.

By the time that the matter got to the Court of Appeal, the case involved two related appeals. The first appeal was by Tannadyce against the dismissal by Associate Judge Christiansen in Christchurch of the company's application to have the CIR's statutory demand set aside. In order for the statutory demand to be set aside, there needed to be a "substantially disputed debt" or "other reasons" why the Court should prevent Inland Revenue from enforcing its debt against the taxpayer. There would not be a substantially disputed debt if the judicial review proceeding was ineffectual or jurisdictionally incompetent.

The second aspect for the Court of Appeal to consider was an appeal by Inland Revenue against the High Court's refusal to strike out Tannadyce's statement of claim for judicial review. Inland Revenue had applied to strike out the judicial review proceeding on the grounds that it disclosed no tenable cause of action or was an abuse of process. If the application to strike was successful, it would bring the judicial review to an end and would mean that the debt could not be said to be "substantially disputed". In other words, it would conclusively deal with the application to set the statutory demand aside as well.

Inland Revenue's argument in this regard was entirely orthodox.

COURT OF APPEAL DECISION

The Court of Appeal overturned the High Court decision refusing to strike out the statement of claim and therefore rejected Tannadyce's appeal with respect to the statutory demand. Importantly, the Court of Appeal did so by applying the prevailing orthodoxy in this area. The former law was helpfully summarised in *Westpac Banking Corporation Ltd v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] NZLR 99, where the Court said (at [59]):

> ….We accept that judicial review is available where what purports to be an assessment is not an assessment. Associated with this, we accept that judicial review is available in exceptional circumstances and thus may be available in cases of conscious maladministration…

While Tannadyce failed in its application for judicial review, the legal principles applicable to judicial review of assessments had not changed. The law remained that judicial review was available in principle where there were procedural defects arising from ultra vires, unlawfulness and such matters as bad faith, abuse of power and errors of law going to the legitimacy of the process, as opposed to the correctness of the assessment.

Mr Henderson (the person behind Tannadyce) is nothing if not a fighter, and Tannadyce appealed to the Supreme Court against the decision of the Court of Appeal striking out its judicial review action. The Supreme court granted leave, which in hindsight should probably have been a warning sign that they had something in mind for the law in this area, because on the facts the case seemed hopeless.

SUPREME COURT DECISION

When it came to the substantive decision on the appeal, the Supreme Court issued a split decision. The judgments of Elias CJ and McGrath J support the orthodox jurisprudential position as to the availability of judicial review in the tax assessment context, but the Judges concluded that on the facts before them, the judicial review statement of claim was rightly struck out. Thus the facts were not enough to get the case into the necessary exceptional categories to justify review.

The minority judgment is delivered by McGrath J and is a very carefully worded judgment explaining the need for public officials to be subject to the accountability of judicial review. It is a judgment that carries all the best of the law of equity, as compared to the comparative harshness of the common law.

MAJORITY JUDGMENT

The judgment of the majority reaches the same conclusion as the minority, but does so by making new law. The judgment of the majority was delivered by Tipping J on behalf of Blanchard and Gault JJ. The key part of their reasoning is in their interpretation of s 109 of the Tax Administration Act 1994 (TAA 1994). Section 109 of the TAA 1994 provides:

> Except in …. a challenge under Part 8A –
>
> No disputable decision may be disputed in a court or in any proceedings on any ground whatsoever…

The majority have discarded the traditional interpretation of s 109 in the context of judicial review, stating that the words "any ground whatsoever" mean what they literally say. The reasoning of the majority is:

- It is clear that by means of s 109 Parliament was concerned to ensure that disputes and challenges capable of being brought under the statutory procedures were brought in that way and were not made the subject of any other form of proceeding in a court or otherwise.
- The exclusion of judicial review is a product of the text and purpose of s 109 in its particular statutory setting.

The majority conclude by saying:

> In summary therefore we would hold that disputable decisions (which include assessments) may not be challenged by way of judicial review unless the taxpayer cannot practically involve the relevant statutory procedure. Cases of that kind are likely to be extremely rare.

Their conclusion was that the circumstances of *Tannadyce* were not extremely rare and hence did not fall into the narrow category now left for review.

MINORITY JUDGMENT

Towards the end of the minority judgment there are several criticisms of the majority judgment (at [39]). The first criticism is that the majority decision does not engage with the prior case law on the point. The riposte that could be made to this is that the earlier case law was considered, but that it was not thought necessary to trawl through it making comments.

The second criticism was that the judgment of the majority was arrived at on a point which was not the subject of argument. A possible riposte to this was that all that the Court was doing was undertaking an exercise in statutory construction as to the meaning of s 109 of the TAA 1994 and that this exercise effectively asks how much external input is needed when doing that. That response might deflate the egos of a number of barristers, as their assistance to the court is obviously not great.

OTHER CRITICISMS

A third criticism can be raised, and that is that the scope of situations which will technically fall outside of the scope of this decision are not a small and "rare" category but form quite a large category. For example, the items listed in s 138E of the TAA 1994 ought to fall within the narrow "rare" exception in which the majority still permits judicial review outside of the statutory disputes process.

The reason for this is that the logic behind excluding judicial review is that it is only in challenge proceedings that Parliament is intending to allow assessments to be challenged: s 109. However, s 138E of the TAA 1994 limits what can be raised in the challenge procedure. Consequently, the items that cannot be challenged in the disputes procedure ought by definition to meet the new test permitting the use of judicial review outside of the disputes process.

The point to be made in this regard is that this exception is rather broad in scope. There is a large list of situations which cannot be the subject of challenge.

A fourth criticism of the majority is that there is some awkwardness created by the Supreme Court's reasoning. For example, under the statutory disputes procedure found in Parts 4A and 8A of the TAA 1994, a taxpayer must set out the issues and propositions of law on which they intend to rely in their respective statements of position: see s 138G(1) of the TAA 1994. Thus a in a review context, grievances of a judicial review nature concerning the process being followed by the CIR towards the assessment must now be raised in the disputes documents.

The majority of disputed assessments are raised under s 113 of the TAA 1994. If the argument advanced by the taxpayer is, for example, that any proposed assessment would breach the taxpayer's legitimate expectation, then that must be articulated in the pre-assessment documentation. If the assessment is nonetheless raised over the objections and submissions of the taxpayer, then that assessing action is a judgment, opinion or determination by the CIR as to how s 113 applies in the disputed context.

However, s 139E(e) of the TAA 1994 precludes a taxpayer from challenging a matter which under (inter alia) s 113 is left to the discretion, judgment, opinion, approval, consent or determination of the CIR. Ultimately all applications for judicial review attack the discretion, judgment, opinion, or approval of the CIR in the making of the amended assessment, which, as mentioned, is usually made under s 113. Judicial review also indirectly attacks the protections afforded to the putative assessment under ss 109 and 114 of the TAA 1994.

Interpreting s 109 of the TAA 1994 literally has one of two consequences. Either the same "it means what it says" interpretation should be applied to other provisions (for example, s 138E of the TAA 1994) such that a great number of matters cannot be challenged, and thus are not by virtue of s 109 protected from review. In this case, the exception provided for by the majority at [61] ought to apply for all s 113 based review-style disputes.

Alternatively, if the breadth of situations that now escape the s 109 prohibition is seen as too broad and not narrow enough, then a departure from the "it means what it says" approach will be required for the interpretation of s 138E. This problem is somewhat magnified by the fact that s 109 and s 114 are also listed in s 138E as sections in respect of which the judgment (et cetera) of the CIR cannot be the subject of challenge.

A fifth related issue is that s 109 is directed to the protection of disputable decisions. It is noteworthy that matters that are excluded by s 138E from challenge are carved out of the definition of what is a disputable decision in s 3 of the TAA 1994. By doing so the protection in s 109 is removed. This provides another strong reason for concluding that all matters listed in s 138E can still be the subject of review in the normal manner.

Finally, at [59], the minority states that:

> We should add, for completeness, that judicial review will also be available when what is in issue is not the legality, correctness or validity of an assessment but some suggested flaw in the statutory process that needs to be addressed outside of the statutory regime...

Thus official actions that are not assessments are intended to still be the subject of judicial review. The difficulty is that "disputable decision" is a defined concept and encompasses far more than just an assessment. It also includes any decision under a tax law other than those listed in (b)(i) to (iv) of the definition of "disputable decision" in the TAA 1994. There remains a very large group of decisions under tax laws that are neither listed in s 138E but nor are they assessments. Those decisions are also protected by s 109, which protects all disputable decisions from challenge outside of the disputes process. Thus the disputes procedure will need to be invoked with respect to these disputable decisions, even if the concern is purely of a judicial review nature and the matter does not relate to an assessment.

CONCLUSION

By way of conclusion, the statutory intricacies of the TAA 1994 with its interrelated specifically defined terms and carve-outs is an area where it may be helpful for the courts to have the assistance of counsel.