# Prosecution of tax evasion raises significant problems for Inland Revenue

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*The Commissioner is empowered to prosecute taxpayers for a range of criminal offences.*[1] *Inland Revenue's Prosecution Guidelines*[2] *explain that the Commissioner considers this is an important aspect of her statutory duty to protect the integrity of the tax regime.*[3]

*But those familiar with Inland Revenue's operations know its investigation function is almost entirely targeted towards the (re)assessment and collection of tax and not upon the detection and prosecution of criminal offences. As a result, Inland Revenue sometimes fails to properly navigate the different requirements of tax disputes and criminal prosecutions. Those failings were exposed in a series of recent cases that resulted in both the collapse of the criminal prosecutions and the failure to complete the substantive disputes procedure.*

*Tax barristers David Weaver and Mark Keating explain how those errors arose and discuss the implications for Inland Revenue's future investigation and prosecution of criminal tax offences.*

## Prosecutions

The Commissioner bears overall responsibility for the administration of the tax system.[4] As part of that duty she is obliged to investigate and prosecute any alleged criminal offences against the Revenue Acts. This duty was confirmed by the Court of Appeal in R v Morris (2005) 22 NZTC 19,217 (CA):

> "[20] Mr McBride's giving evidence against Mr Morris, Mr France submitted, was a step in Mr McBride's duty to carry into effect s 6 of the Tax Administration Act. Under that section, Mr McBride, as an officer of the Department, has a statutory responsibility 'at all times to use [his] best endeavours to protect the integrity of the tax system'. Mr France submitted that 'the integrity of tax returns, the abuse of the tax agent scheme, and more generally prosecution of a fraud on the revenue...all [fitted] comfortably within the concept of giving effect to the Acts'. He said it was difficult to see how a prosecution which sought to denounce, deter and punish a fraud on the revenue could be anything other than conduct that is putting into effect the Inland Revenue Acts. Among the specific matters Mr McBride is bound to protect are 'the rights of taxpayers to have their liability determined fairly, impartially, and according to law' and 'the responsibilities of taxpayers to comply with the law': s 6(2)

> (b) and (d). If someone files a false return and fraudulently obtains a refund, that taxpayer, unless his or her fraudulent behaviour is checked, will have benefited from his or her failure to comply with the law and other taxpayers will suffer a corresponding detriment if the revenue determines the fraudster's liability otherwise than according to law and fails to bring the fraudster before the courts."

So the prosecution of criminal offending serves an important role in the tax system. Inland Revenue publicly warns taxpayers of the consequences of illegal activity[5] and publicises its successful response to tax crime on its website.[6]

But this zeal to hold malefactors criminally accountable can conflict with Inland Revenue's ordinary investigation activity. Most wrongdoing is not immediately apparent but is only detected through the normal audit and disputes procedures. Unlike the police or the Serious Fraud Office, which predominantly open a criminal investigation following a compliant of wrongdoing by a victim, Inland Revenue routinely investigates thousands of taxpayers each year without an initial suspicion of criminal conduct. Inland Revenue's annual report for 2021 explains:[7]

> "All returns that can generate a refund are checked automatically by rules in our system, as are all amended returns. We've identified approximately 117,000 returns across all tax types that had errors or appeared to be fraudulent. These had an estimated value of $300 million (please note this data is unaudited). We are acting, or will act, on these cases—some through prompts and requests that customers review their position, some through audit investigation, and some through prosecution."

Where an investigation reveals errors, or discrepancies in a taxpayer's affairs, additional information and explanations are requested. This approach is in keeping with Inland Revenue's philosophy of trying to assist taxpayers to "get it right" rather than being punitive.[8] Only where the parties cannot agree on the correct treatment, does the Commissioner invoke the statutory disputes procedure in Pt 4A of the Tax Administration Act 1994 (TAA).

But what may commence as a simple risk review or standard audit may uncover alleged tax evasion, GST fraud or other criminal activity. Only then may Inland Revenue conclude that criminal prosecution is warranted.

# To prosecute or not …

Commentators have noted that the number of substantive tax cases has reduced.[9] As reported recently in this publication:[10]

> "For various reasons the number of reported tax cases from the courts has declined markedly in the past decade. In 2011, CCH New Zealand Ltd reported 104 judgments from the High Court, Court of Appeal and Supreme Court, while in 2020 the number reported was 29. For the Taxation Review Authority the numbers for 2011 and 2020 were 12 and 6 respectively."

In contrast, the number of prosecutions has remained constant or even increased, at least comparatively. Referring again to the 2011 and 2020 years:

- In 2011, 10 of the 104 reported judgments involved criminal matters (although 5 of those cases involved different stages of the prosecution of the same defendants).[11]
- In 2020, 5 of the 29 reported judgments involved criminal matters.

In the extreme circumstances of the COVID-19 pandemic, fully 5 of the 15 decisions reported during 2021 from the higher courts involved criminal matters.[12] So Inland Revenue's criminal prosecutions continued apace even while other tax disputes were paused.

Those decisions also record that the Commissioner's success rate in prosecutions is high. Even though the onus and standard of proof are both heavier burdens upon the Commissioner in criminal proceedings,[13] the charges are mostly upheld — with many of those reported cases involving appeals against conviction and/or sentence.

Likewise, after each successful conviction, Inland Revenue routinely issues a media statement welcoming the decision. A recent example includes the press release following the conviction of a couple on 65 charges involving the evasion of $431,644.66 of PAYE and GST:[14]

> "Inland Revenue spokesperson Tony Morris says Tamanini Muaiava has previous tax convictions and says someone who persistently evades their tax obligations in the way Mr Muaiava did, deserves to be held to account … Tony Morris says the offending is straight theft from the community and a gross abuse of trust."

Likewise, Inland Revenue uses such prosecutions to warn taxpayers of the consequences of tax crimes. A media release after another conviction states:[15]

> "… the cases are another reminder that those people who provide advice on tax evasion and fraud schemes, and help to facilitate them, are breaking the law as much as those who participate in them … Inland Revenue as part of its compliance programme is using increasingly sophisticated methods to detect tax evasion and fraud schemes, and will take action against serious non-compliance."

But recently the Commissioner's approach to criminal cases has been exposed and criticised by the courts. The result was at least 2 prosecutions being stayed by the court for prosecutorial misconduct, effectively ending those cases before they could be heard. A stay is an "extreme step" that is only ordered in the "clearest of cases"[16] . What went so wrong?

# The warning

In 2016, the Commissioner successfully prosecuted 2 accountants for filing false tax returns on behalf of their clients.[17] That prosecution was commenced by the Commissioner before some of the relevant clients' returns had been reassessed, meaning the false tax positions remained uncorrected during the trial.

The accountants alleged that the Commissioner was bound by s 109 of the TAA, which mandates that, except through the challenge process in Pt 8A of the TAA:

> • "(a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
> • (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."

As their clients' returns had not been reassessed, the accountants argued that the essential element of the charges (ie falsity of the tax returns) could not be proven because the current returns must be accepted as correct. As a consequence, it was argued that the accountants' conduct must also be correct (or at least not criminally culpable).

Unsurprisingly that argument was dismissed and the accountants were convicted.[18] The Supreme Court in Skinner[19] rejected the accountants' appeal and ruled that s 109 did not apply to criminal prosecutions, thereby allowing the Commissioner to prove that the clients' current returns were willfully wrong without the need to first make a reassessment.

But more importantly, the Supreme Court also warned against the consequences that would have flowed from the accountants' approach, which would have required the substantive civil dispute over the correctness of each return to be resolved before criminal proceedings could be commenced:[20]

> "Hearing the civil proceedings before the criminal trial would carry the risk of interfering with the fair trial rights of the defendant. As he or she would have the burden of proof in the civil proceedings, he or she would be required to disclose information supporting his or her position, and in effect, disclose his or her defence to the criminal charge in advance of the trial."

Our highest court therefore identified that starting civil proceedings before a criminal trial posed the risk of interfering with the defendant's fair trial rights. It effectively warned the Commissioner about bringing any

criminal prosecution before a substantive civil tax dispute. But it was a warning the Commissioner did not heed.

# Safi

In *R* v *Safi*[21] the taxpayers were charged with deliberate suppression of income and tax evasion. Following Inland Revenue's investigation, in September 2015 the police laid criminal charges and then immediately applied for restraining and forfeiture orders over the defendants' property.

Having concluded its investigation, in October 2015 Inland Revenue issued reassessments to the individual taxpayers including the omitted income. To dispute those reassessments the taxpayers were obliged to invoke the statutory disputes procedure.[22]

The purpose of that procedure is explained by the Commissioner in SPS 16/06: "Disputes resolution process commenced by a taxpayer":

> "The disputes resolution process is designed to ensure that there is a full and frank communication between the parties in a structured way within strict time limits for the legislated phases of the process. The disputes resolution process is designed to encourage an 'all cards on the table' approach and the resolution of issues without the need for litigation. It aims to ensure that all the relevant evidence, facts and legal arguments are canvassed before a case goes to a court."

While admirable in the context of resolving substantive tax disputes, that obligation requires taxpayers to issue a Notice of Proposed Adjustment (NOPA) under s 89F of the TAA in a prescribed form that must *"contain sufficient detail of the matters … to identify the issues arising between the Commissioner and the disputant"*.

The taxpayer must therefore detail both the facts and legal arguments in support of its position or it will have forfeited its right to dispute[23] or challenge that assessment.[24] The taxpayer is statutorily obliged to fully disclose its position during the disputes process.

Accordingly, the taxpayers in *Safi* issued NOPAs detailing the facts and legal arguments to dispute the Commissioner's assessment. This disclosure allowed Inland Revenue to further investigate the facts provided by the taxpayers in the NOPA.

The concern arose because, due to the strict statutory response period,[25] the taxpayers were obliged to issue their NOPAs before their criminal proceedings were completed. Assuming the taxpayers planned to rely upon the same facts and arguments in their criminal trial, the Commissioner had been pre-armed with details of their defence that might reasonably result in their conviction.

That obligation to issue the NOPA in response to the Commissioner's reassessments basically required the defendants to disclose their criminal defense contrary to the right to silence enshrined under s 25 of the Bill of Rights Act 1990. The District Court explained the dilemma in the following terms:[26]

> "To protect their position in terms of both those aspects of the civil proceedings [the assessment of considerable sums in tax and the restraint of their property], triggered by the Commissioner, before the conclusion of the criminal trial has had the effect of compelling the defendants to disclose their defence in the criminal trial. That is a breach of trial rights and it must be presumptively unfair."

Inland Revenue argued that this result was too extreme and unwarranted in the circumstances. This argument was summarised:[27]

> "… is then an answer to say, 'let the trial proceed and truth will win out'? Possibly in an inquisitorial process. Our process is adversarial. The defendants are presumed innocent and the prosecution bears the onus of proof. A defendant has a right to silence."

As a result, the District Court concluded Inland Revenue's conduct in forcing the taxpayers to commence the tax dispute was improper:[28]

> "Whether innocently or deliberately the Crown cannot bring about a situation where it can be forewarned ahead of trial what evidence the defence will call and being so forewarned then assert that the trial is fair."

In reaching its decision, the District Court expressly referred to the Supreme Court decision in *Skinner*:

> "The Supreme Court has made clear that if the civil process is triggered before the criminal trial fair trial rights will be in jeopardy. The risk of fair trial rights will move from risk to fact if the defendants in attempting to preserve their position and assets in the civil litigation provide information which discloses the defence to the criminal charges."

As a result, the District Court ruled that:

> "I consider the stay is warranted because the agency of the state has breached the defendants' fair trial rights and the connection between the misconduct and the prejudice is demonstrable. The breach of rights has not occurred in a minor way; it is fundamental. … The trial would be a farce. To conduct a trial that would be a farce is an abuse of the judicial process."

The District Court stayed the prosecution.

# Inland Revenue's new policy

*Safi* obviously concerned Inland Revenue, which recognised how the decision might impact the many (possibly majority of) criminal cases that arose from a civil dispute. The decision itself was not published in any Inland Revenue media release or Tax Information Bulletin. However, Inland Revenue did publish a policy attempting to limit the application of that decision.

Commissioner's Statement CS 20/04: "The disputes resolution process and fair trial rights" is Inland Revenue's attempt to balance a taxpayer's fair trial rights against its normal investigation and disputes practices. The very brief policy (only 2 pages) attempts to set out *"the broad approach that the Commissioner is taking to preserve a taxpayer's fair trial rights in criminal proceedings"*.[29]

Contrary to the position argued in Safi, the policy finally recognises:

> "1. Everyone who is charged with an offence (including offences under the Inland Revenue Acts) has the right to a fair trial. A taxpayer also has a number of other related rights in criminal proceedings. For example, a defendant cannot 'be compelled to be a witness or to confess guilt' and they are entitled to adequate time to prepare their defence."

As a result, the policy confirms:

> "4. The Commissioner considers that it is important to ensure that once prosecution has commenced or is contemplated a taxpayer is not compelled to respond to an assessment or disputes document issued by the Commissioner."

Overall, the policy concedes the important principle of the taxpayer's right to silence and the presumption of innocence, which overrides the normal administration requirements of the tax regime. However, the policy is most noteworthy for what it omits.

First, although the policy is clearly a response to the *Safi* decision, mysteriously it neither refers to that judgment nor alludes to the circumstances in which those concerns arose. This omission gives the misleading impression that the policy was a concession voluntarily granted by the Commissioner and not a legal requirement mandated by the court.[30]

Second, the policy appears to (possibly deliberately) narrow the substance of the *Safi* decision so as to merely require the Commissioner to suspend any dispute that is already on foot once a prosecution is commenced. In practice the policy suggests:

> "8. The Commissioner considers that a taxpayer can elect not to file an outstanding disputes document until the question of prosecution is resolved. This will delay the requirement to respond and therefore either delay the start or pause the Disputes Process.

…

10. Another way that taxpayer rights can be protected is by the parties agreeing to pause (sometimes known as 'park') the dispute at the conference stage until after the question of prosecution has been resolved."

Accordingly, the Commissioner's rather limited "concession" is that taxpayers can either refuse to file the necessary disputes documents or to file a "pro forma" NOPA omitting the information normally required. Furthermore, the policy does not provide any statutory authority for either concession.

But overall, the Commissioner claims that merely pausing a dispute is sufficient to preserve a taxpayer's fair trial rights. Yet CS 20/04 ignores the very risk identified in *Safi* that the taxpayer may have already issued a NOPA or NOR before those criminal proceedings are commenced. That omission was exposed in *Parore*.

# Parore

In *Parore*[31] the Commissioner issued default GST assessments in January 2018 and advised Mr Parore that if he wished to dispute those assessments, he must issue a timely NOPA. Mr Parore filed a NOPA in March 2018 disclosing the relevant facts and his legal arguments.

The Commissioner issued a NOR in April 2018 rejecting the taxpayer's NOPA and the parties held a disputes conference in June 2018. During July 2018, Mr Parore was advised that the Commissioner had decided to commence criminal procedures, and therefore the disputes would be "parked" pending the outcome of that prosecution.

The prosecution was not actually commenced for another 14 months. Ironically, it was subsequently disclosed that this delay was due largely to Inland Revenue's internal consideration over the potential implications of the *Safi* decision, which had been released in September 2018. Nevertheless, the Commissioner opted to press on with the prosecution of Mr Parore in September 2019.

Relying on the *Safi* decision, Mr Parore applied for a permanent stay of prosecution on the grounds that his fair trial rights had been undermined by the earlier requirement to issue a NOPA in response to the Commissioner's default assessments. He pointed out that, as the statutory disputes procedure was already well underway before the criminal proceedings were launched, he had necessarily lost his right to silence.

The District Court granted the taxpayer's application for the same reasons as *Safi*.[32]

The Commissioner appealed on the grounds that, while a prosecution had been contemplated, the decision to prosecute had been made only after the exchange of the NOPA and NOR. Furthermore the Commissioner argued the NOPA disclosed no additional facts and raised only "legal defences". Despite this background, the High Court confirmed that the prosecution should be stayed.

The High Court ruled that, whether innocently or deliberately, the Commissioner cannot bring about a situation where she is forewarned ahead of a criminal trial regarding what defences or evidence a taxpayer may rely upon. In effect, due to the earlier exchange of NOPA and NOR, by the time the decision to prosecute had been made, the taxpayer's right to a fair trial had already been compromised:[33]

"[72] When the Commissioner was dealing with the civil dispute, she had not charged Mr Parore. However, when she subsequently charged him on 26 August 2019, in my judgement, she put Mr Parore in an impossible position. She had used her statutory powers under the TAA to effectively require Mr Parore to disclose his prospective defence, to deprive him of the right to remain silent, to get him to acknowledge the actus reus of certain of the offences and to disclose his hand in relation to other of the offences. When the charges were laid, a fair trial for Mr Parore was already an impossibility."

The Court therefore stayed the prosecution leaving Inland Revenue to continue with the substantive tax dispute:[34]

"[80] … There is an alternative remedy for the Commissioner. She retains the ability to pursue the alleged GST liabilities through the civil disputes process and she can impose penalties if appropriate."

But given delays in the criminal prosecution the Commissioner found that time was against her.

# Parore again

As explained above, Mr Parore issued his NOPA against the default assessments in February 2018. Under s 89P of the TAA the Commissioner must resolve that dispute within 4 years (being February 2022). To do so, the Commissioner must complete the full disputes process. This requires Inland Revenue to have considered the taxpayer's Statement of Position (SOP).[35] If the Commissioner fails to meet that timeframe she must either:

- accept the taxpayer's position is correct and concede the dispute,[36] or
- convince the High Court there are "exceptional circumstances" to justify her failure to complete the disputes process in a timely way.[37]

The High Court decision finally staying the prosecution of Mr Parore was delivered in December 2021, meaning the Commissioner still had 3 months to complete the process. Had the Commissioner immediately issued an SOP, this was possible. But unaccountably she failed to do so.

Instead, in early February 2022 the Commissioner applied to the High Court under s 89K of the TAA for additional time to complete the disputes process. Relying on the leading case of *Fuji Xerox*,[38] the Commissioner was obliged to satisfy the following criteria for the existence of "exceptional circumstances":

- Was there a qualifying event or circumstance beyond the control of the Commissioner?
- Did that qualifying event or circumstance provide a reasonable justification for the delay?
- Should the Court exercise its residual discretion to grant further time?

The High Court ruled against the Commissioner on all grounds.[39]

First, the Court found that both the decision and the timing regarding the prosecution was solely at the Commissioner's discretion so could not be circumstances beyond her control:

> "[48] Yet, in the context of exceptional circumstances beyond the control of the Commissioner, the filing of criminal proceedings in the District Court was delayed by some 14 months. Then there was the reality that, by August 2019, the Safi decision had been known to the Commissioner for 11 months before the charges against Mr Parore were filed. In my assessment, none of the submissions made on her behalf concerning the rationale for this delay are compelling. It was entirely within the Commissioner's power as to when the criminal proceedings were to commence. That there may have been ongoing proceedings with unsuccessful appeals cannot distract from the reality that the Commissioner could have filed criminal proceedings much sooner than August 2019. That would have then enabled the civil process to have been completed well within the four year period. To then come to this Court seeking an extension, without providing a reasonable explanation for the delay, is not a viable pathway to the remedy that the Commissioner now seeks."

By contrast, the Court found that no part of the delay was caused by Mr Parore:

> "[50] In any event, despite the submissions of the Commissioner, I do not accept her argument that the conduct described amounted to a qualifying event or circumstance. Indeed, at almost every significant juncture, the decision to proceed or not lay with her, not Mr Parore. Putting the point beyond doubt, Mr Tully accepted that Mr Parore had no control over the timing of either the civil process or the criminal proceedings and that in fact, this was within the Commissioner's hands
>
> … in the particular circumstances of this case, the delays have been largely as a consequence of the Commissioner's own decisions. The evidence confirmed that Mr Parore, for the most part, responded promptly and provided the information when requested, except where he considered he had a genuine point of dispute to contest the Commissioner's position. In short, I do not accept that the ground argued by the Commissioner, that the need to delay the progression of the civil dispute to protect the taxpayer's fair trial rights, amounted to a qualifying event or circumstance in the context of s 89L(3)."

Next the Court ruled that delays caused by the prosecution did not justify granting the Commissioner additional time in the circumstances:

> In any event, even accepting, hypothetically, that the "parking" of the civil proceedings while the criminal proceedings advanced was a qualifying circumstance, which I do not necessarily accept as correct, once the stay appeal proceedings concluded on 13 December 2021, there was no justification for the Commissioner not having concluded matters within the four-year timeframe.

Finally, even if exceptional circumstances had been established, the Court ruled it would still have not exercised its discretion in favour of the Commissioner in the circumstances:

> [68] Having carefully reviewed the submissions of both counsel, I consider that in this case, I must exercise my residual discretion so as to decline the application. However, I need not do so, given that I am not satisfied that the Commissioner has identified qualifying exceptional circumstances; and, even if the circumstances she has identified do qualify, I do not accept that they constitute reasonable justification. The remedy is disproportionate at this late stage of a lengthy process. I also consider that little would be gained by allowing the extension of time, and in any event doing so would further penalise Mr Parore for the Commissioner's apparent ill-handling of this case. As has been said, it would be inappropriate for the Commissioner's own prosecutorial misconduct – regardless of fault – to now be accepted as an "exceptional circumstance" justifying an extension of time.

Overall, the High Court's justification was the Commissioner's failure to heed the Supreme Court's warning in *Skinner* or its practical implications in *Safi*:

> • (b) Filing charges late, in August 2019, when it was known that a stay had been granted in Safi for the same misconduct in September 2018, 11 months earlier;
> • (c) Taking such steps with the full knowledge of the Supreme Court, High Court and District Court decisions expressly warning against the same misconduct which eventually led to the successful stay application in this case.[40]

Mr Parore both escaped the pending prosecution and prevailed in his substantive tax dispute.

# Consequences?

Presumably the Commissioner has **finally** learned the lesson from *Skinner* — but how is she to apply it? There are 2 possible consequences.

## *Timeliness*

First, in reaching the decision in *Parore* to decline the Commissioner's application for additional time to complete the disputes procedure, the High Court refused to follow the earlier decision in *Faghriyar*.[41]

That case involved surprisingly similar facts: the parties had exchanged their NOPA and NOR before the disputes procedure was "parked" by the Commissioner in order to prosecute the taxpayer; and delays in that prosecution ran down the time permitted for the Commissioner to complete the disputes process. But the differences in *Faghriyar* were (a) the prosecution was successful, and (b) the taxpayer did not oppose the Commissioner's application for additional time.

In light of the reasoning in Parore, those differences alone cannot constitute "exceptional circumstances", so it appears the decision in *Faghriyar* must be incorrect. The Commissioner cannot rely upon the court's power under s 89L of the TAA to save her so she must have one eye on the calendar to ensure any prosecution is concluded with sufficient time to permit the disputes procedure to be completed.

To that end, it is noteworthy that the Commissioner's own best-estimate of "*indicative timeframes*" under the disputes procedure require almost 15 months to complete a standard dispute[42] — and the authors' experience suggests that timeframe is seldom met.

## *A wider right against self-incrimination?*

As detailed above, almost all criminal prosecutions arise from normal tax investigations or disputes, but those processes by necessity require taxpayers to disclose their facts and arguments to the Commissioner.

A decision not raised in the *Parore* litigation is that of *Singh*.[43] That case involved a taxpayer refusing to provide information or documents demanded by the Commissioner under the power now found in s 17B of the TAA. That provision empowers the Commissioner to demand production of *"any any information that the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of an Inland Revenue Act"*.

The breadth of that power is well recognised by the courts with respect to substantive tax disputes or challenges.[44] But the taxpayer in *Singh* argued that providing that information effectively breached his entitlement against self-incrimination under the Bill of Rights Act 1990. This was particularly so as the Commissioner was already planning to prosecute him and was seeking the information for that purpose.

The High Court rejected that argument and ordered the taxpayer to provide the information. It concluded that the purpose of the Commissioner's information-gathering powers would be defeated if a taxpayer was able to decline to provide information on the grounds it might be used in evidence relating to possible enforcement proceedings. In effect, the court concluded that the ongoing administration of the Revenue Acts required an implicit exception to the right against self-incrimination.

> "I reach that conclusion on two grounds. First, the express wording of subs (1) refers to information, books or documents which the Commissioner or officer considers necessary or relevant 'for any purpose relating to the administration or *enforcement* of any of the *Inland Revenue Acts* or for any purposes relating to the administration or *enforcement* of any matter arising from or connected with any other function lawfully conferred on the Commissioner'. (Emphasis added.) So the power given is not only for purposes relating to administration, but also for purposes relating to enforcement. That, in my view, includes prosecutions for breaches of provisions in the Inland Revenue Department Act. Secondly, as in *Sew Hoy* the purpose of the enquiry is to further an investigation initiated because of suspected breaches of the *Inland Revenue Department Act*. That purpose would be defeated if a taxpayer or other person to whom the request were directed were able to decline to answer on the grounds that the information or material may do exactly what the Commissioner is seeking to do, namely to find evidence relating to possible enforcement proceedings.
>
> It is my conclusion, therefore, that the Commissioner was entitled to seek the information books and documents listed in the letter, the appellant was bound to provide them, and his failure to do so was a breach of s 17. He was, therefore, correctly convicted."

That decision raises the question why the statutory disputes procedure did not also warrant an exception to the normal fair trial rights. The purposes of that procedure are to:[45]

- improve the accuracy of disputable decisions made by the Commissioner
- reduce the likelihood of disputes by encouraging open and full communication
- provide the Commissioner with all information necessary for making accurate disputable decisions, and
- require the issues and evidence to be considered by the Commissioner and a disputant before the disputant commences challenge proceedings.

The exchange of a NOPA and NOR obviously fulfils that statutory purpose, and preventing that process (particularly under strict deadlines) will defeat that purpose. Yet unlike in *Singh*, the High Court in *Parore* elected to elevate the taxpayer's fair trial rights over that procedure. Perhaps another taxpayer will re-litigate the reasoning in *Singh* regarding the right against self-incrimination with respect to the Commissioner's information gathering powers. Considering the strong decision in *Parore* it is equally arguable that the obligation to provide information to the Commissioner that will be used in a pending prosecution also breaches the taxpayer's fair trial right.

# Conclusion

The *Parore* cases leave little room for the Commissioner to complete both a successful criminal prosecution and a substantive dispute within the tight statutory timeframes. Normally excusable delays in either process may accumulate to run the clock down, which may well incentivise taxpayers to take every opportunity to prolong those proceedings. Absent disciplined administration, the Commissioner may simply be unable to complete both.

While s 149(5) of the TAA prohibits the Commissioner from prosecuting a taxpayer after a shortfall penalty has been imposed, in practice that prohibition may now apply any time a dispute is commenced. This will require the Commissioner to hone her decision-making at an earlier stage of the investigation processes regarding whether to prosecute a taxpayer.

There is no doubt this restriction will make the Commissioner's job more difficult. Given the warnings against infringing fair trial rights, the Commissioner apparently cannot prosecute a taxpayer once a substantive dispute has begun, no matter what new evidence is uncovered during that process.

Last reviewed on 6 May 2022

**Footnotes**

1 Tax Administration Act 1994 (TAA), Pt 9.

2 See: Our prosecution guidelines (ird.govt.nz).

3 TAA, s 6A.

4 TAA, s 6A.

5 See: Criminal penalties (ird.govt.nz).

6 See: Tax crime (ird.govt.nz).

7 Inland Revenue Annual Report 2021, at 36: Inland Revenue | Te Tari Taake Annual Report 2021 (ird.govt.nz).

8 Ibid, at 36, which states: "Preventing errors and fraud upfront - Our people and systems do much of the upfront work to help customers get it right".

9 See: M Keating, Tax Disputes in New Zealand: A Practical Guide, at 19.

10 See: Grant Henderson, "Tax cases contested in 2021" in New Zealand Tax Planning Report, No 6, December 2021.

11 Litigation finally resolved in Skinner and Rowley v R (No 2) (2016) 27 NZTC ¶22-063 (SC).

12 Criminal matters are beyond the authority of the TRA and all charges are heard in the District Court at first instance.

13 TAA, s 149A.

14 See: Auckland couple sentenced for repeated tax evasion (ird.govt.nz).

15 See: Complex tax evasion case sounds a warning to tax cheats (ird.govt.nz).

16 *Fox* v *Attorney-General* [2002] NZCA 158; [2002] 3 NZLR 62; (2002) 19 CRNZ 378 at [37].

17 *R* v *Rowley and Skinner (No 2)* (2012) 25 NZTC ¶20-133.

18 The accountants' appeal against conviction was declined in *R* v *Rowley and Skinner* (2015) 27 NZTC ¶22-011 (CA).

19 *Skinner and Rowley* v *R* (2016) 27 NZTC ¶22-063 (SC).

20 *Skinner* (SC) at [65].

21 *R* v *Safi* [2018] NZDC 19698.

22 *Allen* v *C of IR* (2006) 22 NZTC 19,827 (SC).

23 TAA, s 89H.

24 TAA, s 89I.

25 TAA, s 89AB.

26 *Safi* at [34].

27 *Safi* at [35].

28 *Safi* at [36].

29 CS 20/04, at [3].

30 Noting that the Commissioner's policy is not binding, either upon the Commissioner or the taxpayer: see *O'Neil* v *C of IR* (2001) 20 NZTC 17,051 (PC).

31 *C of IR* v *Parore* [2020] NZDC 16363.

32 *R* v *Safi* [2018] NZDC 19698 also saw a stay of criminal proceedings granted against the Commissioner because of the effect the tax disputes civil procedures had on a defendant's trial rights.

33 *Parore* at [72].

34 *Parore* at [80].

35 TAA, s 89N.

36 TAA, s 89J.

37 TAA, s 89L.

38 *C of IR* v *Fuji Xerox NZ Ltd* (2002) 20 NZTC 17,470 (CA).

39 *C of IR* v *Parore* (2022) 30 NZTC ¶25-015.

40 See *C of R* v *Parore* (2021) 30 NZTC ¶25-013 at [66].

41 *C of IR* v *Faghriyar* (2020) 29 NZTC ¶24-067; [2020] NZHC 1256 at [39].

42 See SPS 16/05: Disputes resolution process commenced by the Commissioner of Inland Revenue, at [13].

43 *Singh* v *C of IR* (1996) 17 NZTC 12,471.

44 See *C of IR* v *The National Bank of New Zealand Ltd* (1990) 12 NZTC 7,259 (CA) and *Green* v *Housden* (1993) 15 NZTC 10,053 (CA).

45 TAA, s 89A.