IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-1903
[2015] NZHC 1584

UNDER	the Judicature Amendment Act 1972, Part 30 of the High Court Rules and the Tax Administration Act 1994
IN THE MATTER	of an application for judicial review of the Commissioner of Inland Revenue procedural failures, breaching time-bar period and abuse of process
BETWEEN	JAWARH BHASKAR MUSUKU Plaintiff
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 7 July 2015

Appearances: G J Thwaite for applicant
P Leong for respondent

Judgment: 7 July 2015

(ORAL) JUDGMENT OF WOODHOUSE J

Solicitors/Counsel:
G J Thwaite, Auckland
Crown Law, Wellington

[1] The applicant seeks an order that a judgment not be published, or that his name, other identifying information, and some information in the judgment not be published.

[2] In discussions with Mr Thwaite, for the applicant, he accepted that the relief sought could appropriately be met by narrowing the application to suppression of name and any other information that would clearly identify the applicant.

Background

[3] This application arises from a judgment on an application for judicial review brought by the applicant.[1] It related to steps taken by the respondent in proposing adjustments to the applicant's income tax returns for the tax years 2001–2005.

[4] The respondent applied to strike-out the judicial review proceeding and was successful. The Court held:

(a) Two matters challenged as decisions were not decisions and therefore not amenable to judicial review on any basis;

(b) The Supreme Court's decision in *Tannadyce v Commissioner of Inland Revenue* precluded judicial review in this tax case[2].

(c) A time-bar which the applicant said applied did not apply as a matter of law. As Mr Thwaite noted, that particular conclusion may be obiter, but it is unnecessary to reach any conclusion on the point.

[5] The Judge's conclusion refers to matters of relevance on this application, one of which was noted and given some emphasis by Mr Thwaite:

> [36] I am of the view that judicial review of steps in a process is unavailable. Mr Musuku's claim is premature. Although Mr Musuku and his counsel are well-intentioned in their desire to right perceived wrongs, the statement of claim is an abuse of process and likely to cause prejudice and/or delay, as it amounts to a collateral attack on the validity of tax assessments

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1 *M v Commissioner of Inland Revenue* [2015] NZHC 678.

2 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

> outside of the mandatory statutory disputes and challenge processes in Part 4A and 8A of the Act.
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> [37] Mr Musuku will get his day in court in either the Taxation Review Authority or the High Court if the Commissioner issues an amended assessment. He does, however, have to wait until then to challenge both the process and the Commissioner's substantive position.

Matters of concern in the judgment

[6] Mr Thwaite noted seven matters recorded in the judgment which are of concern to the applicant. In summary, these are: the applicant's name; his occupation as a pharmacist; the respondent's investigation of "possible tax evasion"; the applicant's return of income; the respondent's proposed assessment of income; the respondent's formation of a "provisional" opinion in terms of s 108(2) of the Tax Administration Act 1994; and the respondents suspicion of fraudulent or wilfully misleading behaviour.

The applicant's privacy concerns

[7] The matters the applicant seeks to keep confidential were summarised in the submissions as follows: his profession; family circumstances; his business reputation; his medical condition; and the sensitivity of his tax position.

[8] The evidential basis for the submission was pages in documents which had been put in evidence on the strike out application. The information is of a very general nature in respect of some matters. The submission referring to business reputation refers, in turn, to page 32 of the bundle of documents. That is a page from a letter from accountants acting for the applicant writing to the Inland Revenue investigator. At page 32 of the bundle (page 4 of the letter) there is simply reference to, for example, "Mission Bay Pharmacy (2005) Limited's financial statements for the year ended 31 March 2006." The business is clearly identified, but it does not go beyond that. The chronologically most recent reference to the business interests of the applicant is 2007. There is no evidence relating to relevant circumstances since then, other than in respect of the applicant's health.

Principles

[9] Mr Thwaite, in his written submissions, said:

> The present test establishes the prime public policy as being the principle of open justice, which will be subordinate to privacy concerns in exceptional cases.

He referred to *Rogers v Television New Zealand Ltd,*[3] *Muir v Commissioner of Inland Revenue*[4] and *Madsen-Ries v Just.*[5]

[10] The test was stated by the Court of Appeal in *Clark v Attorney-General* as follows:[6]

> [36] We are not persuaded that there was any error in MacKenzie J's approach to this matter. Indeed, we consider that he was correct to refuse name suppression in this case and we agree with his reasons for that refusal. In particular, we agree with the emphasis he placed on the principle of open justice, including (absent exceptional circumstances) the public identification of all involved in proceedings.

[11] Mr Thwaite's written submissions in broad measure reflected the test in those terms.

[12] For the respondent, Ms Ieong responsibly drew my attention to another Court of Appeal decision indicating that the test may be more evenly balanced. In *Jay v Jay* the Court said:[7]

> [118] It is true the starting point is generally based on the principle of open justice of proceedings. The desirability of open justice must be weighed against competing considerations arising in particular cases and each case must be addressed on its merits. Unlike in the criminal context, "extraordinary circumstances" are not required to justify suppression in a civil case. This Court's judgment in *Muir v Commissioner of Inland Revenue* made no reference to the need for "extraordinary" or "exceptional" circumstances. In refusing leave in that case the Supreme Court observed that situations warranting confidentiality are "likely to differ between the [civil and criminal] categories", and also "within them". Ultimately, bearing in mind the requirements for open justice in a civil context the court must exercise a discretion as to whether to make a suppression order in the particular circumstances of the case.

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3 *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277.
4 *Muir v Commissioner of Inland Revenue* (2004) 21 NZTC 18,894 (CA).
5 *Madsen-Ries v Just* [2013] NZHC 2346.
6 *Clark v Attorney-General* [Name suppression] 17 PRNZ 554 (CA).
7 *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861. (Footnotes omitted).

[13] The Court in *Jay* did not refer to *Clark*. *Clark*, like *Muir* – referred to in the submissions of both counsel as well as in *Jay* – was a case concerned solely with the question of name suppression. In *Clark* the Court of Appeal approved the detailed discussion of the issue and, in particular, the matters of principle, in the High Court judgment. In *Jay* the matter arose at the end of a judgment primarily concerned with an appeal against the substantive decision, and after the parties had agreed to interim name suppression throughout.

[14] The Court in *Jay* clearly did not conclude that *Clark* should not be followed for the reason noted – it was not referred to. In any event, I do not need to determine which decision is to be followed to the extent there is a material difference. Notwithstanding some submissions from Mr Thwaite, it is clear that the Court does not start on the basis that there is a right to privacy which stands equally with the principle of open justice. The starting point is the principle of open justice. This is made clear in *Muir*, which is the leading authority on name suppression in tax cases (although the principles in civil proceedings apply generally).

[15] More is required than to point to adverse consequences of publicity in respect of the matters of concern, and whether they are unproven allegations or not. The facts of *Muir* make that clear, as do High Court cases including *R&M* v *Commissioner of Inland Revenue;*[8] *Madsen-Ries v Just,*[9] *Peters v Birnie*[10] and *Hardie v Commissioner of Inland Revenue*.[11]

This case

[16] The applicant's strongest point, in terms of adverse consequences, is that the judgment refers to the Commissioner's opinion that s 108(2) of the Tax Administration Act 1994 applies. Section 108(2) provides:

> (2) If the Commissioner is of the opinion that a tax return provided by a taxpayer—
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> (a) is fraudulent or wilfully misleading; or

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8 *R & M v Commissioner of Inland Revenue* (2003) 21 NZTC 18, 189 at [6].
9 *Madsen-Ries v Just,* above n 5, at [7].
10 *Peters v Birnie* [2010] NZAR 494 (HC) at [25].
11 *Haride v Commissioner of Inland Revenue*, HC Auckland, CIV 2007-404-003354, 28 June 2007 at [5], [15]-[17].

> (b) does not mention income which is of a particular nature or was derived from a particular source, and in respect of which a tax return is required to be provided,—
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> the Commissioner may amend the assessment at any time so as to increase its amount.

[17] Fraud is a serious allegation. Numerous cases over a long period have emphasised the need for solid evidence before counsel plead fraud in an ordinary civil action. I am satisfied that the considerations that underpin that apply in a broad way to the matter of concern here to the applicant. Against that, what the judgment refers to, although perhaps not always precisely in terms of s 108(2), is an opinion of the Commissioner, not a finding.

[18] The applicant points to the fact that the dispute is now before the Taxation Review Authority and he may, in the end, be vindicated. If he is, he can point to that result.

[19] In my judgment the fact that the matter is before the Taxation Review Authority, and there has not yet been a final determination, is not sufficient justification for name suppression. The applicant chose to bring the application for judicial review. In his claim he pleaded the Commissioner's opinions. And in that regard I note that the primary opinion of the Commissioner was not in respect of s 108(2)(a) – referring to an opinion that a tax return is fraudulent – but s 108(2)(b).

[20] One of the consequences of a civil proceeding in the High Court is that the general anonymity of a proceeding before the Taxation Review Authority does not apply. *Muir* is authority for that proposition. The applicant chose the forum in which the general rule is that there is no annonymity. He is not justified, having received the adverse decision, in now complaining and pointing to the Taxation Review Authority alternative.

[21] There are further considerations. One is that there is a lack of any substantive evidence. As earlier noted, there is no evidence in respect of any relevant business activity of the applicant since 2007. There is not even an affidavit from the applicant directly in support of the suppression application and recording his present circumstances in respect of matters of concern. Possible adverse consequences for

family members would be regrettable, but they are certainly not exceptional. In any event, again, there is no up-to-date evidence pointing to any matters of particular consequence other than broad inferences one might draw in respect of any family members.

[22] A further point concerns a submission by Mr Thwaite that publication of the applicant's name is unnecessary; that it is not something which the open justice principle requires. The essence of the submission is that the relevance of the decision is the application of the *Tannadyce* principle to the facts of this particular case, and with those facts being adequately recorded without reference to the applicants name, or to the particular opinions of the Commissioner, or the actual details of tax returns and re-estimates of the Commissioner. This submission is contrary to observations in *Clark*, as follows:[12]

> [42] With regard to Mr Ellis' comment that there is no public interest in the publication of Mr Clark's name, we remark that the principles of open justice and the related freedom of expression create a presumption in favour of disclosure of all aspects of court proceedings which can be overcome only in exceptional circumstances. We refer here to the case of *Re Victim X* [2003] 3 NZLR 220 (HC and CA) in which this Court upheld the setting aside of a suppression order in favour of the intended victim of a failed kidnapping plot. The Court was mindful of "the sense of anguish" the result would cause the intended victim and his family but held that the victim's private interest did not outweigh the fundamental principles of open justice and freedom of expression.
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> [43] No exceptional circumstances have been pointed to in this case justifying departure from the open justice principle. We apprehend that Mr Ellis' main concern is that publicity will focus on what he sees as irrelevant matters, viz Mr Clark's crimes, rather than his alleged treatment at the hands of prison officers. It is not for the courts, however, to grade public interest factors into matters that can or should be reported and those that should not. The right to freedom of expression is better served by placing as few restrictions as possible on it and certainly by avoiding value judgments by the courts as to the relative worth of matters the press chooses to publish.

[23] The remaining point involves the comparison of the circumstances presented in this case and those in *Muir*. In *Muir* there was substantially more evidence of prejudice, but the Court of Appeal upheld the High Court's refusal of name suppression. An application for leave to appeal to the Supreme Court was dismissed. And it is reasonably significant, as a point of factual comparison, that in *Muir* the tax

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12 *Clark v Attorney-General* [Name suppression], above n 6.

issues were transferred from the Taxation Review Authority on an application by the Commissioner that has been opposed by the taxpayers; that is to say the taxpayers had not voluntarily chosen to bring their tax case before the High Court.

[24] For these reasons, I am satisfied that it would be contrary to authority binding on me, when that is applied to the facts of this case, to grant name suppression. The application is accordingly dismissed.

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Woodhouse J