The National Council of Women of New Zealand Incorporated (NCWNZ) is a charitable organisation established in New Zealand in 1896. On 4 June 2009, following the enactment of the Charities Act 2005 (the Charities Act), NCWNZ was registered as a charitable entity by the Charities Commission as at 30 June 2008 (the Registration Decision). On 22 July 2010, the Charities Commission revoked the registration with effect from 19 August 2010 (the Deregistration Decision).

On 10 September 2012, NCWNZ applied to the respondent, the Charities Registration Board (the CRB), the successor to the Charities Commission, for reregistration as a charitable entity. The NCWNZ requested that it be reregistered as at 19 August 2010, in order to avoid any potential exposure to income tax during the period of its deregistration.

On 15 April 2013, the CRB granted the NCWNZ’s reregistration application, but with effect from 10 September 2012, not 19 August 2010 (the Reregistration Decision). The Commissioner of Inland Revenue (the Commissioner) subsequently assessed NCWNZ for income tax for the period that NCWNZ was not registered as a charitable entity, namely 19 August 2010 to 10 September 2012 (the Deregistration Period). In this appeal, NCWNZ challenged both the Deregistration Period, and the assessment of income tax for that period.

Prior to the enactment of the Charities Act, the Commissioner granted charitable status for tax purposes. There was no other regulation of charitable entities in New Zealand at that time. The Charities Act now provides for the regulation of charities generally, including for the registration of societies, institutions and trusts as charitable entities. Section 13 of the Charities Act sets out the essential requirements an entity must meet to qualify for registration.

Section CW41 of the Income Tax Act 2007 exempts income derived by a charitable entity from income tax provided that entity is a tax charity. A tax charity is a charitable entity registered as such under the Charities Act. The NCWNZ was a properly registered tax charity until it was deregistered by the Charities Commission in the Deregistration Decision. The reason for deregistration was that the Charities Commission had concluded after investigation that a main purpose of NCWNZ was to advocate for changes in law, policy or decisions of central government, which was not a charitable purpose. NCWNZ was therefore deregistered on the basis that it did not have exclusively charitable purposes as required under NZ law. NCWNZ did not appeal the Deregistration Decision.

Later, after discussions with the Charities Commission (and its successor the CRB), the NCWNZ was reregistered. During the Deregistration Period NCWNZ had become liable for income tax, had filed tax returns, and had been assessed for and paid income tax with respect to the 2011 and 2012 tax years. Should the reregistration of the NCWNZ have been backdated to 19 August 2010? Section 20(2)(b) of the Charities Act was argued by the CRB in its decision of 15 April 2013 (the Reregistration Decision) which stated:

Pursuant to section 20 of the Act, the Board may direct that an entity be given an effective registration date that is before the time at which the entity became registered as a charity. Section 20(2)(b) clearly states that an effective registration date must not be ‘earlier than the time that the chief executive received a properly completed application for registration of the entity as a charitable entity’. The Board therefore directs that the effective registration date be the date of the NCWNZ’s present application for registration, i.e. 10 September 2012.
The first ground of appeal therefore became the power of the CRB to backdate a registration decision under section 20 of the Charities Act. The NCWNZ contended that the power was a wide one, and that since they had submitted a properly completed application for registration on 28 May 2008, the CRB could have registered it at any time after that date. However, the CRB naturally took a narrower view – that it could only consider applications that were actually before it after it became the relevant registration entity. His Honour agreed with the narrower view (at [37]–[38]):

If the backdating power is seen as enabling the CRB to relieve a registrable charity of the adverse consequences of the CRB taking some time to process an application, then it is to authorise the CRB to give credit to the charitable entity for the period of time during which the CRB is responsible for reaching a positive decision on the application. On that basis, in the anomalous circumstances here, the period between the deregistration decision and NCW’s second application is certainly not a delay caused by the CRB in the same way as the period between the lodging of an application and the CRB arriving at its decision in respect of it. Plainly, the discretion provided for by the transitional provision was not intended to provide relief for the period between a deregistration decision (following an initial application and acceptance as a charitable entity) and a second application to the CRB.

His Honour described the position of the NCWNZ as perhaps ‘genuinely anomalous’ (at [25]), but nevertheless agreed with the CRB that the wider view of section 20(2)(b) was not correct (at [41]). However, could another power be used by the court? His Honour thought that it could, describing the section 20(2)(b) argument as unnecessary (at [41]) in the light of the court’s powers on appeal under section 61 of the Charities Act. In particular, section 61(4) states that the High Court can make any order it sees fit on appeal (at [50]–[52]):

Section 61(4) is not confined to the Court making any other order the CRB could have made, but rather any other order that the Court thinks fit. It has been treated as:

... designed to allow the Court the widest possible scope to do what is necessary in light of the substantive conclusions reached in the appeal before the Court.

Consistent with that observation, s 61(4) appears to free the Court from being limited to orders that could have been made by the CRB. I am satisfied that this is a provision affording wider powers to the Court on appeal than those granted by the Act to the original decision-maker. Once that point is reached, I am persuaded of the merits of the alternative argument for NCW.

His Honour agreed that the work of the NCWNZ had continued in the same manner over time (at [53]–[55]):

It is a situation in which a robust approach to the scope of the Court’s powers is warranted. The Act is to be applied to facilitate charitable works, not frustrate them…The consequence is that, on the view of the law applying to the permitted scope of charitable purposes since at least the reregistration decision, NCW was entitled to be registered throughout. The adverse consequences of being deprived of that include a liability for income tax, and the taint on its status which deponents on its behalf contend has continued, and has been substantial. Given the overall purpose of the Act to encourage and promote the effective use of charitable resources, an order extending the CRB’s backdating order is justified. Accordingly, I order that NCW is to be registered as a charity from 19 August 2010.

In respect of the tax challenge, the outcome of the registration appeal also disposed of the tax appeal. An order in the appeal effecting a backdating of registration to coincide with the deregistration was sufficient to resolve the tax issue. In those circumstances, the Commissioner acknowledged that the
basis for the assessment had fallen away and the tax paid by NCWNZ was to be refunded, together with an amount calculated under the relevant statutory provisions for use of money interest.

Despite this clear outcome, His Honour went on to consider the tax question in a separate part of the judgement. The Commissioner had taken the view that during the period of deregistration, the NCWNZ had not been a tax charity within the meaning of the Charities Act. His Honour agreed with this view (at [72]). Moreover, His Honour held that there was no discretion that the Commissioner could have used to avoid the obligation to collect the tax from the NCWNZ as it had done (at [77]). Therefore, if the registration decision had not gone as it did for the NCWNZ, then its liability for tax would have been upheld. Therefore, the appeal by the NCWNZ was successful in that its registration as a charity was backdated to 19 August 2010, and it had no liability for tax during the period it should have been registered.

The case may be viewed at: http://www.nzlii.org/nz/cases/NZHC/2014/3200.html