departure is warranted in the public interest. The Board was prepared to act pursuant to this power in the *Highway Motors'* case, supra. It was held that, since the Commercial B zones of the district were fully built up and the respondent had been arbitrary and unreasonable in failing to make any provision for the extension of these zones, the public interest required that the departure should be granted, in spite of the fact that it might necessitate a change in the district scheme. The respondent argued that the application should not be granted because the area was already sufficiently served by car sales premises. However, the Board held that this consideration was not relevant with regard to the present application for it was not the duty of the respondent to act as a licensing authority for that form of commercial enterprise, nor was the departure sought out of zone on the ground of public need or convenience. However, had the applicant sought to establish cause for a departure from the provisions of the scheme by showing that there was a need for the desired use, then the question of whether or not the area was adequately serviced would no doubt have been highly relevant.

The extended jurisdiction of the Board under s. 35(1) was also discussed in *G.U.S. Properties Ltd.* v. *Timaru City Council* (1971) 4 N.Z.T.P.A. 12. In that decision the Appeal Board indicated what steps could be taken by a Council which has to reject a meritorious application because it has no jurisdiction to allow it under s. 35(2). Generally it is open to the Council:

(i) to resolve whether it will support an appeal brought to the Board and to declare the matters which in its opinion the Board should take into account under subs. (6); and

(ii) to declare what conditions should in its opinion apply, should the Board see fit grant consent to the application on appeal; and/or

(iii) to resolve to bring down such a change or variation to the scheme as would have the effect of permitting the proposal as of right.

The Board stated that it would be reluctant to authorise, by recourse to subs. (6), a proposal which is capable of being authorised and which should be authorised by a change or variation to the scheme. However, in the present case, since it was not open to the respondent to bring down a change to the operative district scheme because of the provisions of s. 29(2), the Board felt that it should in the public interest exercise its discretion under s. 35(6).

R. P. La Hood

TAXATION AND ESTATE PLANNING

Land and Income Tax Act 1954 s. 108

Section 108 avoids as against the Commissioner for income tax purposes any "contract, agreement or arrangement" made or entered

into in so far as it purports to have the effect of altering the incidence of income tax or relieving anyone of liability to pay tax. The three recent cases discussed below help to throw further light on the construction and effect of this wide provision.

In *Martin* v. *C.I.R.* [1972] N.Z.L.R. 340 the objector owned an interest in a partnership which operated the Naenae Hotel and was the principal shareholder in a company known as the White Hart Hotel Ltd. which had substantial accumulated losses. In October 1960 he sold his interest in the partnership to the company. At 31st March 1961 the company was therefore entitled to the whole of the objector's former interest in the partnership, thus allowing it to pay off its losses. The objector did not include in his personal tax return for that year, any income from the partnership. In December 1961 the company resold the interest to the partnership.

The Commissioner treated the whole transaction as void for tax purposes under s. 108. The objector's contention was that the transaction could be explained by reference to ordinary business dealings—he had entered into the agreement for the purposes of gathering together his hotel interests so that he could deal more effectively with the firm from which he obtained his supply of liquor.

The Court referred to the Privy Council decisions in *Newton* v. *C.I.R.* [1958] A.C. 450 and *Mangin* v. *C.I.R.* [1971] N.Z.L.R. 591 and emphasised that not every scheme with some tax-saving feature will be set aside under s. 108. To bring a transaction within the section it must be shown that it was entered into for the dominant purpose of evading tax. The Court considered as relevant factors in this case: that there were several other methods by which the taxpayer could have effected his alleged purpose, that when he decided to use White Hart Hotel Ltd he was aware that it had accumulated losses to carry forward which could work to his advantage, and that the resale took place as soon as the set-off of these losses was accomplished and the usefulness of the company as a means of reducing tax was at an end. In view of these matters the Court held that the transaction was carried out for the dominant purpose of avoiding liability for tax.

The effect of the avoidance of a transaction under s. 108 was discussed by the Court of Appeal in *Wisehart, McNab & Kidd* v. *C.I.R.* [1972] N.Z.L.R. 319. This case sounds a warning that avoidance of arrangements pursuant to s. 108 does not necessarily restore the position previously existing and that failure of a tax avoidance scheme may deprive the taxpayer of deductions which would otherwise be allowable. The appellants who were solicitors created family trusts and these trusts took up all the shares in a company known as Marlborough Developments Ltd. Following the acquisition of these shares the partnership entered into several transactions with the company. When they required dictating machines they arranged for these to be hired to the company by the owner and the company in turn hired them to the partnership at a higher rental. Later the partnership sold all its plant and equipment to the company and dismissed all its staff who were then re-employed by the company. The partnership then entered into a deed with the company who agreed to supply them with plant, equipment and staff at a set charge.

The Court of Appeal had little trouble in deciding that the dominant purpose of these arrangements was to relieve of tax liability, and that the arrangements therefore were void against the Commissioner by

virtue of s. 108. The real importance of this case lies in the discussion by the Court as to the extent of the liability falling on the appellants by reason of the Court's findings. The findings did not affect the appellant's gross income but related to the various amounts which could be deducted as allowable expenditure pursuant to ss. 110 and 111 of the Act.

Since the sale of the plant and equipment to the company was void, these items remained the property of the partnership at all times and they were entitled to deduct depreciation. The staff, salaries and the payments for the hire of the dictating machine posed more complex problems. The staff were dismissed by the partnership and accepted employment with the company. The agreement between the partnership and the company having been declared void, it could not be said that the staff accepted employment again by the partnership and so technically the appellants incurred no expenditure resulting from the employment of staff. Here the Commissioner had taken a liberal view and agreed to allow the usual deductions. The Court did not disturb his discretion but was careful to point out that the Commissioner was under no compulsion to take such an attitude. They considered the technical legal position would be that such expenditure was not deductible. Similarly in the case of the dictating machine, the Commissioner had agreed to allow the hire payments actually made as deductions. The Court pointed out that had he chosen to adopt a stricter attitude he might have been entitled to disallow the total hire payment made by the partnership.

In *Wisehart, McNab & Kidd v. C.I.R.* it was also pointed out that the only arrangements which can be attacked under s. 108 are those to which the taxpayer is a party. Part of the appeal in this case concerned the relinquishment by the appellant partners, of an insurance agency after they had persuaded the insurance company to grant the agency to the company in which they (the appellants) were principal shareholders. The Court of Appeal held that it was not within its powers to declare the appointment by the insurance company of this company as its agent void under s. 108. The appellants were not parties to the transaction; all they had done was to relinquish the agency and suggest the appointment of the company. Once the partnership had divested itself of the agency, its future lay in the exclusive control of the insurance company. This issue was also raised in *Udy* v. *C.I.R.* [1972] N.Z.L.R. 714 where the objector was an agricultural contractor who had arranged for a friend to set up a family trust under which he, his wife and children were beneficiaries. The contracting equipment was sold to the trust which from that date on carried on the contracting business under the management of the objector. The scheme was set aside under s. 108 although the objector had argued that it was outside the scope of the section because he was not a party to the creation of the scheme. The Court held that a transaction falls within the section if it takes place at the instigation of the taxpayer notwithstanding that the formalities were carried out by another person. They took into consideration that despite the fact that he was not a party to the trust deed, he was the controlling force behind the whole scheme; it was conceived and implemented by him, his equipment was used for the trust business and he had wide powers of management.

Assessable income—goodwill—s. 88(1)(d) Land and Income Tax Act 1954

Section 88(1)(d) provides that assessable income includes "all rents, fines, premiums, or other revenues (including payment for or in respect of the goodwill of any business, or the benefit of any statutory licence or privilege) derived by the owner of land from any lease, licence, or easement affecting the land, or from the grant of any right of taking the profits thereof."

In *Romano Motels* v. *C.I.R.* [1972] N.Z.L.R. 646 the taxpayer objected to the Commissioner including in his assessable income a sum of $5,000 which he had received in consideration of the goodwill and lease of his motel business.

This was the first time the interpretation and application of s. 88(1)(d) had been before the New Zealand courts. The learned judge held that the goodwill of a motel business undoubtedly attaches to the locality and site arising from the continuation of the business in the same premises and was therefore caught by s. 88(1)(d). He pointed out that payments for personal goodwill are less likely to be caught. One wonders how the courts will deal with goodwill payments enveloping both personality and locality factors. One assumes that some sort of apportionment would have to be made.

Assessable income—valuation of stock

Section 101 provides that the consideration received for the sale of any trading stock shall be that specified in the contract of sale but the Commissioner has the right where trading stock is sold with other assets of a business to determine the part attributable to the trading stock.

In *Hansen* v. *C.I.R.* [1972] N.Z.L.R. 193 the objectors sold their farm for $200,000, the agreed value placed on livestock being $27,000. An independent valuer valued the livestock at $82,000. It was this figure that the Commissioner accepted as being correct for the purposes of determining assessable income and he accordingly re-apportioned under s. 101.

The objectors argued that the application of s. 101 was limited to cases where the contract of sale did not state a specific value in respect of livestock. The Court of Appeal rejected this and held that s. 101 is wide enough to cover every transaction where the parties have sold trading stock together with other assets whether they had purported to apportion consideration between the assets or not.

Recent legislation

By the Land and Income Tax Amendment Act (No. 2) 1972 the existing dividend rebate provisions have been extended to provide a rebate equal to the smaller of 10 per cent of assessable dividend income or $400 reduced 10 cents per dollar by which total taxable income exceeds $4,000 (s. 3). This means the rebate cuts out when the total taxable income reaches $8,000. By s. 8 the maximum exemption for donations and school fees is raised to $200. Section 18 provides that

payroll tax is now deductible from assessable income and by s. 10(d) the first $500 of income derived by non-profit making organisations is exempt from tax.

Catherine Mallon