6/9

NZ Law Reports

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

LOW PRIORITY

No. AP. 174/88

1123

BETWEEN LINDSAY JOHN HUNTER of Wellington, Chief Inspector of Police

Appellant

AND THE COMMISSIONER OF INLAND REVENUE

Respondent

Date of Hearing: 17 August 1989

Counsel:

D L Mathieson, QC, for Appellant
G D Pearson and Virginia Flaus for Respondent

Date of Decision: 31st August 1989.

RESERVED DECISION OF McGECHAN J.

The Proceeding

This is a Case Stated by the Taxation Review Authority under s43. It raises a principal question as to deductibility against salary of certain unreimbursed relocation expenses incurred by a Police officer on transfer. It also raises a procedural question as to the extent of the grounds upon which the Commissioner now may rely in the course of resolution of the taxpayer's objection. The tax involved is less than $2,000, and by s43(1) Inland Revenue Department Act 1974 the case is stated on questions of law only.

FACTS: BASIC

The basic facts are straightforward. The Case filed recites the following as either admitted or proved;

"(1) At all material times the Appellant was a Police Officer and a member of the New Zealand Police.

(2) The Police Department advertised a vacancy for a position at Lower Hutt. The Appellant, who was an Inspector, lived and worked in Christchurch. His appointment to the vacancy involved his promotion to the rank of Chief Inspector, being the rank at which the Lower Hutt vacancy was advertised.

(3) The Appellant's application was considered along with that of others. The Appellant was appointed and was transferred by the Department from Christchurch to fill the vacancy at Lower Hutt. The advertising of the vacancy, the Appellant's application, and his promotion and transfer were all duly carried out in accordance with the proper procedures.

(4) The Appellant duly transferred from Christchurch to Lower Hutt. The transfer involved his selling his home in Christchurch and moving his wife and family to Wellington. The Appellant incurred expenditure in the transfer, including reasonable expenditure for solicitor's fees, real estate agents' commission, stamp duty and incidental expenses on the sale of his home at Christchurch and the purchase of a home in Wellington.

(5) The Appellant's reasonable expenditure exceeded by $1,130.06 the maximum entitlement he had to reimbursement from the Department according to the relevant Commissioner's Determinations. His reasonable expenses amounted to $7,547.56. He was reimbursed the maximum permissible amount, namely $6,417.50, by the Department. He was out of pocket for the $1,130.06. All the Appellant's expenditure was in fact reasonable. $1,130.06 was in fact the amount of the expenditure incurred on the items by the Appellant for which he was not reimbursed.

(6) The Appellant was required by the Department to transfer from Christchurch to Lower Hutt in the course of his duties as police officer.

(7) The Appellant transferred "as a condition of his employment". (The Authority held this to be a mixed question of fact and law.)

(8) The Appellant's home sold at Christchurch and the home he purchased in Wellington were each the Appellant's domestic, private dwellinghouse used by the Appellant, his wife and family for that purpose.

(9) In his income tax return for the year ended 31 March 1985 the Appellant claimed a deduction of $945.43 for the expenditure involved. That claim was disallowed by the Commissioner.

(10) Correspondence ensued between the Appellant and the Commissioner. This correspondence, along with the Authority's decision, is annexed. By his letter of 21 May 1986 the Commissioner accepted the Appellant's letter of 8 April 1986 as a late objection to the 1985 assessment of income tax and by implication that the Appellant had incurred the $1,030.06 which had not been reimbursed.

(11) Apart from the Commissioner's letters of 22 August 1985 and 21 May 1986, and the Case Stated, there was no oral or written statement by the Commissioner to the Appellant before the hearing before the Authority on 4 November 1987 that the Commissioner intended to rely at the hearing on alleged non-compliance with Clause 8 of the Fourth Schedule to the Income Tax Act 1976.

The findings of fact made by the Authority are set out in greater detail in the decision of the Authority."

FACTS: ADDITIONAL DETAIL

Certain points warrant further detail. I draw only upon the decision of the Authority, and only to the extent matters are beyond controversy.

First, the circumstances from which transfer arose, and employer directions as to relocation. The Authority found:

> "7 The transfer of the objector from A to B and the sale and purchase of his homes came about as a result of the objector applying for the vacancy advertised by the Department at B and the objector applying for and consequently being promoted and transferred from A to fill the vacancy at B. The Department's letter of 11 October 1984 contains details of the promotion and transfer. It was addressed to the objector's District Commander at A, the person who had the control and direction of the objector (subject to that of the Commissioner of Police), to whom the objector had the obligation to carry out duties assigned to him by that person, and who I would otherwise include as coming within "the Department", as an all inclusive name.
>
> 8 The letter of 11 October 1984 stated, inter alia (with alterations made by me to prevent the objector's identity becoming generally revealed):
>
> > "1 ... [the objector] is promoted to the rank of ... [the rank for the vacancy advertised which was one step up for the objector] on and from 4 October 1984.
> >
> > 2 The member is transferred from ... [A to B] to fill a vacancy advertised in the Police Gazette.
> >
> > 3 A Police residence, if available, will be allocated to the member by the District Commander, ... [at B].
> >
> > 4 If there is no Police residence available at ... [B] for the member's occupation he will be required to make immediate application for an allocation of a pool house or alternatively make his own accommodation arrangements.
> >
> > 5 The member's transfer and the removal of his household and effects are not to be actioned until he has arranged suitable accommodation at ... [B] which is vacant and ready for his occupation.
> >
> > 6 The member is not to transfer ahead of his family without approval of this office.

> 7 The General Instructions on Transfers are to be met and should be bought (sic) to the member's attention. If for any reason, the member's transfer cannot be effected in accordance with these Instructions, this office is to be advised. A copy of the State Services Commission Circular on the housing advisory service available from the Valuation Department is attached for the information of the member.
>
> 8 The member is to note that, if applicable, allowances will cease from the date of promotion.
>
> On taking up appointment, members will be reimbursed for any allowances ceased to which they are still entitled.
>
> 9 The attached copy of this memorandum including the Certificate of Promotion are to be handed to the member."

The objector received a copy of this letter of 11 October 1984 advising him of his appointment, in accordance with the terms of that letter."

Second, more specifically as to the question of "requirement" to transfer and the "mixed" question of fact and law as to condition of employment, the authority found:

> "9 The evidence was somewhat equivocal as to whether the objector's move from A to B was in compliance with an order or requirement of the Department. To some extent that is dependent on the proper interpretation of relevant statutory provisions as to the terms and conditions of the objector's employment as a Police officer. Taking into account those provisions, which I mention hereunder, the terms of the letter of 11 October 1984, all the relevant surrounding circumstances and the evidence given on behalf of or by the objector, I am satisfied that the objector was required by the Department to transfer from A to B in the course of his duties as a Police officer. If he did not so transfer that would require him to withdraw his application to fill the vacancy at B for which he had received promotion. He may then have been permitted to stay at A, but as he had been promoted for the purposes of his transfer to fill the vacancy at B, it is probable that he would have had to ask for his promotion to be revoked in order for him to stay at A, or it would have been revoked, with the likely consequence that he may not have received any other promotion for two years thereafter, within the discretion of the Department. Although it was a requirement of the Department that the

objector transfer from A to B it may have been possible in the course of good industrial relations, or an understanding employment contract, for the objector to have renegotiated that requirement to have it changed or revoked, but that would necessitate the making of a new arrangement between the Department and the objector. There was no such alteration, revocation or change to the Department's requirement that the objector transfer from A to B on his promotion, so that the objector in making his transfer was complying with the requirement of the Department. As such I think he was also carrying out his transfer as a condition of his employment, although that is a mixed question of fact and law."

FACTS: CORRESPONDENCE

Certain correspondence is referred to in paragraphs 10 and 11 of the Case Stated. It bears upon procedural point involved. The return of 9 June 1985 and assessment of 24 July 1985 are not in evidence. Evidently, the return claimed the deduction in question, and the assessment disallowed it. By letter dated 30 July 1985 the appellant stated:

"Your assessment dated 24 July refers. I wish to object on the grounds that the expenditure on transfer is not a private cost.

The costs are essentially reimbursement for the actual costs of re-establishing the household at a new location for the purposes of the Police."

The Commissioner responded 22 August 1985 disallowing the objection on the basis the taxpayer had been fully reimbursed (an arithmetical error later corrected); but going on to say:

"For your information, however, I would advise you that where there is an excess over an amount reimbursed in respect of transfer expenses, that excess is normally considered to be expenditure of a private or domestic nature and, as such, is specifically prohibited as a deduction in terms of s106(1)(j) of the Income Tax Act 1976. Further, any claim made under Clause 8 of the Fourth Schedule of the Income Tax Act 1976 requires to be supported by documentary evidence, ie copy of the contract of service or industrial agreement, showing that the expenditure is incurred for purposes of and as a condition of employment. In order to qualify as a

deduction under this clause it is not enough for the expenditure to be considered necessary by the taxpayer but must be incurred as a result of a legal requirement imposed by the employer."

The appellant resumed the exchange by a letter dated 8 April 1986 which pointed out the arithmetical error mentioned, and continued:

"3 PRIVATE EXPENSES

It is a necessary condition of my employment that I be prepared to serve anywhere in New Zealand. This principal is ensconced in statutory regulations, The Police Regulations 1959, Section 15. I enclose a memorandum from my employer showing that the transfer was for the purposes of and as a condition of employment.

I conclude therefore that my correct claim is a proper statement of expenses as a condition of my employment and should be allowed."

The Commissioner's response of 21 May 1986, accepting that 8 April 1986 letter as a late objection, went on to state:

"It is noted from your letter that, as in your return of income, your claim is based on clause 8 of the Fourth Schedule of the Income Tax Act 1976, 'other expenses as a condition of employment'.

Expenditure incurred by a taxpayer in providing a home for himself and his family is considered to be a private and domestic nature and as such is outside the provisions of clause 8 of the Fourth Schedule. This clause can be applied only to expenditure incurred in relation to the carrying out of your duties for the Police Department. It cannot be applied in respect of expenditure of a private or domestic nature which is specifically prohibited as a deduction from income by section 106(1)(j) of the Income Tax Act 1976.

In moving from ... [A to B] you were putting yourself in the position of being able to perform your duties. In the same way, a person who travels to and from his home to work daily cannot claim the expenses incurred in travel as it is for the purposes of putting himself in the position of being able to perform his duties.

Your objection is disallowed."

There is also correspondence between the Director Personnel (Police Staff) and an Assistant District Commissioner, dated 1 April and 3 June 1986 respectively. It refers to the appellant by name. It is not referred to directly in the Authority's decision, but comes within the correspondence referred to as "annexed" in the Case Stated. For completeness I note the following content. The Director's letter stated:

> "From a philosophical point of view it would fit with our own wishes if Mr Hunter's loss in claiming full transfer expenses on this occasion were held to have been an unavoidable and necessary work related expense."

The Assistant District Commissioner's reply stated:

> "It is not agreed that such expenditure comes within the provisions of the Fourth Schedule of the Income Tax Act 1976. It is considered to be expenditure of a private or domestic nature and as such is specifically prohibited as a deduction from income by section 106(1)(j) of the Act."

LEGISLATION

The legislation potentially relevant is to be considered as it stood for the income year ended 31 March 1985. Section 101 prohibited deductions from assessable income (including of course income derived from employment) unless expressly provided. Section 104 made such provision: expenditure incurred in gaining or producing assessable income may be deducted, except as otherwise provided. (There have been no material changes to s101 and s104 since). Section 105, as it then stood, as inserted retrospectively by s15(1) Income Tax Amendment Act (No. 2) 1985, reimposed limitations upon deductibility in respect of income derived from employment eg. salary. In view of diminishing access I will set out s105 as it then stood in full. The key words for present purposes are those underlined in s105(2). (There have been amendments to s105(2) since).

"105. (1) For the purposes of this section the term 'income from employment' means -

"(a) Income from employment as defined in section 2 of this Act:

"(b) Any salary, wages, or other income to which section 6(2) of this Act applies:

"(c) Withholding payments of the classes specified in clause 10 of Part A and clause 6 of Part B of the Schedule to the Income Tax (Withholding Payments) Regulations 1979.

"(2) For the purposes of section 104 of this Act and notwithstanding anything in section 106 of this Act, the amount or, as the case may be, the sum of the amounts of the expenditure and losses incurred by any taxpayer in deriving assessable income, being assessable income that consists of income from employment, in any income year shall be deemed to be such amount (referred to hereafter in this subsection as the qualifying amount) as is equal to the greater of -

"(a) An amount equal to the smaller of -

(i) An amount equal to 2 percent of that income from employment in that income year:

(ii) $52:

(b) An amount equal to the smaller of -

(i) The aggregate of the amounts of the expenditure and losses (being expenditure and losses incurred by the taxpayer in gaining or producing that assessable income) of any of the kinds specified in the Fourth Schedule to this Act, reduced by every amount received (whether before or after the incurring of that expenditure and those losses), by or on behalf of the taxpayer, in respect of or in relation to that expenditure and those losses:

(ii) The said aggregate, reduced by every amount that, in relation to the said expenditure and losses so incurred, is (in accordance with the said Fourth Schedule, and by reason of the maximum or, as the case may be, the maxima specified therein in respect of the said expenditure and losses) not a deductible amount;-

and, except to the extent of the qualifying amount, no deduction shall be allowed under section 104 of this Act of any expenditure or loss incurred by the taxpayer in so deriving that assesable income.

"(3) For the purposes of subsection 2(b) of this section, expenditure or loss shall be deemed not to have been incurred unless the taxpayer furnishes to the Commissioner such receipts or other evidence, documenting the incurring of the expenditure or loss, as the Commissioner considers necessary.

"(4) Notwithstanding anything in section 108 of this Act, no deduction shall, in calculating the assessable income derived in any income year by any taxpayer (being assessable income that consists of income from employment), be allowed in respect of any depreciation in respect of any asset, other than an asset used in and for the purposes of travel where the expenditure or loss incurred on that travel is of a kind that is referred to in clause 6 of the Fourth Schedule to this Act and that is, within the meaning of the said Fourth Schedule and in relation to the taxpayer and to that income year, an item of expenditure or loss deductible in respect of income from employment."

The Fourth Schedule so referred to in s105(2)(b) included under a heading "items of expenditure (or loss) deductible in respect of income or employment" various items culminating in paragraph 8.

"8 Expenditure incurred by the taxpayer for the purposes of, and as a condition of, his employment, not being expenditure of any of the kinds referred to in any of the foregoing provisions of this Schedule and not being expenditure that consists of or is in relation to sums or matters of any of the kinds referred to in section 106 of this Act."

Section 106 so referred to at outset of s105(2) and paragraph 8 above, as it then stood, in its relevant parts provided:

"106 Certain deductions not permitted - (1) Nothwithstanding anything in section 104 of this Act, in calculating the assessable income derived by any person from any source, no deduction shall, except as expressly provided in this Act, be made in respect of any of the following sums or matters:

(j) Any expenditure or loss to the extent to which it is of a private or domestic nature:"

BEFORE THE AUTHORITY: ISSUES AND DECISION

There were two issues before the Authority. They, and the arguments which support them, remain.

(1) The lesser procedural issue. The appellant submitted that in the circumstances, and particularly on the correspondence prior to hearing, the Commissioner was limited in his grounds to s106(1)(j) (private or domestic nature). In particular, the Commissioner could not raise or rely upon arguments based on clause 8 (for purposes of and as a condition of employment). The appellant's submission appears to have been based on CIR v V H Farnsworth Limited (1984) 1 NZLR 428.

The Authority rejected the appellant's submission, considering the correspondence fairly and adequately raised the Commissioner's reliance on clause 8 prior to hearing. Further, in the circumstances both the "often mutually exclusive concepts" of clause 8 and s106(1)(j) were in issue.

2 The principal issue. The appellant submitted expenditure was incurred for the purposes of and as a condition of the appellant's employment; so falling within clause 8; and was not of a private or domestic nature so as to be prohibited by s106(1)(j). The appellant's submission as summarised by the Authority was:

"Mr Mathieson argued that s106(1)(j) of the Act does not prohibit the deduction sought in this case. He claimed the expenditure in issue was not of the same character as expenditure incurred in travel to and from work or that incurred for other basic requirements for the day to day
living of an individual person, such as food, clothing and for general consumption; such expenditure on the latter items he said was generally of a recurring nature and was of the character described by Richardson J in

> CIR v Haenga (1985) 9 TRNZ 41. The expenditure in this case, it was submitted, was not of that nature or character concerned with the ordinary living expenses of a member of society. Nor was it to provide a home for the objector and his family. It was incurred because of the requirement of the Department for the objector to transfer from A to B. It was only paid once. It was incurred by the objector for employment purposes, it was of a character in the circumstances of the case to make it deductible for tax purposes."

The Commissioner submitted to the contrary. Again as summarised by the Authority:

> "Ms Flaus in her submissions referred to ss105 and 106 of the Act and clause 8 of the Fourth Schedule. She also referred to s30 of the Income Tax Act and s36 of the Inland Revenue Department Act 1974 and cases relating to the burden of proof upon the objector. She then cited CIR v Haenga (supra) and CIR v Banks [1978] 2 NZLR 472 as to the need for the objector to establish that the expenditure in issue was incurred in his gaining or producing assessable income, with reference to the nexus test for such expenditure to be deductible. She next submitted that because there was not that close relationship between the expenditure and the objector's income earning process it had not been incurred in his gaining or producing assessable income. It was, she submitted, of a private or domestic nature and was therefore prohibited as a deduction by virtue of s106(1)(j) of the Act. In this regard Ms Flaus referred to Case E49 (1982) 5 NZTC 59,289 Case F99 (1984) 6 NZTC 60,045 and CIR v Mathieson (1984) 6 NZTC 61,838. She submitted that the circumstances of the objector's case were clearly distinguishable from those in CIR v Haenga. She claimed that Haenga's case had very special features which were not present in the instant case.
>
> Ms Flaus also dealt at some length with why in her submissions the expenditure involved had not been incurred for the purposes of and as a condition of the objector's employment, so that it did not come within clause 8 of the Fourth Schedule. In this regard she again referred to Mathieson's case, CIR v Belcher (1986) 8 NZTC 5,047, Morgan v CIR (1987) 9 NZTC 6,112, Case J14 (1987) 9 NZTC 1,080 and Case J5 (1987) 9 NZTC 1,027."

The Authority rejected the appellant's submissions. The essential finding was that the expenditure concerned was "private and domestic", and thus within s106(1)(j) and outside clause 8. The Authority states:

> "The emphasis in the objector's case was on the nature of his transfer from A to B. I think to an extent that overlooks the essential question in the consideration of clause 8, which is not necessarily the reason for the expenditure when it was incurred. Such expenditure may be deducted as of the kind specified in that clause only if it was incurred by the objector "... for the purposes of, and as a condition of, his employment, ...". It is not wholly correct to ask the reason for the expenditure, rather in accordance with the express provisions of the clause, it is necessary to look at its purpose, and to find whether the expenditure itself was incurred as a condition of employment; not as a result perhaps of some other condition which as a question of fact and degree, and as a question of construction of the employment contract, is not immediately and directly a condition relating to the employee incurring expenditure as an employment requirement.
>
> The objector's transfer from A to B was for the purpose of his employment and was undertaken in my view as a condition of his employment in the sense that it was a requirement imposed upon the objector by the Department. The expenditure involved in this case however, if it was for that purpose, was, I think also immediately and directly related to and for the purposes of the objector's private and domestic benefit or necessity of providing shelter at B rather than at A in the way of a private dwellinghouse, for himself, his wife and family. It was for the objector's and his wife and family's private and domestic use and employment. Before his transfer he had such a facility at A. Because of his transfer he sold his dwellinghouse at A and purchased another dwellinghouse at B. It was therefore, at least in part, because of his private and domestic purposes and requirements that the expenditure was incurred by the objector. He clearly thought it necessary for himself and his family to have a private home at B, so he sold that at A and purchased the home at B. In all the circumstances I find that was, if not the sole purpose of his incurring the expenditure, it was a substantial and significant purpose."

The Authority considered he was not limited by the appellant's own views as to the purposes of the expenditure, referring to Mallieu v Drummond (1983) 2 AC 861, 870 (the lady barristers clothes) and continued.

> "In considering the meaning and effect to be given to the words in clause 8, "for the purposes of ... his employment," Richardson J in Haenga's case (p 126) suggested that that issue "... is to be determined objectively having regard to all the circumstances relating to that employment", that is the taxpayer's

employment. Further, His Honour observed that it was the purposes of the employment and not of the taxpayer that were relevant. The question was "... simply whether the expenditure was incurred to serve the purposes of the employment", (p 127).

I conclude that the expenditure in issue was incurred by the objector primarily to serve purposes of a private or domestic nature. Richardson J categorised such expenditure in Haenga's case (p 128) as follows:

> "An outgoing is of a private nature if it is exclusively referrable to living as an individual member of society and domestic expenses are those relating to the household or family unit."

The question whether the expenditure was for the purpose of employment is not the same as whether it was incurred in gaining or producing assessable income. It is of a more limited nature. However the purposes for which the expenditure was incurred is still an issue of fact turning upon the circumstances relevant to that issue. On the facts of this case, I have no doubt that the expenditure in issue incurred by the objector was for private or domestic purposes. If it was also for the purposes of his employment then at the best it was only partly for that purpose. I have no intelligible or sensible basis upon which to make an apportionment of that expenditure between those two purposes, one for private and domestic and the other for employment. On the evidence I am inclined to the view that the purpose of the expenditure was substantially more for private or domestic rather than for employment purposes. It was incurred essentially because of the objector's private and domestic circumstances.

As to whether the expenditure was incurred by the objector as a condition of his employment, that must be considered in the light of the decisions in CIR v Belcher (1986) 8 NZTC 5047 and CIR v Mathieson (1984) 6 NZTC 61,838. Although I have previously expressed some difficulty in discerning the subtle distinctions in the interpretation of clause 8 between expenditure incurred as a result of a condition of employment and that incurred as a condition of employment for tax and deduction purposes generally, I am bound by those decisions. In Belcher's case Hardie Boys J said (p5,050) as to the requirement of the expenditure being incurred as a condition of employment in clause 8:

> "The paragraph does not speak of a direction by the employer, but of a condition of the employment. It does not speak of expenditure incurred to fulfil a condition, but of expenditure incurred as a condition. It

> therefore makes it necessary to interpret the particular contract of employment in each case, in order to determine whether it requires the expenditure, and I respectfully agree with the Chief Justice in Mathieson that that is a question of law properly before the Court on appeal."

In the present case there is no condition, as such, in the sense of a contractural requirement, that the expenditure in issue be incurred by the objector. Alternatively, the objector has failed to satisfy the onus of proof upon him of showing that there was such a condition of employment. The fact that provision is made by the Department to refund or reimburse expenditure of the nature incurred and in issue in this case does not, in my view, mean that the expenditure was incurred as a condition of employment as that term is to be interpreted according to the cases mentioned.

Assume (sic) the expenditure in issue was incurred by the objector for the purpose of his employment and as a condition of his employment, I think it still of the kind referred to in s106 of the Act, namely s106(i)(j), and as such it does not come within clause 8 of the Fourth Schedule. Expenditure may be incurred for the purpose of gaining assessable income, and be an essential prerequisite to the derivation thereof, but as in this case it was of a private or domestic nature or character because it was to provide the objector with a family home at B, it was not regarded for tax purposes relevant or incidental to the objector's activities as a Police Officer in his income earning activities; Lodge v FCT (1972) 128 CLR 171, 3 ATR 254. The expenditure was spent for moving the family home from A to B. The cost of housing or moving the private and domestic home of the objector, his wife and family was not closely connected with his duties and operations as a Police officer for which he was paid his assessable income. It was closely connected to and relevant and incidental to the objector's private and domestic arrangements of providing a home for himself, his wife and family to suit them all. Such expenditure is of the kind covered by s106(1)(j) and as such is excluded from expenditure allowed as a deduction under clause 8 of the Fourth Schedule to the Act."

THE QUESTION(S):

To quote the Case Stated:

> "6 The question of law for the determination of this honourable Court is whether the Appellant's expenditure on transfer expenses was a permissible deduction. This involves the following more particular questions of law:
>
> (1) Was the Authority correct in holding that the Commissioner was not debarred from raising or relying at the hearing upon arguments relating to non-compliance with Clause 8 of the Fourth Schedule to the Income Tax Act 1976?
>
> (2) Was the Authority correct in holding that the expenditure in issue was incurred by the Appellant primarily to serve purposes of a private or domestic nature?
>
> (3) Was the Authority correct in holding that the expenditure in issue was incurred by the Appellant for private or domestic purposes, and so fell within section 106(1), (j) of the Income Tax Act 1976 and was a prohibited deduction?
>
> (4) Was the Authority correct in holding that there was no contractual requirement that the expenditure in issue be incurred by the Appellant as a condition of his employment (assuming that the answer to Question (1) is "Yes")?"

Question No. 1: Commisioner debarred from clause 8 arguments?

In view of conclusions reached subsequently, I can be brief. In CIR v V H Farnsworth Limited (1984) 1 NZLR 428, the Court of Appeal faced a situation where the Commissioner at the stage of dismissing objection and indeed even into the early stages of hearing relied on s119E (1954), but then in the course of hearing sought to switch basis to quite different s91(1D)(1954). Moreover, the four year limit under s25(1) Inland Revenue Department Act 1976 to any increase in assessment by then had expired. The Court would have none of it. Cooke P. at 430 considered that when a taxpayer had made returns, and been assessed, then in the

absence of fraud or the like "it would not be right to allow the Commissioner to support an increased assessment by taking an entirely new point for the first time after the four years." Richardson J. (434, 435) noted that objection proceedings are not a "general review". If an assessment "is made and is expressed to be made under one provision", the taxpayer specifies the grounds of objections and is limited at hearing to those grounds. Whilst the Commissioner "is not confined in express terms to the approach he adopted in arriving at his assessment", Richardson J. was satisfied "that limitation follows" from features of the statutory scheme. If the Commissioner were "free to adopt a fresh basis" for treatment of the objection after a taxpayer became committed to a contest "on a different ground" s36 would preclude the taxpayer responding. Parliament could not have intended a taxpayer to be left so vulnerable. Richardson J. observed (434)

> "I consider it implicit in the statutory scheme affecting objections that the Commissioner cannot shift his ground and thereby short-circuit the objection process."

and then further at 436:

> "I am inclined to the view that a line should be drawn between those cases in which the Commissioner is amplifying the grounds on which he initially relied or is advancing new contentions to support the application of the statutory provision or principle on which he relied - in respect of which any embarrassment to the objector can be met by an adjournment and costs - and those cases where he is seeking to change the basis for his assessment."

See also per Somers J, adopting a broadly similar approach, at 438.

The rule does not preclude amplification of grounds on which the taxpayer initially relied, or the advancing of new contentions to support the application of the statutory provision or principle relied upon. This is emphasised by Cooke P. in the subsequent decision of the Court of Appeal in Smith v CIR (1987) 1 NZLR 727, 734:

"In Commissioner of Inland Revenue v V H Farnsworth Limited (1984) 1 NZLR 428 the judgments in this Court include references to the Commissioner, in objection proceedings, not being free to "take an entirely new point", to "rely on an altogether different section", to "adopt a fresh basis" or to "shift his ground" or to"rely on a different provision" or where he has made an assessment "under one section of the Act" to rely on "a different provision". It was recognised that some provisions might be "distinct". That case was in fact concerned with whether a different section s91, could be relied on at the hearing, when the Commissioner had relied in the case stated and the correspondence solely on s119E. Moreover, he was seeking to rely on s91(1D) to support an increased assessment, and at the time when he first invoked s91 the four year period limited by the Act had expired. Whether an added contention amounts to adopting a fresh basis or the like on the one hand, or is more realistically to be seen as a further particular or added reason for the ground of assessment, on the other, is at least partly a question of degree and hence judgment. It cannot be solved by the use of language alone. The foregoing quotations from Farnsworth bring that out by the probably unavoidable generality of their wording.

There is nothing in any of the Farnsworth judgments to the effect that where the Commissioner has committed himself to a particular paragraph - here s88AA(1)(d) - he is precluded from relying on that paragraph as a whole. Putting the point in another way, although the Commissioner may have tied his case to a particular statutory provision, neither the Farnsworth judgments nor anything in the Act restrict him to any particular chain of reasoning to support his reliance on that provision. Subject only to the jurisidiction to order further particulars in a proper case, as to which no issue is now before the Court, I think that the Commissioner is entitled under the Act to take the attitude conveyed in his letter of 30 September 1981; just as the objector is entitled to take the attitude conveyed in the letter from his solicitors then under reply. No narrow approach should be taken to the grounds put forward on either side. Any question of surprise or breach of natural justice at the hearing could be met by any necessary adjournment. The Court has full power at the hearing both to ensure procedural justice and to decide the case in accordance with the law, as illustrated for instance by the decision of the Court in Duff v Commissioner of Inland Revenue [1982] 2 NZLR 710."

(See also 742 per Bisson J.). An example of readiness to exclude belated reliance on s106(1)(j) may be found in CIR v Belcher (1988) 1 NZLR 710, 717.

Second, the correct approach to correspondence. Primary focus should be on the objection itself, and the communication disallowing that objection. These, and particularly the latter, specify grounds for disallowance upon which the Commissioner relies and to which it is sought he be tied. However, as with any question of interpretation, assistance is given by context. It is appropriate to construe the objection and disallowance in the light of surrounding materials and circumstances. The appellant's submission was that, as a matter of policy, the Commissioner should be compelled to state the basis for rejection "with exactitude". Given relative expertise and resource advantages, the taxpayer should be able to limit himself to the statutory wording relied on by the Commissioner, without being at risk of later being confronted by some different basis, and to proceed to hearing on the basis of the Commissioner's actual statements. A "strict construction" of correspondence from the Commissioner explaining his reasoning should always be adopted. Indeed, in oral argument counsel put resolution of the present case as turning very much upon whether such strict construction was to be adopted. Counsel for the respondent contested application of any such principle of strict construction, pointing rather to the words of Cooke P. in Smith supra (734) that "no narrow approach should be taken to the grounds put forward on either side". In principle, I do not favour a strict construction; or indeed any construction other than that dictated by commonsense and reasonable perceptions. While exactitude is desirable, given realities in Government departments it should not be elevated to religion. Bad cases will breed their own punishment. In the general run of cases as a matter of realism and public resources some degree of latitude must be

allowed. I am not at all sure Cooke P when referring to "no narrow approach" in context intended a generalisation. The phrase follows on immediately after reference to particular letters, which were written as without prejudice to generality. However, to the extent Cooke P. may have been prepared to approach matters otherwise than on a narrow basis, I gain some comfort. I will read the correspondence concerned in what I hope to be an ordinary and commonsense manner, with an eye to the meanings which objectively would have been taken by those involved in the circumstances at the time.

Thirdly, the correspondence itself. Letters prior to ultimate objection and disallowance are somewhat equivocal. The appellant's letter of 8 April 1986 is not. While the subheading is "private expenses", reading naturally as a reference to 106(1)(j), the text refers to the transfer as "for the purposes and as a condition of employment", clearly centering upon the opening requirements of clause 8. The Commissioner, faced with a claim to deduction clearly put forward in those terms, wrote back on 21 May 1986 disallowing the claim in words which read naturally as limited to 106(1)(j). The key passage picks up earlier reference to provision of a home as being "private and domestic", and then states clause 8 cannot be applied to expenditure of a "private and domestic nature", which "is specifically prohibited as a deduction from income by s106(1)(j)." It is very difficult to escape a conclusion this statement is intended to be specific. I find the ultimate position taken by the Commissioner, on a fair reading, was that clause 8 could not be applied to allow deduction because expenditure was of a private and domestic nature prohibited by s106(1)(j).

Fourth, the effect of that conclusion. As a matter of strict logic and language, there is no escape. The Commissioner now seeks to rely not merely upon 106(1)(j) but also upon opening statutory words. Is Farnsworth to be applied?

The proposal is not attractive. I see no merit in allowing the Commissioner to contend expenditure was "private or domestic", but prohibiting him from arguing it was not "for purposes of and as a condition of" employment, a concept which may come near to a converse. Indeed, and in the conceded absence of prejudice, it would be artificial to do so. Farnsworth is not an inflexible doctrine. I consider neither principle nor authority requires its application in this case.

In principle, the present is not the type of situation which led the Court of Appeal to pronounce the Farnsworth embargo as a matter of imputed legislative intention. It does not involve a Farnsworth movement from one initial basis to another different basis, leaving the taxpayer outflanked and without defence. The purpose and underlying policy of the Farnsworth doctrine is to prevent a taxpayer, who has objected and prepared to fight on ground 'A', finding himself at hearing faced de facto with a new assessment on different ground 'B', in respect of which he has not even had the protection of prior objection procedure and which he is unable to fight. The present is not a situation where that problem arises to any unacceptable degree. The appellant objected on the overall basis expenditure was for the purpose of and as a condition of employment. The Commissioner asserted the expenditure was private or domestic. The appellant, in preparing to meet the assertion expenditure was private or domestic, almost inevitably had involved himself to a degree in rebuttal assertions that the expenditure was for the purposes and as a condition of employment. The appellant was not prejudiced by the move. The reason is plain. In terms of issues the development was not significant. Policy does not require Farnsworth protections.

Nor, I consider, does authority. The course which the Commissioner seeks to take savours less of some "shift" in position by the Commissioner then Richardson J's mere "amplification" of objection, or invocation of further grounds supporting the position taken under a specific provision. It can well be viewed as a move under which previous position taken that clause 8 did not apply on grounds arising from the rider as to s106 became a position that clause 8 did not apply on grounds arising from opening words as well as such rider. More importantly perhaps, it presents as a development to which the words of Cooke P, in Smith (supra 734) seem apt. Cooke P remarked that whether added contention amounts to a fresh basis (prohibited), or is "more realistically" to be seen as an added reason for the grant of assessment (permitted) "is at least partly a question of degree and hence judgment". Cooke P observed "it cannot be solved by the use of language alone". I must involve myself in matters of demarcation and judgment, and not merely in linguistic analysis. I have no difficulty with the exercise, for reasons already reviewed. In taking that view I do not disregard CIR v Belcher (1988) 1 NZLR 710, in which the Court of Appeal per Richardson J (717) did not permit the Commissioner to move from ground taken under then s105(2)(b) and (then) clause 8 to the effect expenditure was not a condition of employment, to ground under s106(1)(j) that expenditure was private or domestic. In Cooke P's words, there are questions of degree and hence judgment. The two cases are quite different.

Fifthly, a conclusion. I have the misfortune to differ from the Authority on the preferable interpretation of the objection/disallowance documentation. I do not think it is to be read as raising "purpose/condition", as well as the s106(1)(j) private or domestic consideration. However, neither as a matter of policy nor authority do I see the Farnsworth doctrine as applicable to the resulting situation. Each case depends on its own facts. This

present is not a case where the Commissioner should be held to s106(1)(j) alone.

Question 4: Contractual requirement expenditure be incurred as a condition of employment

There are some problems with the wording of the question. The Authority approached the problem whether expenditure concerned was within clause 8 "as a condition of his employment" on the basis of law prevailing before delivery of the decision of the Court of Appeal in CIR v Belcher (1988) 1 NZLR 710. In particular, the Authority endeavoured to apply the rationale put forward in Belcher at first instance (1985) 9 TRNZ 129 which drew a distinction between expenditure incurred as a result of a condition of employment (not deductible), and "as a condition of employment" (deductible). While the Authority accepted the transfer was undertaken "as a condition of his employment in the sense that it was a requirement imposed upon the objector by the department" (14), the ultimate finding was that "there is not a condition, as such, in the sense of a contractural (sic) requirement, that the expenditure in issue be incurred by the objector". Alternatively, the objector had not satisfied the onus of showing such a "condition of employment" (16). The distinction drawn has given rise to the question as worded. The distinction since has been disapproved by the Court of Appeal: CIR v Belcher (1988) 1 NZLR, 710, 715 ("I do not find the distinction drawn to be helpful"; Richardson J). In the result, the question as framed is somewhat inappropriate. It should not be "was there contractual requirement that the expenditure in issue be incurred by the appellant as a condition of his employment?" Rather, it should be "was there a condition of the contract that the appellant take the action concerned? If so, was the expenditure necessarily incurred in doing so?" The matter was not one which assumed prominence at hearing. I think the best course is to answer the question both as worded, and as I consider it now should be worded.

First, was there a contractual requirement the expenditure be incurred as a condition of employment? First, two matters of approach. I willingly adopt the pragmatic approach of Quilliam J in Morgan v CIR (1987) 10 TRNZ 737 both for its (with respect) inherent commonsense, and in view of its citation by the Court of Appeal in Belcher, supra 715. Whether a contractual requirement exists for employee expenditure requires recognition of the practical realities of the employee's position at the time. In Morgan (supra), a life insurance agency manager was required to achieve, through agents employed under him, certain targets. He incurred expenditure in the provision of incentives for those agents. There was no express employer direction this be done. There was no express contractual term this be done. However, industry experience indicated there was no other way in which the taxpayer could meet those targets. Quilliam J (743) looked at "the reality of the matter". There was "no choice but to conform to the method". The obligation "was of such a nature that it amounted to a condition of his employment", as did the expense which went with it. Each case must turn on its own contract, and own facts, but I regard the present as parallel. The appellant applied for a position which involved promotion and transfer. His application was granted. From that point, as a matter of the practical realities of his position and employment future, he was bound to accept the promotion. If he declined to take it he may be ineligible for two years. I am prepared to accept that within the narrowing pyramid at his level such a course and consequence was not a practical reality. With the promotion, he was bound to accept the transfer to the position applied for. He could not have the one, and not the other. Moreover, he was the subject of express direction, made within powers, to transfer. He would be in breach of obligation if he did not do so. The transfer, again as a matter of practical realities, forced the appellant to sell his family home in Christchurch and

purchase some satisfactory replacement in the greater Wellington area, incurring the usual expenses in the process. It was put that there was no contractual requirement for such action. The appellant could, for example, have sought a pool house, or rented. I do not think that realistic. The transfer was to a permanent position. He would be leaving Christchurch, perhaps forever. There is no apparent reason for him to maintain a house in that city and deprive himself of a house in his new area. He was a senior officer, with a wife and family, who ordinarily would expect and be expected to own his own family home. The promotion, transfer and selling and purchase inevitably would involve the appellant in expenditure. Regulation 32 tacitly recognises as much; and the propriety of employer reimbursement. The expenditure was a necessity flowing from legal requirements of employment, as was expenditure by the taxpayer in Morgan's case. There was no express contractual condition, but even on the strict approach taken before the decision of the Court of Appeal in Belcher, I am satisfied that on the Morgan approach there was a contractual requirement that the expenditure be incurred as a condition of employment.

Second, was there a contractual requirement the appellant take the action concerned? If so, was the expenditure necessarily incurred in consequence? On this up-dated approach, much which has been said already remains applicable. The sale and purchase action was a practical necessity of the employment; and on the Morgan approach a tacit contractual condition accordingly. The expenditure clearly was incurred as a necessary consequence. However, the matter can be resolved more simply and directly in the light of the decision of the Court of Appeal in Belcher supra, not available to the Authority. Belcher supra, involved a university lecturer whose contract of employment obliged her to carry out appropriate research. The choice of research topic, within that generalisation, was hers. She chose to carry out research which necessarily involved

her in overseas travel (as opposed to other research which might have been conducted locally). She applied for and obtained study leave for that research, which she undertook accordingly, incurring travel and accommodation expenses. In a sense, the expenditure was a self-inflicted wound. By her choice of research topic, and application for study leave, she incurred the financial commitment. It was not as a result of specific employer direction into that specific field. The Court of Appeal nevertheless regarded the expenditure as incurred as a condition of employment. The matter was put by Richardson J (716) on both a wider and "narrower" basis. On a wider basis, it was a condition of her employment she undertake appropriate research. She did so. The expenditure was necessarily incurred in a carrying out that research. Caedit questio. The expenditure was incurred as a condition of the employment. On a narrower basis (CP Somers J, 720), following grant of her leave application she was obliged to carry out that research. She was contractually required to carry out that research. It was a condition of her employment she do so. That carried the "practical requirement" she meets associated costs. The expenditure was incurred in meeting that condition of her employment. Ipso facto the expenditure was as a condition of her employment. The appellant's position is parallel. He asked for, and was granted, promotion and transfer. It was a condition of his employment. He transferred. He was obliged to do so. The expenditure on transfer, including the sale and purchase expenses, necessarily was incurred in meeting that condition of his employment. I will not repeat that already said in relation to alternative accommodation possibilities. On the rather wider approach to "condition of employment" within clause 8 which has opened out since the decision of the Court of Appeal in Belcher, I have no doubt expenditure concerned is to be regarded as made "as a condition of employment."

Questions 2 and 3: Expenditure "private or domestic"?

Is the present "relocation expenditure comprising real estate agent's commission and legal fees on sale and purchase of a personal residence incurred primarily to serve purposes of a private or domestic nature" (Question 2), or "for private or domestic purposes" (Question 3)?

The questions stem primarily, as their wording indicates, from s106(1)(j), but fall to be resolved against an inter-related statutory context. Section 104 stipulates the expenditure must be incurred in "gaining or producing assessable income." Of more immediate relevance s105(2) as it then stood, repeated that requirement (also using the term deriving"); but with added limitation to expenditure falling within the fourth schedule. The fourth schedule stipulated various permitted categories, some with further internal limitations, concluding with general clause 8 permitting expenditure "for the purposes of and as a condition of his employment", provided such expenditure was not otherwise within the fourth schedule, and did not consist of or relate to sums or matters of the kinds referred to in s106. Section 106 listed various prohibited heads of expenditure, concluding with the s106(1)(j) category "private or domestic nature". That category is to be given content not in isolation but within context. An exercise in statutory interpretation is involved.

I look first for statutory intention. The policy underlying prohibition of deduction of expenditure of a private or domestic nature is obvious enough. It is to overcome openings otherwise available, as a matter of logic, and to protect an important tax base from undue erosion. I refer generally to the observations of Richardson J in CIR v Haenga (1986) 1 NZLR 119, 127-128. If s105(2) and clause 8 stood unqualified, they could permit deduction of expenditure on matters such as food, clothing, medical

expenses, travel, and shelter. All, in a broad sense, would be incurred in gaining assessable income, or for the purposes of employment. One does not gain assessable income, or hold employment if starving to death, or dying from disease or exposure. On a sine qua non approach, the logic would be unanswerable. There might perhaps be more room to resist contention that expenditure on such needs could be as a "condition of employment", but an employer and employee soon enough solemnly could make it so as a matter of contract, procuring deductibility to the benefit of both so far as remuneration is concerned, and the detriment of the revenue alone. The profligate taxpayer given to high expenditure on food and clothing might indeed achieve the nirvana of a tax loss through living sufficiently beyond means. Policy obviously requires control. The policy solution is prohibition of so-called personal or domestic expenditure. To say food, clothing, or shelter or the like is an essential requirement for the purposes of gaining an income might remain logical, but it is not generally to be legal. A line is to be drawn, placing beyond the pale that which "properly" is expenditure of a personal or domestic nature. No statutory definition is given. Obviously, there will be borderline cases involving line drawing. The Courts are expected to do so in a manner which promotes this statutory object.

I turn to authority. Traditionally, at least until recently, a conservative approach has been taken. A few examples in cogate areas will illustrate. Child minding expenses may well be a pre-requisite to the earning of income, but generally have been rejected for reasons including labelling as "private or domestic" e.g. Lodge v FCT (1972) 128 CLR 171, 176. Food, whether ordinary or exceptional to meet taxpayer needs, may be essential for a taxpayer to earn, but is regarded as in the personal or domestic category; e.g. TRA Case 35 (1988) 12 TRNZ 444 (distinguishing at 446 business entertainment). Clothing may have been purchased, so far as conscious motive is

concerned solely for professional use; but the expenditure will satisfy other needs of the objector for warmth and decency; and cannot be said to have been purchased "wholly and exclusively" ... "for the purpose of ... the profession"; Mallalieu v Drummond (1983) 2 ALL ER 105. The familiar rules as to the expenses of travelling between home and work are to like effect. Quite simply, a line is to be drawn. Rather closer to present facts are two (non-Police) relocation expenses cases which have come before the Authority in recent years. Again, on the facts, the expenditure has been treated as personal or domestic. In TRA Case 32, (1984) 7 TRNZ 259, a local body worker transferring from one employment in Northland to another and different employment in Wellington, sought to deduct legal fees and real estate commission on the sale and purchase involved. The deduction was disallowed inter alia on the basis the expenditure was private or domestic. It was "to enable 'O' to live in an area from which he could readily travel to his place of work on a day-to-day basis." In TRA Case F99 (1984) 6 NZTC 60, 045 the (private sector) taxpayer changed employment from Wellington to Auckland. A like claim was given, inter alia, a like answer (60, 047). The two cases did not involve transfer at employer direction in the course of one continuing employment, or any statutory background. I mention in passing the interesting contrast in relation to deductibility by an employer, or partner, at least in England, in respect of relocation expenses paid as part of outlay in gaining or producing assessable income; Mackinlay v Arthur Young & Co (1988) ALL ER 1. However, deductibility by an employer or partner raises different considerations from those applicable to an employee. Latterly, a perhaps more liberal approach has emerged at appellate level. The most authoritative exposition for present purposes is by the Court of Appeal in CIR v Haenga 1986 1 NZLR 119. Haenga did not involve relocation expenses. It was an unusual and rather special case. With respect, some might think it a high water mark of private or domestic categorisation. The taxpayer was a Railways

employee. From distant times, Railways as employer had deducted small sums from employees' wages which were paid into a statutory welfare fund. The welfare fund provided benefits for Railways employee, including even holiday homes, although only during employment. Deductions were made under statutory authority. The Court accepted, as a fact, that the practice not only was beneficial to Railways employees, but also contributed to the smooth running of the Railways operations through better work attendance and performance (121). The taxpayer sought to deduct his year's contributions under then s105(2) and clause 8. That previous legislation was in superficially different terms, but overall requirements were the same (see per Richardson J 124-125). At first sight, one might think such expenditure by a taxpayer clearly was for private and domestic purposes; his own personal welfare. On the particular facts, the Court of Appeal nevertheless found otherwise. It was common ground the expenditure was a condition of employment. Woodhouse P aligned himself essentially with the subsequent judgment of Richardson J. The learned President's additional observations will be noted so far as appropriate in the course of other judgments. Cooke J (122) took a broad brush approach. His Honour looked at the overall facts, and fitted these to a perceived natural and ordinary meaning of the phrase "personal or domestic". Cooke J noted the employee was required by the terms of his engagement to make regular contributions to a fund specifically linked to employment, for the purposes of better performance of employment. He could not earn his income without making those contributions. Applying a "natural and ordinary" meaning approach, Cooke J considered "such expenditure would not naturally be described as private or domestic", but could "perfectly naturally be described as incurred in gaining the employees assessable income and for the purpose of employment." The decision lay "in the area of degree or discretionary evaluation" (122) (and CP per Woodhouse P 120). If even one of the constitutent elements had been missing, e.g., the link between the welfare fund and the

employment, the decision could have been different. There was a point at which it is no longer "sufficiently natural" to describe expenditure as "other than private or domestic". Richardson J first isolated (125) as statutory ingredients of deductibility:

(i) the fourth schedule purposes/condition requirement;

(ii) the s105(2)(b) requirement expenditure be incurred in gaining or producing assessable income and

(ii) the s106(1)(j) private or domestic barrier.

I observe that both (i) and (ii) can have a bearing upon (iii). As to (i), if an expenditure is for the purpose and/or as a condition of employment, that may be some indication the expense is not private and domestic, although not determinative. As to (ii) Richardson J specifically accepted (128) "in some cases 105(2)(b) and 106(1)(j) may raise different considerations", but in the context of Haenga's case took a parallel approach resulting in a finding on deductibility under 105(2)(b) carrying with it a finding deduction was not barred under 106(1)(j). It follows that while His Honour's principal focus was on 105(2)(b) (incurred in gaining or producing assessable income) that analysis may be treated as applicable to 106(1)(j) (private or domestic). Richardson J then (126-127) analysed ingredient (i), "purposes of employment". The words take colour from statutory context. Dictionary meaning, ("object or end in view) does not assist in identification. The employment nexus implicit in "for purposes of employment" is not satisfied unless expenditure is a condition of employment; but contractual status is not enough. Further, the concern is with the "purposes of the employment" (CP Woodhouse P, 120). Those do not hinge on what was actually in the mind of the taxpayer, and are not

"the purposes of the taxpayer". The paragraph 8 purpose "is not specifically directed to the income earning process. It is sufficient that the expenditure be incurred for the purposes of the employment"; as opposed to contributing to the earning of assessable income. Of more immediate relevance, Richardson J then turned (127-128) to ingredient (ii), the s105(2)(b) requirement equated with s106(1)(j). His Honour treated the requirement as identical to that in the first limb of s104, and harkened back to CIR v Banks (1978) 2 NZLR 472 and similar authority. Richardson J observed (127) the requirement involved "an amalgam of considerations". The thrust of an inquiry shifts with circumstances. "In some circumstances it is helpful to focus on the essential character of an outgoing in the sense of its being incidental and relevant to the gaining or producing of the assessable income." That "essential character" approach, however, was not always helpful. Some expenses e.g. rates, repairs and travel costs are not inherently or even prima facie of either income or non-income related character. Accommodation and meals obtained away from home cannot simply be labelled "private" without further analysis. Nor does the quotation of "in gaining or producing" and "in the course of gaining or producing" assist in determining how close the nexus between expenditure and income earning process must be. A value judgment as to sufficiency of the nexus is required. Having so emphasised essential character or role in income producing activity were not certain guides, His Honour then turned (127) to complications arising where "the asset or advantage in respect of which expenses are incurred may serve private and income earning purposes", i.e. dual purposes. Taking two classic examples, His Honour noted that expenses on travel to work, and child care expenses, conveniently have been regarded "as a private matter a form of consumption". Recognising logic, Richardson J accepted "in as much as they are a prerequisite to the earning of income it is arguable that they are incurred in the gaining of the assessable income"; and indeed that the argument

could extend to "such basic items as essential food, clothing, and shelter" which maintained ability to perform employment. However, the legislature would not have contemplated "such an erosion of the income tax base in respect of employment income", and (128) ".. with careful emphasis on the character of the expenditure incurred the Courts have denied the notion that an expense is incidental and relevant to the derivation of income merely because it is necessary in that sense ... On this approach deduction may be refused where the expenditure is of a private nature ... An outgoing is of a private nature if it is exclusively referable to living as an individual member of society and domestic expenses are those relating to the household or family unit." (I interpolate that by such reference to "exclusively referable" I do not think Richardson J meant to obliterate the well accepted practice of an apportionment of mixed private/business use so common for example with telephones and motor vehicles). His Honour did not further or more precisely develop touchstones for the private/domestic classifications involved. Returning to the particular facts, Richardson J accepted that "ordinarily health care is uniquely personal to the individual concerned and affects his private life as well as his work potential". However, such need not always be the case. There could be such emphasis on maintaining a particular standard of fitness (or even grooming) that expenditure for that end cannot fairly be characterised as private. While such was not the present case, it suggested to His Honour it was "overly simplistic" to brand contributions "as inherently of a private rather an than employment character" and indeed "in the very unusual circumstances of this case" and "not without hesitation" Richardson J concluded otherwise. Sufficient nexus existed between the expenditure and income. The expenditure was imposed on the employee by statute, reflecting recognition that benefits had impact on work performance. "It is more than a pre-requisite to the earning of income. It is directed to the income earning process itself." Turning briefly to ingredient (iii), i.e.,

106(1)(j) itself, His Honour observed, in the course of noting that private or domestic considerations already had been dealt with in the context of s105(2)(b), that "any personal satisfaction derived from membership of the Welfare Society and the availability of benefits is only an incidental effect of the expenditure."

There is also some help to be gained from the subsequent decision of the Court of Appeal in CIR v Belcher (1988) 1 NZLR 710. As mentioned, that case concerned deductibility of travel expenses and accommodation abroad incurred by a university lecturer for the purposes of her employment. The principal question at issue was whether expenses were incurred as a "condition" of employment. Richardson J (717), with whom Casey J concurred, declined to allow the Commissioner to raise a new point based on 106(1)(j) that expenditure was private or domestic, but in any event dismissed that contention. His Honour stated (717):

> "As earlier noted, the Authority held that all the expenditure was incurred by the taxpayer in gaining or producing her assessable income from the university within s105(1)(b). That finding has not been challenged. And the finding under cl 6 is that the travel costs were incurred on travel in the course of the taxpayer's employment and under cl 8 it is that other research expenses were incurred as a condition of and for the purposes of the employment. On that analysis these were work related expenses. As in CIR v Haenga [1986] 1 NZLR 119, 128, the finding of deductibility under those provisions involves a finding that deduction is not barred under s106(1)(j)."

In the result, accommodation expenses while temporarily abroad in the course of employment were not private or domestic.

A cautionary note is needed in relation to the Belcher extract just quoted (717), and its reference back to Haenga. I do not think Richardson J intended to rule that expenditure incurred in gaining or producing assessable under 105(2)(b) automatically could not be private or

domestic expenditure within 106(1)(j); or that a combination of findings that expenditure was incurred in gaining or producing assessable income under 105(2)(b) and was within clause 8 as being for purposes and as a condition of employment, automatically conveyed the expenditure was not private or domestic within 106(1)(j). Such was in fact the situation in the two cases concerned. However, Richardson J in Haenga (128), expressly noted that 105(2)(b) and 106(1)(j) "may raise different considerations." The same may well be the case in relation to clause 8 and 106(1)(j). Careful analysis of the basis on which terms in 105(2)(b) and the fourth schedule have been defined and applied will be necessary before any such pre-emptive conclusion can be drawn.

Overall, what is to be gathered from these strands of authority? There is no one touchstone, or set of touchstones, allowing some sure mechanical classification. It is one of those situations which cause such despair amongst tax accountants and manual writers looking for rules of thumb. Whatever logic might dictate, no "but for" test can be applied to permit deductibility. For policy reasons, a line is drawn at so-called "private or domestic expenditure". There are certain accepted approaches to determining classification, the utility and merit of which vary with circumstances, and none of which is conclusive. It is helpful to look at the so-called "essential character" of the expenditure, but the impression gained is not conclusive in itself. As Haenga's case illustrates, an expenditure which in its essential character may seem a paradigm case of private or domestic expenditure may as a result of other factors be characterised otherwise. It is useful to look for nexus between the expenditure, and the income production or intended income production. In the end, whether there is sufficient nexus to take an expenditure out of the private or domestic character and into a deductible work-related classification involves a value judgment. It may simply be putting the matter another

way to apply a test distinguishing between pre-requisite to earning income, and actual participation in the income earning process. In the end, an overall view must be taken. As with the ancient jibe about obscenity, at times private or domestic expenditure can be difficult to define but not unduly difficult to recognise. It is very much a question of perception and judgment. In the manner of Cooke J in Haenga, one almost inevitably ends up looking at all the facts, and asking whether the total position so displayed fits within a natural and ordinary meaning of expenditure "of a private or domestic nature."

I return to this case. I keep in mind there are good policy reasons incorporated in the "private or domestic" prohibitions. The object of the prohibition is to be upheld. It is not a restriction by Parliament intended to be lightly read down. There are pointers both ways.

(i) A convenient, although far from conclusive, starting point is the so-called "essential character" of the expenditure. What is its description? What is it for? The immediate answer is: to provide housing for the taxpayer and his family. To that extent, and taken only so far, it presents very distinctly as private or domestic expenditure. Counsel for the appellant characterises this question, and this limited analysis, as erroneous. It is not erroneous in itself. Error would be in its being regarded as the sole test.

(ii) Another convenient, but equally inconclusive approach is to examine the role of the expenditure in the income producing activity of the taxpayer. It has no direct role. It is not expenditure like rental on a required work telephone; expenditure on specialised clothing; or food for a Police dog. It is expenditure

which meets a "but/for" test, or pre-requisite test, rather than constituting part of the actual income earning activity itself. Again, the indicator points towards private or domestic character.

(iii) The expenditure is made to enable the taxpayer to fulfill a requirement made by his employer. Indeed, it is to fulfil legal obligations binding the appellant to transfer himself in person and thus the availability of his services to Wellington. The purpose of the expenditure is to enable him to continue to carry on with his existing employment. It is not a matter of making statutory payments, as in Haenga. It is if anything perhaps more like expenditure to meet contractual obligations as in Belcher. It is not a payment incurred as a matter of personal whim, unconnected with employment. It is not "exclusively referable" to private life.

(iv) As perhaps an aspect of the same job related underlay, the expenditure can be characterised as incurred not simply to provide housing, but rather to enable relocation from one house to another house, due purely to employment requirements. It is not as if the taxpayer were buying a first home for himself and his family; or buying a new home in a different city to take up a new employment with a fresh employer. It is a transfer from one house to another dictated by the ongoing practical requirements of existing employment. The position is not one of expenditure on buying a house. It is one of expenditure on moving from one house to another for employment reasons. I note in passing the dictum of Balcombe LJ in Mckinlay v Arthur Young & Co (1988) 2 ALL ER 1, 15 that while the

provision of habitation must always in part at least be simply to serve a human need "it may be possible, in appropriate circumstances, to distinguish the cost of moving house from the cost of providing a house" (and cp per Slade LJ, 10). Counsel for appellant characterised this point as the correct question. It is not: but it is one correct question.

(v) The transfer activity, ostensibly private or domestic, in fact is one which this employer presumes to regulate to an unusual degree, compared with private situations. There are indeed General Instructions, having the force of delegated legislation, as to some aspects of transfer. Reference is made to the letter of 11 October 1984 supra. In particular, transfer is not to be actioned until the Officer has arranged suitable vacant accommodation. Relocation is not left as an activity entirely outside the employment relationship, as one might expect if it were regarded as purely personal or domestic.

(vi) As an aspect of the same employer involvement, regulations provide for a high degree of reimbursement of expenditure of the type involved. Indeed the non-reimbursement of a remaining balance at issue in this case appears to be an accident of timing rather than a reflection of policy. Some might think it curious that an employer would reimburse expenditure regarded in the employment context as purely personal or domestic, thereby making a payment which logically would be either a gift or disguised remuneration. The more realistic assessment would be that the employer, employee, and Crown (through legislation involved)

regarded such expenditure as "work related." Such a common perception was noted and influential in Haenga. Arguably, the same view should be taken here.

(vii) I mention, but rather to put aside, a submission that the non recurring nature of the payment is an indication it is not private or domestic. Certainly, many private or domestic payments, e.g., rent, are recurrent. However, that by no means necessarily is so. Expenditure on a heart transplant operation is seldom recurrent but obviously would be private or domestic. I do not think regularity is anything more than a faltering guide at best.

In the end, I join with Cooke J in Haenga as best I can in standing back and looking at the position overall. Questions of degree and judgment are involved. Does this factual situation present as one in which, on an ordinary and natural meaning of the words, expenditure is "of a private or domestic nature", or primarily so? The margin is not wide, but on balance I consider it does. The provision of shelter essentially is a highly personal and domestic requirement. It is necessary for survival itself, as even those unemployed know only too well. It is within the category at which the private/domestic purposes limitation policy is aimed. Essential character is not in itself conclusive, as Haenga illustrates. Other employment oriented aspects may turn the classification around, and there are such employment oriented aspects in this case. There is an employment condition that the appellant transfer the venue of employment and incur whatever relocation expenses are involved without necessarily receiving complete reimbursement. There is a degree of employer interest and regulation of relocation activity. There is also a degree of statutory background to the events and expenditure concerned. However, even in total, on my appraisal, these

are not sufficient to take an expenditure which in ordinary thinking would be private and domestic out of that natural category. To borrow Cooke J's words it is not "sufficiently natural" to describe the expenditure as "other than private or domestic". While decision could rest at that point, two further aspects warrant comment. First, the case falls short of the compelling features in Haenga. In particular, the payment concerned is more a pre-requisite to earning income, than part of the income earning process itself. Likewise, the case concerns permanent accommodation purchased as a capital asset, rather than transient travel accommodation as involved in Belcher. Second, if this appellant is entitled to deduction because of employer directed transfer, it is difficult to say upon what grounds other employees subject to even purely contractual directions for transfer might be denied the same right. It is difficult, to believe the legislature intended such a potentially significant category to be classified as deductible under clause 8 without specific mention. Policy points in the opposite direction, and should be upheld.

A Comment

Regulation 32(2) and (3) require the Police Department to reimburse reasonable costs "subject to General Instructions". General Instructions are a form of delegated legislation made under specific powers contained in Part III s30 (Police Act 1950). I was informed during hearing there are no such General Instructions. Instead, limits have been imposed, or purportedly imposed, not by General Instructions but by "determinations" made under Part IV Police Act 1958. Whether that is a legitimate or effective method of limiting the statutory right to full reimbursement of reasonable expenses is not a point in issue in these proceedings. The point, if it exists, is not decided even by implication.

Answers

The general questions and four more particular questions are answered as follows:

General Question: The answer is: the appellant's expenditure on transfer expenses was not a permissible deduction.

Question (1): Yes.

Question (2): Yes.

Question (3): Yes.

Question (4): (a) The answer to the question as worded is "no".

(b) The transfer was a condition of employment. The expenditure was necessarily incurred in connection with the transfer.

R A McGechan J.

Solicitors for Appellant: Harrison Murphy and Partners, Wellington

Solicictors for Respondent: Crown Law Office, Wellington.