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[redacted]

N2LR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 103/93

UNDER THE JUDICATURE AMENDMENT ACT 1972

BETWEEN: BRENT LEROY MILLER, PATRICIA ANN MILLER, BRIAN ANDREW O'NEILL and MOIRA O'NEILL all of Auckland, Company Directors

Plaintiffs

AND: THE COMMISSIONER OF INLAND REVENUE as head of the Inland Revenue Department, a Department State

Defendant

M105/93

UNDER THE JUDICATURE AMENDMENT ACT 1972

BETWEEN: LYNDON LEE McDOUGALL AND JOHN JAMES McDOUGALL of Tauranga, Businessmen

Plaintiffs

AND: THE COMMISSIONER OF INLAND REVENUE as head of the Inland Revenue Department, a Department State

Defendant

Hearing: 2-5 and 13 December 1996

Counsel: B M Grierson for Plaintiffs
F B Bolwell and C Courtney for Defendant
M R Ruffin for the Commissioner on related appeal

Judgment: 23rd January 1997

SECOND JUDGMENT ON APPLICATION FOR JUDICIAL REVIEW

Solicitors: *B M Grierson, Birkenhead for Plaintiffs*
Crown Law Office, Wellington for Defendant
Crown Solicitor, Auckland for the Commissioner on related appeal

This judgment deals with certain issues left undetermined in my judgment of 8 November 1996 with which it is to be read. That judgment dealt with all significant aspects of the applications for judicial review other than

(1) whether the Commissioner may supersede an assessment which is under appeal by one made on an inconsistent basis (Part VI). That is the major concern of this judgment, which determines the point of principle in favour of the second plaintiffs;

(2) whether the Commissioner discriminated unfairly against the plaintiffs by treating them differently from other taxpayers (Part XIII). The contention was not supported by significant evidence or submissions and is dismissed;

(3) whether there was absence of the actual firm assessment required by law (Part XIV). The point is discussed briefly at the end of this judgment and is answered in favour of the Commissioner;

(4) the application of the limitation provision (s25) of the Income Tax Act 1976 (Part XV). Mr Ruffin is counsel for the Commissioner in Appeal M1002/94 in which the first plaintiffs are appellants and the Commissioner is respondent. He appeared to deal with the s25 issues, in respect of which it had been considered convenient to hear concurrently the argument on the applications for review and on the appeal. It became plain, however, that his argument would entail such detail that I directed that it be heard in the course of the appeal fixture which is to commence on 24 February 1997.

The judgment of 8 November 1996 was delivered as an interim judgment for reasons recorded at page 9. I reserved leave to counsel to make further submissions within 14 days on matters which had not been sharply focused upon in oral argument. In the event, three issues were raised additional to those so far listed:

(1) Mr Grierson asked me to view and to order discovery and inspection of the documents italicised on page 27 of the judgment;

(2) Ms Bolwell contended that I should not have referred at pages 28 and 40 to s9(h) of the Official Information Act 1982;

(3) Ms Bolwell for a time contended that the second plaintiffs had waived the right to argue that the Commissioner may not supersede an assessment under appeal by one made on an inconsistent basis.

As to (1), I called for and examined the documents, which exemplify the prior application of Track B to persons other than the second plaintiffs. I do not consider that they throw such significant light on this case to justify the breach of confidentiality of other parties that would be entailed and decline the application for discovery and inspection.

As to (2), Ms Bolwell did not challenge my response to her argument that the reference to s9(h) was warranted by reason of the presumptive legally enforceable right of the plaintiffs to personal information under Part II of the Official Information Act (***Commissioner of Police v Ombudsman*** [1988] NZLR 385); s34 restricting recourse to the Court does not apply to such right. I adhere to what is said in the judgment in that regard.

As to (3), it became clear during the analysis of the second plaintiffs' proceedings before the Taxation Review Authority (in which Mr Ruffin, not Ms Bolwell, had represented the Commissioner) that the point, which had been pleaded, had not been waived by Mr Grierson. Accordingly the argument of waiver was not pursued.

I turn to the major remaining issue, which for convenience is divided into three parts :

(1) ***Question (1) (Part XV of judgment of 8 November 1996):***

(a) whether

(i) the Commissioner;

(ii) the Taxation Review Authority

may supersede an assessment under appeal by one made on an inconsistent basis;

(b) if not, does that principle apply in relation to the change from Track A assessments (imposing major tax liability on company A) to Track B proposed assessments (imposing major tax liability on its directors)?

(c) If so, what is the effect of Company A's being removed from the register before the appeal is determined?

All three parts of the question concern the limits on the amendment powers of the Commissioner, which appear to be conferred in the widest possible language:

> "23. **Amendment of assessments**
>
> (1) The Commissioner may from time to time and at any time make all such alterations in or additions to an assessment as he thinks necessary in order to ensure the correctness thereof, notwithstanding that tax already assessed may have been paid.
>
> (2) If any such alteration or addition has the effect of imposing any fresh liability or increasing any existing liability, notice thereof shall be given by the Commissioner to the taxpayer affected."

But such language is to be read down in a variety of contexts. First, there are obvious constraints imposed on s23 by the limitation provision s25; it provides that normally

> "... it shall not be lawful for the Commissioner to alter the assessment so as to increase the amount thereof after the expiration of 4 years from the end of the year in which the notice of assessment was issued."

Then s31 confers a power on the Commissioner to "alter the assessment" following objection; the question is whether he concurrently retains at that stage the s23 power. It was answered affirmatively in ***Commissioner of Inland Revenue v McNab*** (1984) 6 NZCT 61,710 discussed below.

Next, the Act contains an elaborate system of rights of appeal to the Taxation Board of Review and thence (alternatively in some cases directly) to this Court. It is inconceivable that the Commissioner could avoid the consequences of a loss before either tribunal by an executive act rather than appeal; the interest in finality of

litigation is a high one, and the rule of law requires that he be bound by an adjudication. The leading authorities - ***Commissioner of Inland Revenue v V H Farnsworth Limited*** [1984] 1 NZLR 428 and its successors - are discussed below.

Then there is the question, in a s99 case, of how the provisions of that section interrelate with s23.

Also of importance is the public interest that the Commissioner should have substantial freedom to exact the correct tax, provided no unfairness results; courts and legislatures have recently been more reluctant than previously to allow one citizen to pass to others the burden of bearing a fair share of the costs of maintaining society. The change in direction in Australia noticed in the 8 November judgment has been continued in the refusal on 15 November 1996 of leave to appeal in ***Madden v Madden*** cited at page 78 and the latest decision of the High Court of Australia in ***Commissioner of Taxation of the Commonwealth of Australia v Spotless Services Ltd*** (M 32/96 judgment 3 December 1996) which has rejected the policy of the ***Duke of Westminster's Case***.

The plaintiffs initially contended that recourse to s23 was excluded in the present case by the taxpayer's giving notice requiring that an objection be heard by a Taxation Review Authority and, *a fortiori*, by the actual statement by the Authority of a case for the purpose of appeal. At the conclusion of his argument in reply Mr Grierson sought to move that point back even further, to the stage where the taxpayer has objected to the assessment.

In considering these contentions, and the Commissioner's challenge to them, it is convenient to consider two specific examples. The simpler is where the Commissioner changed from Track A to Track B with no request for a case stated made or complied with prior to the change of track.

1982 tax year: Coils 1980/LLMcDougall

Coils 1980 was the original trading company of Messrs JJ and LL McDougall. In this judgment I disregard its subsequent changes of name. It was wound up on 1 April 1993.

Initial assessment of LLMcDougall in terms of return

On 4 March 1983 Mr LL McDougall's tax return for the year ended 31 March 1982 was filed, recording income of $20,631[1]. It included salary $20,891 from Coils 1980 for the period 1 April 1981 to 31 August 1981 and nil for the period from 1 September 1981 to 31 March 1982[2]. The difference between salary and the sum returned resulted from minor deductions and additions. On 26 May 1983 a Departmental assessor noted the return and made no change. The resulting tax shown as due (1983 provisional tax $2,571 due 7 September 1982, $3,062 due 7 March 1983 and 1982 less terminal tax credit $1,528[3]) was paid on due date.

Initial assessment of Coils 1980 in terms of return

On 18 April 1983 Coils 1980's return for the same year was filed by Mr Russell. It returned profit of $1,003 and claimed an investment allowance deduction of the same amount, so that its income (and tax) were shown as nil. On 19 April 1983 an assessor noted the return and made no change.

Track A assessment of Coils 1980; no change to assessment of Mr McDougall

On 29 March 1989 a report to the Regional Controller, Central Region, recommended the issue of amended assessments of Coils 1980 for the 1982 year. The income of Coils 1980 was then reassessed for that year, initially at $376,350 and on 19 July 1989 at $373,350 with an assessment of resulting tax $169,582[4]. No change was then made to the assessment of Mr McDougall.

Objection by Coils 1980

On 5 October 1989 Coils 1980 filed an objection[5] which following amplification was disallowed by the Commissioner's letter of 11 September 1992[6] which advised of the 2 month time limit for appeal. No case stated was requested.

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1 VI/3
2 VI/4
3 VI/9
4 II/141
5 Attachment 5 to Ms Bolwell's submissions; Ex 644 TRA
6 Attachment 11

Inspector's letter

On 30 September 1991[7] Mr Vonder advised Mr McDougall of a proposal to assess him under Track B in respect of Coils 1980 (1982-4) and Slioc (1984-90). He was given 14 days to comment.

Inspector's report

On 29 November 1991 Mr Vonder reported[8], recommending application of Track B by reassessing the income of Coils 1980 to the second plaintiffs and its own assessment back to nil.

Track B assessment of LLMcDougall

On 30 March 1992 Mr McDougall was reassessed personally for income of $206,990, including $186,675 attributed to him ex Coils 1980[9] in respect of the 1982 year, resulting in tax of (net) $118,107[10]. On 25 May 1992 an objection was filed[11]. Following a requirement by Mr McDougall a case stated was signed on 25 March 1993 and filed (TRA 93/58).

Discussion

S25 aside, there is in my view no basis for the contention that the Commissioner is prohibited from proceeding with the recovery against Mr McDougall in relation to this claim. The use of s99 cleared the way for a reassessment pursuant to s23 of Mr McDougall's income, from the sum originally returned to the higher figure resulting from ascription of a share of the Coils 1980 income. The reassessment of Mr McDougall via ss99(3) and 23 on a basis inconsistent with liability of Coils 1980 entails in my view a deeming via s99(4) that Coils 1980 did not derive the relevant income. There is a supersession of the Track A assessment of the trading company (which by s99(4) had exonerated Mr McDougall) by the Track B assessment of Mr McDougall (and his fellow former shareholders) which by s99(4) has exonerated the

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7 TRA 93/58 Ex A
8 II/25
9 TRA 93/58 Exhibit L
10 Ibid
11 TRA 93/58 Exhibit N

company. It is immaterial to such exoneration whether or not there is a concurrent complementary reassessment of the company to reflect the reassessment of the former shareholder: s 99(4) itself has operative effect.

Mr Grierson's submission that Coils 1980's objection was sufficient to prevent the Commissioner from exercising power to amend is contrary to the decision of the Chief Justice in ***CIR v McNab*** to which I refer below which recognises the Commissioner's power to amend at that stage.

Recourse to Track B following Track A request for/signature of case stated

More complex is the case where there was a request for and signature of a case stated in respect of a Track A assessment against the trading company and a subsequent attempt by the Commissioner to issue a Track B assessment to the original shareholders. This is illustrated by the second example.

1984 year: WSL/LLMcDougall

On 3 December 1984 WSL filed its return for that year[12]. It returned assessable income of $626[13]. Its initial assessment on 22 January 1985 did not alter the figure.

On 30 November 1984 Mr McDougall signed his personal return for that year[14]. It included income from Coils 1980 and from Slioc but none from WSL. His self assessment was accepted by the Commissioner on 6 March 1985 and resulted in a credit in respect of 1984 terminal tax.

WSL Track A assessment and case stated

On 19 September 1989, following an inspector's report of 3 September 1989[15], WSL's income was reassessed (Track A) at $19,745 with tax of $8885[16]. On 11 October 1989 amended assessment notices were served on WSL[17]. No amendment was made to Mr McDougall's assessment. On 19 October 1989 WSL objected to the

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12 VI/144
13 VI/149
14 VI/21
15 II/50
16 VI/146
17 TRA 90/207 Exhibit R

assessment [18]. The objection was disallowed. A case stated was requested by WSL and on 16 October 1990 was signed (TRA 90/207).

The inspector's WSL Track B report

On 1 September 1992 an inspector reported[19], recommending application of Track B in respect of the income of WSL.

McDougall Track B assessment

On 26 October 1993 a Track B amended assessment was issued to Mr McDougall. It ascribed to him as income a sum of $6,268[20] being part of the sum which had previously been attributed to WSL pursuant to Track A. Mr McDougall objected by letter from Mr Russell dated 28 January 1994[21] and requested that a case be stated. On 7 December 1994 a case stated was signed (TRA 94/155). It included[22] objection to the Commissioner's issuing new assessments in respect of the tax years the subject of an existing case stated.

WSL Track B assessment

As a further part of the process the Commissioner issued a Track B assessment to WSL by which he "added back" the 1984 administration charge of $18,805 and consultancy fee $940, totalling $19,745, treating both as income of WSL but allowing deduction of the $18,805 paid to the second plaintiffs and not allowing the $940 as a deduction[23]. Following objection, its disallowance, and request for a case stated dated 3 June 1994[24], a case stated was signed on 7 December 1994 (TRA 94/154). It contained[25] WSL's objection to the Commissioner's starting again with new assessments when existing cases stated had been adjourned sine die.

The competing submissions

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18 TRA 90/207 Exhibit R
19 II/59
20 TRA 94/155 p A3
21 D248
22 V9 para 20
23 TRA 94/154 p A3
24 Exhibit 646
25 p B6 paras 29-30

For the second plaintiffs Mr Grierson argued :

(1) once a case has been stated in respect of the Track A assessment (or indeed once a case stated has been requested) the Commissioner is functus officio in respect of his amendment power;

(2) that stage having been reached in this case the Commissioner had no jurisdiction to amend to impose Track B liability.

(3) by s99(4) the Track A assessment of WSL entailed a statutory exoneration of the second plaintiffs.

For the Commissioner Ms Bolwell argued :

(1) the Track B assessment to Mr McDougall simply superseded his original self assessed figure which the Commissioner had initially accepted;

(2) the assessment to Mr McDougall was authorised by s23; and alternatively by s31;

(3) the supervening Track A assessment ***to WSL*** was irrelevant ***to Mr McDougall.***

The legislation

The following further provisions are reproduced :

> "30. **How objections to assessments originated**
>
> (1) Any person who has been assessed for income tax may object to that assessment by delivering or posting to the Commissioner a written notice of objection stating shortly the grounds of his objection, within such time as may be specified in that behalf of the notice of assessment, not being less than 14 days after the date on which that notice of assessment is given or within such extended time as the Commissioner may allow on the application of the person made before the expiry of -
>
> (a) The time for objection specified in the notice of assessment; or
>
> (b) Any extended time for objection previously allowed by the Commissioner in respect of the assessment:
>
> Provided that, where the assessment is an amended assessment, the person so assessed shall have no further right of objection than he would

have had if the amendment had not been made, except to the extent to which by reason of the amendment a fresh liability in respect of any particular is imposed on him or an existing liability in respect of any particular is increased.

(2) No notice of objection given after the time specified in the notice of assessment or after such extended time as the Commissioner may allow under subsection(1) of this section, shall be of any force or effect unless the Commissioner in his discretion accepts the same and gives notice to the objector accordingly.

31. **Commissioner may amend assessment, or objections may be submitted to Taxation Review Authority**

(1) The Commissioner shall consider all such objections, and may alter the assessment pursuant thereto.

(2) If an objection is not wholly allowed by the Commissioner, the objector may, within 2 months after the date on which notice of the disallowance is given to him by or on behalf of the Commissioner, by notice in writing to the Commissioner require that the objection be heard and determined by a Taxation Review Authority, and in that event the objection shall be heard and determined by an Authority, and the provisions of Part II ofd the Inland Revenue Department Act 1974 shall apply in respect of the institution, hearing, and determination of the proceedings on the objection.

(3) If the Commissioner, after considering the objection, has allowed the objection in part and has reduced the assessment, the reduced assessment shall be the assessment to be dealt with by the Authority.

32. **Powers of Taxation Review Authority on determination of objection or case stated**

(1) On hearing any objection the Authority may -

(a) Confirm or cancel or vary the assessment, or reduce the amount thereof, or increase the amount thereof to the extent to which the Commissioner was empowered to make an assessment of an increased amount at the time he made the assessment to which the objection relates, and that last-mentioned assessment shall be altered by the Commissioner to such extent as may be necessary to conform to that determination:

(b) Make any assessment which the Commissioner was empowered to make at the time he made the assessment to which the objection relates, or direct the Commissioner to make such an assessment, in which case an assessment shall be made by the Commissioner so as to conform to that direction. ..."

Discussion

The power to amend in s23 is expressed to relate to "an assessment" without limitation. There is an argument that the s 23 power, which is contained in Part II, ceased to apply following objection: the objection process is the subject of Part III which contains the more limited amendment power of s 31; the contention is that at the objection stage s 31 provides the sole amendment power.

In ***CIR v McNab*** (1984) 6 NZTC 61,710 Eichelbaum J held that the s 23 power may be exercised in respect of an assessment altered under s31 following objection. The decision is incompatible with the suggested construction that s23 operates only during the stage prior to objection and that s31 provides a codification of the power to alter the assessment after that stage.

By legislating in general terms Parliament has delegated to the court the task of filling in the detail by process of construction. That occurred in ***McNab***. The Act was later in substance re-enacted by the Income Tax Act 1994: refer sAA1(1) and (2). Nothing was indicated in the amendment that Parliament did not accept the High Court's interpretation. Certainty is of importance in matters of tax, insofar as that is consistent with other legislative policies. As observed by Cooke P in ***Hawkes Bay Hide Processors v CIR*** [1990] 3 NZLR 313, 315

> "...the tax field is a technical one in which broad considerations of equity have little part to play. Stare decisis is especially important in such a field. The Court should adhere to the clear trend of authority."

The judgment of the Chief Justice in ***McNab*** promotes the important interest that the Commissioner should have substantial freedom to exact the correct tax; no injustice results from it and indeed the injustice of a wrong assessment is averted. It is in my respectful view to be treated as settling the interpretation of the interrelation between ss23 and 31.

The decision does not however deal with the position where there was not only an objection under s30 and reassessment under s31(1), but also a requirement that the objection be heard by a Taxation Review Authority (s31(2)) and the signing and filing of statement of a case (Taxation Review Authority Regulations 1974 (SR 1974/299) "which shall be deemed to be the institution of the appeal" (Reg. 4(2)), thereby giving jurisdiction to the Taxation Board of Review. From 1 April 1994 the Taxation Review Authority Regulations 1994 (SR 1994/41) substituted a new regime, entailing a 2 stage process of the objector's filing of objection and the Commissioner's subsequently stating, signing, filing and serving a case (Regs. 4 and 6) . By at latest the stage of completion of each set of procedures the Authority has become seised of the appeal from the Commissioner's decision on the objection.

In ***BASF New Zealand Ltd v Commissioner of Inland Revenue*** (1995) 17 NZTC 12,136 Thorp J was required to consider whether the Commissioner retained jurisdiction under s23 to amend an assessment once a case had been stated by the Commissioner to the High Court. He held that jurisdiction was lost by that stage; the apparently unlimited terms of s23 are necessarily circumscribed by the intervention of the Court which having become seised of the issues itself possesses wide power by s33(11) to :

> "(a) Confirm or cancel or vary the assessment, or reduce the amount thereof, or increase the amount thereof, or increase the amount thereof to the extent to which the Commissioner was empowered to make an assessment of an increased amount at the time he made the assessment to which the objection relates, and that last mentioned assessment shall be altered by the Commissioner to such extent as may be necessary to conform to that determination:
>
> (b) Make any assessment which the Commissioner was empowered to make at the time he made the assessment to which the objection relates, or direct the Commissioner to make such an assessment, in which case an assessment shall be made by the Commissioner so as to conform to that direction."

I do not doubt that, as was foreshadowed by the Chief Justice in ***McNab***, a similar analysis applies to the statement of a case to the Taxation Board of Review with its like powers in s32(1) .

The provisions of s 31(1) which empowers an objector to give notice requiring :

> "that the objection be heard and determined by a Taxation Review Authority ***and in that event the objection shall be heard and determined by an Authority*** and the provisions of Part II of the Inland Revenue Department Act 1974 shall apply ..."

subordinate an existing *Commissioner's* assessment to the determination of the *Taxation Review Authority*. Such being the effect of an inconsistent determination, in view of the stipulation which I have emphasised in reproducing part of s 31(1), I am of the view that the ***BASF*** principle applies from the date of the objector's notice requiring that the objection be heard and determined by an Authority. From that point it is the duty of the Commissioner to facilitate the appeal, rather than to exercise powers inconsistent with the Authority's having assumed control of the matter. It follows Question ((1)(a)(i)) that the Commissioner cannot supersede an assessment

under appeal by one made on an inconsistent basis. The remaining question in this part Question ((1)(a)(ii)) is whether *the Taxation Review Authority* may do so.

The interrelation between ss 32 and 99

S32 confers on the Taxation Review Authority jurisdiction to

> "(b) Make any assessment which the Commissioner was empowered to make at the time he made the assessment to which the objection relates, or direct the Commissioner to make such an assessment..."

S 99 renders

> "[(2) E]very arrangement [having the specified purpose or effect] absolutely void as against the Commissioner for tax purposes [to the extent stipulated]."

In such circumstances it requires :

> "[(3)] ... the assessable income ... of any person affected by that arrangement [to] be adjusted in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that person from or under that arrangement ..."

Since the Commissioner was *required* by s99(3) to cause the assessable income to be adjusted in such manner he must have been *empowered* in terms of s32(1)(b) to do so; and accordingly the Authority must in turn have power to do so on appeal. See ***Fletcher v Federal Commissioner of Taxation*** (1988) 84 ALR 245.

The Court of Appeal has however held that there are strict limits upon the Authority's exercise of its general power to :

> "[(b) M]ake any assessment which the Commissioner was empowered to make at the time he made the assessment to which the objection relates".

In ***Commissioner of Inland Revenue v V H Farnsworth Ltd*** [1984] 1 NZLR 428 the majority of the Court of Appeal construed the legislation as containing an implied jurisdictional restriction - that the Commissioner may not on appeal by way of case stated to the court rely on a ground of assessment not originally advanced. The same

principle must apply to an appeal to the Authority. The facts of that case and its successors - ***Cross v Commissioner of Inland Revenue*** [1987] 1 NZLR 498 and ***Smith v Commissioner of Inland Revenue*** [1987] 1 NZLR 727 - involved attempted changes of position of much more limited scope than a switch from Track A to Track B, although none concerned a s 99 argument. Unless that fact provides grounds for distinguishing such authorities they apply *a fortiori* to this case.

In ***Fletcher v Federal Commissioner of Taxation*** there had been no reference before the Administrative Appeals Tribunal to the tax avoidance provisions in Part IVA of the Income Tax Assessment Act 1936. The Full Court was not referred to the New Zealand Court of Appeal cases and did not simply refuse to permit the Commissioner to advance a Part IVA argument, as being beyond jurisdiction. Instead it remitted the matter to the Tribunal for further consideration, at which stage there would be due notice to the taxpayer of the possibility of the application of the avoidance provisions and the opportunity for further evidence to be adduced, so there would be no prejudice to the taxpayer.

In ***Australia and New Zealand Savings Bank Ltd v Federal Commissioner of Taxation*** (1993) 114 ALR 673 Davies J referred to certain observations of Brennan J in ***Federal Commissioner of Taxation v Dalco*** (1990) 168 CLR 614 at 621. He cited them as justifying the Commissioner's being entitled to support the amount of an assessment on a ground other than one taken into account at the time the assessment was made, provided that proper notice is given[26]. Hill J, with whom Heere J agreed, adopted a narrower approach, following the decision of the Federal Court in ***Federal Commissioner of Taxation v Jackson*** (1990) 96 ALR 586 in which ***Fletcher*** had been distinguished.

The Australian discussion considers questions of procedural unfairness. Difficulty of that kind might be avoided in New Zealand by the Authority's exercising jurisdiction under s 32(1)(b) to direct the Commissioner to make a s 99 assessment and to direct that before doing so he must give due notice and the opportunity to adduce evidence.

Relevant to the question of procedural fairness in the present instance would be the 25 day hearing of the merits of the second plaintiffs' case before the Taxation Review

Authority; if the issue were simply whether there has been any unfairness to the taxpayers they might well have difficulty in resisting a contrary conclusion after such argument - cf. ***Calvin v Carr*** [1980] AC 574.

S 99 was not relevant and so not referred to in ***Farnsworth***. I have considered whether it is open to argument that that decision and its successors may be distinguished on that ground, and that ***Fletcher*** should be followed. Such argument may be supported by the mandatory language of s 99(2) and (3); it can be said that reading those provisions together with s 23 there is a statutory direction of such strength as to outweigh the contrary conclusion which ***Farnsworth*** held is appropriate in cases not involving s 99.

I am however of the view that such course would be inconsistent with the ratio of ***Farnsworth, Cross*** and ***Smith***, which is that the impediment to amendment is one not simply of discretion but of jurisdiction. A decision that there is in fact jurisdiction to reassess in one class of case - viz where s 99 is invoked - although not in others, would in my view exceed the proper limits of this Court's authority.

Accordingly, question (1)(a) is answered "NO - the Commissioner may not supersede an assessment under appeal by one made on an inconsistent basis".

(b) Does that principle apply in relation to the change from Track A to Track B?

Ms Bolwell contended that the change from Track A to Track B did not encounter the problems of ***BASF*** and ***Farnsworth***. She argued that only the trading Company A was affected by the Track A assessment; that its imposition of liability upon that Company had no such consequences as to the position of the plaintiffs as to prevent their being assessed (or reassessed) on a Track B basis; that the impermissibility of reassessing *the company* once ***its*** s31(2) requirement had been made said nothing about *the plaintiffs'* position. She argued, in short, that the Track A assessment was *res inter alios acta* as regards the plaintiffs.

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[26] He recognised an exception to that principle as arising on the Australian legislation where the appellate body lacks jurisdiction to exercise the Commissioner's powers of assessment; such problem does not exist under s 32(1) of the New Zealand statute

Mr Grierson relied in response on s99(4) which provides :

> "(4) Where any income is included in the assessable income...of any person pursuant to subsection (3) of this section, then, ***for the purposes of this Act, that income shall be deemed to have been derived by that person and shall be deemed not to have been derived by any other person.***"

He contended that the Track A assessment is far from being *res inter alios acta*: on the contrary s99(4) ties together the tax fortunes of company A and the plaintiffs, since the Track A liability of the company (now no longer open to amendment by the Commissioner) carries with it statutory immunity from liability of the plaintiffs.

Ms Bolwell could suggest no answer to this contention and nor can I.

Since :

(1) a company is relieved of further exposure to amendment *by the Commissioner* of its assessment once a s31(2) requirement has been given;

(2) the *Taxation Review Authority* cannot direct a change from Track A to Track B;

(3) the language of s 99(4) is categorical

the result follows.

It could have been avoided, had the advantages of Track B been perceived at an earlier stage, notwithstanding the competing contentions as to its validity which are the subject of Part VI of the judgment of 8 November 1996. In ***Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd*** [1994] 2 NZLR 681 the Court of Appeal did not challenge the decision of Gallen J at first instance ((1993) 15 NZTC 10,275) that an assessment or amended assessment may lawfully be made on a protective basis, by way of fallback if an alternative and inconsistent assessment is successfully challenged on appeal. I respectfully agree with the view of Gallen J, which has the support of the decision of the High Court of Australia in ***Deputy Commissioner of Taxation v Richard Walter Ltd*** (1995) 183 CLR 168 cited at pages 73-4 of the judgment of 8 November 1996. It would have been open to the

Commissioner to assess on a Track B basis and alternatively, if that were invalid, on the inconsistent Track A basis.

Since that was not done it follows in my view that in each case where there was a requirement under s31(2) that an objection to Track A assessment be heard and determined by a Taxation Review Authority (and *a fortiori* where the case had been stated and the hearing of the appeal commenced) the Commissioner has no power to issue and the Taxation Review Authority has no power to direct an amended assessment under Track B.

Question 1(b) is therefore answered "YES - the principle does apply in relation to the change from Track A to Track B."

(c) What is the effect of WSL's being removed from the Register of Companies before determination of the appeals affecting it?

The final issue is whether it makes any difference that the appeal is no longer alive.

On 29 May 1995 WSL was removed from the Register of Companies[27]. In ***Suzy Speed Holdings Limited v Commissioner of Inland Revenue*** (1994) 16 NZCT 11,108 Greig J decided that since a company once dissolved no longer exists, there could be no exercise by its former liquidator of the former right of the company under s 31, as "any person who has been assessed for income tax", to proceed with the objection.

Here no application has been made for the restoration of the company to the Register; the rights of the dissolved company are *bona vacantia:* Companies Act 1955 s 337.

The present parties do not appear to have addressed before the Taxation Review Authority the effect of the dissolution upon the WSL cases stated. But it is implicit in the judgment of Greig J that the High Court proceedings in ***Suzy Speed Holdings*** would simply abate if, as was there the case, an order of substitution of an alternative appellant could not be made to replace the dissolved company. Such conclusion is consistent with the decision of the House of Lords in ***Morris v Harris*** [1927] AC 252

where an arbitration by a former staff member against a company became ineffectual upon the latter's dissolution. I consider that the dissolution must in the present case equally entail abatement of the case stated appeal. There therefore arises the question of the consequence of that conclusion on the Track A procedure.

At the time the Track A assessments were issued the Authority was seised of the Track A appeal; WSL was still on the Register; and I have held that the pendancy of the Track A appeal deprived the Commissioner of power to issue Track B assessments.

I am of the view that a purported assessment made in such circumstances is made without power and is a simple nullity, rather than one made in abuse of power which could have legal effect if the Court exercised a discretion not to invalidate it. It would have been open to the Commissioner (subject to s 25) to proceed following the dissolution and the consequential abatement to exercise the s 23 power, assuming no successful application had been made to restore the company to the Register. But the Commissioner did not do so and nothing has occurred to validate the purported Track B assessments.

Question (3) (Part XIV judgment 8 November 1996): whether there was absence of the actual firm assessment required by law).

There was no substantial evidence or argument that the Commissioner's conduct in relation to the Track A was other than firm. Nor was there such evidence in relation to Track B and its application to the second plaintiffs, once its advantages had been recognised. It is true that the Commissioner was reluctant to burn his boats. As is observed in the judgment of 8 November 1996, he pleaded that he could opt for both Track A and Track B, although an election would ultimately be required; I understood from Mr Ruffin that he did not want to meet an argument that if Track A were formally abandoned Track B would disappear as having lost its foundation of an effective Track A assessment. Mr Ruffin made plain that the Commissioner's reluctance to have the Track A cases stated formally abandoned was not because of lack of finality of the Track B assessments; and I have just repeated the view expressed in the earlier judgment that the Commissioner could, had he so chosen, have maintained

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[27] Bolwell submissions attachment 14

both Track B and (in the alternative) Track A on foot until the outcome of appeals was known.

I find for the Commissioner on the issue.

Decision

I make the following declarations :

(1) (a) Neither the Commissioner nor the Authority may supersede an assessment under appeal by one made on an inconsistent basis.

(b) That principle applies in relation to the change from Track A assessments to Track B purported assessments.

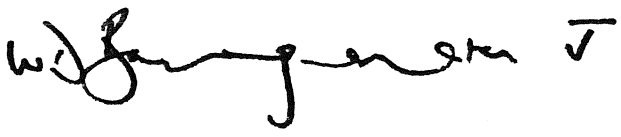
(c) The effect of Company A's being removed from the Register before the appeal is determined does not affect such result.

(2) The Commissioner did not discriminate unfairly against the plaintiffs by treating them differently from other taxpayers.

(3) There was no absence of the actual firm assessment required by law.

I have dealt with two specimen examples. In case a more specific declaration or other order is required in relation to them or other assessments the parties are given general leave to apply by 14 February 1997.

Since the s25 issues raised by the applications for review have been adjourned to be dealt with in conjunction with the first plaintiffs' appeal it may be convenient to deal with costs at the conclusion of that proceeding. They are reserved.



Judgment 8 November 1996

1. Income Tax

Operation of tax avoidance provisions; whether scheme satisfying other provisions of Act could infringe s 99; whether open on facts to find avoidance; extent of Commissioner's power to adjust income to counteract tax advantage; whether Commissioner could claim in the alternative against a company and its former shareholders; whether Commissioner's purpose in securing recovery from taxpayer with means was improper; whether unlawful vendetta; effect of Commissioner's directive; whether Commissioner in breach; whether unfair discrimination; whether exercise of s 99 power ineffectual.

2. Legal professional privilege

Whether available in respect of processes preceding s 99 assessment; application to lawyers employed by Commissioner.

Judgment January 1997

1. Whether

   (i) Commissioner
   (ii) Taxation Review Authority

may supersede an assessment which is under appeal by one made on an inconsistent basis.

2. Whether there was absence of the actual firm assessment required by law.