IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2009-470-000214

UNDER	The Judicature Amendment Act 1972
IN THE MATTER OF	a decision made pursuant to Section 113 of the Tax Administration Act 1994
BETWEEN	BERRYTIME LAND LIMITED Applicant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

CIV 2009-470-000215

AND UNDER	The Judicature Amendment Act 1972
IN THE MATTER OF	a decision made pursuant to Section 113 of the Tax Administration Act 1994
BETWEEN	BERRYTIME LIMITED Applicant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 8 April 2009
(Heard at Hamilton)

Appearances: K J Patterson for Applicants
P Courtney and N Delamore for Respondent

Judgment: 20 April 2009 at 3:30pm

(RESERVED) JUDGMENT OF ANDREWS J
[Applicants' application for interim orders]

This judgment is delivered by me on the 20th day of April 2009 at 3:30pm pursuant to r 11.5 of the High Court Rules.

....
Registrar / Deputy Registrar

Solicitors:
Ken J Patterson, P O Box 13006 Tauranga 3141
Crown Law, PO Box 2858, Wellington 6140

INTRODUCTION

[1] Berrytime Limited ("Berrytime") and Berrytime Land Limited ("Berrytime Land") have each issued proceedings against the Commissioner of Inland Revenue ("the Commissioner" or "Inland Revenue") seeking judicial review of decisions to decline to amend self assessments of GST payable by the companies.

[2] The companies have also applied for interim orders under s 8 of the Judicature Amendment Act 1972. The orders sought are as follows:

> 1. Declaring that, pending the determination of the application by the applicants for judicial review, no further steps shall be taken with respect to the taxation position of the applicant.
>
> 2. Declaring that, pending the determination of the application for judicial review the current Court proceedings issued by the respondent on the applicant for winding up be stayed.
>
> 3. For costs of and incidental to this.

[3] The applications are opposed.

Background

[4] It is necessary to set out the background against which Berrytime and Berrytime Land have issued proceedings for judicial review, and have applied for interim orders, in some detail. The background traverses the companies' applications for amended assessments of their GST liability and the Commissioner's liquidation proceedings against the companies.

The companies

[5] Berrytime and Berrytime Land were both incorporated in New Zealand on 7 December 2006. In each case the company's registered office was in Queensland, where their sole director lives. The two companies were registered for GST in New Zealand on 1 January 2007.

[6] The business of each company was to source and arrange contracts to buy Child Care Centres and Early Learning Centres. The entity for which this business

was conducted is variously described in the documents before the court as "ABC Development Learning Centre (NZ) Limited", "ABC Learning Centres Limited", "ABC Developmental Learning Centres Limited", and "ABC Developmental Learning Centres Pty Limited". "ABC" will be used to refer to these entities.

[7] When a suitable centre was identified Berrytime (or Berrytime Land) would enter into a conditional agreement for sale and purchase with the owner. The agreement would then be considered by the board of ABC. If ABC approved the acquisition, Berrytime (or Berrytime Land) would nominate ABC as purchaser, by a Deed of Nomination. A nomination fee was payable to the company.

Relevant legislation

[8] Under s 16 of the Goods and Services Tax Act 1985 ("GST Act") and s 92B of at the Tax Administration Act 1994 ("TA Act") taxpayers are required to assess GST payable by them and to file returns setting out the tax payable. A taxpayer's obligations are also set out in s 15B of the TA Act. These are as follows:

> (a) Correctly determine the amount of tax payable …:
>
> (b) Deduct or withhold the correct amounts of tax from payments or receipts when required to do so …:
>
> (c) Pay tax on time:
>
> (d) Keep all necessary information … and maintain all necessary accounts or balances … :
>
> (e) Disclose to the Commissioner … all information that tax laws require the taxpayer to disclose:
>
> (f) … co-operate, to the extent required by the Inland Revenue Act, with the Commissioner in a way that assists the exercise of the Commissioner's powers …:
>
> (g) Comply with all the other obligations imposed on the taxpayer by the tax laws.

[9] Self-assessments of tax are deemed to be correct (s 109(b) TA Act). Assessments (including self-assessments) may be challenged by way of the disputes procedures set out in Part IV(A) and VIII(A) of the TA Act. The Part IV(A)

procedure must be commenced by lodging a Notice of Proposed Adjustment ("NOPA") within four months of the assessment being filed.

[10] Section 109 TA Act provides:

> **109 Disputable decisions deemed correct except in proceedings**
>
> Except in objection proceedings under Part VIII or a challenge under Part VIII(A) –
>
> (a) No disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
>
> (b) Every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.

[11] Pursuant to the definitions of "disputable decision" and "assessment" in s 3 TA Act, a self-assessment is a disputable decision.

[12] Section 113 TA Act provides that the Commissioner may amend assessments:

> **113 Commissioner may at any time amend assessments –**
>
> (1) Subject to sections 89N and 113D, the Commissioner may from time to time, and at any time, amend an assessment as the Commissioner thinks necessary in order to ensure its correctness, notwithstanding that tax already assessed may have been paid.
>
> (2) If any such amendment has the effect of imposing any fresh liability or increasing any existing liability, notice of it shall be given by the Commissioner to the tax payer affected.

Berrytime and Berrytime Land's GST returns

[13] Berrytime filed self-assessments of GST ("the GST assessments") for the periods ending from 31 January 2007 up to 31 March 2008. Berrytime Land filed self- assessments for the periods ending from 31 January 2007 to 31 October 2008. The assessments totalled $3,365,134.54 (for Berrytime) and $808,924.32 (for Berrytime Land). Apart from one payment of $246,914.63 on behalf of Berrytime Land, none of the assessed GST has been paid. As a result, penalties and interest have been added to the GST liability.

Liquidation proceedings

[14] Inland Revenue filed proceedings to wind up both companies on 22 September 2008, on the grounds of persistent and/or serious failures to comply with the Companies Act, and that winding up was just and equitable. The former ground related to the companies not having (prior to 24 June 2008) a registered office in New Zealand and failing to hold specified documents at their registered office. The latter ground was based on the companies' late filing and non-payment of GST and income tax returns.

[15] In the affidavit filed in support of the liquidation proceedings it is said that Inland Revenue had concerns as to the companies from late 2007 onwards. There had been e-mail, letter and telephone contact with the companies but that led only to the payment of $246,914.63 referred to earlier.

[16] Amended statements of claim were filed on 10 October 2008. Liquidation was sought on the basis of the companies' inability to pay their debts, in addition to the grounds set out in the original statement of claim.

[17] The liquidation proceedings were heard before Associate Judge Doogue on 26 March 2009. The companies defended the proceedings on the grounds that the Commissioner should have amended the self-assessments and that their proceedings for judicial review (filed soon after the companies' requests for amendment were declined) if successful, could result in the Commissioner being compelled to amend the assessments, with the consequence of reducing the debts which arose out of the assessments. Counsel for the companies submitted to Associate Judge Doogue that the correct liability for Berrytime is $137,319.71, and for Berrytime Land $550,892.82.

[18] In his judgment issued on 3 April 2009, Doogue AJ concluded that both companies are insolvent. However, rather than make orders placing the companies in liquidation, he adjourned at the proceedings until 7 April 2009, noting that if the companies had not made payment, then certificates of unpaid debt would be required.

[19] On 7 April 2009 the liquidation proceedings were further adjourned until 22 April 2009, for mention, pending the outcome of the present application for interim orders.

The companies' application for amendment of assessment under s 113

[20] In late April 2008 Mr Bevan Spalding of Rodewald Hart Brown, Chartered Accountants ("RHB") advised Inland Revenue that his firm had been appointed tax agents for the companies. As at that time, Berrytime and Berrytime Land had filed GST returns for the periods up to 31 October 2007. The statutory period within which a NOPA could be lodged had passed.

[21] By a letter dated 16 June 2008, headed "Voluntary Disclosure" RHB said that Berrytime had made errors in the GST returns for the periods ending 30 April 2007, and 30 June to 31 October 2007.

[22] The letter described Berrytime's business activity as being locating appropriate sites for Child Care Centres, for which services it received fees, and further said that in some instances Berrytime had received funds from a client on a contingent basis, and held those funds as stakeholder for GST purposes. Berrytime had not understood the GST implications of holding money as a stakeholder and had, in error, filed returns that included all the funds received as taxable supplies.

[23] A summary of the required amendments to the GST assessments was attached to the letter. It was noted that the total GST liability for Berrytime would reduce by $1,883,169.11. The letter ended with a request that the amendments be made and new assessments issued.

[24] As Berrytime was out of time to file a NOPA, the only manner in which the GST assessments could be amended was by the exercise of the Commissioner's discretion under s 113 TA Act. The letter of 16 June 2008 was treated by Inland Revenue as a request for the exercise of that discretion.

[25] Inland Revenue's Standard Practice Statement "SPS 07/03 Requests to Amend Assessments" sets out Inland Revenue's practice for exercising the Commissioner's discretion under s 113 to amend assessments to ensure their correctness. Among the principles set out at paragraph 30 it is stated (at 31(f)) that "the onus is on taxpayers to provide all relevant information with amendment requests". RHB was advised that information was required. A copy of an e-mail dated 15 July 2008 from Mr Spalding to the Director of Berrytime and Berrytime Land, Mr Lomas, asking for copies of all relevant agreements between Berrytime, Berrytime Land, ABC, and any related agreements to be provided, was annexed to the affidavit filed in support of the liquidation proceedings.

[26] RHB provided some information in its letter to Inland Revenue dated 29 July 2008. It also noted that it had not received documentation requested from the companies. Following a meeting between Inland Revenue and RHB, RHB sent a further letter to Mr Lomas asking for information to be provided.

[27] The 16 June 2008 request for amendment was declined in a letter from Inland revenue dated 11 September 2008. It will be recalled that the liquidation proceedings were filed on 22 September 2008, and the amended statement of claim on 11 October 2008.

[28] A second request for amendment of the GST assessments was made by RHB in a letter dated 23 January 2009, headed "Application to Reassess GST under Section 113 of the Tax Administration Act 1994". Amendments were sought of the GST assessments for both Berrytime (for the periods ending 30 April 2007 up to and including 31 January 2008) and for Berrytime Land (for the periods ending 30 June 2007 to 31 August 2007, and 31 October 2007).

[29] The letter set out the "background facts" which included reference to a company Canungra Pastoral Company Pty Limited ("Canungra"). It was said that ABC had transferred funds to Canungra, and when Berrytime or Berrytime Land became entitled to the nomination fee, funds were "attributed to the Berrytime Group".

[30] The funds said to have been transferred by ABC to Canungra were described as a loan, and the letter stated that Berrytime had incorrectly returned GST:

> … for $40,000,000.00 loaned by ABC to Canungra, on the basis that this is the amount was expected to be derived by Berrytime from the contract with ABC. [Sic]

[31] With respect to Berrytime Land it was said that Berrytime Land had incorrectly returned GST for:

> ... $7M loaned by ABC to Canungra.

[32] A summary of the adjustments requested was attached to the letter, but no other supporting documentation.

[33] A meeting was held on 4 February 2009 between Inland Revenue officers, Mr Lomas and RHB. Mr Lomas travelled to New Zealand to attend the meeting. In a letter to Mr Lomas dated 13 February 2009 Inland Revenue set out its concerns. The letter referred to the onus on taxpayers to provide all relevant information. It was noted that no supporting documentation had been provided in support of either the first request for amendment (on the grounds that funds were held by Berrytime as stakeholder) or the second request for amendment (on the grounds that GST had been incorrectly returned for loans from ABC to Canungra). The letter further referred to undertakings made to Inland Revenue to make payment of GST, which had not been met.

[34] A list of information required was set out in an Appendix to the letter. That included, as item 27:

> Loan document(s) in respect of ABC Learning Centres Limited (ABC Australia) to Canungra and any other document(s) to support the loan between the above parties.

[35] A response was requested by 27 February 2009.

[36] Nothing was received by 27 February. On 10 March 2009 the date for providing information was extended to 13 March 2009. Inland Revenue's letter faxed to RHB said:

> ... If the above information is not received by 13 March 2009, we will have no option but to decline the s 113 (of Tax Administration Act 1994) request to amend the relevant GST returns due to the application not complying with the requirements of the Standard Practice Statement 07/03 – requests to amend assessments (i.e. insufficient information to support amendments).

[37] At 3:27pm on 13 March 2009 RHB e-mailed a letter to Inland Revenue. RHB also sent Inland Revenue a series of e-mails comprising scanned documents supporting the s 113 request for amendment.

[38] With respect to the loan referred to in the 23 January 2009 request for amendment, it was said in RHB's letter that:

> As indicated in the meeting on 4 February 2009, funds were lent to Canungra Pastoral Company Property Limited ("Canungra") by ABC Developmental Learning Centres Limited ("ABC"). Berrytime became legally entitled to payment of the nomination fees at the date the contracts were nominated to ABC.

[39] With respect to Inland Revenue's request for loan documentation, RHB said in its letter:

> The service agreement between ABC, Canungra and Berrytime and the prior development agreements, is the documentation that is available in respect of these transactions.

[40] As to the statement in its letter of 10 March 2009 that Inland Revenue would have "no option but to decline" the s 113 request to amend assessments, RHB commented that under s 113 the Commissioner "may from time to time, and at any time, amend an assessment". RHB said there was:

> ... a clear understanding at the meeting on 4 February 2009 that if the Commissioner could see that progress was being made in relation to resolving the issues that an extension of time would be given in respect of providing the information in full, and the court proceedings. The information provided with this letter is sufficient to demonstrate to the Commissioner that positive progress is being made.

[41] An Inland Revenue officer, Ms Aradhana Lal was the recipient of the 13 March e-mails from RHB. By 4:54pm that day she had received 20 e-mails. She read then, printed them and put them into folders for the investigation team dealing with the matter. They filled two "Eastlight" folders. One folder was made up of documents in relation to late delivery penalties including tax invoices issued from

ABC to Canungra. The second folder contained documents including RHB's cover letter and the service agreement referred to earlier.

[42] Ms Lal and others in the team spent the afternoon of 13 March 2009 going through the documents. They reviewed them again both in the morning and the afternoon of 16 March and again on 17 March. It was concluded that no evidence had been found in the documents to support the assertion of a loan between ABC and Canungra.

[43] On 18 March 2009 Inland Revenue sent a letter to RHB advising that the s 113 requests for amendment had been declined as sufficient evidence had not been provided to confirm that the returns were incorrectly. Separate letters were addressed to Berrytime and Berrytime Land, and were sent to RHB both by mail and by fax.

Credit notes

[44] In addition to the asserted loan, the companies also referred in discussions with Inland Revenue to credit notes issued by ABC in respect of management fees payable by Berrytime under a management agreement. The credit notes totalled $26,019,243.29 and were said to be in respect of management fees paid by Berrytime to ABC for the months of March to June 2008, but for which no services had been provided.

[45] The credit notes were sent to RHB with a cover letter from ABC dated 17 March 2009, as follows:

> Please find enclosed credit notes that we are required to issue under the GST Act as no services where ever provided in relation to these management fees. The credit notes where prepared previously, however, due to an administrative oversight they were not sent to you.
>
> As you agreed in the enclosed letter dated 28 August 2008, no services where provided and no portion of these fees is repayable in any way. As a result of these factors, we are treating the funds received from Berrytime Land as liquidated damages under the contract dated 29 April 2008. [Sic]

[46] Although credit notes were exhibited with the cover letter, a letter dated 29 April 2008 was not.

Application for judicial review

[47] The statements of claim by Berrytime and Berrytime Land are identical. They set out the chronology of the liquidation proceedings and refer to an affidavit being filed on behalf of Inland Revenue shortly before the hearing on 25 March 2009, recording that the s 113 request for amendment of the self-assessments of GST had been declined.

[48] The grounds for relief by way of judicial review of the decisions to decline to amend the GST assessments are set out as follows:

a) Breach of natural justice: it is alleged that Inland Revenue failed to properly consult with the companies. The particulars state that the decision to decline to amend the assessments was communicated three days before the liquidation hearing, that the reason given for declining amendment was that sufficient evidence had not been provided, that the companies had been denied the opportunity to comment on or make or submissions as to the decision to decline, and that no details had been given of Inland Revenue's reasons for the decision.

b) Mistake of fact: it is alleged that Inland Revenue made a mistake of fact in taking the view that the companies' self-assessments of GST were correct, and in disregarding relevant clauses in the service agreement between the companies and ABC as to when the companies became legally entitled to the payment of nomination fees.

c) Failure to take relevant considerations into account: it is alleged that Inland Revenue failed to have regard to the following relevant considerations:

i) That the companies were not the entities that received, or were entitled to receive, funds advanced from ABC;

ii) That the companies did not become legally entitled to payment of nomination fees when Canungra received funds from ABC;

iii) That Canungra was not an agent for the companies and did not receive funds from ABC as agent for the companies; and

iv) That GST liability was not triggered when Canungra received funds from ABC, rather on the date of execution of Deeds of Nomination.

d) Unfairness/procedural impropriety: it is alleged that Inland Revenue has a duty pursuant to its Standard Practice Statement SPS 07/03 to take into account all relevant factors and principles set out therein, and had failed to do so.

e) Unreasonableness: it is alleged that the decision was, in all the circumstances unreasonable in light of the huge amount of information requested and provided, that the information raised questions about and indicated the companies' mistakes in making self-assessments, and that Inland Revenue was unreasonable in not taking account of evidence provided by the companies.

Application for interim orders

[49] Section 8 of the Judicature Amendment Act 1972 provides that the court may, if in its opinion it is necessary to do so for the purpose of preserving an applicant's position, make an interim order for all or any of the following purposes:

> (a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power;

(b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates;

(c) [Not relevant to this application].

[50] There was common ground between counsel for the parties as to the appropriate approach to be taken to an application for interim orders; namely to address first the question whether orders are necessary to preserve the applicant's position, then to apply a wide discretion based on the strength of the claim, the statutory framework, the public interest, and the private and public repercussions of granting relief.[1] These factors will be considered in turn.

Are interim orders necessary to preserve the position of Berrytime and Berrytime Land?

[51] Mr Patterson for the companies, submitted that interim orders are necessary, because if the companies are placed in liquidation they will not have the opportunity to pursue the judicial review proceedings. Ms Courtney, for the Commissioner, submitted that interim orders are not necessary, as the judicial review proceedings could be continued by a liquidator.

[52] While Ms Courtney's submission has some force, it can be accepted that it would be the companies' preference to pursue the judicial review proceedings themselves, rather than leave them in the hands of a liquidator. There is also force in Mr Patterson's submission that once in place, liquidation would be difficult to "unwind" should the outcome of judicial review proceedings lead to a reduction of the GST liability, and payment by the companies of any such liability.

[53] Interim orders may, therefore, be necessary to preserve the companies' position. It is necessary, however, to go on to consider what that "position" is. This requires consideration of the judicial review proceedings themselves, and the statutory framework within which they have been brought.

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[1] See *Carlton & United Breweries Limited v Minister of Customs* [1986] 1 NZLR 423 (CA), at 430

Statutory framework

[54] The relevant sections of the GST Act and the TA Act have been set out earlier in this judgment. As noted, s 109 TA Act provides that an assessment cannot be disputed in a court or in proceedings on any ground whatsoever, and that every disputable decision and its particulars are deemed to be and are taken to be correct in all respects. A "disputable decision" includes a self-assessment.

Strength/weakness of the companies' claim for judicial review

[55] Counsel for the parties were agreed that against the statutory framework referred to, the courts have accepted that the correctness of a tax assessment can only be challenged by way of the procedures set out in the TA Act, and that challenge by way of judicial review will be available only in exceptional cases.

[56] To this effect, counsel referred to the judgment of Lord Hoffman in the Privy Council in *Miller v Commissioner of Inland Revenue*[2] at [18]:

> ... it will only be in exceptional cases that judicial review should be granted where the challenges can be addressed in the statutory objection procedure. Such exceptional cases may arise most typically where there is abuse of power.

[57] In its judgment in *Westpac Banking Corporation v Commissioner of Inland Revenue*[3] the Court of Appeal considered the availability of judicial review in tax disputes. In the judgment of the Court, William Young P said, at [53]:

> The New Zealand authorities support the proposition that it is open to a taxpayer to challenge what purports to be an assessment which in fact does not represent the genuine assessment of the Commissioner as to the tax position of the company. ... Generally the Courts have accepted that the correctness of a tax assessment can only be challenged in challenge proceedings ... and that challenge by way of judicial review is reserved for exceptional cases ... The cases are not particularly specific as to what circumstances are sufficiently exceptional as to warrant judicial review proceedings.
>
> [Case citations omitted.]

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2 *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316

3 *Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] NZCA 24 (20 February 2009); application for leave to appeal to the Supreme Court dismissed: [2009] NZSC 36 (8 April 2009)

[58] The Court went on to say at [59]:

> We think it appropriate to continue to apply the established principles as to judicial review in tax cases. We accept that judicial review is available where what purports to be an assessment is not an assessment. Associated with this, we accept that judicial review is available in exceptional cases and thus may be available in cases of conscious maladministration (as was recognised in *Futuris*). We can reconcile this with ss 109 and 114 on the basis that in such cases (ie no genuine assessment or conscious maladministration) what is challenged is either not an assessment, or at the very least, not the sort of assessment which the legislature had in mind in enacting those sections. On this basis we see the availability of judicial review as depending on the claimant establishing exceptional circumstances of a kind which results in the amended assessment falling outside the scope of sections 109 and 114 and thereby not engaging those sections.

[59] Counsels' argument in the present case centred on whether Berrytime and Berrytime Land could establish "exceptional circumstances".

[60] Mr Patterson submitted that the exceptional circumstances were made up of factual matters, a "tint" of conscious maladministration, and abuse of power.

[61] The factual matters he referred to were:

a) The "sheer size" of the tax liability;

b) The "sheer size" of the credit notes;

c) The circumstances of the initial self-assessments (the fact that the companies were based off-shore, and the high value of the assessments, which was "not the norm in New Zealand").

[62] No evidence was put forward to support a finding that the matters referred to were exceptional, and it cannot be accepted that any of them can be described as exceptional.

[63] Mr Patterson also submitted that it was relevant that the companies "were committed" to ensuring that the correct tax position was represented, and that the companies, their tax agents, and their director had taken "extraordinary efforts" to meet Inland Revenue's requirements.

[64] In the light of a taxpayer's obligations (see s 15B TA Act, referred to earlier) it cannot be accepted that the companies' efforts to have the GST assessments amended constitute "exceptional circumstances". The companies were required to make the assessments, to provide information to Inland Revenue, and to co-operate with Inland Revenue's investigation.

[65] With respect to "conscious maladministration" Mr Patterson submitted that this lay in an element of pre-determination by Inland Revenue. He submitted that Inland Revenue had allowed itself only two hours to review the material provided on 13 March 2009 before determining that there was insufficient evidence to support the request for amendment.

[66] That submission cannot be sustained in the light of Ms Lal's affidavit evidence (filed after Mr Patterson's submissions) that the material was reviewed by the Inland Revenue team over 13, 16 and 17 March 2009. Nonetheless, Mr Patterson submitted that the team was looking for a loan agreement, did not find one, so declined the request for amendment. He submitted that there was no careful analysis of the material.

[67] Ms Courtney submitted that a claim of conscious maladministration could not succeed. She referred to the history of contact between Inland Revenue and the companies and their tax agents RHB, the failure of the companies to provide supporting documentation with their two requests for assessment, and the repeated requests by Inland Revenue for information supporting the requests. Considerable opportunity was given to the companies to provide information, she submitted, but information "had to be extracted out of them". Ms Courtney submitted that the evidence demonstrated that Inland Revenue acted lawfully and properly in dealing with the companies, and was not in breach of any of its obligations and duties under the TA Act.

[68] The judicial review proceedings are at an early stage. However, on the basis of the information before the Court, it cannot be said that either Berrytime or Berrytime Land has a strong case for an allegation of conscious maladministration.

[69] In relation to "abuse of power", Mr Patterson submitted that Inland Revenue had been "hastily rushing through" consideration of the s 113 request for amendment, so that the liquidation proceedings could be progressed through to orders to wind up the companies, thus enabling Inland Revenue to access a wealthy shareholder for payment of tax liabilities.

[70] Mr Patterson referred to *Miller v CIR*, where it was argued that the Commissioner had been motivated in making reassessments, following a finding that a tax arrangement was "tax avoidance", by the fact that the shareholders who were reassessed were solvent whereas their former trading company was not. The Privy Council observed that Richardson J (as he then was) had identified the issue of the Commissioner's motivation as being "arguably sufficient to constitute a claim of abuse of power". The argument was rejected on the facts in the High Court, and that finding was not disturbed in the Court of Appeal or Privy Council.

[71] Mr Patterson's submission in the present case was founded on an affidavit sworn by Mr Lomas on 3 October 2008 and filed in the liquidation proceedings. In that affidavit Mr Lomas said:

> My latest calculation of my net worth owned personally and in associated entities is $134,950,500. Annexed marked 'A' is a copy of a letter from my accountant KPMG, Gold Coast, confirming this is a fair estimate.

[72] Annexed to the affidavit was a letter from Mr D van Herwaarde of KPMG, Gold Coast, Queensland. That letter is as follows:

> **Lomas Group**
>
> We act as accountants for the Lomas Group.
>
> Attached is the net asset position for the Lomas Group, which has being [sic] prepared by Mr Douglas Lomas.
>
> No audit or review has been performed and accordingly we do not express an opinion on such financial data and no warranty of accuracy or reliability is given.
>
> In accordance with our firm policy, we advise that neither the firm nor any member or employee of the firm undertakes responsibility arising in any way whatsoever to any person in respect of the financial data or of the report, including any errors or omissions therein, arising through negligence or otherwise however caused.

[73] Contrary to Mr Lomas' assertion, the letter does not confirm his personal net worth, nor that the figure stated by him is a "fair estimate". Mr Lomas' affidavit would not provide any grounds for Inland Revenue to pursue a motive of accessing Mr Lomas' "personal" wealth.

[74] Again it must be acknowledged that the judicial review proceedings are at a very early stage. However, it must again be said that on the information available at this time, the case for arguing that there was an abuse of power by Inland Revenue cannot be described as strong.

[75] In summary, the companies' case for establishing exceptional circumstances for judicial review proceedings cannot, by any means, be described as strong. On the contrary, on the information presently available it can only be described as weak. Accordingly, to return to the question posed earlier, the companies' present "position" is that they have issued proceedings for judicial review, but their case for establishing the exceptional circumstances required for such proceedings is weak.

Public interest

[76] Both counsel referred to s 6 TA Act, which provides that Ministers and Officials having responsibility under the Act:

> … are at all times to use their best endeavours to protect the integrity of the tax system.

[77] Subsection (2) sets out a list of matters included in the meaning of "the integrity of the tax system".

[78] Mr Patterson submitted that it is necessary for the protection of the integrity of the tax system that the interim orders be made, in that "the integrity of the tax system" requires the Commissioner to correct "genuine errors" in assessments. He submitted that the companies have maintained, throughout, that there genuine errors in the GST assessments.

[79] Ms Courtney made a contrary submission based on s 6, that protecting the integrity of the tax system required the orders not to be made. She submitted that

policy factors are important in the context of tax cases, noting that the Court of Appeal in *Westpac v CIR* at [62] – [64] had criticised the use of judicial review in tax disputes because of the potential to delay tax liability, when the responsibility is on the taxpayer to assess and pay that liability.

[80] Ms Courtney also submitted that considering the question of public interest required a balancing of the public interest in the Commissioner and Inland Revenue being able to carry out their statutory duties under the various Inland Revenue Acts (including the TA Act) against the likelihood of the companies' succeeding in their judicial review proceedings.

[81] I accept Ms Courtney's submission that in the light of my finding as to the strength (or rather weakness) of the companies' cases, that balance falls on the side of not preventing the Commissioner and Inland Revenue from carrying out their statutory duties and obligations, or from continuing the liquidation proceedings.

Private and public repercussions of granting the orders sought

[82] Ms Courtney submitted under this heading that this court has no jurisdiction to stay itself. Against this, Mr Patterson submitted that s 8 of the Judicature Amendment Act 1972 gives clear statutory authority to stay any proceedings that are in connection with any matter to which the application for review relates.

[83] I accept Mr Patterson's submission, but it does not assist in considering whether the companies' application for interim orders should be granted.

Conclusion

[84] Having considered the questions of the necessity of preserving the companies' position, the statutory context, the strength/weakness of the companies' claims for judicial review, and the public interest, I am not satisfied that the interim orders sought by the companies should be made.

[85] Accordingly, the applications by both Berrytime and Berrytime Land for interim orders are dismissed.

[86] Inland Revenue is entitled to costs on a 2B basis, for a half-day hearing, together with disbursements as certified by the Registrar.

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Andrews J