IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-1370

IN THE MATTER OF	The Judicature Amendment Act 1972
BETWEEN	AMALTAL FISHING COMPANY LIMITED Plaintiff
AND	COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 29 July 2008

Appearances: G Malone for Plaintiff
E J Norris and R Roff for Defendant

Judgment: 3 February 2009 at 4 pm

JUDGMENT OF MALLON J

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Introduction

[1] Amaltal Fishing Company Ltd ("AFC") seeks judicial review of assessments notified by the Commissioner of Inland Revenue ("the Commissioner") in April 2006 in respect of income earned in the 1994 and 1995 tax years. The challenge to the assessments has been brought by judicial review because AFC did not meet the timeframe for bringing a challenge under the Tax Administration Act 1994 and its application to bring its challenge outside the timeframe was declined by the Tax Review Authority and, on appeal by AFC, the High Court.

[2] AFC contends that the 2006 assessments were *ultra vires*. Although AFC's pleadings raised other issues, by the time of the hearing before me it confined its case to the following four grounds:

a) The 2006 assessments were time-barred by s 25(1) of the Income Tax Act 1976 ("Income Tax Act") because nil notices of assessment were issued to AFC in 1996 at a time when the Commissioner and AFC understood AFC's tax could be group assessed;

b) By not accounting for depreciation in the 1995 year (on items the Commissioner had reassessed as capital in the 1994 year) pending the resolution of the issues in respect of the 1994 assessment, the Commissioner issued a provisional or tentative assessment that did not accord with his honest belief as to the tax payable by AFC;

c) The Commissioner failed to issue the 2006 assessments within a reasonable time and therefore the process undertaken by the Commissioner breached s 27 of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"); and

d) The 2006 assessment for the 1994 tax year took into account irrelevant considerations and was unreasonable in that it arbitrarily treated a sum of $275,607 as recovered expenditure and this could

only have been done by unreasonably ignoring the evidence and/or taking into account irrelevant factors.

[3] The Commissioner submits that none of the grounds alleged by AFC are amenable to judicial review. It says that the statutory challenge procedure was available and there are no exceptional circumstances such that judicial review should be permitted. Even if judicial review were available, the Commissioner submits that none of the grounds would be made out because:

a) The 2006 assessments were not time-barred under s 25(1) because the nil notices of assessment in 1996 were issued in error and no such assessments had in fact been made;

b) The 2006 assessment for the 1995 tax year was not a provisional or protective assessment. The Commissioner did not know the correct depreciation figure at the time of the assessment or made an error in thinking that he could not, and he will make an amendment once the correct figure is ascertained;

c) Section 27(1) of the Bill of Rights Act is not engaged in this case but, if it were, the Commissioner has not allowed or caused any unreasonable delay and no prejudice has been suffered as a result of the alleged delay; and

d) The Commissioner took into account the relevant evidence but reached a different conclusion on the facts. Disputes involving contents of evidence are matters for challenge proceedings not judicial review.

Background

[4] AFC is a wholly owned subsidiary of Amaltal Corporation Limited ("ACL"). On 20 June 1996 AFC and ACL, and a third company in the Amaltal Group which was no longer trading and had no taxable income, filed tax returns for the 1994 and

1995 years. The three Amaltal companies were separate tax entities and filed individual returns. In a letter accompanying these returns, ACL's accountant requested that the income of AFC and ACL be group assessed to ACL. ACL's consolidated accounts were filed with the individual tax returns.

[5] AFC's return for the 1994 year calculated residual income tax payable of $309,245. Consistent with the request in the letter a penned edition to AFC's return stated that this tax was "Transferred to Group Assessment" and referred to ACL's return. ACL's return calculated residual income tax payable of $4,260,570. A penned addition to ACL's return inserted and added the $309,245 tax payable by AFC stating this was for the Group assessment. Once provisional tax that had been paid by ACL was taken into account ACL calculated a refund due of $430,185.

[6] AFC's return for the 1995 tax year calculated residual income tax payable of $3,701,784. As with the 1994 return a penned addition stated that the tax payable was "Transferred to Group Assessment" and referred to ACL's return. ACL's return calculated residual income tax payable of $3,111,889. Again, ACL's return included a penned addition incorporating the $3,701,784 tax payable by AFC, stating that this was for the group assessment. Once provisional tax that had been paid by ACL was taken into account, ACL calculated a refund due of $686,327.

[7] Notwithstanding AFC/ACL's request for a group assessment, the return details for each of AFC and ACL were entered into the Inland Revenue Department's computerised processing system (the "FIRST system") individually. This was done by a data operator in Inland Revenue's processing centre on or about 24 June 1996. Individual treatment of the returns would have meant that ACL had credits for the 1994 and 1995 years without deduction for AFC's tax and AFC would have had tax to pay for the 1994 and 1995 years. However, because of a technical error in the AFC return (the rounding of the tax to the nearest dollar) the AFC return had gone into "error resolution" meaning that returns had gone into a suspense-type account pending resolution of the error.

[8] Accounts with credit balances are reviewed by IRD officers and actioned as appropriate. Ms Tomlinson, an Inland Revenue officer, was assigned to review and

action ACL's credit balance. By letter dated 22 August 1996 she wrote to ACL asking for confirmation as to how its credit balance was to be treated. In response, amongst other things, Ms Tomlinson was alerted to the 20 June 2006 letter which had requested the group assessment. She also reviewed the returns and noted that ACL and AFC were treating the returns as consolidated whereas Inland Revenue's records showed separate returns for each. To avoid similar confusion going forward Ms Tomlinson asked ACL/AFC to complete a consolidated election form and this was then done.

[9] In order to effect the consolidation and deal with the credit balances in accordance with AFC/ACL's instructions Ms Tomlinson first set about clearing the AFC 1994 and 1995 returns from error resolution. She did this by adjusting the net profit figures for AFC for the 1994 and 1995 years to zero. Her notes entered into the FIRST system record "was in error *res* so was assessed as nil". Similarly her handwritten notes recorded "reassessed to nil". She says that she did this to reflect that ACL would be jointly assessed for AFC's income. Then she changed the net profit figures in ACL's 1994 and 1995 return details to include AFC's income. Her notes entered into the FIRST system record that ACL's income was "reassessed to assess income for all three coys". Her handwritten notes record a similar note. She then prepared the documentation for the refund on the basis of a joint assessment. All of these actions were taken on 3 September 1996. On the basis of Ms Tomlinson's calculations, Inland Revenue issued a refund cheque to ACL on 4 September 1996.

[10] Unbeknown to Ms Tomlinson at the time, the result of adjusting the net profit figures for AFC to zero caused the FIRST system to automatically issue nil notices of assessment to AFC for the 1994 and 1995 years. These were issued on 3 September 1996. In both cases the notices recorded "as returned" the income and tax AFC had shown in its return and recorded "as assessed" sums of nil income and nil tax.

[11] On 30 October 1996 notices of assessment to ACL for the 1994 and 1995 years were issued. This was not done by Ms Tomlinson but by someone else within Inland Revenue. The notices did not state that they were "joint assessments" and

were in the name of ACL rather than the Amaltal Group but, consistent with the request for a group assessment, the notices recorded "as returned" sums for taxable income and tax incorporating AFC's income and tax as per the returns. Similarly they recorded "as assessed" amounts for taxable income and tax as per the group calculations in the returns.

[12] In November 1997 the IRD commenced an audit of ACL and AFC. The audit initially focused on the 1995 tax year but also looked at other tax years, including the 1994 tax year. The IRD concluded that adjustments were required in relation to AFC's taxable income for the 1994 and 1995 years. Notices of Proposed Adjustments (NOPAs) and Notices of Response (NORs) were exchanged and there were meetings and discussions between Inland Revenue and AFC in 2000.

[13] The disputed issues were not resolved and so on 29 March 2001 the Inland Revenue issued an amended assessment to ACL which increased ACL's taxable income for 1994 from $13,847,926 to $16,263210.12, with a consequential effect on the tax payable for that year. The amended assessment, as per the assessment issued on 30 October 1996, incorporated AFC's income and tax for that year. Inland Revenue also issued an amended assessment to ACL on 7 May 2001 for the 1995 year. This adjusted the taxable income from $20,647,493 to $20,728,790 with a consequential effect on tax. Like the amended assessment for the 1994 year this incorporated AFC's income and tax.

[14] On 28 May 2001 ACL lodged a notice of claim in respect of the amended 1994 assessment with the Taxation Review Authority. One of the grounds of this challenge was that there was no power to jointly assess AFC and ACL in that year because s 191(7) of the Income Tax Act 1976 under which joint assessment could be made had been repealed with effect from the 1993 income year. The amended assessment for the 1995 year had not been preceded by a NOPA from the Commissioner because it made only adjustments agreed to during the audit. However, a NOPA dated 5 July 2001, ACL opposed the amended 1995 assessment on the basis that it was a joint assessment and also on the basis that it was time-barred (and on other legal grounds that are not relevant for present purposes).

[15] By letter dated 3 September 2001 the Commissioner accepted that its 7 May 2001 amended assessment for ACL for the 1995 year was time-barred (it having been issued later than four years after 31 March 1997 – the end of the year in which the original assessment had been made.) However it also advised that the discrepancies which had given rise to the amended assessment would be assessed in relation to AFC for the 1995 year. On that same date (3 September 2001) the Commissioner then issued a NOPA for AFC for 1995. The effect of the proposed adjustments was to increase AFC's tax by $26,827.92. AFC did not accept this and issued its NOR on 6 November 2001.

[16] As to the 1994 year, having reviewed the position, the Commissioner accepted that he did not have the power to jointly assess AFC and ACL. Accordingly on 7 August 2002, by consent of the parties, the Taxation Review Authority declared the 1994 amended joint assessment (the amended assessment issued on 29 March 2001) to be invalid and reassessed ACL's tax for the 1994 year back to $4,260,570.27, which was its individual tax as per the June 1996 return. This left the adjustments the Commissioner intended to make in respect of AFC for the 1994 year to be dealt with separately.

[17] On 12 August 2002 AFC made a proposal to settle the issues. In June 2003 the Commissioner responded rejecting the offer but agreeing with AFC that it would issue a NOPA to AFC for the 1994 year and once AFC had responded with its NOR it would issue assessments to AFC for the 1994 and 1995 years. Meetings and correspondence took place between Inland Revenue and AFC/ACL between 17 July 2003 and 15 April 2004. On that latter date AFC advised Inland Revenue that it did not believe there was anything else it could add to attempt to have Inland Revenue accept its view on the issues. It requested that the Department issue a NOPA to AFC for the 1994 year.

[18] The NOPA to AFC for the 1994 income year was issued by the Commissioner on 20 October 2004. This proposed assessment had the net effect of increasing AFC's tax by $693,200.29. It included:

a) The tax originally included in AFC's individual return which had been included in the joint assessment issued to ACL plus an adjustment based on agreed matters arising out of the audit;

b) An adjustment for expenditure recovered from an insurance payment received as a result of the vessel Amaltal Challenger sinking. (The Commissioner considered the vessel was deemed to be disposed of for its cost price of $1,723,433. It considered that the difference between this amount and the insurance payment of $1,998,500 received ($275,067) was a recovery of deducted expenditure. On that basis the underlying expenditure was not deductible: s 106 of the Income Tax Act);

c) An adjustment of $1,628,439.47 in respect of repairs of the vessel Amaltal Endeavour. (AFC had claimed repair costs of $2,163,223.41. The Commissioner considered $1,851,655.03 of the expenditure amount claimed was incurred prior to the first fishing voyage. Of that amount, $71,658.56 was agreed by AFC to be of a capital nature and included under a) above as one of the agreed adjustments. The remaining amount of $1,779,996.47 was proposed to be disallowed by the Commissioner, although $151,557.00 would be allowed as agreed depreciation for the 1994 year, leaving a net proposed adjustment of $1,628,439.47).

[19] AFC's NOR for the 1994 income year was dated 25 November 2004 and was received by Inland Revenue on 10 December 2004. AFC amended its NOR, and the amended NOR was sent under cover of a letter dated 13 December 2004 and received by Inland Revenue on 14 December 2004.

[20] On 27 April 2006 the Commissioner issued new assessments to AFC in relation to the 1994 and 1995 tax years. For the 1994 year AFC's income tax was assessed at $1,002,445.29. Of the amount still to be paid $104,092.40 was overdue for payment and the remaining $693,199.98 was due for payment on 21 June 2006. For the 1995 year AFC's income tax was assessed at $43,728,611.92. Of the amount

still to be paid, $506.25 was overdue and a new due date for the remaining $26,828.01 to be paid was set for 21 June 2006.

[21] AFC did not challenge the 2006 assessments under the statutory challenge procedures provided in Part VIIIA of the Tax Administration Act within the prescribed period of time. Amaltal's internal accountant had received the notices of assessment but misread the timeframe for filing challenges. They were forwarded to Amaltal's lawyer and external accountant, seemingly by chance, on the last day for filing the challenges. AFC applied to file late challenges. Under s 183D of the Tax Administration Act 1994 it was required to establish "exceptional circumstances" as defined by that section. It submitted that there were such exceptional circumstances through a combination of the history of long delays, communications by Inland Revenue suggesting a step was imminent and then that step not occurring, a history of corresponding or copying correspondence to Amaltal's solicitors which did not occur when the notices of assessment were sent, and what was said to be an understandable misreading by the in-house accountant of the timeframes for filing a challenge. The Taxation Review Authority declined this application (Case Y7 (2007) 23 NZTC 13,066), and an appeal to the High Court was dismissed (Case Y7 (2007) 23 NZTC 21,639).

[22] AFC filed the present application for judicial review on 22 June 2007. It was stayed pending resolution of the appeal to the High Court against the Taxation Review Authority's refusal to allow AFC to challenge the assessments out of time. When the appeal was dismissed by the High Court the present proceedings were continued.

Preliminary issue – the availability of judicial review

[23] Section 109 of the Taxation Administration Act 1994 provides:

> **109 Disputable decisions deemed correct except in proceedings**
>
> Except in objection proceedings under Part 8 or a challenge under Part 8A,—

(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.

[24] In light of this section (and its predecessors), cases such as *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665 (CA); *Miller v CIR* [2001] 3 NZLR 316 (PC); and *Commissioner of Inland Revenue v Abattis Properties Ltd* (2002) 20 NZTC 17,805 (CA) have considered when judicial review will be available to challenge assessments made by the Commissioner. The current position as established in these and other cases is that:

a) The correctness of an assessment that has been made can only be challenged in proceedings on objection.

b) The legitimacy of the process adopted by the Commissioner and the validity of the outcome may be challenged in judicial review proceedings.

c) If a judicial review challenge is available the Court has a discretion whether to grant relief by way of judicial review.

d) When the objection procedure is available it will only be in an exceptional case that the court will exercise its discretion to grant relief by way of judicial review.

[25] As to what may fall within b), both parties referred to *CIR v Ti Toki Coberets (1989) Ltd* [2001] NZLR 147 (CA). In that case the Court of Appeal referred (at [40]) to judicial review being available to address procedural error, defects resulting in *ultra vires*, unlawfulness, bad faith, abuse of power, and errors of law going to the legitimacy of the process rather than the correctness of the decision. But it did not say that judicial review relief would always be granted in such circumstances nor discuss whether and when the Court's discretion would be exercised to grant such relief. The Court found (at [49]) that the particular grounds of challenge in that case

were not questions of procedure but were collateral attacks on the assessments to be dealt with by the statutory procedure.

[26] As to what may amount to exceptional circumstances when the statutory challenge procedure is also available the Commissioner says that the typical example is an assessment issued in abuse of power and that it is difficult to speculate what else might constitute an exceptional circumstance. He says that AFC could have availed itself of the statutory challenge procedure but failed to do so within the required timeframe. He says that the Taxation Review Authority and the High Court's view that AFC should not be permitted to make its challenge outside the statutory timeframe support his position that there are no exceptional circumstances warranting the exercise of the Court's discretion to grant relief by way of judicial review.

[27] AFC's written submissions did not address the availability of judicial review but oral submissions were made at the hearing. In those submissions AFC said that exceptional circumstances were not confined to where there had been an abuse of power. AFC says that judicial review is available whenever there has been a fatal flaw that affects the *vires* of a decision. It says that because its application to challenge the assessments under the statutory procedure outside the statutory timeframe has been declined it has no other remedy for the unlawful actions of the Commissioner. It says that this points towards the Court exercising its discretion to grant relief.

[28] I do not accept AFC's submission that its unsuccessful application to pursue its objections to the assessments through the statutory procedure point in favour of exercising my discretion to grant judicial review relief. It may be a relevant factor in some cases combined with other factors but it is not a decisive factor in and of itself. The timeframe for exercising challenge rights under the statutory procedure would be too easily thwarted if that were the case. Nor, however, do I agree with the Commissioner's submission that exceptional circumstances cannot be made out because AFC's application was unsuccessful. To bring a challenge under the statutory procedure outside the required timeframe an applicant must establish "exceptional circumstances" defined as being an event or circumstance beyond the

control of the applicant that provides the applicant with a reasonable justification for not commencing the challenge in the required timeframe (s 138D(2) Tax Administration Act 1994). That test is narrower than matters that are potentially relevant to my discretion to grant relief on judicial review.

[29] I turn to consider the grounds of review relied upon by AFC.

Ground 1 – Time-bar

Introduction

[30] AFC contends that the 2006 assessments for the 1994 and 1995 years are time-barred. This depends on whether the statutory timeframe for issuing these assessments ran from the time the nil notices of assessment were issued on 3 September 1996.

[31] AFC submits that the timeframe commenced from the time notices of assessment were issued regardless of whether they were sent in error. It also contests whether the notices were sent in error. The Commissioner submits that the timeframe commenced from notices of assessment only if an assessment has been made. He submits that AFC had not been assessed as having nil income and tax and the notices were sent in error. There being no other valid assessment, the Commissioner submits that the timeframe under which reassessments can be issued had not commenced.

Preliminary issue

[32] An assessment challenged on the basis that it is time-barred can be challenged via the statutory challenge procedure. In *Golden Bay Cement* the Court of Appeal permitted such a challenge in judicial review proceedings but said the issue "could and should have been pursued by the objection procedure" (at [30]). The Court considered that in the circumstances it would be wasteful of the Court's resources for the issue to be reargued in case stated proceedings in the High Court

[which] were also on foot. But, in deciding this it also said that “[i]f a similar situation should arise in future, the Courts are unlikely to exercise their discretion to grant a remedy in review proceedings in favour of a taxpayer who chooses not to pursue the objection procedure provided by the legislature” (at [30]).

[33] A few years later the issue arose in *CIR v Abattis Properties Ltd* (2002) 20 NZTC 17,805. One of the grounds of challenge in that judicial review proceeding was that the assessment was statute barred. The Court of Appeal struck out the judicial review proceeding. It reiterated (at [22]) that “challenges to the validity of assessments can be pursued in the standard objection procedures and that, in all but exceptional circumstances, they should be”.

[34] In this case AFC did not put forward any exceptional circumstances other than that the statutory challenge procedure was no longer available to it. As set out above ([28]) this does not of itself amount to exceptional circumstances. This ground of review could have and should have been raised via the statutory objection procedure. This ground of challenge therefore fails because it is not an appropriate case to exercise my discretion to grant relief. Nevertheless, for completeness I go on to consider whether the 1994 and 1995 assessments were time-barred.

Assessment time-barred?

[35] The Commissioner and AFC take a different view as to what the legislation provides. It is therefore necessary to review the statutory provisions.

[36] The Commissioner was required to undertake an annual assessment of the tax payable by each taxpayer based on that taxpayer’s return and other information available to the Commissioner (s 19(1) Income Tax Act). Before its repeal, there was also power to make a joint assessment of income tax payable by every company in a group of companies. If that power was exercised then (under s 191(8) Income Tax Act):

> … each company included in that group of companies shall be severally liable for an amount of income tax equal to the amount that would have been

assessed if a separate assessment of income tax in respect of the income derived by that company in that income year had been made.

[37] Because returns could be filed and assessments made and issued electronically s 21D of the Inland Revenue Department Act 1974 (in force with effect from 17 December 1992) provided (before its repeal):

21D Assessments And Determinations Made By Electronic Means

Any assessment or determination made for the purposes of any of the Inland Revenue Acts that is made automatically by a computer or other electronic means in response to or as a result of information entered or held in the computer or other electronic medium shall be treated as an assessment or determination made by or under the properly delegated authority of the Commissioner.

[38] The Commissioner was required to give notice of the assessment to the taxpayer as soon as may be convenient after the assessment (s 29(1) Income Tax Act). Except in objection proceedings the assessment was conclusively deemed and taken to be correct (s 27 Income Tax Act).

[39] The Commissioner had power to amend an assessment to ensure that it was accurate even though tax may have been assessed and already paid (s 23(1) Income Tax Act). The Commissioner was required to give notice to the taxpayer if the amendment would impose fresh liability or increase the taxpayer's existing liability (s 23(2) Income Tax Act). Upwards amendments were subject to a time-bar in the following terms:

25 Limitation of time for amendment of assessment

(1) When any person has made returns and has been assessed for income tax for any year, 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 original assessment was issued*. (emphasis added)

[40] This wording came into force on 13 March 1992. This amendment substituted the "notice of original assessment was issued" wording in the place of "assessment was made".

[41] The Commissioner submits that s 25(1) is only triggered from the notice of an assessment if the notice is of an assessment (and not, for example, if the notice is

a mistake). The Commissioner emphasises that the language of s 25(1) of the Income Tax Act requires that there has been both an assessment and a notice of that assessment. He submits that the purpose of the amended wording (refer [40] above) was to provide certainty as to when the time period would run from. The Commissioner submits that *Golden Bay* and *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA) establish that the assessment issued must have the character of an assessment. He submits that, as in *Golden Bay* and *Paul Finance Ltd v Commissioner of Inland Revenue* [1995] 3 NZLR 521, notices of assessments issued in error do not have that character.

[42] AFC acknowledges that in *Golden Bay* notices of assessment issued in error were not assessments for the purposes of the time-bar but submits that *Golden Bay* is distinguishable because it pre-dated the amendment to s 25 of the Income Tax Act and the introduction of s 21D of the Inland Revenue Department Act. AFC refers to the terms of the 3 September 1996 notices it received. It itemised the tax to pay "as returned" and "as assessed". It submits that unless a taxpayer can rely on a notice of assessment as indicating that an assessment has been made, triggering the start of the 4 year time period, then he or she can never know when the period has commenced and will never be certain that it has finality. AFC submits that the taxpayer should not be expected to, for example, write to Inland Revenue to ask if a notice of assessment in fact referred to an assessment having been made, and that this cannot be the statutory intention.

[43] I do not accept AFC's submissions. I agree with the Commissioner that s 25(1) required first that there had been an assessment. The statutory scheme draws "a clear distinction" between the making of an assessment and giving notice of it after it has been made: see *Hyslop v Commissioner of Inland Revenue* [2001] 2 NZLR 329 (CA) at [20]. It requires the Commissioner to make an assessment. It separately requires the Commissioner to give notice of the assessment.

[44] An assessment is "the process by which the Commissioner carries out his statutory obligation to ascertain the amount on which tax is payable and the amount of tax": *Lloyds Bank Export Finance Limited v Commissioner of Inland Revenue* [1992] 2 NZLR 1 at [20] citing with approval this statement from the High Court.

Prior to the legislative amendments relied upon by AFC an assessment required "the exercise of judgment on the part of the Commissioner" in quantifying the liability: *Canterbury Frozen Meat Co* at [40]. There was no such assessment when notices of assessment were issued in error or where there was no intention to trigger an immediate tax liability for the taxpayer: *Golden Bay* at [38] and [39]. AFC accepts this was the position under the legislation prior to the amendment to s 25(1) of the Income Tax Act and the introduction of s 21D of the Inland Revenue Department Act.

[45] These amendments did not, however, alter the position in this respect. Section 25(1) retained the requirement for an assessment. The amendment was made only to the concluding words to clarify that the time ran from the notice, not from when the assessment was made. Section 21D of the Inland Revenue Department Act does not state that an assessment issued by the computer in error is to be treated as, or is conclusive evidence of, an assessment. Its effect is that even though the computer has carried out the calculation automatically it is to be treated as having been made by or under the properly delegated authority of the Commissioner. As per *Paul Finance* at [33], the assessment must have "the character of an assessment" and "must be made in response to or as a result of information entered into or held in the computer, not due to an incorrect or mistaken command".

[46] AFC says that *Paul Finance* is also distinguishable because, although it was decided after the amendments, it was concerned with GST returns. I do not agree that *Paul Finance* is distinguishable because it concerned GST rather than income tax. AFC does not say why the Court of Appeal's view of s 21D in that case does not apply to assessments of income tax and there is no reason why it would not.

[47] AFC says that *Golden Bay* is distinguishable on the facts because the notices in that case were sent in error. AFC also says that *Paul Finance* is distinguishable because it involved a systems error and the taxpayer knew that the error had occurred and that the assessment process was incomplete and further information was awaited from the taxpayer. It says that in the present case Ms Tomlinson must have known that the notices would issue. AFC says that Ms Tomlinson's notes made at the time indicate that, contrary to her evidence, she had a clear intent to assess AFC as nil and

to include AFC's income within ACL's income. It says that, as was said in *Canterbury Frozen Meat Co*, it does not matter if the Commissioner has made an error in the assessment providing he applied his mind to the assessment. It says that Ms Tomlinson did that here intending to assess AFC as having nil income because she (wrongly) considered that AFC's income could be validly assessed as ACLs.

[48] The Commissioner submits that the present case is materially similar to *Golden Bay*. He submits that the nil assessments were issued in error. He relies on the evidence of Ms Tomlinson that she did not intend to issue nil assessments and was not aware that the computer had generated them. Ms Tomlinson's evidence is that she was intending to take AFC out of error resolution so that she could action AFC/ACL's request for a group assessment. The Commissioner submits that the joint assessments issued in the name of ACL were intended to be the assessments for AFC and ACL and just because those joint assessments turned out to be invalid AFC cannot turn to the nil assessments mistakenly issued and say that they are the valid assessments.

[49] I do not agree with AFC that *Paul Finance* and *Golden Bay* are distinguishable on their facts. As in those cases, the nil notices in this case were issued in error in that Ms Tomlinson did not know and did not intend for them to issue. She says:

> Assessments of AFC were not the intended outcome of my actions … My intention was to record within the FIRST system income of AFC as part of Amaltal's returns so that the correct credit balances could be refunded … It is now apparent that as a result of taking the AFC returns out of error resolution "notices of assessment" were automatically issued by the FIRST system to AFC. I never gave any thought to notices of assessment being issued as a result of this action, because I was actioning credit balances, not making assessments.

[50] AFC contests this. It refers to her contemporaneous notes (refer [9] above). These are arguably inconsistent with her evidence that she was actioning credit balances not making assessments. But Ms Tomlinson explains this by saying that the return details had already been entered into the system by the processing centre, and that she used "assessed" and "reassessed" to describe the type of administrative

action she was taking and that she "gave no thought to assessment or notices of assessment".

[51] Her explanation is supported by the separate joint assessments issued on 30 October 1996 by someone else within Inland Revenue. The only basis on which this could be done was pursuant to s 191(8) of the Income Tax Act. Under that section, the effect of the joint assessments was that AFC was severally liable for the amount of tax that would have been assessed if separate assessments had been made. Accordingly AFC's tax was not assessed as "nil" but was included in the amounts shown on the assessments issued in ACL's name. That was the quantification of AFC's tax liability for the 1994 and 1995 years, not the "nil" assessments AFC had mistakenly received.

[52] In my view the four year time period in s 25(1) of the Income Tax Act did not commence from 3 September 1996. AFC had received notices of assessment on that day but it had not been assessed as having "nil" income for that year. The notices were issued in error. This ground of review fails.

Ground 2 – conditional assessment

Introduction

[53] The second ground of review concerns the failure of the Commissioner to include in his 2006 assessment of AFC for the 1995 year a deduction for depreciation on the items the Commissioner had reassessed as capital in the 1994 year. The Commissioner agreed (and still agrees) that a deduction for depreciation should be made, but did not make that deduction pending the resolution of the dispute in respect of the 1994 year.

[54] AFC contends that by not making the deduction the Commissioner has issued a provisional or tentative assessment that is not his honest belief as to the tax payable by AFC for the 1995 year. It points to schedules prepared by the Commissioner in

2003 which, amongst other things, calculates proposed depreciation that would be allowed on the items reassessed in the 1994 year as capital.

[55] The Commissioner submits that the assessment was not conditional or protective and was an honest assessment of AFC's liability on the information available. He says that the Inland Revenue officer (Mr Tear) believed that he could not determine the depreciation until the 1994 income year dispute was resolved. Mr Tear's affidavit did not elaborate on why depreciation could not be calculated on the basis of the Commissioner's view of the 1994 tax position. Counsel for the Commissioner accepted at the hearing that Mr Tear got this wrong because the 1995 assessment was inconsistent with the 1994 assessment. It is said that this was an error of law rather than constituting a provisional assessment. It is also said that this is a matter for challenge proceedings, not judicial review.

Analysis

[56] Both parties referred to *Canterbury Frozen Meat Co* in which the Commissioner's assessment was said to be invalid on the basis that it was qualified and provisional. The case came before the Court of Appeal on an application to strike out the taxpayer's judicial review proceeding. The Court of Appeal declined to strike out the proceeding and to express any final view on the facts before it. It did, however, comment that an assessment must be the definitive liability of the taxpayer at the time it is made subject only to challenge through the objection process (per Richardson J at 690) and that the Commissioner must determine, as best as he can on the information available, the amount of the tax even if he believes it is not necessarily correct (per McKay J at 692-693).

[57] After the hearing before me the Commissioner filed a memorandum drawing my attention to *Federal Commissioner of Taxation v Futuris Corporation* [2008] HCA 32, a decision of the High Court of Australia issued subsequent to the hearing. Counsel for the Commissioner noted that *Futuris* referred to *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360 which was considered in *Canterbury Frozen Meat Co*. The memorandum does not make any submission as to what I should draw from *Futuris*. AFC's counsel responded with a memorandum

stating that *Futuris* was of limited (if any) relevance and that the facts of the present case are closer to *Canterbury Frozen Meat Co*.

[58] In *Futuris,* alongside the statutory challenge proceedings, the taxpayer brought an application in the Federal Court seeking a declaration that the assessment was invalid. One of the grounds was that the Commissioner had made a tentative or provisional assessment. This argument was rejected on the facts. The Commissioner is correct that the Court referred to *Bloemen* (which was cited in *Canterbury Frozen Meat Co*) but I see nothing in the High Court's decision that is contrary to the principles set out in *Canterbury Frozen Meat Co* which I have referred to above ([56]).

[59] Of more relevance for present purposes is the High Court's view that even if the assessment was valid declaratory relief ought to have been refused. The High Court (at [48] majority decision, [153] to [168] per Kirby J) referred to the discretionary nature of the relief and considered that the relief should be refused in view of the separate statutory challenge procedures. This contrasts with *Canterbury Frozen Meat Co* where the Court of Appeal refused to strike out the judicial review proceeding, but that decision pre-dates *Miller* and other decisions emphasising that exceptional circumstances are required before judicial review relief will be granted (refer above [24]).

[60] I consider that the 2006 assessment for the 1995 year was not the amount of tax that the Commissioner honestly believed was payable on the information before him. The Commissioner was in error in issuing an assessment that created a liability to pay the amount so assessed when the Commissioner's view was that it would need to be amended if his position in respect of the 1994 year was upheld.

[61] This issue could and should have been addressed in challenge proceedings. AFC has not referred to any exceptional circumstances warranting the exercise of the Court's discretion to grant relief in judicial review proceedings. Nevertheless I consider the appropriate course is to adjourn this aspect of the proceeding until the Commissioner has amended the 1995 tax assessment to allow for depreciation in light of the outcome of this case. Within 14 days of the amendment being made

counsel are to advise whether there are any issues arising out of that such that relief in this proceeding is appropriate or whether this aspect of the proceeding can also be dismissed.

Ground 3 – Section 27(1) of the Bill of Rights Act

Introduction

[62] AFC submits that the 2006 assessments were *ultra vires* because they were not made within a reasonable time and thereby the Commissioner breached s 27(1) of the Bill of Rights Act. It seeks orders setting aside the 2006 assessments, declaring them to be invalid and prohibiting the Commissioner from altering the assessments for the 1994 and 1995 years above the nil assessments notified on 3 September 1996.

[63] The Commissioner submits that s 27(1) of the Bill of Rights does not apply, but even if it did there has not been unreasonable delay on his part and AFC has not suffered any prejudice as a result of the delay. As with all the other grounds the Commissioner also submits that AFC has failed to show exceptional circumstances or an abuse of power such that judicial review relief should be granted.

Analysis

[64] Section 27(1) of the Bill of Rights provides:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[65] AFC submits that the assessment was a determination affecting the taxpayer's rights. The Commissioner submits that "determination" in s 27(1) has an adjudicative connotation and that it is at least arguable that the Commissioner's assessment is not of that character. He submits that the requirement for a

determination of an adjudicative character is established by *Daniels v Chief Executive Department of Work and Income* [2002] NZAR 615 (HC) at [13]; *Chisholm v Auckland City Council* [2005] NZAR 661 (CA) at [32]; *Ubilla v Minister of Immigration* HC WN CIV-2003-485-2757 19 February 2004 at [32] and *Minister of Fisheries v Pranfield Holdings Ltd* [2008] 3 NZLR 649 (CA) at [136].

[66] Subsequent to the hearing before me the scope of s 27(1) was considered by the Court of Appeal in *Combined Beneficiaries Union Incorporated v Auckland City COGS Committee* [2008] NZCA 423. It held that s 27(1) did not require that the determination be adjudicative in nature. The Court of Appeal referred to a number of authorities including *Chisholm* and *Pranfield Holdings*. The Court of Appeal considered (at [43]) that the word "adjudicative" had been used in *Chisholm* to highlight the requirement for the determination directly to affect a person's rights, obligations or interests protected or recognised by law. It said the term was shorthand for the types of decisions to which natural justice ordinarily applies. It said (at [48] and [51]) that if *Pranfield Holdings* went further than this then it was not bound to follow it and it declined to do so.

[67] In light of *Combined Beneficiaries Union* the application of s 27(1) in this case depends not on whether the assessment is of an adjudicative character but rather whether it is a "determination in respect of [AFC's] rights, obligations, or interests protected or recognised by law". It might be said that the Commissioner's assessment determines AFC's tax obligations, which are obligations recognised by law and so the Commissioner's determination falls within s 27(1). The tax obligation is determined subject only to any challenge pursued by the taxpayer or any later reassessment by the Commissioner.

[68] Proceeding on the basis that s 27(1) may apply, the next question is whether the principles of natural justice required that an assessment under the Income Tax Act be made without unreasonable delay. AFC relies on *Unitec Institute of Technology v Attorney General* [2006] 1 NZLR 65 at [125] where the High Court accepted that natural justice requires that a decision be made within a reasonable time. AFC also referred to *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307 at 376 and 377 and *Bangs v Connex South Eastern Ltd* [2005] 2

All ER 316 at 318 in support of its submission as to the factors relevant to whether the delay is unreasonable.

[69] In response the Commissioner submitted that the principles of natural justice were embodied in the statutory dispute process which was complied with; that, in view of the Court of Appeal's decision in *Unitec*, there was no authority for the proposition that the principles of natural justice are capable of importing some further timeliness requirement; and that, even if there was such an obligation, it would not arise in the face of the express, strict, statutory time limits for completing the steps in the disputes process and for making an assessment. The Commissioner submitted that *Blencoe* and *Bangs* are distinguishable because there were express legislative requirements for steps to occur within a reasonable time. The Commissioner further submitted that on the facts in this case there had been no unreasonable delay nor any prejudice suffered by AFC as a result of any delay.

[70] I agree with the Commissioner that there is doubt as to whether the right to natural justice in this context included the right to a determination (the assessments) without unreasonable delay. The Court of Appeal's decision in *Unitec* focused on the specific statutory scheme and found that there was no timeframe under which the Minister was required to act. It did not discuss whether and when the requirements of natural justice included an obligation that a determination be made without unreasonable delay.

[71] Given the different provisions at issue and their different contexts, *Blencoe* and *Bangs* do not provide authoritative support for that position either. *Blencoe* was concerned with a lengthy delay in the processing of a complaint of sexual harassment about a Minister in the Government of British Columbia which was before the Human Rights Commission. The delay had caused emotional harm and financial prejudice to the, by this stage, dismissed Minister and his family. At issue was whether this delay breached s 7 (the right to life, liberty and security and the right not to be deprived thereof except in accordance with the principles of fundamental justice). The Supreme Court of Canada found that there was no constitutional right outside the criminal context to be tried within a reasonable time and that the Court of Appeal had erred in applying s 11(6) principles (a person

charged with an offence has the right to be tried within a reasonable time) outside the criminal context. The Supreme Court considered that delay could amount to an abuse of process where the delay compromised a fair hearing or where there was other significant prejudice.

[72] *Bangs* was concerned with delay between an Employment Appeal Tribunal hearing and its decision. Appeals from the Tribunal were confined to errors of law. At issue was whether a breach of article 6(1) of the European Convention on Human Rights (providing that "in the determination of his civil rights … everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law" (emphasis added)) could constitute an independent ground of appeal as a question of law. The Court of Appeal held that no independent ground of appeal existed in such cases. It considered that if the delay resulted in a perverse decision then such perversity gave rise to an error of law. It also said there might also be exceptional cases in which unreasonable delay by the Tribunal in promulgating its decision "could properly be treated as a serious procedural error or material irregularity giving rise to a question of law". It considered that this would occur if there was a real risk that the delay deprived the party of its right to a fair trial under article 6(1).

[73] *Blencoe* and *Bangs* therefore illustrate the concerns that delay in decision making can give rise to, and potential avenues of redress, but they do not establish any principle that natural justice requires that a tax assessment be made within a reasonable time. The Bill of Rights affirms that a person charged with an offence has the right to be tried without undue delay (s 25(1)) but outside the criminal context the right to justice is less prescribed. Turning to general principle, in broad terms natural justice requires that a person affected by a determination receives a fair hearing. What that entails in any particular case depends on the circumstances and the nature of the determination assessed in light of any relevant statutory provision.

[74] Here the Commissioner was required to make an assessment. The Commissioner advises that most assessments are preceded by the statutory disputes procedure set out in Part IVA of the Tax Administration Act under which there is the exchange of NOPAs and NORs which provide the taxpayer with notice of the

Commissioner's views and an opportunity for the taxpayer to respond. Once an assessment is made there is the further opportunity to be heard before an independent tribunal via the challenge procedure. The parties are agreed that the statutory time limit at the relevant time was that provided in s 25(1) of the Income Tax Act. That put a time limit on when a reassessment could be made but counsel have not directed me to any time limit on when the original assessment was to be made. (Section 25(1) of the Income Tax Act contrasts with s 108 of the Tax Administration Act under which the four year time limit runs from the end of the year in which the return was filed.) If there is no such time limit, a requirement that an assessment be made within a reasonable time is not necessarily inconsistent with the statutory provisions. If unreasonable delay occurs the taxpayer may suffer prejudice through the uncertainty of its financial affairs and the accumulation of interest on tax not paid. That said, I would need more authority from AFC than has been put forward here to find that natural justice required the assessment to be made within a reasonable time.

[75] Even if natural justice required the assessment to be made within a reasonable time I am satisfied that the delay in this case did not breach any such natural justice right which AFC may have had. AFC says that the nearly 10 year period between when the Commissioner issued the 2006 assessments and when AFC submitted its returns in June 1996 was wholly unreasonable. It says that:

a) By 19 June 2000 (the date on which the Commissioner issued the NOPA to ACL for the 1994 year) the Commissioner knew the basic issues and facts leading to the substantive adjustments for the 1994 year;

b) By 28 May 2001 (the day on which ACL filed its notice of claim in the Taxation Review Authority contending that AFC and ACL could not be assessed jointly) the Commissioner knew that joint assessments could not be made;

c) By 3 September 2001 (the date of the NOPA to AFC for the 1995 year) the Commissioner knew all the issues and facts leading to the adjustments for the 1995 year; and

d) By 7 August 2002 (the date of the Taxation Review Authority consent order that the 2001 assessments were invalid) the Commissioner had accepted the invalidity of the joint assessments.

[76] AFC says that there then occurred the following unexplained periods of delay:

a) Failing to respond until June 2003 to a proposal for settlement or resolution of the dispute made by AFC and ACL on 12 August 2002;

b) A period of between April 2004 and October 2004 without meetings or correspondence; and

c) After AFC filed its amended NOR on 13 December 2004, the Commissioner did not issue the assessments until mid 2006, and failed to make contact with AFC after April 2005 to inform AFC that it was still considering the matter.

[77] The Commissioner says that up until 2002 the issue was complicated by the invalid joint assessments. He says that between 2002 and 2004 there were extended negotiations. He says that AFC's NOR received in December 2004 raised new legal arguments and the period from then until the assessments in 2006 was a normal amount of time.

[78] A 10 year period between the filing of the returns and the assessments looked at in isolation seems very long. However for nearly half of that time both parties had been of the view that joint assessments could be made or at least that issue had not been raised. After that period there were three periods of delay which AFC has highlighted. But each of those periods, while not desirable, is not particularly lengthy in context. I do not agree that because of the already lengthy history the

Commissioner was then under any duty to make the assessments in a shorter time frame than would otherwise be required.

[79] AFC was aware that the matters were unresolved. It was aware of the Commissioner's views on the substantive items that were proposed for adjustment from March 2001 in respect of the 1994 year and from May 2001 for the 1995 year. AFC does not suggest any risk that the correctness of the assessment was affected by the delay. AFC says that prejudice arose to the extent that evidence from witnesses would have been required under the statutory challenge procedure and their memories may have dimmed or they may have moved to other employment. No particular witness nor the nature of their evidence was identified but in any event I do not see this as a basis for setting aside the assessments when the statutory challenge did not proceed. Counsel for AFC has not referred me to any correspondence where AFC complained of the delays, identified any concerns because of the delays or requested more prompt attention to the matter. In these circumstances AFC received a fair "hearing" in respect of the assessments, although it took some time.

[80] Finally, even if the principles of natural justice required that the assessments be made in a reasonable time and even if that did not occur, in the absence of any concern about the correctness of the assessment because of the delay I would not view the appropriate remedy to be the setting aside of the assessments. The choice of remedy for a Bill of Rights breach should be proportionate to the particular breach and should have regard to other aspects of the public interest: *Martin v Tauranga District Court* [1995] 2 NZLR 419 at 428 (per Richardson J). Overall the harm to AFC in this case arising because of the delay would not warrant having the tax it is assessed as owing being expunged.

[81] As a result of the delay AFC, which ceased operations several years ago, was unable to finalise its affairs until the tax position was resolved but it knew what Inland Revenue proposed and it could make arrangements in light of that. I accept that the "stop/start" nature of the assessment process over the years would have involved some additional cost in terms of AFC's advisers each time they had to pick up the file afresh but this is insufficient to warrant setting aside assessments.

[82] AFC says that there was prejudice through cumulative interest on the additional tax included in the assessment. AFC also says that this is despite an agreement that no penalties or additional taxes would be paid pending the resolution of the dispute. It says that if the Commissioner had acted promptly it would have been aware that the Commissioner did not intend to honour the agreement and AFC could have paid the necessary additional sum to prevent the ongoing accumulation of interest. The Commissioner disputes there was any such agreement and has provided calculations showing that once he allows depreciation in the 1995 year a credit transfer to the 1994 year will wipe any penalties attributable to any alleged delay. He further identifies that $423,205.48 of additional tax has been charged on the core tax included in the 2006 assessment. This additional tax was charged because the core tax was not paid on 21 June 2006. These charges therefore arose after the delays AFC relies on as giving rise to prejudice. He also points out there was provision for the core tax to be treated as deferrable tax which would have allowed the Commissioner to remit the additional tax at his discretion. However AFC did not qualify to have its tax treated in this way because it failed to commence challenge proceedings within the required timeframe. AFC responds by saying that this shows prejudice because it is clear that the Commissioner intends to charge additional tax when AFC/ACL relied on the Commissioner's agreement that this would not occur.

[83] My reading of the letter said to give rise to the agreement not to charge penalties or additional tax is that the Commissioner agreed that tax need not be paid until the disputes were settled on the condition that the tax credit from depreciation subsequently allowed would be offset against the tax owing in the 1994 year once the dispute was settled and transfers would be made to cover additional tax on the agreed adjustments (as compared with all adjustments that may be made). Be that as it may, the Commissioner's memorandum shows that no prejudice has arisen from the delays relied upon by AFC. The additional tax was incurred subsequent to those delays.

[84] This ground of review therefore fails.

Ground 4 – Arbitrary and unreasonable adjustment

Introduction

[85] This ground of review concerns an adjustment made to the 1994 year which increased the tax payable by $90,772.11. The adjustment was made in respect of Amaltal Challenger, a fishing vessel owned by AFC. On 6 July 1994, when steaming to Nelson with a catch of hoki, the vessel sank in the Cook Strait. The Commissioner treated a portion of the insurance proceeds as recovered expenditure, which expenditure was not deductible. AFC considered this portion was not recovered expenditure but a capital profit. It submits that the Commissioner's decision to treat this sum as recovered expenditure unreasonably disregarded the evidence before him and took into account irrelevant factors.

Preliminary issue

[86] The ground raises the lawfulness and rationality of the assessment in the sense that it alleges that irrelevant considerations were taken into account and that it was an unreasonable (which I take as being in the *Wednesbury* sense) decision. (The pleading referred to "substantive unfairness" and "an unreasonable exercise" of the Commissioner's powers but the submissions were framed as I have set out. The submissions also alleged an error of law, but no particular error of law was identified.)

[87] Although the lawfulness and rationality of a decision are traditional judicial review grounds they squarely challenge the correctness of the assessment. The matters AFC raises could and should have been dealt with under the statutory challenge procedure. Counsel for AFC accepted that Inland Revenue was on strongest ground here in contending that its challenge should have been under this procedure rather than by way of judicial review. The only exceptional circumstance pointed to by AFC as to why I should nevertheless grant judicial review relief is that AFC is time barred from bringing its challenge procedure. As stated above ([28]) this is not an exceptional circumstance in my view.

Unlawful or irrational?

[88] Even if I were to consider the substance of the matters raised by AFC I have not been persuaded by AFC that the Commissioner's assessment was unlawful or irrational. The vessel was insured under a marine hull policy of insurance. The policy sets out the interests insured as being:

> (a) Hull and materials, engines and machinery, gear, equipment and everything connected therewith.
>
> (b) Increased value of hull and machinery including excess liabilities. Policy proof of interest. Full interest admitted. Without benefit of salvage.

[89] It sets out the "values/amounts" insured (being agreed amounts) as $1.6 million "(A) Hull and Machinery" and $400,000 for "(B) Disbursements etc". A letter from the insurance brokers to ACC explains that the "Hull and Machinery" insurance is "[f]or partial loss" and the increased value is the amount paid out in addition to the Hull and Machinery amount "in the event of a total loss occurring". On 12 August 1994 the insurer paid out $1,998,500 being the total sums insured less the value of a dinghy that was recovered. The State Insurance payment records that the vessel is a Constructive Total Loss. It sets out the $1,998,500 as being:

Sum Insured Hull & Machinery	$1,600,000
Less Recoverable Zodiac	$1,500
Payable	$1,598,500
Sum Insured Disbursements	$400,000
	$1,998,500

[90] For income tax purposes for the 1994 year AFC had treated the insurance settlement as follows:

a)	Book value of vessel reimbursement	$684,967
b)	Depreciation recovered	$880,799
	Vessel cost	$1,565,766
c)	Capital profit	$432,734
		$1,998,500

[91] Section 117(7) of the Income Tax Act provided that where depreciable property had been disposed of in accordance with the specified circumstances "the Commissioner shall deem the property to have been disposed of for a consideration equal to the property's market value or, if the market value cannot be ascertained, for a consideration specified by the Commissioner". In the course of the audit, the Commissioner and AFC agreed that the specified value of the vessel was $1,723,433. This was made up of the $1,565,766 AFC had included in its return together with an additional $157,667 of additional expenditure capitalised.

[92] A specified value of $1,723,433 left a sum of $275,067 (compared with $432,733 as per the return). The issue between AFC and the Commissioner was AFC's treatment of this sum as capital profit and the Commissioner's view that it was recovery of expenditure which had been claimed as a deduction by AFC for tax purposes. Pursuant to s 106(1)(c) of the Income Tax Act, expenditure could not be claimed as a deduction where it was recoverable under insurance. The Commissioner treated the whole of the $275,067 as recovered expenses. AFC claims that expenses were nowhere near $275,067 and the Commissioner's decision to treat this sum unreasonably disregarded the evidence before him and took into account irrelevant factors.

[93] The issue arises because the insurer paid out under the policy on the agreed sums without requiring details of value or expenditure. The Commissioner took the view AFC had claimed a number of items as expenditure, which he listed. He considered that the amount of these costs was unknown but it was "reasonable to assume these costs were at least the amount of the insurance received after deducting depreciation recovered". AFC disputes this.

[94] AFC says that there was no evidence before the Commissioner that the claimed expenses equated to at least $275,607 and that the evidence indicated that no value could be ascribed to that sum. It says that the Commissioner had assumed that recovered expenditure included reimbursement to employees for personal effects lost due to sinking, costs during any delay in locating employees to another vessel and costs in making accident reports and insurance claims. It says that these costs were not claimable under the policy anyway and so the Commissioner took into account

irrelevant factors. It says that it advised the Commissioner that other items he had identified as recovered expenditure (rescue costs and crew wages) had not been incurred. It says that the Commissioner refused to accept AFC's evidence that other expenses that would have been included in the insurance payment were for considerably smaller amounts than the $275,067 paid.

[95] All of these points concern the need for the Commissioner to identify the particular expenses claimed by AFC as against the insurance proceeds recovered. The Commissioner's view was that it was not necessary and would be difficult to do so and that it was reasonable to assume that expenses that would have been paid equated at least to the insurance of $275,067. While it was open to AFC to persuade the Commissioner otherwise on the evidence, the Commissioner's view was that AFC had not done so. AFC may have been able to point to some expenses that were not covered by the policy (although counsel for AFC did not direct me to the particular policy wording that showed that they were not recoverable) but that did not of itself mean that other expenses that were covered by the policy and that had been claimed as a deduction must have been less than $275,067. AFC contended that other expenses referred to by the Commissioner were less than $275,000 but the Commissioner was entitled to reject that evidence if he viewed the assertions as unlikely and in the absence of other evidence that supported the assertions. Further, if the payment was not for expenses, then it raises the question of what it was for. AFC contends that it was for the "increased value" of the vessel above its book value. However I was not directed to any evidence as to that increased value. Nor was I directed to any evidence as to how the agreed insured sums were derived. Nor were any submissions made as to the meaning of the insurance terms. The insurance documents in the agreed bundle that I have reviewed (as set out above [88] and [89]) are inconclusive.

[96] In summary, while AFC may have been able to bring evidence and persuade the hearing authority that the assumption on which the Commissioner proceeded was not correct, on this judicial review application its evidence falls well short of establishing that the Commissioner acted unlawfully or irrationally.

Result

[97] The plaintiff's first ([30] to [52] above), third ([62] to [84] above) and fourth ([85] to [96] above) grounds for judicial review are dismissed. The second ground of review ([53] to [61] above) is adjourned pending the Commissioner making the adjustment to the 1995 year to account for depreciation and counsel advising the Court within 14 days whether this issue is then resolved. All other grounds pleaded in the statement of claim but not pursued are dismissed.

Mallon J

Solicitors:
G Malone, Barrister and Solicitor, PO Box 90 Nelson (ph: 03 544 5134)
E J Norris, Crown Law Office, PO Box 2858, Wellington (ph: 04 472 1719, fax: 04 473 3482)