



Statements issued by the  
Commissioner of Inland Revenue –  
With recent legislative changes what is their  
legal status?

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A dissertation submitted to  
Auckland University of Technology  
In partial fulfilment of the requirements for the degree of  
Master of Business (MBus)

2008

School of Business

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#### **ATTESTATION OF AUTHORSHIP**

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

## **ACKNOWLEDGEMENTS**

I would first and foremost like to thank Chris Ohms for the guidance he has provided while completing this paper. His input has been invaluable.

There are a number of people within Inland Revenue who listened, and provided guidance and support that enabled me to formulate my views. Thanks to Ele Duncan, Martin Scott, Tony Morris, Chris Springett, Lance Home and Ross Baxter. Also to the team I manage you have at times put up with a very absentee team leader. I have also appreciated your support.

The proof reading was completed by my parents, Janie and Kevin Vaughan. I am sure they now know more about this topic than they ever wanted to.

Finally to Aradhana Lal, Dennis Moodley, Ranjit Singh and Sujan Mahabir. We started this together and your support has been invaluable. I never thought I would say this but it's been fun.

## **ABSTRACT**

This dissertation discusses what if any impact that changes made to New Zealand's tax administration system have had on the legal status of statements made by the Commissioner of Inland Revenue. One of the Commissioner's strategic goals is to improve voluntary compliance with the Revenue Acts. One mechanism used by the Commissioner is the issuing of binding rulings and non-binding statements. Binding rulings bind the Commissioner to a particular tax position for as long as the ruling is in force; non-binding statements provide guidance to taxpayers on the Commissioners view of the law.

Over the past two decades New Zealand's tax system has undergone major reform. This paper reviews aspects of that reform then asks do these changes mean that taxpayers are now able to argue in a court of law that they had a legitimate expectation that the Commissioner would act in a certain manner in relation to their tax affairs. Judgements from prior to and after the enactment of the care and management provisions are examined along with relevant overseas authorities.

The conclusion is that while the courts agree that a taxpayer may argue they had a legitimate expectation the Commissioner would act in a certain way they have yet to see the circumstances that allow the argument to succeed. A successful argument would involve a serious abuse of power. While this may provide a level of comfort for the Commissioner when dealing with taxpayers it also raises questions about the accountability of Inland Revenue officers. To ensure he achieves his objective of improving voluntary compliance the Commissioner needs to ensure that his officers act in a consistent manner.

## I. INTRODUCTION

Tax law is regarded as one of the most complex areas of law. This is because, as John Prebble states:<sup>1</sup>

“Income tax law is different from law in general, and from tax laws that depend on transactions or on states of fact. Unlike other laws, income tax law does not relate directly to its subject matter, which is the facts and legal relationships of business activity. Income tax law ignores some facts and transactions and it recharacterises others. In other words, tax law is dislocated from its subject matter.”

Tax practitioners around the world often seek guidance on the tax treatment of a transaction or arrangement prior to entering into it, particularly if the matter is complex. In New Zealand the Commissioner is able to issue binding rulings. The types of rulings are divided into four categories; public, product, private, and status rulings. While these rulings are binding on the Commissioner they are not binding on the taxpayer.<sup>2</sup>

In addition to binding rulings the Commissioner issues non-binding statements. These statements are not binding on either the taxpayer or the Commissioner and fall into three categories;

1. Interpretation statements – these set out the Commissioners view of the law in relation to a specific set of circumstances e.g. IS07/01 The GST Treatment of Sale of Long Term Residential Rental Properties.
2. Interpretation guidelines – these set out the Commissioners approach in interpreting a general area of law e.g. IG0010 Work of a Minor Nature.
3. Standard Practice Statements – these describe how the Commissioner will exercise a statutory discretion or deal with practical issues that arise when administering the revenue acts e.g. SPS 07/03 Requests to Amend Assessments.

While these statements are not binding on either party the practical effect is that Inland Revenue staff are required to follow the directions contained within the

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<sup>1</sup> John Prebble “Should Tax Legislation be Written from a Principles and Purpose Point of View or a Precise and Detailed Point of View?” (2001) 7 New Zealand Journal of Taxation Law and Policy 235, 235.

<sup>2</sup> Section 91A of the Tax Administration Act 1994 binds the Commissioner. Sections 91DB(1); 91EA(a) and 91FA(1) all state if a person to whom a ruling applies, applies the tax law in the way stated in the ruling, the Commissioner must apply the ruling. The use of the word if indicates that the taxpayer does not need to follow the law as set out in the ruling.

statements.<sup>3</sup> But what happens when Inland Revenue staff do not follow the directions contained within these statements?

To date it has been accepted that the Commissioner cannot be bound by his non-binding statements. In fact case law has consistently held that the only thing binding the Commissioner is the legislation that he must apply. In *Reckitt & Coleman (New Zealand) Ltd v Taxation Board of Review*<sup>4</sup> McCarthy J stated:<sup>5</sup>

“...the general scheme of the act is as follows. Liability for tax is imposed by the charging sections, ss 77 to 79 of the Land and Income Tax Act 1954. The Commissioner acts in the quantification of the amount due, but it is the act itself which imposes independently, the obligation to pay.”

This received support in *O’Neil v CIR*.<sup>6</sup> The taxpayer argued that the Commissioner had not followed the four step analysis set out in his policy statement on Section 99 (referred to as the CPS) therefore it was ultra vires for the Inland Revenue officer to come to a conclusion that the arrangement was tax avoidance. Lord Hoffman stated:<sup>7</sup>

“...the question of whether an arrangement is void against the Commissioner under s 99(2) is not a matter for his discretion or policy. The Act says that an arrangement falling within the terms of the section “shall be absolutely void.” Likewise, the Commissioner is under a statutory duty to reassess the taxpayer’s assessable income to counteract any tax advantage. Discretion enters into the matter only as to the method of calculation by which the Commissioner discharges that duty.

The CPS nevertheless reassured taxpayers that, before invoking s 99, the Commissioner would undertake a careful and thorough analysis of the meaning and purpose of the statute and the purpose or effect of the arrangement. He would consider whether it was a fair and reasonable inference that one purpose was tax avoidance. He would decide whether the scheme frustrated the underlying scheme and purpose of the legislation.

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...their Lordships do not think that the CPS was intended to lay down conditions at all. They do not consider that the parts of the document

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<sup>3</sup> Inland Revenue *IR115G Binding Rulings – A Guide to Rulings that are Binding on Inland Revenue*, Wellington May 1995; 9.

<sup>4</sup> [1966] NZLR 1032.

<sup>5</sup> *ibid* 1045.

<sup>6</sup> (2001) 20 NZTC 17,051 (PC).

<sup>7</sup> *ibid* 17,059.

relied upon by the appellants do more than to reassure the public that the Commissioner and his officers will think very carefully about whether s 99 applies to any particular case. But his statutory duty is to reassess the taxpayer in any case in which s 99 applies and this duty cannot be made subject to internal conditions.”

Over the past two decades New Zealand’s tax system has undergone major reform. This commenced with the election of the 1984 Labour Government. A Goods and Services Tax was introduced and the reorganisation and the simplification of the Income Tax legislation commenced. The 1990 report of the Tax Simplification Consultative Committee recommended that a system of binding rulings be introduced. This was followed by the 1994 Organisational Review of the Inland Revenue which made recommendations regarding a new disputes resolution process and care and management provisions. These recommendations were enacted over a period of time and, finally, despite being practice for many years self assessment was legislated for.

The amendment to section 92 of the Tax Administration Act 1994 (the TAA) took effect from the end of the 2002/2003 income tax year and provides for the self assessment of tax returns. Now when completing returns that are required to be filed the onus is on the taxpayer to establish the facts and interpret tax legislation as it applies to their situation. There is a greater recognition that when completing their returns a taxpayer will be interpreting tax law. As such there is seen to be a greater reliance on statements issued by the Commissioner.

Related to the self assessment process are the changes to the legislation governing the disputes resolution process. As taxpayers are now required to self assess if they wish to amend a tax position taken they must enter into the disputes resolution process and issue a Notice of Proposed Adjustment.<sup>8</sup> Again in preparing these notices a taxpayer can be relying on statements made by the Commissioner.

These changes have highlighted the concept of legitimate expectation. Legitimate expectation is a concept that has arisen out of public and administrative law. It means that a person can rely on previous statements made by public bodies, and given a similar set of facts expect an outcome similar to what others have experienced. This concept along with the care and management provisions contained within the TAA has

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<sup>8</sup> Section 89D Tax Administration Act 1994.



lead to discussion as to whether or not the Commissioner can be bound by statements made.<sup>9</sup>

Chapter Two, Statements Issued by the Commissioner, discusses the background and statutory changes that allow the Commissioner to issue binding rulings. It also provides a brief overview of the types of non-binding statements the Commissioner currently issues. Chapters Three and Four then discuss the changes to and the current legislative framework surrounding assessment and disputes resolution. Chapter Five then discusses the concepts of legitimate expectation and estoppel. The development of the two concepts is discussed then the affect they have had on tax law is reviewed. The section reviewing the affect on tax law is broken into several sections; the affect on tax law in the United Kingdom; the affect on tax law in New Zealand prior to the enactment of the care and management provisions; a discussion of the enactment of care and management provisions; and the affect on tax law after the enactment of the care and management provisions. A conclusion is then reached on the impact the concepts of legitimate expectation and estoppel have had on New Zealand Tax Law. The final chapter discusses the implications that the conclusion reached in Chapter Five have for the Commissioner.

## **II. STATEMENTS ISSUED BY THE COMMISSIONER**

### **A. INTRODUCTION**

Prior to the introduction of the binding rulings legislation the Commissioner was not bound in any way by rulings issued regarding the application of tax laws to any taxpayer. This was first discussed in *Reckitt and Colman (New Zealand) Ltd v Taxation Board of Review*<sup>10</sup> where McCarthy J stated:<sup>11</sup>

“...the general scheme of the Act is as follows. Liability for tax is imposed by the charging sections, ss77 to 79 of the Land and Income Tax Act 1954. The Commissioner acts in the quantification of the amount due, but it is the Act itself which imposes, independently, the obligation to pay.”

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<sup>9</sup> see *CIR v Lemmington Holdings Limited* (1982) 5 NZTC 61,268 (CA); *Brierley Investments Limited v CIR* (1993) 15 NZTC 10,212 (CA); and *ANZ National Bank Limited v CIR* [15 April 2008] HC Wellington CIV 2005-485-1037.

<sup>10</sup> [1966] NZLR 1032.

<sup>11</sup> *ibid* p1045.

The next case before the Court of Appeal was *CIR v Lemmington Holdings Ltd.*<sup>12</sup> The decision in *Reckitt and Coleman* was cited with approval and in his judgement Richardson J went on to say:<sup>13</sup>

“..sec. 19...provides the means for the Commissioner to ensure that the assessment as amended reflects what in his judgment is the statutorily imposed liability for tax in the particular case. It is his judgment that counts under the statutory scheme in all these situations and it is a judgment which must be exercised from time to time unfettered by any views that he may have previously expressed either generally or in relation to a particular taxpayer or matter and unconstrained by any assessments he may have previously made.”

Despite this the Commissioner regularly publishes his views on how tax law will be applied in Public Information Bulletins (PIBs), subsequently renamed Tax Information Bulletins (TIBs), and other booklets. Practice was, and still is, that these views are applied by Inland Revenue employees and not departed from.

## **B. BACKGROUND**

Prior to the introduction of the binding rulings regime a system of private rulings was operated by the Commissioner. Taxpayers were able to write to the Commissioner outlining the facts of a transaction and ask how the law would be applied to that transaction. The Commissioner was under no obligation to provide a ruling nor was he bound by any ruling provided. Policy statements were also issued. These were general pronouncements on the application and interpretation of the provisions of the Income Tax Act. An example is the Commissioners Policy Statement on Section 99 (of the Income Tax Act 1976). These statements set out the Commissioner's view on the need for the section, how it functioned in relation to the rest of the act, the impact and relevance of recent legislative changes and case law, how the section was to be applied, and some examples outlining the effect of the new policy. As there was no statutory basis for such a system the Commissioners ability to provide rulings was limited. In fact, based on the comments made in the *Reckitt and Colman* case any ruling provided that was later found not to reflect the statutory requirements of the day would have been a breach of the Commissioners obligations to apply legislation as enacted by Parliament. This could also lead to situations where a taxpayers were relying on a rulings made prior to a change in legislation. The Commissioner would have had to

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<sup>12</sup> (1982) 5 NZTC 61,268 (CA).

<sup>13</sup> *ibid* 61,272.

correct the ruling and the taxpayers subsequent tax position which could place the taxpayer in a worse position than they would have been in had they not relied on the ruling.

Taxpayers were made aware of the risk in PIB 117. The Commissioner set out the limitations of the system by stating:<sup>14</sup>

“...While every endeavour will be made to give a ruling which will stand, an advance ruling or interpretation can only be an expression of opinion and is not binding on the Department. If it is later found to be incorrect for any reason, e.g., incomplete facts given, the operation of a scheme not being in accord with the stated position as set out in an agreement and/or other documents, changes in the law or interpretation of the law, the Department is bound to correct the position and apply the law. Of course the correctness of a ruling can only be finally determined when the relevant return of income has been furnished and an assessment issued.”

In 1990 the Tax Simplification Consultative Committee recommended a system for issuing Binding Rulings should be introduced as it would assist in reducing compliance costs. In its 1992 Budget Speech the government announced that such a system would be introduced; the discussion document outlining the proposed system was released on 7 June 1994. The stated benefits were:

- A reduction in uncertainty for taxpayers about the implications of business decisions; and
- Additional assistance provided to taxpayers in complying with tax laws.

The discussion document identified the above as “transaction certainty” and “compliance certainty” and defined the terms as:<sup>15</sup>

“Certainty about the tax implications of proposed transactions leads to increased efficiency, since taxpayers know the tax cost before deciding whether or not to undertake a transaction. The term ‘transaction certainty’ describes the form of business certainty that arises when taxpayers know in advance the tax treatment of their proposed transactions.

The second type of certainty mentioned in the 1992 Budget can be termed ‘compliance certainty’. A binding ruling reassures taxpayers that the matter will not be subject to a higher tax liability, provided the terms

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<sup>14</sup> Inland Revenue *Public Information Bulletin 117* June 1982 pg 8.

<sup>15</sup> Inland Revenue *Binding Rulings on Taxation – A Discussion Document on the Proposed Regime* (Wellington 1994); [2.6] – [2.7].

of the transaction do not change. The risk of incurring a penalty for non-compliance is also effectively eliminated.”

Other benefits of the system were anticipated to be reduced litigation and better and quicker flows of information to Inland Revenue concerning trends in taxpayer behaviour and grey areas of the law.

### **C. *BINDING STATEMENTS***

The binding rulings regime, enacted as sections 91A to 91I of the TAA, came into force from 1 April 1995, with subsequent amendments made in 1999. Under the legislation there are three types of rulings the Commissioner is able to issue. These are:

- Public Rulings<sup>16</sup> – These set out how tax law applies in relation to any type of person and any type of arrangement. If the ruling applies to a person and that person applies tax law as stated in the ruling the Commissioner is bound by the ruling.
- Private Rulings<sup>17</sup> – These are rulings on how tax law applies, or would apply to a person and arrangement for which the ruling is sought. The person must apply to the Commissioner for the ruling and provide details of the applicant; all relevant facts and documents relating to the arrangement, state the tax laws that are relevant to the arrangement; state any propositions of law relevant to the issues raised in the application; and provide a draft ruling.
- Product Rulings<sup>18</sup> – These state how tax law applies, or would apply to an arrangement or the consumer of the product and the arrangement.

The 1999 legislative change allowed the Commissioner to issue a status ruling<sup>19</sup> clarifying whether or not an earlier product or private ruling is affected by any subsequent legislative changes. Once the Commissioner has issued these statements he is bound by them, taxpayers are not.

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<sup>16</sup> section 91D Tax Administration Act 1994.

<sup>17</sup> section 91E Tax Administration Act 1994.

<sup>18</sup> section 91F Tax Administration Act 1994.

<sup>19</sup> section 91GA Tax Administration Act 1994.

Under the legislation the Commissioner may not make a binding ruling if in his view:<sup>20</sup>

- The person to whom the ruling is to apply is not seriously contemplating entering into the arrangement;
- After an additional request for information has been made there is insufficient information in respect of the arrangement; or
- It would be unreasonable to provide a ruling based on the resources available to the Commissioner.

In order to be considered valid the application must:<sup>21</sup>

- Disclose all of the relevant facts and documents relating to the arrangement for which the ruling is sought;
- State the tax laws on which the ruling is sought;
- State the propositions of law relevant to the arrangement; and
- Provide a draft ruling.

The Commissioner is required to:<sup>22</sup>

- Give the applicant an opportunity to be consulted if the content of the proposed ruling differs from that required by the applicant before the Commissioner makes a ruling; and
- Ensure as far as practicable that efforts are made to minimise the fees the applicant will be liable for.

One of the more common complaints surrounding the binding rulings regime is the length of time it takes to obtain a ruling. During Inland Revenue's 2007 financial year fifty four private and product rulings were completed however none of these were completed within published timeliness standards. A note in the 2007 Annual Report advised this was due to staffing issues and the complexity of the rulings sought. It then went on to state that a review of processes and practices is being undertaken to improve timeliness.

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<sup>20</sup> Sections 91E(4) and 91F(4) Tax Administration Act 1994.

<sup>21</sup> Sections 91ED(1) and 91FD(1) Tax Administration Act 1994.

<sup>22</sup> Sections 91EG, 91FG, 91GE Tax Administration Act 1994.

#### **D. NON BINDING STATEMENTS**

Despite the introduction of the Binding Rulings Regime the Commissioner continued to issue non-binding rulings as requested. The following passage was included in the guide “Binding Rulings” issued in May 1995:<sup>23</sup>

##### **“Non-binding Rulings**

Inland Revenue already provides taxpayers with advice on tax matters, through enquiries at our offices, through letters we receive, and in our information booklets. This advice sets out our interpretation of the law and in most cases tax will be assessed based on this advice. However, we are not required to assess your tax based on this earlier advice if it later turns out that it contained an incorrect interpretation of the law.

Inland Revenue also releases general statements on our interpretation of the law, usually in the Tax Information Bulletins. We are generally reluctant to change our view from these statements.

We will continue to give non-binding rulings, even though binding rulings are now available.”

The advantages of obtaining a non-binding ruling were that the level of disclosure required regarding the transaction was not as detailed and that they were not charged for. The downside was that the rulings were not binding on the Commissioner. Although rare, it was possible for the Commissioner to resile from a stated position.

At the same time the Commissioner reviewed his policy statements. In TIB Volume 8 No 2 August 1996 a revamp of the policy statements was announced. Policy Statements would no longer be produced, instead three types of statements were introduced and would be issued as appropriate. These are:<sup>24</sup>

- Interpretation Statements: These statements set out the Commissioners view of the law in relation to a particular set of circumstances in cases when a binding ruling cannot be issued or is inappropriate.
- Interpretation Guidelines: These statements discuss the Commissioner’s approach to the interpretation of a general area of law.
- Standard Practice Statements: These statements describe how the Commissioner will, in practice, exercise a statutory discretion or deal

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<sup>23</sup>Inland Revenue *IR115G Binding Rulings – A guide to rulings that are binding on Inland Revenue* May 1995.

<sup>24</sup>Inland Revenue *Tax Information Bulletin* Volume 8 No 2 August 1996; 1.

with practical issues arising out of the administration of the Inland Revenue Acts.

In July 2006 the Commissioner advised corporate taxpayers that non-binding opinions would no longer be issued. The reason given by Inland Revenue was that the “binding rulings process is now well imbedded.”<sup>25</sup> The statement by Inland Revenue went on to say:<sup>26</sup>

“Corporates will, however, continue to exchange correspondence with taxpayers. In evaluating a request for a technical opinion to be expressed in correspondence we will take into account Corporates' desire to continue to work with businesses to ensure correct and consistent outcomes. Alongside this must be the recognition by taxpayers that we have limited resources and cannot spend extensive hours on complex issues or on requests that are not clear cut, are very fact-specific, have many tax aspects to be considered or are more appropriately dealt with by a binding ruling.

New Zealand's self-assessment regime requires reasonable care to be taken and often this means taxpayers will seek external advice in meeting their statutory obligations. The binding rulings regime is also available to assist taxpayers achieve certainty. The changes to the non-binding opinion process are made with a specific intention to ensure more capacity to speed up the issuing of binding rulings. Businesses should consider identifying at an earlier stage if a binding ruling is required.”

The decision was met with widespread condemnation amongst the tax community and described as “moving the ambulance from the top to the bottom of the cliff.”<sup>27</sup> One practitioner stated “By arguing that issues of difficulty should be dealt with by way of binding ruling or through audits and the disputes resolution process, the IRD is encouraging an adversarial approach, which also encourages taxpayers to take a come and get me approach... This is hardly a framework for a fair and efficient tax system.”<sup>28</sup>

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<sup>25</sup> Inland Revenue *Corporates Contact* Number Thirty Three – July 2006; 1.

<sup>26</sup> *ibid* 1.

<sup>27</sup> Rob Hosking “Inland Revenue Scraps Non-Binding Complex Tax Rulings” *National Business Review* (Auckland New Zealand July 21 2006); 1.

<sup>28</sup> *ibid* 1.

### III. ASSESSMENT

From the 2002/2003 income tax year the TAA was amended to reflect that New Zealand taxpayers were now responsible for assessing their own income tax obligations. In reaching a final position for the return that is to be filed a taxpayer interprets tax law and applies it to their situation. Sources of information available to taxpayers in meeting their obligation to self assess their taxation liability include binding and non-binding statements issued by the Commissioner.

#### A. *THE COMMISSIONERS DUTY*

The introduction to ‘Legislating for Self Assessment of Tax Liability – A Government Discussion Document’ states:<sup>29</sup>

“In practice, taxpayers often self assess their own tax liabilities because their returns are automatically processed by Inland Revenue. However, so long as the legislation continues to place the responsibility on the Commissioner for making an assessment, that responsibility is duplicated. The proposals in this discussion document are a response to the concern that such duplication is economically inefficient. They also recognise that taxpayers, because of the information they possess, are best placed to assess their tax liabilities.”

Prior to the 2002/2003 income tax year the Commissioner was statutorily responsible for making an assessment or determination for every taxpayer based on their circumstances. Prior to its amendment section 92(1) of the TAA stated:

“...the Commissioner shall in and for every year, and from time to time and at any subsequent time as may be necessary assess the taxable income and income tax liability of the taxpayer and the tax payable by the taxpayer.”

Assessment is the process that ascertains the amount of tax payable by a taxpayer. A determination involves a similar process but ascertains, amongst other things, if a taxpayer has available losses from prior years that can be carried forward or any losses in the current year.<sup>30</sup>

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<sup>29</sup> Inland Revenue *Legislating for Self Assessment of Tax Liability – A Government Discussion Document* (Wellington 1998).

<sup>30</sup> *Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue* (1991) 13 NZTC 8,134 (PC).



## B. SELF ASESMENT

From the 2002/2003 income tax year New Zealand moved to a system of self assessment. The benefits of legislating for self assessment were seen to be:<sup>31</sup>

“1.6 Legislating for self-assessment will:

- bring the Tax Administration Act 1994 (TAA) into line with modern administrative practice;
- make the law on assessment consistent with other recent administrative reforms including the new penalties provisions, disputes resolution procedures and binding rulings legislation;
- clarify income tax law - particularly in the area of discretions; and
- lay a foundation for future phases of the project to rewrite the tax legislation.”

Section 92 of the TAA was amended by the *Taxation (Taxpayer Assessment and Miscellaneous Provisions) Act 2001* and currently reads:<sup>32</sup>

“A taxpayer who is required to furnish a return of income for a tax year must make an assessment of the taxpayer's taxable income and income tax liability and, if applicable for the tax year, the net loss, terminal tax or refund due.”

The amendment to section 92 resulted in the following changes:

- Taxpayers who are required to furnish an income tax return must assess their own taxable income and income tax liability then include a notice of assessment in the income tax return;<sup>33</sup>
- The assessment is made on the date the return is received at an Inland Revenue office;<sup>34</sup>
- The definition of the term assessment was amended to reflect that both the Commissioner and taxpayers can assess tax liabilities;<sup>35</sup>
- Amended returns would no longer be accepted by Inland Revenue however taxpayers may file a Notice of Proposed

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<sup>31</sup> *Legislating for Self Assessment of Tax Liability*, above note 29; 1.

<sup>32</sup> Section 92(1) Tax Administration Act 1994.

<sup>33</sup> Section 92(1) Tax Administration Act 1994.

<sup>34</sup> Section 92(2) Tax Administration Act 1994

<sup>35</sup> Section 3 Tax Administration Act 1994.

Adjustment within four months of filing the return, be it self assessed or an assessment made by the Commissioner;<sup>36</sup> and

- To ensure consistency taxpayers who are not required to file returns are treated as if they had fulfilled their self assessment obligations for the income year.<sup>37</sup>

### **C. THE ASSESSMENT PROCESS**

Assessment is the process by which the provisions of the Income Tax Act 2007 are applied by either the taxpayer or Commissioner to the taxpayer's affairs to determine the correct amount of tax payable. The assessment process does not impose the liability to pay tax. This is done by section AA 1 of the Income Tax Act 2007 which states:

**AA 1** The main purposes of this Act are—

- (a) to define, and impose tax on, net income:
- (b) to impose obligations concerning tax:
- (c) to set out rules for calculating tax and for satisfying the obligations imposed.

The definition of 'assessment' is contained in section 3(1) of the TAA and means:

- (a) An assessment of tax made under a tax law by a taxpayer or by the Commissioner:
- (b) An assessment of a net loss for the purposes of the Income Tax Act 2007:
- (c) An assessment of terminal tax or a refund for the purposes of the Income Tax Act 2007:
- (d) An assessment of a refund due under the Goods and Services Tax Act 1985:
- (e) An amendment by the Commissioner of an assessment:

When completing their assessment taxpayers, with or without knowing it, are responsible for:<sup>38</sup>

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<sup>36</sup> Section 89D Tax Administration Act 1994.

<sup>37</sup> Section 33 Tax Administration Act 1994.

- Considering the facts relating to their own financial affairs;
- Interpreting and applying the law to those facts;
- Determining the amount of tax owing; and
- Making that determination with an appropriate degree of finality.

The Commissioners powers relating to assessments are the ability to amend assessments; section 113 of the TAA, and the ability to issue default assessments; section 106 of the TAA. In making a default assessment the Commissioner is estimating the tax payable when:

- A taxpayer has not filed a self assessment;
- The Commissioner is not satisfied with a return filed by a taxpayer; or
- The Commissioner believes a person is a taxpayer even though they have not filed a return.

Once the default assessment is issued it is the taxpayer's responsibility to either pay the amount owing or prove that the amount is incorrect. Should the Commissioner consider issuing assessment under section 113 of the TAA which leads to an increase in the amount of tax payable the Commissioner must issue a Notice of Proposed Adjustment.

Once an assessment has been made the Commissioner must give notice of the assessment to the taxpayer.<sup>39</sup> This notice may only be the amount of tax payable or refundable if:<sup>40</sup>

- The taxpayer's self assessment is correct;
- The assessment is a default assessment;
- The taxpayer has received an income statement that is deemed, by the TAA, to be an assessment;
- The assessment is made as a result of the taxpayer's failure to inform the Commissioner that the details contained in an income statement are incorrect; or

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<sup>38</sup> *Legislating for Self Assessment of Tax Liability*, above note 29; 9.

<sup>39</sup> Section 111 Tax Administration Act 1994.

<sup>40</sup> Section 111(1) Tax Administration Act 1994.

- The Commissioner has issued a separate statement setting out the matters contained in the assessment. E.g. an Agreed Adjustment issued during the course of an audit.

Section 111(6) of the TAA protects the Commissioner in that it states that any failure on the part of the Commissioner to give the taxpayer a notice of assessment does not invalidate the assessment.

Over the years the courts have, on many occasions, considered the Commissioner's actions when making and issuing assessments. While most of the cases were decided prior to the enactment of the self assessment provisions the case law is still regarded as relevant. The principles that have emerged from the courts are discussed below.

The first is that in making an assessment the Commissioner is carrying into effect a statutory duty and cannot be estopped from carrying out that duty. In delivering the majority judgement in *CIR v Lemmington Holdings Ltd*<sup>41</sup> Richardson J stated:<sup>42</sup>

“to restrain the Commissioner from making assessments within his jurisdiction would be ... contrary to the scheme of the income tax legislation...”

In *North Island Wholesale Groceries Ltd. v Hewin*<sup>43</sup> Richardson J, affirmed this view and went on to say:<sup>44</sup>

“The Commissioner's statutory functions...are directed to the quantification of the liability for tax which is imposed by the statute itself. They are not a matter of balancing management and collection responsibilities as in England. He does not have a general dispensing power. He cannot be estopped by past conduct from performing his statutory obligations in making assessments reflecting his present judgment as to that statutorily imposed liability.”

The second principle that has emerged is that the issuing of the notice of assessment is not part of the assessment process. An assessment is:<sup>45</sup>

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<sup>41</sup> (1982) 5 NZTC 61,268 (CA).

<sup>42</sup> *ibid* 61,271.

<sup>43</sup> (1982) 5 NZTC 61,289 (CA).

<sup>44</sup> *ibid* 61,294.

<sup>45</sup> *R v DFC of T ex parte Hooper* (1926) 37 CLR 368; 373.

“...an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called 'a notice of assessment' ... But neither the paper sent nor the notification it gives is the 'assessment'. This is and remains the act or operation of the Commissioner.”

By issuing a notice of assessment the Commissioner is notifying the taxpayer that the assessment process is complete and there is now an obligation to make payment. In *Hyslop v CIR*<sup>46</sup> the Court of Appeal found:<sup>47</sup>

“The statutory scheme thus draws a clear distinction between making an assessment and giving notice of an assessment after it has been made. It distinguishes between coming to a decision and communicating a decision....

In terms of the statutory scheme, however, the giving of notice of the assessment and providing the taxpayer with details of the assessment process to facilitate the framing of an objection are necessarily subsequent to the making of the assessment and ss 26 and 29(6) proceed on the premise that the assessment process ends when the assessment is made.”

The third principle to emerge is that in making an assessment the Commissioner must, based on the information available to him, use his judgment in determining the amount of taxable income and tax payable by a taxpayer. The statutory language in respect of the making of assessments applies to the Commissioner as well as taxpayers. This was first established in *CIR v Canterbury Frozen Meat Co Ltd*<sup>48</sup> when Richardson J stated:<sup>49</sup>

“In making an assessment the Commissioner is required to exercise judgment. He or she is not entitled to act arbitrarily or in disregard of the law or facts known to the Commissioner.... There must be a genuine attempt to ascertain the taxable income of a taxpayer even if carried out cursorily or perfunctorily.”

In the same judgement McKay J found:<sup>50</sup>

“The section requires the Commissioner to make an 'assessment' that is based on the return made by the taxpayer or on other information available to the Commissioner. It is, therefore, not an arbitrary figure to

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<sup>46</sup> (2001) 20 NZTC 17,031 (CA).

<sup>47</sup> *ibid* 10,037.

<sup>48</sup> (1994) 16 NZTC 11,150 (CA).

<sup>49</sup> *ibid* 11,158.

<sup>50</sup> *ibid* 11,160.

be chosen at random. The information available may not enable the taxable income to be assessed with precision, but the assessment must still be 'based on' the return and the other information available. The Commissioner is to determine as best he can on the information available what is the amount on which tax is payable and what is the amount of the tax. If he makes or otherwise reaches a wrong conclusion, that can only be challenged and put right through the objection procedure. The Commissioner is not empowered, however, to issue an assessment which does not represent his own honest opinion....”

The issue of the Commissioner issuing a tentative or provisional assessment was also considered during these proceedings. Richardson J stated:<sup>51</sup>

“The making of an assessment determines the indebtedness of the subject to the Crown. The liability is unqualified. Sanctions are provided for failure to pay. It follows that a decision which is tentative or provisional or subject to adjustment or conditional does not reflect the statutory scheme... to constitute an assessment for income tax purposes the decision of the Commissioner must be definitive as to the liability of the taxpayer at the time it is made and final subject only to challenge through the objection process.”

The approach was affirmed in *CIR v New Zealand Wool Board*<sup>52</sup> where Richardson P, found:<sup>53</sup>

“The statute requires a genuine attempt to ascertain the assessable income of the taxpayer. That obvious obligation cannot be elevated into a requirement that the Commissioner not assess unless and until fully informed of the taxpayer's affairs. Section 19 provides for assessments to be made 'from the returns made [by the taxpayer]' and 'from any other information in [the Commissioner's] possession' and s 21 recognises that assessments may also be made where no returns have been furnished. The statute requires the exercise of judgment but it does not set a high threshold as to the material on which that judgment is based. The Commissioner must do the best he or she can on the information in his or her possession and so, as it is put in the *Canterbury Frozen Meat Co Ltd* case, it is only where the Commissioner acts arbitrarily — without any foundation for the assessment — or in disregard of the law or facts known to the Commissioner, that the purported assessment will be set aside on that ground.”

The next significant case regarding assessments issued by the Commissioner was *Dandelion v CIR*.<sup>54</sup> The taxpayer had entered into a transaction that the Commissioner considered to be tax avoidance. The Commissioner issued an amended

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<sup>51</sup> *ibid* 11,158.

<sup>52</sup> (1999) 19 NZTC 15,476 (CA).

<sup>53</sup> *ibid* 15,489.

<sup>54</sup> (2001) 20 NZTC 17,293.

assessment disallowing expenses related to the transaction. The first assessment for the income tax year ended 31 March 1986 was issued on 22 December 1986 and showed tax payable of \$168,788.64. After adjustments this was reduced to \$142,412.64. The Commissioner, after considering and applying section 99 of the Income Tax Act 1976 to the transaction, issued an “income tax notice of adjustment 1986” showing an increase in assessable income of \$570,080 dated 26 March 1991. The taxpayer argued that the assessment dated 26 March 1991 was tentative and could not be upheld. Tomkins J held:<sup>55</sup>

“It remains as a valid assessment even if the Commissioner believes that further enquiries are going to be required in order to arrive at the correct tax payable. It must be an honest assessment based on the information available at the time the assessment was made. As *McKay* J put it, it must represent “the honest judgment of the Commissioner as to what is a correct figure as best he can determine it in the state of his knowledge at the time”.”

Even though further enquiries were needed to arrive at the correct assessment the Court held that the Commissioner had made the assessment based on the information held at the time.

The final principle to emerge is that if Inland Revenue’s computer systems generate an assessment due to a processing error no assessment results<sup>56</sup> as the Commissioner has not turned his mind to making the assessment.

#### **IV. DISPUTES RESOLUTION**

The disputes resolution process is entered into when the taxpayer and Commissioner do not agree on what the taxpayers assessment should be. If the taxpayer is applying a binding ruling to their tax affairs the Commissioner is unable to dispute the assessment however non-binding statements are a different issue. Even if a taxpayer has applied a statement when reaching their final tax position the Commissioner is able to resile from that statement and enter into the disputes process. The application of a statement may have an impact in determining if shortfall penalties are appropriate but will not have an effect in determining the overall correct tax position.

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<sup>55</sup> *ibid* 17,297.

<sup>56</sup> *Paul Finance Ltd v CIR* (1994) 16 NZTC 11,257.

## **A. BACKGROUND**

The 1994 report on the Organisational Review of the Inland Revenue concluded that<sup>57</sup>:

- The present disputes resolution is deficient; and
- The way disputes are resolved is critical to taxpayer's perception of fairness and has wider impacts for tax administration.

At the time the report was written if a taxpayer wished to object to an assessment issued by the Commissioner a notice of objection had to be made. To be considered valid it had to:

- Be in writing and delivered or posted to the Commissioner;
- Be within the time limit or extended time approved by the Commissioner;
- State the grounds on which the objection was based; and
- Be a matter that the taxpayer could object to. There were discretions the Commissioner could exercise that could not be disputed.

Taxpayers had to ensure the grounds stated for the objection were comprehensive as no new grounds could be raised at a hearing by either party. Once the Commissioner received an objection one of three things could occur. The objection would be allowed and the assessment or determination would be altered. The matter would be at an end. Alternately the Commissioner could disallow the objection in part or in whole. Once the Commissioner had given notice to the taxpayer of this decision the taxpayer could request that case be stated to the Taxation Review Authority (TRA) or High Court.

The major problems identified by the Organisational Review Committee were:<sup>58</sup>

1. Inland Revenue was provided with several opportunities in the process to reconsider its position. This was considered to be a disincentive to get the assessment correct in the first place.

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<sup>57</sup> Organisational Review Committee *Organisational Review of the Inland Revenue Department* (Wellington 1994); 65.

<sup>58</sup> *ibid* 66.



2. Disputes were prolonged as there was an inadequate level of expertise applied prior to the assessment being generated.
3. Resolving disputes could take an unacceptably long time as there was no legislative time limit within which the Commissioner had to consider an objection. From 1 April 1994 a legislative requirement was introduced that required a decision be made within six months regarding a taxpayers request to state a case to the Taxation Review Authority or High Court.
4. Inland Revenue was seen as both a party to the process and the decision maker. Often an objection was considered by the person who carried out the original audit.
5. The costs involved in settling a tax dispute were seen as excessive.

The Committee recommended that Inland Revenue develop a new approach to tax disputes that incorporated the following:<sup>59</sup>

1. Every practical effort is made to ensure that assessments are correct before they are issued;
2. Any dispute is identified at the earliest practical time;
3. Communication between the taxpayer and IRD is direct and open to ensure that all information relevant to the dispute is available as soon as possible; and
4. Appropriate independent advice to IRD is introduced at the earliest practical time. This will involve the earlier commitment of specialist skills, such as legal skills.
5. The audit and the final quantification of the proposed liability should be separated. The aim being to provide an impartial decision maker; thus decreasing the likelihood of the dispute continuing.
6. A process should be developed that allows for the fast tracking of small claims to the Taxation Review Authority.

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<sup>59</sup> *ibid* 67.

In December 1994 a discussion document “Resolving Tax Disputes; Proposed Procedures” was published and amending legislation enacted in July 1996. The new disputes resolution process took effect from 1 October 1996.

## **B. PART IVA OF THE TAX ADMINISTRATION ACT 1994**

### **1. PURPOSE**

The purpose of the disputes legislation is to establish procedures that:<sup>60</sup>

- a) Improve the accuracy of disputable decisions made by the Commissioner under certain of the Inland Revenue Acts; and
- (b) Reduce the likelihood of disputes arising between the Commissioner and taxpayers by encouraging open and full communication—
  - (i) To the Commissioner, of all information necessary for making accurate disputable decisions; and
  - (ii) To the taxpayers, of the basis for disputable decisions to be made by the Commissioner; and
- (c) Promote the early identification of the basis for any dispute concerning a disputable decision; and
- (d) Promote the prompt and efficient resolution of any dispute concerning a disputable decision by requiring the issues and evidence to be considered by the Commissioner and a disputant before the disputant commences proceedings.

Section 3(1) of the TAA defines a disputable decision as:

- An assessment;
- A decision of the Commissioner under, tax law. except for a decision-
  - To decline to issue a binding ruling under Part VA; or
  - That cannot be the subject of an objection under Part VIII;
  - or
  - That cannot be challenged under Part VIIIA; or
  - That is left to the Commissioner's discretion under sections 89K, 89L, 89M(8) and (10) and 89N(3).

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<sup>60</sup> Section 89A(1) Tax Administration Act 1994.

The same section defines the term “Disputant” as a person:<sup>61</sup>

- Who may issue a Notice of Proposed Adjustment to the Commissioner;
- To whom the Commissioner may issue a Notice of Proposed Adjustment or an assessment; or
- Who may challenge a disputable decision;

under tax law.

The majority of disputes are commenced by the Commissioner and occur as a result of audit activity. Section 89C of the TAA requires that the Commissioner issue a Notice of Proposed Adjustment (NOPA) prior to making an assessment unless any of the legislated exceptions apply. These exceptions include:<sup>62</sup>

- The assessment corresponds with a tax return;
- The tax return contains what the Commissioner considers to be a simple or obvious mistake or oversight and the assessment merely corrects the mistake or oversight;
- The assessment reflects an agreement reached between the Commissioner and taxpayer;
- The Commissioner has reasonable grounds to believe that the taxpayer has been involved in fraudulent activity;
- The assessment corrects a tax position the Commissioner considers vexatious or frivolous;
- The taxpayer is entitled to issue a NOPA and has done so; and
- The assessment corrects a tax position taken by the taxpayer or associated person as a consequence of an incorrect tax position taken by another taxpayer and the Commissioner is able to issue an assessment to the other taxpayer.

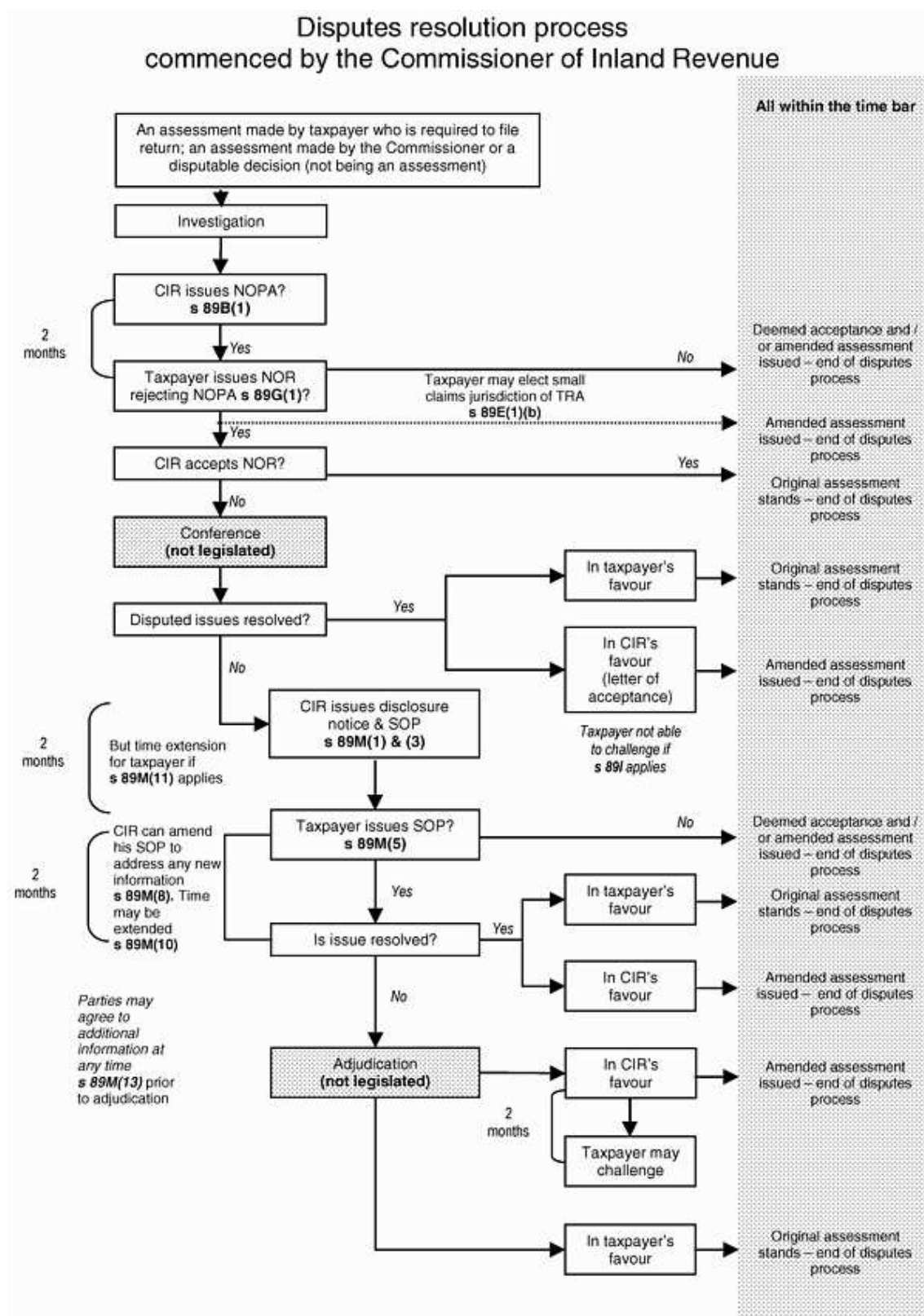
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<sup>61</sup> Section 3(1) of the Tax Administration Act 1994.

<sup>62</sup> For a full list of exceptions see section 89C of the Tax Administration Act 1994.

## 2. PROCEDURES

An outline of the process is as follows:<sup>63</sup>



<sup>63</sup> Inland Revenue SPS 05/03 *Disputes Resolution Process Commenced by the Commissioner of Inland Revenue Standard Practice Statement* (Wellington 2005); 5.

The first step in the disputes process is the issuing of a NOPA. If the Commissioner wishes to amend an existing assessment and the taxpayer does not agree the disputes process must be commenced. Any NOPA issued by the Commissioner must:<sup>64</sup>

- Identify the proposed adjustments to be made to the assessment;
- Provide a concise statement of the key facts and law in sufficient detail to inform the taxpayer of the grounds for the Commissioners proposed adjustments; and
- State how tax law applies to the facts.

With the enactment of the self assessment legislation changes were made to the disputes procedures that allowed taxpayers to issue a NOPA.<sup>65</sup> The situations in which a taxpayer is able to issue a NOPA are:

- The Commissioner has issued an assessment without first issuing a NOPA;
- The Commissioner has issued a default assessment. To dispute the assessment the taxpayer must issue a NOPA and file the return. These must be filed with the Commissioner at the same time;
- The taxpayer has received an income statement and considers it to be incorrect;
- The taxpayer receives a notice of a disputable decision that is not an assessment; or
- The taxpayer has made a self assessment and wishes to dispute that assessment.

The disputes procedures were reviewed and legislative changes took effect from 1 April 2005. One of the major changes made was timeframe in which a taxpayer could issue a NOPA. This became four months from the date of the Commissioner's

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<sup>64</sup> Section 89F(2) Tax Administration Act 1994.

<sup>65</sup> Section 89D Tax Administration Act 1994.

assessment or the date on which the taxpayer's assessment was received at an office of Inland Revenue.<sup>66</sup>

Any NOPA issued by a taxpayer must:<sup>67</sup>

- Identify the proposed adjustments to the assessment;
- Provide details of the facts and law in sufficient detail to inform the Commissioner why the adjustment is being proposed;
- State how the law applies to the facts; and
- Include copies of the documentation that the taxpayer is aware of that are relevant to the issues identified in the NOPA.

The recipient of the NOPA must reply with a Notice of Response<sup>68</sup> (NOR) within the response period,<sup>69</sup> two months from the date of issue of the NOPA. If the NOR is not received within the response period deemed acceptance will generally occur and the dispute is finalised. The response notice must contain details of:<sup>70</sup>

- The facts or legal arguments in the NOPA that the issuer of the NOR considers incorrect;
- Why the issuer considers those facts or legal arguments to be wrong;
- Any facts and legal arguments relied on by the issuer of the NOR;
- How the legal arguments apply to the facts; and
- Quantitative adjustments to any figure referred to in the NOPA that result from the facts and legal arguments relied on by the issuer of the NOR.

If, after the NOPA and NOR have been considered by both parties, the dispute is not resolved the Commissioner will request a Conference. This is the first of two administrative phases in the process and is not legislated for. The Conference can be formal or informal discussions held between the two parties with the aim being to clarify the issues that are subject to the dispute. In the Standard Practice Statement

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<sup>66</sup> Section 3(1) Tax Administration Act 1994 – definition of response period.

<sup>67</sup> Section 89F(3) Tax Administration Act 1994.

<sup>68</sup> Section 89G Tax Administration Act 1994.

<sup>69</sup> Section 3(1) Tax Administration Act 1994.

<sup>70</sup> Section 89G(2) Tax Administration Act 1994.

(SPS) 05/03 Disputes Resolution Process Commenced by the Commissioner of Inland Revenue the timeframe given for conducting the conference is within three months of the rejection of the NOR. As this is an administrative phase either party can choose to dispense with it. The SPS outlines the situations where the Commissioner will not hold the conference.<sup>71</sup>

“167. The Commissioner considers the conference phase to be an important part of the disputes resolution process.

168. In some circumstances the Commissioner will not hold further discussions or a conference, even though agreement has not been reached. This does not mean that the disputes resolution process will come to an end, as the disclosure notice and statement of position phase will still be undertaken. Where the dispute is not resolved in the statement of position phase, the Commissioner and the taxpayer will endeavour to have the dispute resolved via the adjudication process.

169. Conferences may not be held or may be abridged in one or more of the following situations:

- There may be revenue losses incurred as a result of delaying tactics used by a taxpayer to frustrate the collection of tax.
- The Commissioner is satisfied that the taxpayer or the taxpayer’s agent is acting in a frivolous or vexatious manner. For example where, the taxpayer or their agent is setting unreasonable demands as to the time and place, or terms of such meeting(s), or refuses to conduct themselves reasonably at any meeting.
- The taxpayer contests the Commissioner’s policy and it is agreed to disagree, or where it is otherwise agreed that a conference would be of no benefit.
- The taxpayer advises the Commissioner that they do not want a conference to be held.

170. Where it is practicable, the decision whether or not the conference phase will be dispensed with or abridged will be communicated in writing to the taxpayer or their tax agent within seven days of that decision being made. The reasons for the decision not to hold, or abridge, any conference must be documented.”

If at this time the dispute is not resolved the Commissioner will issue a Disclosure Notice<sup>72</sup>. This is mandatory and triggers the evidence exclusion rule. The notice must include reference to section, 138G of the TAA, and a statement to its effect.

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<sup>71</sup> SPS 05/03 above n 63; [167]-[170].

<sup>72</sup> Section 89M Tax Administration Act 1994.

The effect of the rule is that both parties are restricted to evidence included in their Statement of Position (SOP) should the matter proceed to court. The rule refers to documentary evidence only and does not include any witnesses that may be called at a hearing.

The issue of the evidence exclusion rule came before the Court of Appeal in *CIR v Zentrum Holdings Ltd.*<sup>73</sup> The taxpayer had entered into an arrangement that the Commissioner considered to be tax avoidance. After receiving the taxpayers NOR the Commissioner issued amended assessments. A case was stated to the TRA which found for the taxpayer. In preparing his appeal to the High Court the Commissioner formed the view that the transactions were a sham and gave notice that he wished to amend his argument. An interlocutory application was brought before the High Court limiting the Commissioner to arguing the grounds of the assessment. In finding for the taxpayer the High Court found that the principles established in *CIR v V H Farnsworth Ltd*<sup>74</sup> and *F B Duvall Ltd v CIR*<sup>75</sup> were still relevant and the Commissioner was prevented from adding new arguments. Even though the legislation relevant to the prior decisions was the Income Tax Act 1976 and the Inland Revenue Department Act 1974 it was held that the same jurisdictional limitations applied to the Tax Administration Act 1994. In finding for the Commissioner the Court of Appeal held:

“The general structure of the disputes process is not as conducive to this line of argument as the structure of the scheme which was addressed in *Farnsworth*. Section 36 of the *Inland Revenue Department Act 1974* has no direct counterpart in the 1994 Act. Further, as just noted, the challenge process involves a challenge to the assessment rather than a reconsideration of the taxpayer’s objection. If the Commissioner and taxpayer were to be confined to the positions each had adopted in either the pre-assessment process or up to the time when the challenge proceedings were lodged, one would expect this to be the subject of direct legislative provision.

The only statutory provision which is directly on point is 138G which provides:

138G Effect of disclosure notice: exclusion of evidence

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<sup>73</sup> (2006) 22 NZTC 19,912 (CA).

<sup>74</sup> (1984) 6 NZTC 61,770 (CA).

<sup>75</sup> (2000) 19 NZTC 15,658 (CA).



As noted, no disclosure notice was given in this case. Accordingly, the evidence exclusion rule provided for by s 138G did not apply. The existence of specific evidence exclusion rule which applies only in specified circumstances rather suggests that outside those circumstances there is no comparable implied and absolute rule confining the parties to the positions formally taken in their NOPAs and NORs. Further, and perhaps more importantly, the existence of the discretion provided for by s138G (2) to waive the evidence exclusion rule where a disclosure notice has been given is flatly inconsistent with the existence of such an implied and absolute rule.”

If the dispute was commenced by the Commissioner his SOP<sup>76</sup> must accompany the Disclosure Notice. If the dispute was commenced by the Taxpayer they have two months from the issuing of the Disclosure Notice to provide their SOP to the Commissioner. SOP’s must include:<sup>77</sup>

- An outline of the facts on which the disputant intends to rely;
- An outline of the evidence on which the disputant intends to rely;
- An outline of the issues the disputant considers will arise; and
- The propositions of law on which the disputant intends to rely on.

While at the NOPA stage the submissions should be concise and contain sufficient detail to progress the case and potentially resolve the dispute. The SOP will contain detailed submissions on the matters in dispute. Once a SOP has been issued a response must be received within the response period. If no response is received deemed acceptance will occur. It is possible for the taxpayer to apply to the High Court for an extension of time to reply. This will be considered when:<sup>78</sup>

- The application is received prior to the end of the response period; and
- The taxpayer considers it is unreasonable to reply to the Commissioner’s SOP within the two month response period as the issues in dispute had not previously been discussed by the parties.

The Commissioner may, within two months of the issue of the taxpayer’s SOP provide the taxpayer with additional information in response to matters contained within that

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<sup>76</sup> Section 89M (3) Tax Administration Act 1994.

<sup>77</sup> Section 89M (4) Tax Administration Act 1994.

<sup>78</sup> Section 89M(11) Tax Administration Act 1994.

document. This covers situations where the taxpayer has raised new arguments. The additional information will be provided in the same format as the Commissioner's SOP as it then becomes a part of it. While the taxpayer does not have the right of reply to this they can seek agreement from the Commissioner to include additional information.

If at this point agreement has not been reached on the matters in dispute one of two processes can occur. The matter may be referred to the Adjudication Unit or an assessment is issued. Adjudication is the second part of the disputes process that is not legislated for. The Adjudication Unit is part of Inland Revenue's National Office and its role is to take a fresh look at the dispute in an impartial manner. SPS 05/03 states "The Commissioners practice is to refer all disputes to the Adjudication Unit, where practicable."<sup>79</sup> Once the Adjudication Unit has reached a decision the taxpayer and Inland Revenue Officer involved are advised. The Commissioner must follow the Adjudication decision; therefore if the finding is against the Commissioner the matter is at an end. If the finding is against the taxpayer the taxpayer may challenge the assessment in either the Taxation Review Authority, or if certain conditions are met, the High Court. These proceedings must be commenced within two months from the date of the issue of the assessment.

The second process that can occur is the issuing of an assessment. The legislative changes to the disputes process that took effect from 1 April 2005 limited the Commissioner's ability to issue an assessment until after the taxpayer's SOP has been considered. The Commissioner may issue an assessment at this point if time bar is an issue. The taxpayer may also request that an assessment be issued. As an assessment is a disputable decision and should the taxpayer wish to progress the matter proceedings are commenced in the High Court or the TRA.

The matter of whether the Commissioner must fully utilise the disputes process prior to the issuing of an assessment has recently been considered by the Court of Appeal in *CIR v ANZ National Bank Ltd & Ors.*<sup>80</sup> The taxpayer entered into a series of transactions the Commissioner considered to be tax avoidance. An investigation was commenced that covered the income tax years 31 March 2000 to 31 March 2004. The disputes process was commenced with the Commissioner's NOPA issued and the taxpayer's NOR received and considered. As the time bar arose in relation to the 2000

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<sup>79</sup> SPS 05/03 above n 63; [102].

<sup>80</sup> (2007) 23 NZTC 21,167 (CA).

income tax year the Commissioner issued an assessment incorporating the adjustments proposed in the NOPA. The taxpayer's issued proceedings in the High Court. One of the issues considered was the extent to which the disputes procedures should be considered mandatory.<sup>81</sup> In reaching his decision MacKenzie J stated:<sup>82</sup>

“Insofar as the process is one of dispute resolution, it is to be noted that it is in essence a one-sided process...a “win/no lose” situation for the taxpayer. If the issue is resolved in the taxpayer's favour by the Unit, no assessment will issue. If the issue is resolved in the Commissioner's favour, an assessment will issue, but the statutory challenge procedures will be available to the taxpayer. That is an important consideration in considering whether it was intended that all cases should be referred through that process. In my view, it is not reasonable to infer from the legislation and the Commissioner's processes set out in the TIB an intention that the Commissioner would invariably allow matters to be resolved by such process. Where the issues in a particular case are of such complexity that the Commissioner would wish to ensure that the matter was placed either before the Taxation Review Authority or this court, and was unwilling to subject the case to the risk that the Unit might foreclose that possibility, I consider it is unlikely that an intention should be attributed to him, or to the legislature, that the adjudication process must always be followed.”

The case was appealed and when delivering the Court of Appeal's judgement O'Regan J stated:<sup>83</sup>

“We have reached the clear view that it is not open to a High Court Judge in the context of a case management application for adjournment to direct the Commissioner to implement what are essentially internal administrative procedures... We doubt that, even in a judicial review proceeding seeking a mandatory order, such an order would be appropriate where the Commissioner's reason for not pursuing the administrative procedures is that the time bar has intervened, and he has had to issue an assessment to protect his position... we do not need to decide that in this case because the appellants did not seek judicial review. What is clear, however, is that it is not appropriate to deny a party access to the Court because that party has not undertaken a prelitigation process which it is not lawfully obliged to undertake.”

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<sup>81</sup> *ANZ National Bank Limited & Ors v CIR (No 2)* (2006) 22 NZTC 19,835.

<sup>82</sup> *ibid* 19,840.

<sup>83</sup> *ANZ National Bank Ltd* above n 80; [20].

## V. LEGITIMATE EXPECTATION & ESTOPPEL

### A. ORIGINS

#### I. LEGITIMATE EXPECTATION

The concept of legitimate expectation has its origins in public law; it relates to the duty of public administrators to act with fairness in their decision making processes. The term was first used by Lord Denning in *Schmidt v Secretary of State for Home Affairs*<sup>84</sup> when he stated:<sup>85</sup>

“It all depends on whether he has some right or interest, or I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say.”

It was seen as a factor that should be taken into account in determining if natural justice applies to a set of circumstances. This view was repeated in *Breen v Amalgamated Engineering Union*<sup>86</sup> where the court held:<sup>87</sup>

“... [I]f he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive without a hearing, or reasons given, then these should be afforded him according as the case may demand.”

In this case the plaintiff had for many years been elected shop steward by his colleagues, the election was then subject to confirmation by the district committee of the union. In prior years the election had been confirmed, this year it was not. Breen had not been present at the meeting and no reasons for the refusal were provided. The court held, unanimously, that the committee was required to act fairly in the exercise of its discretion to refuse or grant confirmation; by a majority it held that the committee had not acted unfairly. Lord Denning in his dissenting opinion regarding the committee’s actions considered what fairness required and stated:<sup>88</sup>

“Seeing that he had been elected to this office by a democratic process, he had, I think, a legitimate expectation that he would be approved by the district committee unless there were good reasons against him. If they had something against him they ought to tell him and to give him a chance of answering it before turning him down. It seems to me

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<sup>84</sup> [1969] 1 All ER 904.

<sup>85</sup> *ibid* 909.

<sup>86</sup> [1971] 1 All ER 1148.

<sup>87</sup> *ibid* 1154.

<sup>88</sup> *ibid* 1155.

intolerable that they should be able to veto his appointment in their unfettered discretion.”

In essence the courts were holding public bodies to a standard of fairness. If past practice changed then those affected by the change, particularly those adversely affected, should be given the right to make submissions.

A new dimension was added to the concept in *Attorney General v Ng Yuen Shui*.<sup>89</sup> The respondent was from Macau, in Hong Kong illegally, and had been able to stay under existing policy. There was a change in policy which led to the respondent being detained and a removal order issued. Prior to the respondent’s detention the government had announced that “...illegal immigrants from Macau...will be interviewed in due course. No guarantee can be given that they may not subsequently be removed. Each case will be treated on its merits.”<sup>90</sup> The question before the Privy Council was whether the statement gave Ng the right to be heard prior to deportation. Lord Fraser stated:<sup>91</sup>

“The narrower proposition for which the respondent contended was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has a legitimate expectation of being accorded such a hearing.”

It was held that in light of the Government’s public statement Ng was entitled to a fair hearing. In reaching the decision the Privy Council relied on *Schmidt* and the Court of Appeal decision in *Re Liverpool Taxi Owners Association*.<sup>92</sup> The Liverpool Corporation was proposing to increase the number of licensed taxi cabs and the town clerk gave the association an undertaking that interested parties would be consulted prior to a decision being made and a timetable agreed to. The corporation sought to increase the number of licenses outside of the timetable. The association lodged court proceedings preventing the corporation from implementing the revised plan without consultation. Lord Denning held that in the discharge of its administrative functions the Corporation was under a duty to act fairly and must “hear those affected before coming

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<sup>89</sup> [1983] 2 All ER 346.

<sup>90</sup> *ibid* 349.

<sup>91</sup> *ibid* 350.

<sup>92</sup> [1972] 2 All ER 589.

to a decision adverse to their interests.”<sup>93</sup> As the Corporation has given an undertaking it was held it could not be disregarded. Lord Denning held:<sup>94</sup>

“So long as the performance of the undertaking is compatible with their public duty, they must honour it... At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say; and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honouring their undertaking than by breaking it. This is just such a case. It is better to hold the corporation to their undertaking than to allow them to break it.”

It should be noted that the duty to be fair and the right to a hearing did not predetermine the outcome of the decision making process. All that was required was for the public body to keep an open mind.

This principle received support in New Zealand in *New Zealand Maori Council v Attorney General*.<sup>95</sup> The Crown had commenced the restructure of the Broadcasting Corporation of New Zealand by transferring the assets of Radio New Zealand and Television New Zealand into separate state owned enterprises. The Maori Council was concerned about the effects of the restructure on the survival of the Maori language. Relying on section 9 of the State-Owned Enterprises Act 1986 which stated:

**9 Treaty of Waitangi** – Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

the council argued that the proposed transfer of assets was unlawful. Both the High Court and Court of Appeal had held the Crown could transfer the assets. During the course of the High Court proceedings the Crown placed before the Court contracts with Radio New Zealand and Television New Zealand. The contracts gave access to a Maori Broadcaster on favourable terms and allowed access to Television New Zealand production facilities. The Privy Council held:<sup>96</sup>

“The position is that in practice the Crown can exert considerable control over the state enterprise. Accordingly, the transfer of the assets will have little, if any, effect on the Crown's ability to fulfil its obligations to preserve the language. It is no doubt correct that the Crown would use these powers sparingly since it would impinge on the directors'

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<sup>93</sup> *ibid* 594.

<sup>94</sup> *ibid* 594.

<sup>95</sup> [1994] 1 NZLR 513 (PC).

<sup>96</sup> *ibid* 525.

responsibility, but the exercise of the powers, in the unlikely event of this being necessary, would be fully justified because of what would be at stake.

...

The assurance may not be directly enforceable in law and it has to be considered in the context of Maori fulfilling their responsibilities to take such action as is reasonably available to preserve the language, but this does not mean that it is devoid of legal significance. The assurance once given creates the expectation, or to use the current parlance the "legitimate expectation" that the Crown would act in accordance with the assurance, and if, for no satisfactory reason, the Crown should fail to comply with it, the failure could give rise to a successful challenge on an application for judicial review."

During the same year Gallen J delivered a similar decision in *Northern Roller Mining Co Ltd v Commerce Commission*.<sup>97</sup> The case involved the deregulation of the wheat industry and the Commerce Commissions failure to adhere to a stated policy. Gallen J found legitimate expectation could extend to matters of substantive fairness and stated:<sup>98</sup>

"I do not think that the field is so wide open that some broad concept of fairness can be used to justify interfering with a decision that merely gives rise to perhaps a general unease or distaste... It could perhaps be suggested that legitimate expectation itself as a concept is a shorthand term for an expectation that decision making will be carried out not only according to law, but in accordance with those principles which law embodies unless there is something in the decision making power itself that excludes such an approach."

Substantive legitimate expectation was also considered in *New Zealand Association for Migration and Investments v AG*.<sup>99</sup> Randerson J, after reviewing the relevant authorities, found that no legitimate expectation existed but noted that there are two key considerations that form the basis for legitimate expectation cases:<sup>100</sup>

"On the one hand there is the public interest in holding a public authority to promises made in the interests of proper public administration and allowing people to plan with some assurance. On the other, there is also the public interest in allowing governments and other public authorities to change policy from time to time when it is perceived appropriate to do so."

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<sup>97</sup> [1994] 2 NZLR 747.

<sup>98</sup> *ibid* 750.

<sup>99</sup> [2006] NZAR 45.

<sup>100</sup> *ibid* 51.

When considering the courts role in these cases he cited with approval Sedley J's comments in *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*.<sup>101</sup>

“...recognise the constitutional importance of ministerial freedom to formulate policy but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has legitimacy which fairness outtops the policy choice which threatened it.”

## 2. ESTOPPEL

Even though the terms appear to be used interchangeably at times estoppel has a separate legal heritage from that of legitimate expectation. Estoppel has evolved from private law and has its roots in equity. Definitions of the terms are many and include:<sup>102</sup>

“*Estoppe*: commeth for the French word *estoupe*, from whence the English word stopped: and it is called an estoppel of conclusion, because a mans own act or acceptance stoppeth or closeth his mount to allege or plead the truth.”

Sir Frederick Pollock described estoppel as “a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence.”<sup>103</sup> From this comment it can be seen that the flexible nature of the concept could make it hard to define in simple terms. Lord Denning defined the concept as:<sup>104</sup>

“Estoppel...is a principle of justice and equity. It comes to this: when a man by his words or conduct, has lead another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.”

In modern terms estoppel has been described as:<sup>105</sup>

“...a mechanism for enforcing consistency; when I have said or done something that leads you to believe in a particular state of affairs, I may be obliged to stand by what I have said or done, even though I am not contractually bound to do so.”

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<sup>101</sup> [1995] 2 All ER 714; 731.

<sup>102</sup> Sir Edward Coke, *A Commentary upon Littleton*, 19<sup>th</sup> ed corr. by Charles Butler (London: Clarke, Saunders and Benning, Maxwell, Sweet, Butterworth, Stevens, Pheney & Richards, 1832); 352.

<sup>103</sup> Sir Frederick Pollock quoted by Lord Wright in *Canada & Dominion Sugar Company Ltd v Canadian National (West Indies) Steamships Ltd* [1947] A.C. 46; 55.

<sup>104</sup> *Moorgate Mercantile Co. Ltd v Twitchings* [1976] 1 Q.B. 255; 241.

<sup>105</sup> Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford: Oxford University Press, 2000); 1.



Over time the elements necessary to establish estoppel have remained consistent. From the definitions above it can be seen that the party seeking estoppel must establish:

- A representation;
- A reliance on that representation; and
- The reneging on the representation has had a detrimental effect.

The introduction of estoppel into public law occurred when Lord Denning delivered his judgement in *Roberston v Minister of Pensions*.<sup>106</sup> A returning officer had been advised by the war office that it accepted his disability was as a result of military service, not a prior rugby injury. Based on the legislation at the time this entitled the soldier to a disability benefit. The war office had also assured the soldier that he was entitled to the benefit. However, when he applied to the Office of Pensions for the benefit his application was declined. The issue before the court was whether the assurance given by the War Office was binding on the Office of Pensions. Lord Denning rejected the Crown's argument that it could not be bound by estoppel.<sup>107</sup>

“The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity i.e. the doctrine that the Crown cannot bind itself so far as to fetter future executive action.”

Lord Denning went on to say the Minister of Pensions was bound for two reasons. First the War Office had assumed authority for the matter and had given the assurance. In receiving the assurance the soldier was entitled to assume that all relevant parties had been consulted. Second as the War Office was bound by its assurance then as “it is but an agent for the Crown, it binds the Crown also.”<sup>108</sup> As other departments are agents of the Crown they are also bound.

Since its introduction into public law estoppel has had a varied impact. It has been stated that “the doctrine of estoppel has no place in public law.”<sup>109</sup> Despite this comment there have been continued attempts to estoppe public bodies from carrying out

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<sup>106</sup> [1948] 2 All ER 767.

<sup>107</sup> *ibid* 770.

<sup>108</sup> *ibid* 770.

<sup>109</sup> *Barratt Guildford v Secretary of State for the Environment* [1990] JPL 25 per Otton J.

their statutory duties. The next section will examine both the doctrine of estoppel and the doctrine of legitimate expectation in a tax context.

## **B. IN A TAX CONTEXT**

The legislative changes made to the TAA in 1995 were based on provisions contained in the United Kingdom tax legislation. For that reason when reviewing tax cases that address legitimate expectation and estoppel the starting point is case law developed in the United Kingdom.

### **I. THE FLEET STREET CASUALS**

Whilst the actual case reference is *ICR v National Federation of Self-Employed and Small Business Ltd*<sup>110</sup> the case is commonly referred to as the *Fleet Street Casuals Case* as it revolved around an agreement the Revenue had reached with casual workers in the newspaper industry. These workers had been using fictitious names in order to receive wages without the appropriate tax deductions. When the revenue authorities became aware of this an agreement was reached with the employees, relevant employers and the unions. The employees would submit returns and pay tax for the prior two years; in return the Revenue would not investigate tax evaded prior to that. The reasoning for entering into the agreement was that there would be difficulties in obtaining information for a full investigation of the prior years. It was seen as a better use of resources to enter into the agreement and ensure future compliance. The Federation considered the agreement unfair and preferential so sought a declaration that the Revenue had acted unlawfully and it must assess and collect all taxes due from the casual workers.

The House of Lords unanimously refused the declaration. Lord Wilberforce noted there was a statutory basis for entering into the agreement:<sup>111</sup>

Section 1 of the Act of 1970 provides that 'Income tax ... shall be under the care and management of the Commissioners'. This Act contains the very wide powers of the Board and of inspectors of taxes to make assessments upon persons designated by Parliament as liable to pay income tax. With regard to casual employment, there is a procedure laid down by statutory instrument (the Income Tax (Employments) Regulations 1973 (S. I. 1973 No 334) by which inspectors of taxes may proceed by way of direct assessment or in accordance with any special arrangements which the Commissioners of Inland Revenue may make

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<sup>110</sup> [1982] AC 617 (HL).

<sup>111</sup> *ibid* 631-632.

for the collection of tax. As I shall show later it was a 'special arrangement' that the Commissioners set out to make in the present case.”

Lord Scarman accepted that there was a statutory basis for the agreement then focused on whether or not the revenue had acted properly in deciding if this was the most practical and cost effective way of collecting tax. He stated:<sup>112</sup>

“In the daily discharge of their duties inspectors are constantly required to balance the duty to collect ‘every part’ of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which mean that not all the tax known to be due will be collected.”

While the case does not expressly refer to the concepts of legitimate expectation or estoppel as it involves the Revenue’s assessment of a certain group of taxpayers versus its duty to be fair to all taxpayers it is often referred to in cases involving the two concepts. The case is seen as an authority for the idea that it is not unlawful for the Revenue not to collect all taxes if there is a management basis for making that decision.

## **2. PRESTON**

In the next significant case, *Preston v ICR*,<sup>113</sup> the taxpayer argued he had reached an agreement with the Revenue and as such could rely on it. Mr Preston’s tax returns had been referred to the Special Investigations Section of the Revenue, which requested an interview and additional information about a number of transactions included in the returns. Mr Preston, in his reply, offered to withdraw his claims for loan interest relief and capital losses “on the basis that by doing so I shall facilitate the agreement of my tax affairs.”<sup>114</sup> Additional information was requested about the rise in the value of shares in a company, Gymboon Ltd. Mr Preston advised it was due the company earning substantial profits. The inspector involved replied by saying “I do not intend to raise any further enquires on your tax affairs.”<sup>115</sup> At a later date the Special Investigations Section reviewed the accounts of Gymboon Ltd and in reviewing what appeared to be a potential tax avoidance scheme formed the view that Mr Preston had been involved. A revised notice of assessment was issued when it was too late for Mr Preston to revive his claims for interest and capital loss. A judicial review of the decision to issue the

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<sup>112</sup> *ibid* 651.

<sup>113</sup> [1985] 2 All ER 327.

<sup>114</sup> *ibid* 856.

<sup>115</sup> *ibid* 857.

revised assessment was sought arguing it breached the earlier agreement. The House of Lords was unanimous in its finding that no agreement had been reached but went on to say:<sup>116</sup>

“In principle I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation.”

Whilst the taxpayer failed in this instance the House of Lords made it clear that if such an agreement existed the Revenue may be open to judicial review on the grounds of legitimate expectation. If legitimate expectation had been established then the Revenue may have been estopped from upholding the revised assessment.

### **3. MFK UNDERWRITING AGENCIES LTD**

These principles were further developed in *R v ICR ex parte MFK Underwriting Agencies Ltd*.<sup>117</sup> Banks were proposing to issue securities and the Revenue had been approached seeking confirmation that an element payable on redemption of the securities would be treated as capital not income. Revenue officials had indicated, in general terms, that they agreed with that view. After the securities had been issued the Revenue decided to treat the elements as income. The question before the court was whether the Revenue should be prevented from doing so as indications to the contrary had been given. The court held that as only a tentative view had been expressed there was no indication the Revenue would be bound and there was no abuse of power:<sup>118</sup>

“...[I]f, in a case involving no breach of statutory duty, the Revenue makes an agreement or representation from which it cannot withdraw without substantive unfairness to the taxpayer who has relied on it, that may found a successful application for judicial review.”

The court held that the statutory duty to reassess was, when deciding the extent to which the Revenue could be bound, was an important element that required consideration. It was also stressed that it was important that a taxpayer would have to “put all his cards

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<sup>116</sup> *ibid* 341.

<sup>117</sup> [1990] 1 All ER 91.

<sup>118</sup> *ibid* 109.

face upwards on the table”<sup>119</sup> when seeking advice that was to be relied upon. Bingham LJ noted that there were limits to the extent to which the Revenue could be bound:<sup>120</sup>

“If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were to be permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness.”

#### **4. MATRIX SECURITIES LTD**

Again the issue before the court in *Matrix-Securities Ltd v ICR*<sup>121</sup> was the extent to which the Commissioner can be bound. The taxpayers wished to promote a tax effective unit trust investment. Central to the tax effectiveness was that investors should be entitled to capital allowances. A request was made to the local inspector of taxes to provide an assurance this would be allowed. The assurance was given. Prior to the request being made the Revenue had issued a circular advising that only the Financial Institutions Division could approve schemes of this kind. When the Financial Institutions Division learnt of the local inspectors ruling it wrote to the taxpayers revoking the tax clearance given. The taxpayers had, based on the clearance given by the local inspector, commenced promoting the investment.

The case failed on the basis that the taxpayers had failed to disclose all material facts relevant to the transaction. Whilst on paper the trustee was paying \$95 million of the property a series of circular transactions meant the actual price paid was \$8 million. Further as the Revenue had notified taxpayers that only the Financial Services Division could approve such transactions, it was not unfair to revoke the decision of the local inspector.

What is important about this decision was that the House of Lords had no doubt that if full disclosure had been made to the appropriate branch of the Revenue any

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<sup>119</sup> *ibid* 110.

<sup>120</sup> *ibid* 110-111.

<sup>121</sup> [1994] 1 All ER 769.

clearance given, whether correct in law or not, would have been binding on the Revenue. Lord Browne-Wilkinson stated:<sup>122</sup>

“It is the statutory function of the Revenue to collect the taxes which Parliament has legislated are to be payable. The tax liability which any given transaction attracts can only be determined by the courts after the transaction has been carried through. But the financial viability of many transactions depends on its tax repercussions. Therefore taxpayers frequently need to know the tax consequences of a transaction before carrying it through. To meet this need, the Revenue are prepared in certain circumstances to give advance assurances as to the tax repercussions of a transaction so that the parties can proceed with confidence. The practice is of greatest benefit to taxpayers and it would not be in the public interest to discontinue it.

It is now established that, in certain circumstances, it is an abuse of power for the Revenue to seek to extract tax contrary to an advance clearance given by the Revenue. In such circumstances, the taxpayers can by way of judicial review apply for an order preventing the Revenue from seeking to enforce the tax legislation in a sense contrary to the assurance given...”

## **5. THE UK POSITION**

Prior to the enactment of New Zealand’s care and management provisions the principles that had emerged from the United Kingdom courts, in relation to legitimate expectation, were:

- The Commissioner is able to forgo the collection of taxes based on the care and management provision contained within the legislation;
- The Commissioner can be estopped on the basis of legitimate expectation;
- If taxpayers wish to estop the Commissioner they must have disclosed all relevant information; and
- The Commissioner is able to give advance clearance to transactions.

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<sup>122</sup> *ibid* 791.

### **C. IN THE NEW ZEALAND TAX CONTEXT**

The New Zealand position is anything but clear. An underlying factor is the scheme and purpose of the Income Tax legislation. Until April 1995 there was no managerial discretion contained in the legislation allowing the Commissioner to forgo the collection of taxes. The care and management provisions may have had an impact on the ability of taxpayers to argue that they had a legitimate expectation that the Commissioner would act in a particular way. The following sections will review the position prior to the introduction of the care and management provisions; the introduction of the care and management provisions and cases heard subsequent to the enactment of the provisions. A conclusion will then be drawn as to whether the Commissioner can be estopped by a claim of legitimate expectation.

#### **I. LEGITIMATE EXPECTATION PRIOR TO THE CARE AND MANAGEMENT PROVISIONS**

##### **a) THE START OF THE DEBATE**

The first time a taxpayer argued they had a legitimate expectation that the Commissioner would act in a certain way was in *CIR v Lemmington Holdings Ltd.*<sup>123</sup> The taxpayer company formed a view that there was a market available in Australia for high quality plastic goods and with the income tax concessions available under the Income Tax Act 1976 the business was worthwhile. The taxpayer entered into a series of arrangements that enabled investors to take advantage of these concessions. The Commissioner reviewed the arrangements and issued the necessary special tax certificates. At a later date the Commissioner commenced an investigation into the tax affairs of the company which resulted in the certificates being withdrawn and the losses claimed by the investors being disallowed. The taxpayer applied under the Judicature Amendment Act 1972 for relief arguing that the certificates should continue in force and it was unfair to withdraw them.

Richardson J delivered the decision for the majority of the Court of Appeal which found that the claim of legitimate expectation could not be upheld. He stated that “to restrain the Commissioner from making assessments within his jurisdiction would

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<sup>123</sup> (1982) 5 NZTC 61,268 (CA).

be both contrary to the scheme of the income tax legislation and outside the proper scope of the *Judicature Amendment Act 1972*.<sup>124</sup> He went on to say:<sup>125</sup>

“Just as estoppel cannot be raised against the operation of a statute imposing a duty of a positive kind, so too the jurisdiction under the 1972 Act cannot be invoked as a prior restraint on the carrying out of a statutory obligation.”

Despite the finding against the taxpayer Richardson J made some comments that a claim of legitimate expectation may succeed. He first addressed the Commissioner’s statutory duty to assess:<sup>126</sup>

“The Commissioner acts in the quantification of the amount due and in various situations expressly provided for in the statute he exercises a discretion as to particular items. But it is the Act itself which imposes the obligation to pay income tax, and the Commissioner’s statutory functions are directed to the quantification of that liability.”

He then went on to say:<sup>127</sup>

There is, however, a distinction between challenging the correctness of an assessment and impugning the legitimacy or validity of the process adopted in making a purported assessment. The legitimacy of the process by which a purported assessment was arrived at or a proposed assessment is to be made may perhaps be susceptible to challenge in other proceedings on traditional administrative law grounds.”

The minority judgment of Cooke J found for the taxpayer and went much further in holding that the Commissioner could be subject to legitimate expectation. He stated:<sup>128</sup>

“But, in my opinion, it is at least reasonably arguable that the court may in its discretion grant relief against a proposed exercise of the assessment function if the taxpayer can show that the Commissioner proposes to act either on a fundamentally wrong legal basis or contrary to some binding requirement of natural justice and fairness...”

Subsequent to this the Court of Appeal unanimously rejected a further legitimate expectation claim in *Challenge Realty Ltd v CIR*.<sup>129</sup> The court cited the majority

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<sup>124</sup> *ibid* 61,271.

<sup>125</sup> *ibid* 61,271.

<sup>126</sup> *ibid* 61,272.

<sup>127</sup> *ibid* 61,273

<sup>128</sup> *ibid* 61,277

<sup>129</sup> (1990) 12 NZTC 7,212 (CA).



judgment in *Lemington* and placed particular emphasis on the primacy of the assessment function.

**b) THE DEBATE BECOMES MURKIER**

The issue came before the court again in *Brierley Investments Ltd v CIR*.<sup>130</sup> Brierley Investments had discussed its accounting policies with the Commissioner on an ongoing basis, including the use of formula to calculate the deductions of interest and expenses relating to a series of takeovers of other companies during the 1960s. During the 1980s the Commissioner commenced auditing Brierley's activities and eventually proposed an audit of the tax treatment of its share transactions and loan finance. Brierley sought to restrain the Commissioner arguing that an agreement had previously been reached with the Commissioner and based on UK authorities if the agreement were to be resiled from it would be a breach of power by the Commissioner.

Whilst Brierley failed to obtain the judicial relief it sought there was a decided split in the Court of Appeal about why the claim failed. Richardson J reviewed the scheme of the income tax legislation and found two reasons why the legitimate expectation claim could not succeed. The first was that '...the Commissioner shall...make assessments in respect of every taxpayer of the amount on which tax is payable and of the amount of that tax'<sup>131</sup> and as such:<sup>132</sup>

"The income tax legislation proceeds on the premise that in the interests of the community the Commissioner is to ensure that the income of every taxpayer is assessed and the tax paid. The Commissioner cannot contract out of those obligations. No doubt, and as contemplated under the *State Sector Act* 1988 and the *Public Finance Act* 1989, resource limitations will at times affect the nature and extent of the investigation undertaken to quantify the statutorily imposed liability for tax and the efforts made to pursue recovery. But the Commissioner does not have a general dispensing power. He (or she) cannot opt out of the obligation to make the statutory judgment of the liability of every taxpayer under the Act."

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<sup>130</sup> (1993) 15 NZTC 10,212 (CA).

<sup>131</sup> Section 19(1) Income Tax Act 1976.

<sup>132</sup> *Brierley* above n 130; 10,217.

The second relevant feature was the investigative function of the investigative function of the Commissioner and how it related to the assessment function. Richardson J stated:<sup>133</sup>

“Without an army of tax inspectors the Commissioner is unable to undertake detailed comprehensive investigations of all the affairs of every taxpayer each year. The statutory powers of re-assessment reflect the need for the Commissioner to have time to revisit the affairs of taxpayers over the allowed period. That audit function is crucial to the effective discharge of the Commissioner’s responsibilities.

The income tax regime is substantially dependent on conscientious compliance by the substantial body of taxpayers with their reporting duties. And voluntary compliance is reinforced by the prospect that at any time any aspect of a taxpayer’s affairs, which are the subject of a particular return, may be investigated or re-investigated and reviewed whatever has gone before unless and except insofar as that liability has already been determined through the objection processes.”

He then went on to discuss the limits placed on the Commissioner’s ability to reassess:<sup>134</sup>

“...the Act provides for assessment within a 4-year limitation period irrespective of whether and how the assessments have already been made, there can be no estoppel or waiver since it is envisaged that any statutory power of the Commissioner may be re-exercised from time to time up to the 4-year limit so as to ensure the correctness of the assessment.”

It was acknowledged that judicial review was available as a remedy when a public body had exceeded its powers or breached natural justice; but this is seen to be subject to the legislation governing the body. However, as there was a different legislative scheme from that in the United Kingdom it would be incorrect to limit the Commissioner’s powers by referring to the United Kingdom authorities.

Casey J was not prepared to accept that the legislative scheme was so different that the United Kingdom authorities could not apply. He was of the view that there was similarity in the way revenue authorities managed their duties saying:<sup>135</sup>

“...I see no essential distinction between his obligations and those of the United Kingdom Commissioners who are charged with the "care management and collection" of tax. Administering revenue Acts must

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<sup>133</sup> *Brierley* above n 130; 10,216.

<sup>134</sup> *Brierley* above n 130; 10,218.

<sup>135</sup> *Brierley* above n 130; 10,225.

require similar duties and administrative discretions in each country in the assessment and collection of tax, calling for the exercise of similar standards of fairness.”

Based on that finding:<sup>136</sup>

“...I am disposed to accept that in an appropriate case a decision by the Commissioner to act inconsistently with a taxpayer’s legitimate expectation in the process leading up to an assessment could constitute unfairness amounting to an abuse of power, so as to justify intervention by way of judicial review. However, in the light of his statutory obligations to assess and collect taxes, which must be known to every taxpayer, his action in receiving and acting on successive annual returns without comment about a standard practice could never be regarded by itself as giving rise to a legitimate expectation that he will continue to do so. Something more will be required.”

Casey J went on to find that even if the Commissioner had been able to be estopped from opening prior assessments he would be able to adopt a new basis of assessment in future years. Because of this the Commissioner was able to investigate prior years to obtain information for reaching an assessment bases in future years.

McKay J, the third member of the court, decided the case on its facts and preferred ‘to leave these questions open until a case arises where they will be determinative.’<sup>137</sup>

#### *c) THE DEBATE CONTINUES...*

A further two cases came before the High Court. In *National Bank of New Zealand Ltd v CIR*<sup>138</sup> the taxpayer claimed the Commissioner had approved a method of accounting for GST inputs and based on that refunded money to the taxpayer. Subsequently a revised GST assessment was issued reversing the initial assessment.

Again the court found on the facts that the taxpayer failed. In reaching its decision the Court reviewed the judgements associated with *Brierley* and found:<sup>139</sup>

“Having considered the submissions of counsel and having carefully read the judgment of *Richardson J* I conclude that Mr Latimour is correct in his submission that if the law is as stated, by *Richardson J* then even if

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<sup>136</sup> *Brierley* above n 130; 10,225.

<sup>137</sup> *Brierley* above n 130; 10,234

<sup>138</sup> (1996) 17 NZTC 12,464.

<sup>139</sup> *ibid* 12,467.

the plaintiff proves all the facts set out in its statement of claim (or any variation thereof), that it could not possibly succeed in law.”

The next case before the High Court, *Birkdale Service Station Ltd & Ors v CIR*,<sup>140</sup> involved petrol station owners who, after tying themselves to one of the major oil companies, received payment. The issue before the court was whether the payments were income or capital in nature. The taxpayers argued the Commissioner could not reassess as a PIB<sup>141</sup> outlined the treatment of such payments and they had a legitimate expectation the practice would continue. In addressing the question of legitimate expectation Laurenson J reviewed the judgments from the *Brierley* case and seemed to approve Casey J’s comment that “in other words the Commissioner is entitled to look under every stone to make sure that the information on which he relied in accepting the practice stills supports it...”<sup>142</sup> He then canvassed the steps the Commissioner had taken to determine if the practice was still correct and found:<sup>143</sup>

“So far as the present cases were concerned further investigation by the Commissioner had revealed that an entirely new factor had been introduced. This was the liquidated damages element which I consider completely changed the nature of the payments for tax assessment purposes from capital to income.”

He also noted that as the PIB had made it clear that each case would be examined on its merits no legitimate expectation could exist.

#### **d) THE FINAL WORD...BEFORE CARE AND MANAGEMENT**

The last case to be heard before the Court of Appeal prior to the enactment of the care and management provisions was *New Zealand Wool Board v CIR*.<sup>144</sup> The transaction in question took place in 1988 and involved the investment of Wool Board funds in redeemable preference shares; the income from which was treated as exempt income. The Wool Boards tax affairs had been audited and when this was finalised in 1994 the treatment of the dividends had not been challenged. An amended assessment was subsequently issued including the dividends as assessable income. The Commissioner alleged that redeemable preference shares were part of a wider tax avoidance arrangement. The Wool Board commenced judicial review proceedings and along with

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<sup>140</sup> (1999) 19 NZTC 15,493.

<sup>141</sup> Inland Revenue *Public Information Bulletin* 178 (February 1989); 11.

<sup>142</sup> *Brierley Investments Ltd v CIR*. (1993) 15 NZTC 10,212; 10,225.

<sup>143</sup> *Birkdale* above n 140; 15,514.

<sup>144</sup> (1999) 19 NZTC 15,476.

arguing the assessment was tentative argued that it had a reasonable and legitimate expectation of dialogue with Inland Revenue prior to the issuing of amended assessments as this was the usual practice.

The Court of Appeal found for the Commissioner. Richardson J delivered the judgement and on the matter of legitimate expectation found “...the letter of 30 March 1994 could not under the statute constitute and did not constitute estoppel.”<sup>145</sup> He then went on to say:<sup>146</sup>

“...any scope for invoking legitimate expectation is necessarily limited by the scheme and purpose of the income tax legislation. Legitimate expectation cannot frustrate an honest appraisal by the Commissioner of the income tax liability of the taxpayer by means of an assessment of that liability. Faced with the time bar, if the Commissioner concludes that there is a proper basis for making an assessment the Commissioner is required to make an assessment. In that regard there could be no justification for restraining the Commissioner from making an assessment in the discharge of the Commissioner’s statutory duty before the time bar would otherwise apply or for quashing an assessment as so made.”

## **2. THE CARE AND MANAGEMENT PROVISIONS**

### **a) BACKGROUND**

In submitting its report to the Ministers’ of Revenue and Finance the Organisational Review Committee stated that New Zealand’s tax administration should be based on three strategic directions. These were:<sup>147</sup>

- ‘customer’ services that focus on voluntary compliance in order to maximise revenue;
- technical and communication skills that provide the best advice on all tax matters; and
- efficient automated processes that handle the bulk of returns and information.

The aim of the review was to:<sup>148</sup>

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<sup>145</sup> *ibid* 15,490.

<sup>146</sup> *ibid* 15,492.

<sup>147</sup> Organisational Review Committee *Organisational Review of the Inland Revenue Department* (Wellington 1994)

<sup>148</sup> *ibid* 1.

“investigate and recommend the optimal organisation arrangements for the tax assessment and collection system, and other activities that are currently part of the tax system, the provision of taxation policy advice, legislative management and Ministerial servicing.”

Two of the major recommendations made by the committee were that a new objective was required for the tax administration and that the role of the Commissioner and Chief Executive of Inland Revenue needed legislative clarification. In setting an objective for the tax administration the Committee considered that it must be clear and unambiguous so that the Government, who purchases its services, and the tax administration, can measure the objective.

At the time the report was completed the judicial interpretation of the Revenue Acts was that the Commissioner was required to assess then collect all taxes that are due without consideration of the costs and resources involved. This was considered unrealistic as the Commissioner, along with every other public sector chief executive, was and still is subject to resource constraints. It was considered that the objective of the tax administration function of Inland Revenue should be changed to recognise these constraints.

The Committee recommended that the following elements be incorporated into the objective, which would then be included into a revised section 4 of the Inland Revenue Department Act;<sup>149</sup>

- Operate within the law;
- Collect the highest revenue that is practicable over time (this recognises that the tax administration’s objective should not be to collect either ‘all’ or only ‘some’ revenue);
- Collect revenue at the least administrative cost;
- Operate within the resources appropriated by Parliament; and
- Have regard for the compliance costs incurred by taxpayers.

Next the role of the Commissioner and Chief Executive of Inland Revenue was considered. The Commissioner and Chief Executive are one person and the Committee identified several features and responsibilities of tax collecting which have implications

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<sup>149</sup> *ibid* 49.

for the person holding the role.<sup>150</sup> These responsibilities could at times be seen to be in conflict and the committee considered that it was imperative that the integrity of the tax system be maintained. To assist in this areas were identified were the Commissioner of Inland Revenue should be able to exercise independent judgement. These are:<sup>151</sup>

- The Commissioner must exercise independent judgment on the tax affairs of individual taxpayers and must not be subject to Ministerial direction in relation to those decisions;
- The Commissioner is not subject to any directions relating to any interpretation of tax law; and
- Any directions given on any other matter are given for the purpose of administration of the Inland Revenue Acts and as reflected in the proposed section 4 of the Inland Revenue Department Act and are consistent with the State Sector Act, Public Finance Act and other relevant legislation (the human rights legislation for example).

It was considered necessary that there should be ‘explicit statutory recognition of the management of limited resources in the efficient and effective collection of taxes.’<sup>152</sup> The Committee went on to outline a proposed draft for the replacement of section 4 of the Inland Revenue Act<sup>153</sup> and in the appendices commented on the care and management provisions contained within the United Kingdom tax legislation. It was stated that as the courts had determined the scope of the provisions ‘the implication has also been drawn that the Revenue is legally bound by any views in may have expressed to taxpayers about the application of the tax law, on a care and management basis, to their affairs.’<sup>154</sup> The disadvantage of this was seen to be the possibility that uncertainty may be introduced ‘with respect to the future application of tax law to taxpayers and of effectively binding the Commissioner on issues where this is not appropriate and where a formal ruling has not been considered or given.’<sup>155</sup>

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<sup>150</sup> *ibid* 55-56.

<sup>151</sup> *ibid* 59.

<sup>152</sup> *ibid* 62.

<sup>153</sup> *ibid* 62.

<sup>154</sup> Organisational Review Committee *Organisational Review of the Inland Revenue Department* (Wellington 1994); appendices 25.

<sup>155</sup> *ibid* 25.

In order to avoid this, the Committee made the following recommendations:<sup>156</sup>

1. That the proposed binding rulings regime should specify that a general or specific ruling is the only way the Commissioner can be bound by taxpayers.
2. Specific means would be required to ensure that perceptions of the integrity of the tax system are not diminished. Internal guidelines will need to be developed for the 'exercise of the caser and management in the administration of Inland Revenue Acts.'<sup>157</sup> These guidelines should be consistent with the objective of maximising net revenue over time.
3. To assure taxpayers, Ministers, and Parliament that the integrity of the tax system is being upheld these guidelines, and their application, should be subject to a periodic audit by the Officer of the Controller and Auditor General. These results would then be published in a report to Parliament.

With the reorganisation of the Revenue Acts the Inland Revenue Department Act was replaced with the Tax Administration Act 1994. Effective 10 April 1995 revised sections 6 and 6A of the TAA were enacted. They state:

## **6 RESPONSIBILITY ON MINISTERS AND OFFICIALS TO PROTECT INTEGRITY OF TAX SYSTEM**

### **6(1) [Ministers and officials to protect integrity of tax system]**

Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.

### **6(2) [Definition of ``the integrity of the tax system"]**

Without limiting its meaning, ``the integrity of the tax system" includes—

- (a) Taxpayer perceptions of that integrity; and

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<sup>156</sup> *ibid* pgs 25-27.

<sup>157</sup> *ibid* 27.



- (b) The rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
- (c) The rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
- (d) The responsibilities of taxpayers to comply with the law; and
- (e) The responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and
- (f) The responsibilities of those administering the law to do so fairly, impartially, and according to law.

## **6A COMMISSIONER OF INLAND REVENUE**

### **6A (1) [Commissioner of Inland Revenue]**

The person appointed as chief executive of the Department under the State Sector Act 1988 is designated the Commissioner of Inland Revenue.

### **6A (2) [Care and management of taxes]**

The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

### **6A (3) [Collection of taxes]**

In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—

- (a) The resources available to the Commissioner; and
- (b) The importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and
- (c) The compliance costs incurred by taxpayers.

### *b) THE CURRENT VIEW?*

In a paper<sup>158</sup> delivered to the Institute of Chartered Accountants 2000 Tax Conference Inland Revenue Officials delivered the, then current view of the care and management provisions. The view had as its basis several propositions:<sup>159</sup>

1. Any exercise of discretion by Inland Revenue officers has to be merged with care and with the view of collecting highest net revenue over time and protecting the integrity of the tax system;
2. This is true regardless of whether that discretion is a statutory or general management discretion;
3. All staff exercise their delegated authority with the due regard for care and management; and
4. Care and management considerations can be exercised on a case-by-case basis, but the integrity of the tax system will usually require that such case-by-case application of an overriding discretion will be guided by specific operational policies.

The paper then went on to outline where Inland Revenue considers care and management decisions could and could not apply. It was seen that care and management could be exercised over:

1. A class of case. The example given was that as Inland Revenue operated within limited resources decisions which determine how many taxpayers each year will be selected for audit demonstrates application of care and management.
2. A case by case basis under specific policies. The example given was settlement given of tax disputes pre and post litigation. It was acknowledged that guidelines would need to be developed to give guidance to both officers if Inland Revenue and taxpayers. These would assist in maintaining consistency and preventing abuse.

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<sup>158</sup> McLay, David; Lennard, Mike & Cotton, Margaret "Care and Management" (ICANZ 2000 Tax Conference, New Zealand 28-30 September 2000).

<sup>159</sup> *ibid* pg 8.

3. Care and management of one off cases. It was seen that such cases “must be exceptional...there must be something about them which takes them out of the ordinary run of situations which are taken care of by the Revenue Acts specific provisions or Inland Revenue’s existing operational practice...”<sup>160</sup> As such the power to make such departures is confined to a senior level.

The care and management provisions could not apply in the following situations:

1. The provisions are not a dispensing power. While there is now the ability not to investigate or assess the provisions do not allow the suspension of the provisions of the Revenue Acts in their entirety. It was seen that the Court of Appeal decision in *Attorney General v Steelfort Engineering Ltd*<sup>161</sup> aligned the New Zealand position with that in the *Fleet Street Casuals Case*.
2. The provisions do not bind the Commissioner to a certain assessment. It was acknowledged that if the Commissioner had issued a binding ruling Inland Revenue would assess inline with that ruling. Apart from that case law had demonstrated that the Commissioner cannot be bound to an assessment.

The next statement issued by the Commissioner on the application of care and management provisions was the Draft Interpretation Statement INS00072 [d] Care and Management of Taxes (the ED). The statement was issued for external comment on 21 December 2005 and has yet to be finalised. The principles discussed above were included in the ED, admittedly in more detail, which also discussed the relationship between sections 6 and 6A of the TAA, New Zealand and United Kingdom court decisions affecting the care and management provisions and settlements with taxpayers.

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<sup>160</sup> *ibid* 11.

<sup>161</sup> (1999) 1 NZCC 61,030 pgs 61,036-61,037.

The ED stated that in considering the relationship between sections 6 and 6A of the TAA one of two positions could be adopted:<sup>162</sup>

- Section 6 lays down an overriding principle relating to protecting the integrity of the tax system, and that all steps taken under subsection 6A(2) about the care and management of the taxes, and in particular decisions made in relation to the Commissioner's duty in subsection 6A(3) must also not be in breach of section 6, or alternatively
- Subsection 6A (3) contains an overriding duty which applies notwithstanding the obligation to maintain the integrity of the system under section 6, and indeed notwithstanding anything else in the Revenue Acts.

It concluded that section 6 was the overriding section when considering the exercise of care and management provisions. Supporting judicial authority for this was found in the Court of Appeal decision in *Attorney General v Steelfort Engineering Ltd*<sup>163</sup>:

“In dicta in *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655 the members of this Court varied in the way in which they saw these principles applying to the actions of the Commissioner of Inland Revenue under the income tax regime as it stood at the time. Legislative amendments have since required the Commissioner to exercise powers of assessment and re-assessment in a manner consistent with protecting the integrity of the tax system in an environment where he is operating within limited resources in the care and management of all the functions committed to his charge. So, in exercise of a managerial discretion, the Commissioner now has a broad power to enter into compromises where that course is consistent with his duty under ss6 and 6A of the Tax Administration Act 1994. The position has been aligned with that in the United Kingdom which was discussed in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 and in *Preston*.”

It was seen that while section 6A (3) provided recognition of the tension between managing resources and collecting taxes it was the integrity of the tax system that took precedence. This may mean that there would be actions taken at times that, while protecting the integrity of the tax system, may not mean that the highest net revenue over time is collected. This view received support in *Raynel v CIR*.<sup>164</sup>

“Ordinarily, where a higher net recovery will be achieved through a proposed compromise than by winding up or bankrupting a taxpayer and

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<sup>162</sup> Inland Revenue *INS00072[d] Care and Management of Taxes – Draft Interpretation Statement* Public Rulings Unit (Wellington 2005); 5.

<sup>163</sup> (1999) 1 NZCC 61,030; 61,036.

<sup>164</sup> (2004) 21 NZTC 18,583; 18,592.

there are no countervailing considerations, the Commissioner's duty will be to accept the compromise. But there may be circumstances where, in order to preserve the integrity of the tax system and promote compliance by other taxpayers, the Commissioner will be justified in refusing an offer and, instead, taking enforcement proceedings."

In reaching the above conclusion the ED rejected comments made by Young J in *Fairbrother v CIR*<sup>165</sup> where he seemed to support the view that it's the Commissioner's primary duty to collect the highest net revenue over time. He stated:<sup>166</sup>

"I have no doubt, however, that this issue has now been put beyond doubt by the introduction in 1995 of s 6A of the Tax Administration Act. The phrase 'care and management' was borrowed from the United Kingdom legislation. As well, the specific terms of the duty imposed on the Commissioner to 'collect over time the highest net revenue that is practicable within the law' created by s 6A (3) is very similar to the language employed by Lord Diplock in the Small Businesses case. Section 6A (3) makes it clear that this duty overrides anything else that might be explicit or implicit in the Inland Revenue Acts. In those circumstances, it seems to me that s6A must be regarded as statutory ratification of the approach adopted by the House of Lords in the Small Businesses case."

A similar reference was made by Goddard J in *Sweetline Distributors Ltd v CIR*<sup>167</sup> where he described the duty under section 6A (3) as 'paramount.' The ED stated the Commissioner does not see this perceived primacy as the intended result. It is argued that the legislative objective, contained in section 6 of the TAA, does not create an overriding duty to collect the highest net revenue over time. Section 6A is seen to be limited by the words 'notwithstanding anything in the Inland Revenue Acts' and 'in collecting the taxes committed to the Commissioners charge' which gives statutory recognition to the reality of managing limited resources and the collection of taxes. As section 6 applies to every Minister and officer of government agencies that has Revenue Act responsibilities it is seen as being unqualified in scope.

Both the New Zealand Institute of Chartered Accountants (NZICA) and the New Zealand Law Society (NZLS) have argued that this interpretation is incorrect. The submission by the NZLS states:<sup>168</sup>

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<sup>165</sup> (2000) 19 NZTC 15,548.

<sup>166</sup> *ibid* 15,555.

<sup>167</sup> (2004) 21 NZTC 18,608.

<sup>168</sup> New Zealand Law Society *Submission to Manager, Field Liaison and Communication Adjudication and Rulings, Inland Revenue Department on Ins 00072: Care And Management Of Taxes* 26 May 2006; 4.

“...the Committee submits that Inland Revenue has misinterpreted the effect of section 6A (3). Decisions made in relation to the duty of the Commissioner would narrowly be consistent with the obligations under section 6 to use best endeavours to protect the integrity of the tax system, but there may be instances where section 6A(3) overrides that obligation.”

The NZICA submission also considered that the interpretation of the sections was too narrow and in his paper “Care and Management” presented at the NZICA 2006 tax conference Geoff Harley stated:<sup>169</sup>

“This Exposure Draft approach is sterile and strained. Neither section is more important or precedes the other. They relate to each other. They work contextually together. Having regard to their genesis, it is not sensible to treat them as being separate, with one being overarching.”

Both submissions criticised the ED for taking the view that the ‘primary duty of the Commissioner is to assess and collect taxes or those who are liable.’<sup>170</sup> It was pointed out that section 92 of the TAA now places the onus on the taxpayer to assess. The Commissioner’s powers are limited to reassessment

Other criticisms of the ED included its length and statements made around the ability to settle tax disputes and whether or not they are binding on the Commissioner. As mentioned above the ED is still that, a draft. While reference is made in various standard practice statements to the care and management provisions the Commissioner has yet to state his, non-binding, view of the law. In the meantime the Care and Management provisions are now being used as a basis for supporting legitimate expectation claims before the courts.

### **3. LEGITIMATE EXPECTATION AFTER THE CARE AND MANAGEMENT PROVISIONS**

#### **a) THE EFFECT OF SECTIONS 6 AND 6A OF THE TAA**

The first case arguing that a taxpayer had a legitimate expectation was *CIR v Ti Toki Cabarets (1989) Ltd.*<sup>171</sup> The taxpayers, a separated couple, had entered into what they considered to be a Matrimonial Property Agreement, and relied on the Commissioner’s statement regarding such agreements contained in TIB Vol.1, No 1, December 1989.

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<sup>169</sup> Harley, Geoff “Care and Management” (NZICA 2006 Tax Conference, Christchurch New Zealand, 6 & 7 October 2006) pg 11.

<sup>170</sup> *INS00072[d] Care and Management of Taxes* above n 140; 1.

<sup>171</sup> (2000) 19 NZTC 15,874.

The Commissioner was of the view that this was not a matrimonial property agreement and issued GST assessments in relation to some of the properties transferred. The disputes procedures were initiated and the case made its way to the Adjudication unit where the decision was made in favour of the Commissioner. Challenge proceedings commenced in December 1998 and Judicial Review proceedings in April 1999. The High Court allowed the proceedings to be consolidated stating there was ‘a tenable case on the pleadings for judicial review based on a breach of legitimate expectation.’<sup>172</sup> Before the Court of Appeal the Commissioner argued:<sup>173</sup>

“...the new provisions, ss 6 and 6A of the *Tax Administration Act* as inserted by the 1996 amendment, do not warrant departure from the previous New Zealand position in favour of the English position as set out in *Preston*, whereby notions of legitimate expectation and estoppel are said to be relevant to the assessment function. These care and management provisions were introduced with a clear appreciation of the statutory differences between New Zealand and England. They do not affect the approach traditionally taken by the courts in both New Zealand and Australia, that in the different statutory regimes, notions of legitimate expectation and estoppel cannot frustrate the assessment function. In particular, the New Zealand legislature introduced at the same time as ss 6 and 6A the binding rulings regime, contained in Part VA of the *Tax Administration Act*, a regime which is absent from the English legislation. A strong inference can be derived from the enactment of this regime that Parliament intended that binding rulings would be the only way in which the Commissioner may be lawfully bound by previous conduct.”

The Court of Appeal found that the question of the Commissioner’s failure to apply the TIB was not a question of procedure or process as it went to the substance of the assessment. As such the matter had to be contested in the challenge proceedings. In delivering the judgment Gault J found:<sup>174</sup>

“This seems to draw a distinction between the formulation of the assessment and the assessment itself. That is not the distinction contemplated in the authorities. Where the judgments distinguish between the correctness of the assessment and the legitimacy of the process employed, they were merely reiterating that judicial review cannot frustrate the honest discharge by the Commissioner of his statutory duty to assess, yet can be invoked to address procedural error, defects resulting in ultra vires, unlawfulness and such matters as bad faith, abuse of power and errors of law going to the legitimacy of the process rather than to the correctness of the decision. Certainly they do

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<sup>172</sup> *Ti Toki Cabarets (1989) Ltd v CIR* (2000) 19 NZTC 15,576 pg 15,583.

<sup>173</sup> *Ti Toki Cabarets (1989) Ltd* above n171; 15,882.

<sup>174</sup> *Ti Toki Cabarets (1989) Ltd* above n 171; 15,883.

not contemplate that the correctness of every assessment can be challenged in review proceedings on the ground that it was arrived at on an erroneous view of the law - that would be entirely contrary to s 109 and its predecessors.”

The Court made it clear that it was the circumstances of this case that made the claim for legitimate expectation untenable. This did not mean that such claims may fail in the future.

In the next case, *V9*,<sup>175</sup> the taxpayers had entered into a number of transactions and claimed a GST input based on the basis that it was a second hand input claim. A subsequent audit of the return approved this and the refund was released. An investigation occurred and the Commissioner proposed to amend the return. The case eventually went to adjudication which concluded that the input tax credit was not available and an assessment issued. Challenge proceedings commenced. Even though the taxpayer had not raised the matter of legitimate expectation and estoppel in its SOP Willy DCJ addressed the issue by stating:<sup>176</sup>

“The position therefore appears to be that notwithstanding the passage of the care and management provisions of the 1994 *Tax Administration Act* referred to above, the Commissioner cannot be precluded from carrying out his statutory function of correctly assessing the GST liability of a given taxpayer.

If the door is still open to a claim to legitimate expectation or estoppel, it is difficult to see how on the authorities set out above in cases where the Commissioner has done no more than exercise his statutory right and duty to assess or reassess a taxpayer for tax.”

He then found that as the Commissioner had correctly exercised his statutory duties the arguments as to legitimate expectation and estoppel failed.

Neither case clearly demonstrated what effect, if any, the care and management provisions have had on legitimate expectation arguments. In *Russell & Ors v Taxation Review Authority*<sup>177</sup> the taxpayer argued before the Court of Appeal that the Commissioner was not complying with his obligations under section 6 of the TAA and section 27 of the New Zealand Bill of Rights to act honestly and fairly in conducting proceedings in the TRA. The taxpayers argued that as the Commissioner had not acted fairly in refusing to comply with the discovery obligations and calling “correct”

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<sup>175</sup> (2001) 20 NZTC 10,101.

<sup>176</sup> *ibid* 10,119.

<sup>177</sup> (2003) 21 NZTC 18,225 (CA).



witnesses, decisions of the TRA should be reconvened. In the High Court O'Regan J said:<sup>178</sup>

“Without wishing to diminish the significance of s 6 in any way, I am unable to accept Mr Judd’s submission that it creates rights and obligations akin to those created by the *New Zealand Bill of Rights Act*. There is nothing in the statutory wording which gives any clue that the legislature had such an intention and indeed, the equivocal nature of the primary obligation suggests a contrary intention...”

In delivering the Court of Appeal judgment Gault J supported this view and went on to say:<sup>179</sup>

“With reference to s 6, we do not accept that the obligation upon the Commissioner to use his best endeavours to protect the integrity of the tax system renders any conduct (not involving a decision) which might be said to be inconsistent with that obligation amenable to judicial review. It was submitted that this statutory provision should be treated as giving "an expedient and inexpensive means to challenge the assessment". We do not agree. The primacy of the objection procedure has been consistently emphasised by this Court and was endorsed by the Privy Council in the *Miller* decision.

In Case Y6<sup>180</sup> the taxpayers argued the Commissioner had breached sections 6 and 6A of the TAA by failing to exercise his discretion under section 24(6) of the Goods and Services Tax Act 1986. In reaching his decisions Barber DCJ considered the decision in V9 along with:<sup>181</sup>

“[76] In *Roma Properties Limited v C of IR* (2002) 20 NZTC 17,877 (CA) the Court of Appeal did not address the issue of an alleged breach of s 6. The Court found that the taxpayer had failed to demonstrate that there were any errors in the exercise of the High Court’s discretion (reported at (2002) 20 NZTC 17,873) where Morris J held that allegations in relation to s 6 had not been proved as there were no allegations of bad faith, abuse of power, or errors of law going to the legitimacy of the process (as opposed to the correctness of the decision on the substantive issue).

[77] In *Fairbrother v C of IR* (2000) 19 NZTC 15,548 (HC), Young J stated at page 15,555:

"[27] I note that s 6A is a direct sequel to the report of the *Organisational Review of the Inland Revenue Department in April 1994*. The Review Committee referred to the argument that

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<sup>178</sup> *Russell v Taxation Review Authority* (2002) 20 NZTC 17,832; 17,840.

<sup>179</sup> *Russell* above n 177; 18,263.

<sup>180</sup> (2007) 23 NZTC 13,056.

<sup>181</sup> *ibid* 13,065.

*the Commissioner was obliged to assess and collect all taxes that are due regardless of the resources and costs involved. In the opinion of the Review Committee this was 'not a realistic objective'. Reading s 6A in light of the terms of that report confirms my view that there is now no scope for an argument based on an absolute obligation to collect the right amount of tax."*

[78] In *Rogerson v C of IR* (2005) 22 NZTC 19,260 (HC), Potter J cited with approval from Randerson J's decision in *Raynel & Anor v C of IR* (2004) 21 NZTC 18,583 (HC). Her Honour stated at paragraph 24:

*"[24] Randerson J observed that at least since 1995 (when s 6 and 6A were introduced by amending legislation) the Tax Administration Act has required the Commissioner to maximise the recovery of outstanding tax. This obligation is expressed in varying forms in the legislation, but His Honour concluded that it had never been an absolute obligation and the amendments made in 2002 which introduced s 176 in its present form, did not alter the position in that respect.*

*[25] Randerson J noted that the duty imposed by s 6A (3) applies notwithstanding anything in the Inland Revenue Acts, and that therefore s 6A (3) prevails over other provisions in the Act, including s 176. Secondly, the obligation to collect the highest net revenue is not absolute. The Commissioner is only required to take steps to recover revenue which are practicable and lawful. Thirdly, the Commissioner is required to have regard to the resources available to him, the importance of promoting compliance (especially voluntary compliance) by all taxpayers, and the compliance costs incurred by taxpayers.*

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He found that:<sup>182</sup>

*"The Commissioner's duty to recover the highest amount of tax is not absolute. It is limited by other duties, such as maintaining the integrity of the tax system and ensuring taxpayers comply with their tax obligations."*

The only case to consider that section 6 may have been breached by the Commissioner is *Simunovich Fisheries Ltd v CIR*.<sup>183</sup> The Commissioner issued a NOPA proposing the alteration of an assessment in relation to the sale of a boat. However, if this was to succeed the basis of an earlier assessment required altering as

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<sup>182</sup> *ibid* 13,006.

<sup>183</sup> (2002) 20 NZTC 17,456.

well. The taxpayer argued that they had a legitimate expectation, based on an earlier investigation, that the return would not be assessed. The Court found:<sup>184</sup>

“The legitimate expectation argument, if available on the law, must fail on the facts. The Department was not told of the proposed sale of the vessel. The Department was unaware until Mr Simunovich mentioned it to Mr Knock in September 1998 that it had been sold. SFL was aware when it obtained the refund that the Department had not closed off inquiries into the sale, so the possibility of a subsequent re-assessment justified by any further information and consideration by the Commissioner remained open. Any comfort that a time bar under s 108A could provide was still nearly two years away when SFL sold the vessel. SFL must be taken to have accepted the risk, certainly at the time it sold. It could have had no legitimate expectation from the Commissioner’s conduct that the Commissioner would not subsequently decide to re-assess.”

Richardson P then went on to observe:<sup>185</sup>

“What we have said does not involve using judicial review as a collateral process to attack an appealable decision under the statutory challenge procedures provided for in the taxing statutes. The Commissioner has taken the step provided for under the statutory disputes procedures of issuing a NOPA. But this is an unusual case. Under the statute the question of liability for output tax is linked to the circumstances under which the vessel was acquired and to the GST tax characterisation at that time. It is that linkage that gives rise to the procedural difficulty the Commissioner faces and may be the reason why there has been no challenge to the matter proceeding by way of judicial review. Certainly in normal circumstances the issue of a NOPA could not be challenged on the ground that the notified proposed adjustment is wrong. The correct course in that situation is to follow the statutory procedures laid down in Part IVA of the *Tax Administration Act*. As the Privy Council said in *Miller v C of IR* [2001] 3 NZLR 316 at p 329:

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 circumstances may arise most typically where there is abuse of power: *Harley Developments Inc v Commissioner of Inland Revenue* at p 736. But they have also been held to arise where the error of law claimed is fatal to the exercise of statutory power and where it would be wasteful to require recourse to the objection procedure: *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* at p 671.

We recognise that there may be other exceptional cases where the particular exercise of the statutory power (which does not allow the

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<sup>184</sup> *ibid* 17,467.

<sup>185</sup> *ibid* 17,469.

institution of challenge proceedings until a disputable decision, i.e. an assessment, has been made) may fairly be characterised as an abuse of power.”

**b) BINDING RULINGS AND LEGITIMATE EXPECTATION**

The Commissioner is currently involved in litigation with the major banks and while the substantive issues have yet to be heard decisions have been made surrounding the disputes process (see page 34), the secrecy provisions of the TAA and the binding rulings regime.

In *Westpac Banking Corporation v CIR*<sup>186</sup> the issue of legitimate expectation and binding rulings was raised. Westpac, through its subsidiaries entered into a series of structured finance transactions; the Koch, First Data, GE and CSFB transactions. In May 1999 Westpac applied for and received a binding ruling from Inland Revenue in relation to the First Data transaction. The ruling stated that the tax avoidance provisions would not apply to the transaction. Binding rulings were not obtained for the other three transactions. Income tax returns for the 1999, 2000, 2001 and 2002 years accounted for all four transactions. In September 2004 the Commissioner issued amended assessments imposing tax liabilities in relation to the Koch, GE and CSFB transactions as he had formed the view that the transactions had been entered into for the purpose of avoiding tax. Westpac issued challenge proceedings and its statement of claim pleaded:

1. The transactions were not tax avoidance arrangements and as such not void. If the transactions were tax avoidance arrangements, the anti avoidance provisions did not operate in the way alleged by the Commissioner. As such the amended assessments should be cancelled, varied, or reduced.
2. The amended assessments were an abuse of the Commissioners powers and as such unlawful.

The Commissioner argued that section 109 of the TAA was absolute and, based on judicial precedent; the judicial review process could not attack the correctness of his assessment. He then went on to argue that the second cause of action was an attempt to apply the First Data ruling to the remaining transactions; this argument was legally untenable and should be struck out.

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<sup>186</sup> (2008) 23 NZTC 21,694.

In opposing the application to strike out the second cause of action Westpac argued that the amended assessment was a result of inconsistencies; i.e. the interpretation of law as decided by the rulings section in relation to the First Data transaction and the interpretation taken by Corporates in relation to the remaining three transactions. Based on obligations contained in section 6 of the TAA, general public law and the Commissioners Consistency and Escalation Process Memo the Commissioner was obliged to act fairly. Westpac saw itself as an innocent victim in an internal conflict. Alternatively Westpac argued that it had a legitimate expectation that the law would be applied consistently to all four transactions.

In his judgement Harrison J addressed issues around both substantive and procedural legitimate expectation. In ruling on the substantive issues it was found:<sup>187</sup>

“Mr Farmer has not identified any conduct by the Commissioner which might possibly justify its central plea of a legitimate expectation that he would consistently apply the existing approach to Koch, GE and CSFB. The Commissioner was not bound to adopt any particular approach. His only duty was to act in accordance with his statutory powers and obligations... [T]he Commissioner was entitled to change his mind about the taxation implications of this generic type of transaction. That is what he did here, and legitimate expectation cannot be invoked to frustrate the Commissioner’s honest appraisal of the bank’s income tax liability by means of an assessment within the statutory period: *New Zealand Wool Board* per Richardson P at [62], unless of course Westpac obtained a binding ruling for a particular transaction or transactions.

The binding ruling regime was established to provide a mechanism for a taxpayer to secure a privative commitment from the Commissioner on how the taxation law would apply to a particular transaction. In a case such as this, a ruling once obtained would operate as an estoppel against the Commissioner; all the traditional elements, which are absent in this case, would come into play — a representation, an intention that it be relied upon, inducement, actual reliance and detriment if the Commissioner acted otherwise. The bank’s failure to avail itself of this right in a situation where it might be expected to apply negates an argument that anything else done or said by the Commissioner might give rise to a legitimate expectation: *Matrix Securities* per Lord Browne-Wilkinson at 791–792.

There is no sense in which the Commissioner acted contrary to a representation and thus with conspicuous unfairness: *Zeqiri*. A representation or holding out is the trigger point for legitimate expectation. An adoption of the particular legal approach, without a positive affirmation of the type available by the private binding regime,

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<sup>187</sup> *ibid* 21,716.

can never operate as a promise or assurance of the type necessary to provide a foundation for legitimate expectation. Without it, all other considerations, be they based on unfairness or otherwise, fall away.

He then went on to find:<sup>188</sup>

“Westpac’s only legitimate expectation of a substantive benefit was that it would be taxed according to statute: *MFK Agencies* per Bingham LJ at 110. The bank knew the Commissioner had a duty to apply what he considered was the correct view of the law. And it knew he might reassess that view, even change it, at any stage during the four year period before the time bar expired. It must be taken to have accepted the risk of an adverse reassessment given its failure to obtain a binding ruling: *Simunovich* at [47].

...I do not think that Westpac’s case approaches the line where the Commissioner’s decision denied the bank’s legitimate expectation that it would not be assessed to tax on Koch, GE and CSFB on the challenged approach, or that the assessment might be characterised as “so outrageously unfair that it should not be allowed to stand”: *Ex Parte Unilever* per Simon Brown LJ at 236.”

Harrison J then went on to address the issues around procedural legitimate expectation. He stated:<sup>189</sup>

“...the memorandum has no legal force whatsoever. It is not a statutory provision and nor is it statutorily derived such as a regulation, rule or bylaw. It does not create rights or expectations enforceable by a taxpayer or impose any obligations on the Commissioner. It is no more than an internal direction by the Commissioner to IRD employees to follow certain steps for the purpose of avoiding inconsistent application of the law “as between taxpayers”, and the risks of “negative perceptions of the fairness and impartiality of the tax system”.

A similar, and dare I say more promising, argument was advanced but peremptorily dismissed by the Privy Council in *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 31...

...

Lord Hoffmann rejected the argument in these terms at [26]:

"A more fundamental point is that Their Lordships do not think that the CPS was intended to lay down conditions at all. They do not consider that the parts of the document relied upon by the appellants do more than to reassure the public that the Commissioner and his officers will think very carefully about whether s 99 applies to any particular case. But his statutory duty

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<sup>188</sup> *ibid* 21,718.

<sup>189</sup> *ibid* 21,719.

is to reassess the taxpayer in any case in which s 99 applies and this duty cannot be made subject to internal conditions. Nor do Their Lordships think that he intended to restrict his duty in such a way."

The principle underlying Lord Hoffmann's statement would be no different if the argument was advanced under the banner of legitimate expectation. The Court of Appeal made this very point when a different taxpayer but from the same tax scheme stable attempted to re-run the argument in a subsequent case: *Dandelion Investments Ltd v C of IR* (2003) 21 NZTC 18,010; [2003] 1 NZLR 600. Describing the policy statement as "no more than an administrative reassurance to the public" (at [74]), McGrath J added: at [75]:

"In the end this ground fails for the reasons articulated by the Privy Council, reflecting as they do earlier observations of this Court as to the limited scope for application of the principle of legitimate expectation to confine the Commissioner in the exercise of statutory duties in relation to assessment functions... The Commissioner cannot act in a manner incompatible with statutory powers which must be exercised to a specified end..."

Westpac's argument cannot succeed for other reasons. As noted earlier, the foundation stone of an argument for legitimate expectation in public law is the existence of a promise, representation or assurance by an authority, loosely termed a representation, to act in a certain way. Westpac's case does not get near this first base. As I have said, the Commissioner's memorandum is an internal administrative document which was never intended to be published, and was not published, to taxpayers as a whole.

While Harrison J found that the legitimate expectation argument did not succeed based on the facts he too was of the view that a claim may at some point succeed. In addressing the argument that the Commissioner had acted in an inconsistent manner he referred to the principles referred to in *Miller v CIR*<sup>190</sup> and stated 'indeed the Commissioner is under a statutory duty to change his mind if he concludes his earlier view was wrong.'<sup>191</sup> He found:<sup>192</sup>

"...the purpose of Westpac's claim for judicial review is to place it in the same position it would have enjoyed with favourable private rulings on Koch, GE and CSFB. However viewed, Westpac's claim of inconsistency leading to unfairness is in essence a challenge to the correctness of the Commissioner's amended assessment, rather than to the process of making that decision and its validity. The bank's case, whether as pleaded or differently argued, does not approach that rare or

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<sup>190</sup> (1993) 15 NZTC 10,187; 10,203-10,204 Blanchard J.

<sup>191</sup> *Westpac* above n 186; 21,710.

<sup>192</sup> *Westpac* above n 186; 21,713.

exceptional circumstance where the Commissioner's decision to assess it to tax on the three transactions might possibly be an abuse of power and thus justiciable.

In reaching this decision he observed:<sup>193</sup>

“Westpac had a statutory right to secure the same taxation protection for Koch, GE and CSFB as it enjoyed for First Data. Its reasons for failing to take that step are irrelevant. (It is inexplicable, though, that the bank, which must have acted on professional advice, did not apply for binding rulings for all transactions, given the amounts potentially at issue and the well known vulnerability of redeemable preference share transactions to scrutiny by the Revenue. The inconvenience factor, put forward by Mr Farmer, is totally inconsequential within this framework and Westpac's omission is, I think, fatal to an argument of reasonable reliance.

The decision is being appealed and as yet no date has been set. A similar argument was, in the meantime advanced in *ANZ National Bank Ltd & Ors v CIR*.<sup>194</sup> ANZ argued that the binding ruling that it had obtained on one of its transactions gave rise to an expectation. The Commissioner's subsequent actions were a breach of this representation and they were seeking to estop the Commissioner from issuing assessments. In finding for the Commissioner Wild J relied heavily on the findings in *Westpac*. He found that it was clear that the ruling had applied only to the transaction it was given for. Indeed this was clear by various comments made through out the ruling it applied to that transaction only.<sup>195</sup> As such it was 'untenable to suggest that the Karapiro Ruling was/is a representation by the CIR that he would afford the same tax treatment to similar transactions by the ANZ.'<sup>196</sup> He then went on to observe:<sup>197</sup>

“...that the *HTV* and *Preston* principle could only apply in this context if the CIR attempted to go back on a private binding ruling he had given, after full disclosure by the taxpayer, e.g. if, having given the Karapiro Ruling, the CIR had then changed his mind and assessed the ANZ on the basis that the Karapiro transaction was tax avoidance (see [81] in *Westpac*). Of course, in such a situation the ANZ would not need to resort to *HTV* and *Preston*. It could invoke s91EA which requires the CIR to apply the ruling.

Short of that, the equitable doctrine of estoppel by representation has no place in taxation law. Equity and tax are hardly bedfellows. Tax is a matter of interpreting the legislation and applying it to the facts. As

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<sup>193</sup> *Westpac* above n 186; 21,713.

<sup>194</sup> [15 April 2008] HC, Wellington CIV 2005-485-1037.

<sup>195</sup> *ibid* [19].

<sup>196</sup> *ibid* [18].

<sup>197</sup> *ibid* [27]-[28].



Rowlett J famously said in *Cape Brandy Syndicate v IRC* [1921] 1 KB 64 at 71:

... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

#### **D. IS LEGITIMATE EXPECTATION AVAILABLE IN NEW ZEALAND?**

The courts have held that it would be possible for a taxpayer to argue that they had a legitimate expectation that the Commissioner would act in a particular manner. To date the argument that could succeed has yet to be heard. It has been consistently held that in considering the Commissioner’s actions the scheme and purpose of the revenue acts, particularly the Income Tax legislation must be taken into account. The purpose of the Income Tax Act is to:<sup>198</sup>

- (a) define, and impose tax on, net income;
- (b) to impose obligations concerning tax:
- (c) to set out rules for calculating tax and for satisfying the obligations imposed.

The principles that can be drawn from the above cases are;

1. The Commissioner has statutory obligations and cannot be prevented from carrying these obligations into effect;
2. Even with the enactment of the self assessment rules the Commissioner is responsible for ensuring the correctness of the assessments. So long as this process is completed within the four year statute bar period this is a valid exercise of the Commissioners powers;
3. While Judicial Review may be available in challenging the process that the Commissioner used to arrive at an assessment it cannot challenge the correctness of the assessment.
4. It is now recognised that the Commissioner is no longer required to collect all taxes owing;

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<sup>198</sup> Section AA 1 Income Tax Act 2007.

5. The Commissioner may take steps to protect the integrity of the tax system. These steps may conflict with the duty to collect the highest net revenue over time;
6. The Commissioner is bound by any binding rulings; and
7. Non-binding statements are exactly that. They have no legal effect on the Commissioners actions.

If a taxpayer was to successfully argue that the Commissioner should be estopped as they have a legitimate expectation as to his actions the Courts are of the view that there must be exceptional circumstances that clearly demonstrate an abuse of power.

## **VI. CONCLUSION**

The *Lemington* case is regarded as the start of the debate as to whether the concept of legitimate expectation can apply to New Zealand tax law. It would seem that Richardson J's comments are as applicable today.<sup>199</sup>

“..sec. 19...provides the means for the Commissioner to ensure that the assessment as amended reflects what in his judgment is the statutorily imposed liability for tax in the particular case. It is his judgment that counts under the statutory scheme in all these situations and it is a judgment which must be exercised from time to time unfettered by any views that he may have previously expressed either generally or in relation to a particular taxpayer or matter and unconstrained by any assessments he may have previously made.”

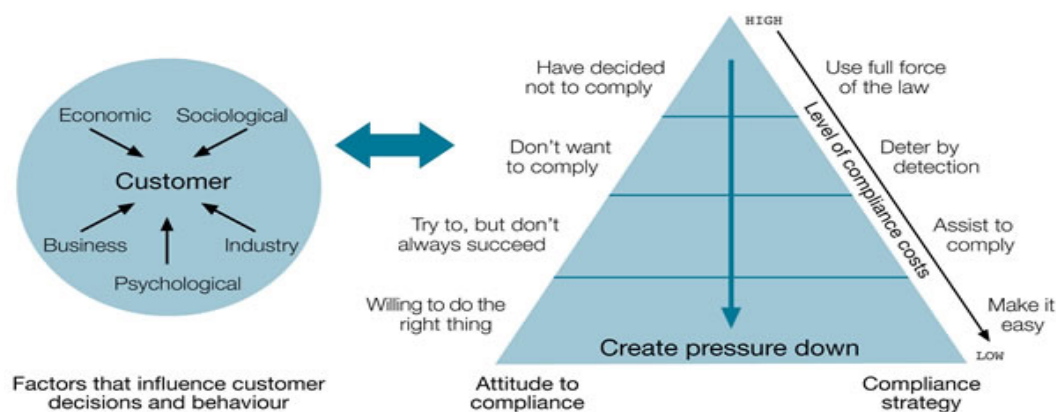
Recent judgements have made it clear that it is statute that sets the incidence of tax; not the Commissioner of Inland Revenue. The only instance where the Commissioner can be bound is where he has issued a binding ruling and as this is authorised by legislation the principle established in *Lemington* is not infringed. While the Courts have accepted that an argument of legitimate expectation may one day succeed none of the changes made to New Zealand's tax administration system have impacted on the Commissioners primary objective; to ensure that returns filed by taxpayers are correct. The care and management provisions recognise that while the

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<sup>199</sup>*CIR v Lemington Holdings Limited* (1982) 5 NZTC 61,268 (CA); 61,272.

Commissioner operates with limited resources and no is longer required to collect every cent owing should he choose to challenge the validity of an assessment so long as this is completed within the statutory framework the substantive basis of the assessment cannot be challenged.

According to its business plan; *Our Way Forward: 2006 to 2011* Inland Revenue's strategic direction includes creating an environment that promotes voluntary compliance. If taxpayers are to meet their obligations then Inland Revenue sees itself as having a responsibility to inform customers of their obligations and encouraging them to comply. The Compliance Model, set out below, was developed to guide Inland Revenue when dealing with its customers.



The business plan goes on too state that in applying the model Inland Revenue will:<sup>200</sup>

- build strong relationships and partnerships—providing the right experience for customers through the right channels and making it easy to comply
- appropriately enforce the law to help move customers who have decided not to comply to a position where they are likely to do so in the future
- take an integrated approach, using both specialist and cross-functional teams to optimise our customer understanding, risk assessment and compliance model thinking.

Underpinning the model is the need for us to maintain and build on our core technical, legal and policy skills.

<sup>200</sup> Inland Revenue *Our Way Forward: 2006 to 2011* (Wellington 2006); 5

In attempting to meet the strategic goal of voluntary compliance the Commissioner issues a variety of publications that assist customers in meeting their obligations. The conflict is that in carrying out his statutory obligations these non-binding statements have no legal effect. It is likely that the majority of taxpayers, if using these statements to assist them in fulfilling their self assessment obligations are not aware of this. Should a taxpayer enter into a dispute with the Commissioner, and argue that they had relied on such statements, and then have the assessment amended to reflect the correct position in law; the risk is that a once compliant taxpayer could move up the compliance triangle not down. It is likely that in this instance the Commissioner would not be imposing a shortfall penalty<sup>201</sup> but it is unlikely that a taxpayer who does not have extensive, or limited, tax knowledge would regard themselves as lucky for escaping the penalty.

The question then becomes do these non-binding statements have any value and the answer is yes. They assist the Commissioner in reaching his strategic objective of voluntary compliance. By publishing statements containing guidance it is easier for taxpayers to comply with what can be complex legislation. It could be argued that the publishing of such statements became a requirement with the enactment of the care and management provisions. One of the biggest criticisms of Inland Revenue is the length of time it takes for what are seen to be important statements to be issued. The draft interpretation statement on the care and management provisions, issued in 2005, has yet to be finalised. Along similar lines the Commissioner issued *INA0009 Interpretation of Sections BG1 and GB1 of the Income Tax Act 2004 Exposure Draft for External Consultation* on 24 September 2004. Again this has yet to be finalised and issued.

Unless the scheme of New Zealand's tax legislation changes the Commissioner's duty will remain unchanged; to ensure that taxpayer assessments are correct. The issuing of non-binding statements is an important part of this duty. The Commissioner needs to ensure that these statements are issued in a timely manner. It would seem that more of Inland Revenue's resources are required to be directed into producing these statements. It may also be of benefit if in the TIBs the Commissioner canvases the public on what areas of tax law they wish to see non-binding statements issued. These should then be included in the work programme.

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<sup>201</sup> See for example the discussion on page 17 in Interpretation Statement [IS0053] *Shortfall Penalty for Not Taking Reasonable Case* issued 4 October 2005

The next challenge facing the Commissioner is the need for consistency of interpretation; particularly by Inland Revenue officers. There has been a move towards greater accountability of the public sector in New Zealand as evidenced by the recent Supreme Court judgement in *Couch v Attorney General*.<sup>202</sup> While the Commissioner may feel secure in the knowledge that case law supports the view that non-binding statements are just that he needs to ensure that Inland Revenue officers act in a manner that assists in promoting his ultimate aim; voluntary compliance. If there is a perception that officers do not apply stated policy when dealing with taxpayers his job becomes much harder.

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<sup>202</sup> SC 49/2006 [2008] NZSC 45.

## **VII. APPENDIX – PART VA OF THE TAX ADMINISTRATION ACT 1994**

### **91A Purpose of this Part**

**91A** The purpose of this Part is to—

- (a) Provide taxpayers with certainty about the way the Commissioner will apply taxation laws; and
- (b) Help them to meet their obligations under those laws,—

by enabling the Commissioner to issue rulings that will bind the Commissioner on the application of those laws. The Part also recognises the importance of collecting the taxes imposed by Parliament and the need for full and accurate disclosure by taxpayers who seek to obtain binding rulings.

### **91B Interpretation**

**91B** In this Part—

**Discretion**, in relation to the exercise of the Commissioner's discretion under a taxation law, includes—

- (a) The exercising of a power by the Commissioner:
- (b) The forming of an opinion by the Commissioner:
- (c) The attaining by the Commissioner of a state of mind:

**"Taxation law"** means a provision specified in section 91C (1) in respect of which the Commissioner may make a binding ruling; and includes, in relation to any such provision that requires or authorises the Commissioner to exercise a discretion, the exercise of that discretion.

### **91C TAXATION LAWS IN RESPECT OF WHICH BINDING RULINGS MAY BE MADE**

#### **91C (1) [Taxation laws]**

The Commissioner may make a binding ruling on any provision of—

- (a) The Estate and Gift Duties Act 1968; or

- (b) The Gaming Duties Act 1971; or
- (c) The Goods and Services Tax Act 1985, except sections 12 and 13 of that Act; or
- (d) The Stamp and Cheque Duties Act 1971; or
- (e) The Income Tax Act 1994, on an application to which section YA 4(1)(a)(i) of the Income Tax Act 2004 applies, except to the extent to which the matter in question is or could have been, before the repeal of the Income Tax Act 1994, the subject of a determination of the Commissioner under—
  - (i) Sections 90 or 90AC of this Act in relation to a financial arrangement; or
  - (iA) Section 90A of this Act in relation to the extent to which a financial arrangement provides funds to a party under the arrangement; or
  - (ii) Section 91 of this Act in relation to petroleum mining; or
  - (iii) Section EF 1(3) of the Income Tax Act 1994 in relation to accrual expenditure; or
  - (iv) Any of sections EG 4, EG 10, EG 11, and EG 12 of the Income Tax Act 1994 in relation to depreciable property; or
  - (v) Section EL 4 of the Income Tax Act 1994 in relation to specified livestock; or
  - (vi) Section EL 9(3) of the Income Tax Act 1994 in relation to non-specified livestock; or
- (eb) The Income Tax Act 2004, on an application to which section ZA 4(1)(a)(i) of the Income Tax Act 2007 applies, except to the extent to which the matter in question is or could be the subject of a determination of the Commissioner under—
  - (i) Sections 90 or 90AC in relation to a financial arrangement; or
  - (ii) Section 90A in relation to the extent to which a financial arrangement provides funds to a party under the arrangement; or
  - (iii) Section 91 in relation to petroleum mining; or
  - (iv) Section 91AAD or 91AAE in relation to livestock; or

- (v) Any of sections 91AAF to 91AAM in relation to depreciation; or
  - (vi) Section EA 3(8) of the Income Tax Act 2004 in relation to accrual expenditure; or
- (ec) the Income Tax Act 2007, except to the extent to which the matter in question is or could be the subject of a determination of the Commissioner under—
- (i) sections 90 or 90AC in relation to a financial arrangement; or
  - (ii) section 90A in relation to the extent to which a financial arrangement provides funds to a party under the arrangement; or
  - (iii) section 91 in relation to petroleum mining; or
  - (iv) section 91AAD or 91AAE in relation to livestock; or
  - (v) any of sections 91AAF to 91AAM in relation to depreciation; or
  - (vi) section EA 3(8) of the Income Tax Act 2007 in relation to accrual expenditure; or
- (f) Any Order in Council or regulation made under section 225 of this Act or under any of the Acts listed in paragraphs (a) to (eb) of this subsection, except—
- (i) Any provision to the extent that it is or could be the subject of a determination referred to in paragraph (e) or (eb); or
  - (ii) section RD 24 of the Income Tax Act 2007.

**91C (1A) [Binding ruling under s 91GB]**

The Commissioner may make a binding ruling under section 91GB.

**91C (2) [Binding ruling on exercise of Commissioner's discretion]**

The Commissioner may also make a binding ruling on how the Commissioner will exercise his or her discretion under a provision specified in subsection (1).

**91C (3) [Provisions on which no binding ruling may be made]**

The Commissioner may not make a binding ruling on a provision that authorises or requires the Commissioner to—

- (a) Impose or remit a penalty; or



- (b) Inquire into the correctness of any return or other information supplied by any person; or
- (c) Prosecute any person; or
- (d) Recover any debt owing by any person.

**91C (4) [Matters on which binding rulings may not be made]**

Despite subsection (1), the Commissioner may not make a binding ruling on the following provisions and matters:

- (a) whether a person meets the eligibility requirements in section LH 3 of the Income Tax Act 2007:
- (b) whether expenditure or depreciation loss meets the requirements of the definition of **eligible expenditure** in section LH 4 of that Act:
- (c) whether an activity meets the requirements of the definition of research and development activities in section LH 7 of that Act.

**Public Rulings**

**91D Commissioner may make public rulings**

**91D** The Commissioner may at any time make a public ruling on how a taxation law applies in relation to any type of person and any type of arrangement.

**91DA Content and notification of a public ruling**

**91DA (1) [Public ruling]**

A public ruling must state—

- (a) That it is a public ruling made under section 91D; and
- (b) The taxation law or laws on which it is a ruling; and
- (c) The arrangement to which the ruling applies; and
- (d) How the taxation law or laws apply to the arrangement; and
- (e) Either—
  - (i) The period or tax year for which the ruling applies; or

- (ii) In the case of a ruling issued for an indefinite period, the date or tax year from which the ruling applies.

Anything that does not contain these statements is not a public ruling.

**91DA (2) [Notification of public ruling]**

The Commissioner shall notify the making of a public ruling by notice in the *Gazette*.

**91DA (3) [Notice]**

The notice shall indicate the subject of the public ruling and state where a copy of the ruling may be obtained.

**91DA (4) [Public ruling to be published]**

The Commissioner must publish each public ruling, in full, in a publication of the department.

**91DB Effect of a public ruling**

**91DB (1) [Application of taxation law in accordance with ruling]**

Notwithstanding anything in any other Act, if—

(a) A public ruling on a taxation law applies to a person in relation to an arrangement; and

(b) The person applies the taxation law in the way stated in the ruling,—

the Commissioner must apply the taxation law in relation to the person and the arrangement in accordance with the ruling.

**91DB (2) (*repealed*)**

**91DC APPLICATION OF A PUBLIC RULING**

**91DC (1) [Application of taxation law in accordance with ruling]**

A public ruling on a taxation law applies to a person and an arrangement—

(a) If the taxation law is expressly referred to in the ruling; and

(b) For an arrangement that is specified in the ruling; and

(c) For an arrangement that is entered into either—

- (i) During the period or tax year for which the ruling applies; or
  - (ii) In the case of a ruling issued for an indefinite period, on or after the date, or on or after the first day of the tax year, from which the ruling applies; and
- (d) Either—
  - (i) For the period or tax year specified in the ruling; or
  - (ii) In the case of a ruling issued for an indefinite period, for an indefinite period.

#### **91DC (2) [Non-application of s 91DC (1)]**

Subsection (1) does not apply to a taxpayer who has issued the Commissioner with a notice of proposed adjustment to change the effect of a ruling previously applied by the taxpayer.

#### **91DD Extension of a public ruling**

##### **91DD (1) [Publication of notice of extension]**

The Commissioner may extend the period for which a public ruling applies by publishing a notice of extension in the *Gazette*.

##### **91DD (2) [Notice of extension]**

A notice of extension must state—

- (a) That it is an extension of a public ruling under this section; and
- (b) The original period or tax year for which the ruling applied; and
- (c) The new period or tax year for which the ruling applies.

#### **91DE Withdrawal of a public ruling**

##### **91DE (1) [Commissioner may withdraw public ruling]**

The Commissioner may at any time withdraw a public ruling.

##### **91DE (2) [Notification of withdrawal]**

The Commissioner must notify the withdrawal by giving adequate notice in the *Gazette*.

**91DE (3) [Date of withdrawal]**

A public ruling is withdrawn on the date stated in the notice of withdrawal. The date cannot be before the date on which notice is given under subsection (2).

**91DE (4) [Non-application of public ruling to arrangement entered into after date of withdrawal of ruling]**

If the Commissioner withdraws a public ruling, the ruling does not apply to an arrangement entered into after the date of withdrawal.

**91DE (4A) [Application of withdrawn public ruling]**

If the Commissioner withdraws a public ruling, the ruling continues to apply—

- (a) To an arrangement to which it previously applied that was entered into before the date of withdrawal; and
- (b) Either—
  - (i) For the remainder of the period or tax year specified in the ruling; or
  - (ii) In the case of a ruling issued for an indefinite period, for 3 years after the date stated in the notice of withdrawal.

**91DE (5) [Notice of withdrawal]**

A notice of withdrawal must specify—

- (a) That it is a withdrawal of a public ruling under this section; and
- (b) The ruling that is being withdrawn; and
- (c) Either—
  - (i) The original period or tax year for which the ruling applied; or
  - (ii) In the case of a ruling issued for an indefinite period, the original date or tax year from which the ruling applied; and
- (d) The date of the withdrawal.

Anything that does not contain these statements is not a notice of withdrawal of a public ruling.

## **Private Rulings**

### **91E Commissioner to make private rulings on request**

#### **91E (1) [Private ruling made on request]**

Subject to section 91EF, the Commissioner must make a private ruling on how a taxation law applies, or would apply, to a person and to the arrangement, whether a single or a recurring arrangement, for which the ruling is sought.

#### **91E (2) [Application of taxation law]**

The Commissioner may make a private ruling on how a taxation law applies to the arrangement described in an application whether or not reference was made to that taxation law in the application.

#### **91E (3) [Commissioner may decline to make private ruling]**

The Commissioner may decline to make a private ruling if—

- (a) The Commissioner considers that the correctness of the ruling would depend on which assumptions were made about a future event or other matter; or
- (b) The matter on which the ruling is sought is subject to an objection, challenge, or appeal, whether in relation to the applicant or any other person; or
- (c) The applicant has outstanding debts relating to earlier binding ruling applications.

#### **91E (4) [Circumstances where no private ruling to be made]**

The Commissioner may not make a private ruling if—

- (a) The application for the ruling would require the Commissioner to determine questions of fact; or
- (b) At the time the application is made or at any time before the ruling is issued, the Commissioner considers that the person to whom the ruling is to apply is not seriously contemplating the arrangement for which the ruling is sought; or
- (c) The application is frivolous or vexatious; or
- (d) The matter on which the ruling is sought—

- (i) Concerns a tax (excluding provisional tax), duty, or levy that is due and payable, unless the application is received before the tax (excluding provisional tax), duty, or levy is due and payable; or
- (ii) Is being dealt with, or in the Commissioner's opinion should be dealt with, by one or both competent authorities of the parties to a double tax agreement; or
- (e) A private ruling already exists on how the relevant taxation law applies to the person and the arrangement, and the proposed ruling would apply to a period or a tax year to which the existing ruling applies; or
- (f) An assessment relating to the person, the arrangement, and a period or a tax year to which the proposed ruling would apply has been made, unless the application is received by the Commissioner before the date an assessment is made; or
- (g) The Commissioner is auditing or investigating how the taxation law applies to the person and to the arrangement for a period or a tax year to which the proposed ruling would apply; or
- (ga) The application relates to an arrangement that is the subject of a notice of proposed adjustment; or
- (h) In the Commissioner's opinion the applicant has not provided sufficient information in relation to the application after the Commissioner has requested further information; or
- (i) In the Commissioner's opinion it would be unreasonable to make a ruling in view of the resources available to the Commissioner; or
- (j) The application for the ruling would require the Commissioner to form an opinion as to a generally accepted accounting practice or to form an opinion as to a commercially acceptable practice.

**91E (4A) [Non-application of s 91E (4) (a)]**

Subsection (4)(a) does not apply if the application for the ruling relates to how either sections GC 6 to GC 14 or YD 5 of the Income Tax Act 2007 applies, or would apply, to the person applying for the ruling and to the arrangement, whether a single or a recurring arrangement, for which the ruling is sought.

**91E (5) [Arrangement entered into before date of receipt of application]**

The Commissioner may not, before 1 April 1996 or such other date as may be specified by the Governor-General by Order in Council for the purposes of this subsection, make a private ruling on an arrangement if that arrangement was entered into before the date on which the Commissioner received the application for the ruling.

**91E (6)** (*repealed*)

### **91EA Effect of a private ruling**

#### **91EA (1) [Application of taxation law in accordance with ruling]**

Notwithstanding anything in any other Act, if—

- (a) A private ruling on a taxation law applies to a person in relation to an arrangement; and
- (b) The person applies the taxation law in the way stated in the ruling,—

the Commissioner must apply the taxation law in relation to the person and the arrangement in accordance with the ruling.

#### **91EA (1A) [Non-application of s 91EA (1)]**

Subsection (1) does not apply if a taxpayer has issued the Commissioner with a notice of proposed adjustment to change the effect of a ruling previously applied by the taxpayer.

**91EA (2)** (*repealed*)

### **91EB Application for a private ruling**

#### **91EB (1) [Application of private ruling]**

A private ruling on a taxation law applies to a person in relation to an arrangement—

- (a) Only if the taxation law is expressly referred to in the ruling; and
- (b) Only for the period or tax year for which the ruling applies.

#### **91EB (2) [Non-application of private ruling]**

A private ruling does not apply to a person in relation to an arrangement if—

- (a) The arrangement is materially different from the arrangement identified in the ruling; or

- (b) There was a material omission or misrepresentation in, or in connection with, the application for the ruling; or
- (c) The Commissioner makes an assumption about a future event or another matter that is material to the ruling, and the assumption subsequently proves to be incorrect; or
- (d) The Commissioner stipulates a condition that is not satisfied.

## **91EC Applying for a private ruling**

### **91EC (1) [Application for private ruling]**

A person, in their own right or on behalf of a person who is yet to come into legal existence, may apply to the Commissioner for a private ruling on how a taxation law applies, or would apply, to—

- (a) The person making the application or the prospective person, as the case may be; and
- (b) An arrangement, whether a single or a recurring arrangement.

### **91EC (2) [Joint application]**

Two or more persons may jointly apply, or a person on behalf of two or more persons who are yet to come into legal existence, may apply to the Commissioner for a private ruling on how a taxation law applies, or would apply, to each person and to an arrangement, whether a single or a recurring arrangement.

### **91EC (3) [Application form and disclosure requirements]**

An application for a private ruling—

- (a) Must be made in the form prescribed by the Commissioner; and
- (b) Must comply with the disclosure requirements of section 91ED.

### **91EC (4) [Withdrawal of application]**

An applicant for a private ruling may at any time withdraw the application by notice in writing to the Commissioner.



### **91EC (5) [Withdrawal of joint application]**

The withdrawal of an application by a joint applicant for a private ruling shall not be treated as withdrawing the application of the other party or parties to the application unless the Commissioner considers that the withdrawal—

- (a) Materially affects the arrangement identified in the application; or
- (b) Results in insufficient information in relation to the application being provided to the Commissioner.

### **91ED Disclosure requirements**

#### **91ED (1) [Disclosure requirements]**

An application for a private ruling must—

- (a) Identify the applicant; and
- (b) Disclose all relevant facts and documents relating to the arrangement for which the ruling is sought; and
- (c) State the taxation laws in respect of which the ruling is sought; and
- (d) State the propositions of law (if any) which are relevant to the issues raised in the application; and
- (e) Provide a draft ruling.

#### **91ED (2) [Waiver of requirements]**

If the Commissioner considers that it would be unreasonable to require the applicant to comply with any of the requirements in paragraphs (c) to (e) of subsection (1), the Commissioner may waive those requirements.

### **91EE Commissioner may request further information**

**91EE** The Commissioner may at any time request, by notice, further relevant information from an applicant for a private ruling.

### **91EF Assumptions in making a private ruling**

#### **91EF (1) [Assumptions about future events]**

If the Commissioner considers that the correctness of a private ruling would depend on assumptions being made about a future event or other matter, the Commissioner may—

- (a) Make the assumptions that the Commissioner considers to be most appropriate; or
- (b) Decline to make the ruling.

**91EF (2) [No assumptions about information which can be provided]**

The Commissioner may not make assumptions about information which the applicant can provide.

**91EG Right to consultation**

**91EG** Before the Commissioner makes a private ruling, the Commissioner must give the applicant a reasonable opportunity to be consulted if the content of the proposed ruling differs from that requested by the applicant.

**91EH Content and notification of a private ruling**

**91EH (1) [Content]**

A private ruling must state—

- (a) That it is a private ruling made under section 91E; and
- (b) The identity of the person, the taxation law, and the arrangement (which may be identified by reference to the arrangement in the application) to which the ruling applies; and
- (c) How the taxation law applies to the arrangement and to the person; and
- (d) The period or tax year for which the ruling applies; and
- (e) Material assumptions about future events or other matters made by the Commissioner; and
- (f) Conditions stipulated by the Commissioner.

Anything that does not contain these statements is not a private ruling.

**91EH (2) [Notification]**

The Commissioner shall notify the making of a private ruling by sending a copy of the ruling to the person or persons who applied for it.

**91EI Withdrawal of a private ruling**

### **91EI (1) [Notification of withdrawal]**

The Commissioner may at any time withdraw a private ruling by notifying the person to whom the ruling applies in writing that the ruling has been withdrawn.

### **91EI (2) [Date of withdrawal]**

The private ruling is withdrawn from the date specified in the notice of withdrawal. That date may not be earlier than the date on which the person could reasonably be expected to receive the notice of withdrawal.

### **91EI (2A) [Status ruling]**

A status ruling on a withdrawn private ruling does not apply on and after the date specified in the notice of withdrawal.

### **91EI (3) [Arrangement entered into before date of withdrawal]**

If the Commissioner withdraws a private ruling—

- (a) The ruling does not apply if the arrangement was entered into after the date of withdrawal; but
- (b) The ruling continues to apply, for the remainder of the period or tax year specified in the ruling, if the arrangement was entered into before the date of withdrawal; and
- (c) A status ruling that has been made on the private ruling continues to apply, for the remainder of the period or tax year specified in the private ruling, if the arrangement was entered into before the date of withdrawal.

## **91EJ DISCLOSURE OF PRIVATE RULING (*repealed*)**

### **Product Rulings**

### **91F Commissioner may make product rulings**

#### **91F (1) [Application for product ruling]**

The Commissioner may make a product ruling on how any taxation law applies to a particular arrangement if—

- (a) The Commissioner receives an application for a product ruling on the arrangement; and

- (b) The Commissioner is satisfied that a private ruling cannot be made because it is not practicable to identify the taxpayers who may enter into the arrangement; and
- (c) The characteristics of the taxpayers who may enter into the arrangement would not affect the content of the ruling.

**91F (2) [Application of taxation law]**

The Commissioner may make a product ruling on how a taxation law applies to the arrangement described in an application whether or not reference was made to that taxation law in the application.

**91F (3) [Commissioner may decline to make product ruling]**

The Commissioner may decline to make a product ruling if—

- (a) The Commissioner considers that the correctness of the ruling would depend on which assumptions were made about a future event or other matter; or
- (b) The matter on which the ruling is sought is subject to an objection, challenge, or appeal, whether in relation to the applicant or any other person; or
- (c) The applicant has outstanding debts relating to earlier binding ruling applications.

**91F (4) [Circumstances where no product ruling to be made]**

The Commissioner may not make a product ruling if—

- (a) The application for the ruling would require the Commissioner to determine questions of fact; or
- (b) At the time the application is made or at any time before the ruling is issued, the Commissioner considers that the person to whom the ruling is to apply is not seriously contemplating the arrangement for which the ruling is sought; or
- (c) The application is frivolous or vexatious; or
- (d) The matter on which the ruling is sought is being dealt with, or in the Commissioner's opinion should be dealt with, by one or both competent authorities of the parties to a double tax agreement; or
- (e) A product ruling already exists on how the taxation law applies to the arrangement, and the proposed ruling would apply to a period or tax year to which the existing ruling applies; or

(f) In the Commissioner's opinion the applicant has not provided sufficient information in relation to the application after the Commissioner has requested further information; or

(g) In the Commissioner's opinion it would be unreasonable to make a ruling in view of the resources available to the Commissioner; or

(h) The application for the ruling would require the Commissioner to form an opinion as to a generally accepted accounting practice or to form an opinion as to a commercially acceptable practice.

### **91FA Effect of a product ruling**

#### **91FA (1) [Application of taxation law in accordance with ruling]**

Notwithstanding anything in any other Act, if—

(a) A product ruling on a taxation law applies to an arrangement; and

(b) A person who enters into the arrangement applies the taxation law in the way stated in the ruling,—

the Commissioner must apply the taxation law in relation to the arrangement in accordance with the ruling.

#### **91FA (1A) [Non-application]**

Subsection (1) does not apply if a taxpayer has issued the Commissioner with a notice of proposed adjustment to change the effect of a ruling previously applied by the taxpayer.

#### **91FA (2) (*repealed*)**

### **91FB Application of a product ruling**

#### **91FB (1) [Application of product ruling]**

A product ruling on a taxation law applies to an arrangement—

(a) Only if the taxation law is expressly referred to in the ruling; and

(b) Only for the period or tax year for which the ruling applies.

#### **91FB (2) [Non-application of product ruling]**

A product ruling does not apply to an arrangement if—

- (a) The arrangement is materially different from the arrangement identified in the ruling; or
- (b) There was a material omission or misrepresentation in, or in connection with, the application for the ruling; or
- (c) The Commissioner makes an assumption about a future event or another matter that is material to the application of the ruling, and the assumption subsequently proves to be incorrect; or
- (d) The Commissioner stipulates a condition that is not satisfied.

## **91FC Applying for a product ruling**

### **91FC (1) [Application for product ruling]**

A person, in their own right or on behalf of a person who is yet to come into legal existence, may apply to the Commissioner for a product ruling on how a taxation law applies, or would apply—

- (a) To an arrangement; or
- (b) To the consumer of the product that is the subject of the ruling, and to the arrangement.

### **91FC (1A) [Applicant must intend to be party to proposed arrangement]**

A person making an application under subsection (1) or a prospective person, as the case may be, must intend to be a party to the proposed arrangement.

### **91FC (1B) [Consumer]**

For the purpose of subsection (1) (b), a "consumer" is a party to the arrangement who is not the applicant.

### **91FC (2) [Application form and disclosure requirements]**

An application for a product ruling—

- (a) Must be made in the form prescribed by the Commissioner; and
- (b) Must comply with the disclosure requirements of section 91FD.

### **91FC (3) [Withdrawal of application]**

An applicant for a product ruling may at any time withdraw the application by notice to the Commissioner.

### **91FD Disclosure requirements**

#### **91FD (1) [Disclosure requirements]**

An application for a product ruling must—

- (a) Identify the applicant; and
- (b) Disclose all relevant facts and documents relating to the arrangement for which the ruling is sought; and
- (c) Explain—
  - (i) Why it is not practicable to seek a private ruling; and
  - (ii) Why the characteristics of the taxpayers who may enter into the arrangement are not relevant to the content of the ruling; and
- (d) State the taxation laws in respect of which the ruling is sought; and
- (e) State the propositions of law (if any) which are relevant to the issues raised in the application; and
- (f) Provide a draft ruling.

#### **91FD (2) [Waiver of requirements]**

If the Commissioner considers that it would be unreasonable to require the applicant to comply with any of the requirements in paragraphs (d) to (f) of subsection (1), the Commissioner may waive those requirements.

### **91FE Commissioner may request further information**

**91FE** The Commissioner may at any time request, by notice, further relevant information from an applicant for a product ruling.

### **91FF Assumptions in making a product ruling**

#### **91FF (1) [Assumptions about future events]**

If the Commissioner considers that the correctness of a product ruling would depend on assumptions being made about a future event or other matter, the Commissioner may—

- (a) Make the assumptions that the Commissioner considers to be most appropriate; or
- (b) Decline to make the ruling.

**91FF (2) [No assumptions about information which can be provided]**

The Commissioner may not make assumptions about information which the applicant can provide.

**91FG Right to consultation**

**91FG** Before the Commissioner makes a product ruling; the Commissioner must give the applicant a reasonable opportunity to be consulted if the content of the proposed ruling differs from that requested by the applicant.

**91FH CONTENT AND NOTIFICATION OF A PRODUCT RULING**

**91FH (1) [Content]**

A product ruling must state—

- (a) That it is a product ruling made under section 91F; and
- (b) The name of the person who applied for the ruling; and
- (c) The taxation law and the arrangement to which the ruling applies; and
- (d) How the taxation law applies to the arrangement; and
- (e) The period or tax year for which the ruling applies; and
- (f) Material assumptions about future events or other matters made by the Commissioner; and
- (g) Conditions stipulated by the Commissioner.

Anything that does not contain these statements is not a product ruling.

**91FH (2) [Applicant to receive copy of ruling]**

The Commissioner must send a copy of the ruling to the applicant as soon as practicable after the date on which the ruling is made.



**91FH (3) [No publication before 2 months from date of ruling]**

Unless earlier publication is requested by the applicant in writing, the Commissioner cannot publish a product ruling until 2 months have passed after the date the ruling is made.

**91FH (4) [Earlier publication]**

If earlier publication is requested by the applicant, the Commissioner must—

- (a) Notify the making of the product ruling by notice in the *Gazette*; and
- (b) Publish the product ruling in a publication of the department as soon as possible.

**91FH (5) [Notification and publication]**

After the 2-month period has ended, the Commissioner must—

- (a) Notify the making of a product ruling by notice in the *Gazette*; and
- (b) Publish each product ruling, in full, in a publication of the department.

**91FH (6) [Product ruling to be published before copy released to other taxpayers]**

A taxpayer, other than the applicant, cannot obtain a copy of a product ruling before it is published by the Commissioner.

**91FI EXTENSION OF A PRODUCT RULING (*repealed*)**

**91FJ Withdrawal of a product ruling**

**91FJ (1) [Withdrawal by Commissioner]**

The Commissioner may at any time withdraw a product ruling.

**91FJ (2) [Notification of withdrawal]**

The Commissioner must notify the withdrawal by giving adequate notice in the *Gazette*.

**91FJ (3) [Date of withdrawal]**

A product ruling is withdrawn on the date stated in the notice of withdrawal. The date cannot be before the date on which notice is given under subsection (2).

### **91FJ (3A) [Status ruling]**

A status ruling on a withdrawn product ruling does not apply on and after the date specified in the notice of withdrawal.

### **91FJ (4) [Arrangement entered into before date of withdrawal]**

If the Commissioner withdraws a product ruling—

- (a) The ruling does not apply to an arrangement entered into after the date of withdrawal; but
- (b) The ruling continues to apply, for the remainder of the period or tax year specified in the ruling, to any arrangement to which it previously applied that was entered into before the date of withdrawal; and
- (c) A status ruling that has been made on the product ruling continues to apply, for the remainder of the period or tax year specified in the product ruling, if the arrangement to which it previously applied was entered into before the date of withdrawal.

### **91FJ (5) [Notice of withdrawal]**

A notice of withdrawal must specify—

- (a) That it is a withdrawal of a product ruling under this section; and
- (b) The ruling that is being withdrawn; and
- (c) The original period or tax year for which the ruling applied; and
- (ca) Any status ruling that applied to the product ruling; and
- (cb) That the status ruling is also being withdrawn; and
- (d) The date of the withdrawal.

Anything that does not contain these statements is not a notice of withdrawal of a product ruling.

### **91FJ (6) [Applicant to receive written notice of withdrawal]**

The Commissioner shall also give notice of the withdrawal to the person who applied for the product ruling.

## **Rulings Generally**

## **91G EFFECT OF LEGISLATIVE CHANGE ON BINDING RULING**

**91G** A binding ruling does not apply from the date a taxation law is repealed or amended to the extent that the repeal or amendment changes the way the taxation law applies in the ruling.

### **91GA APPLYING FOR RULING ON EFFECT OF CHANGE IN LEGISLATION**

#### **91GA (1) [Private ruling]**

A person who applied for a private ruling made under section 91E, may apply to the Commissioner for a ruling on whether the amendment or repeal of a taxation law that is stated as applying in the private ruling has changed the way that the law applies in the ruling.

#### **91GA (2) [Product ruling]**

A person who applied for a product ruling made under section 91F, may apply to the Commissioner for a ruling on whether the amendment or repeal of a taxation law that is stated as applying in the product ruling has changed the way that the law applies in the ruling.

#### **91GA(3) [Status ruling]**

A ruling made under subsection (1) or (2) is a ``status ruling".

### **91GB COMMISSIONER TO MAKE STATUS RULINGS ON REQUEST**

#### **91GB(1) [Change in taxation law applying in ruling]**

The Commissioner must make a status ruling on whether the amendment or repeal of a taxation law that is stated as applying in a private or a product ruling has changed the way that the law applies in the ruling.

#### **91GB(2) [Change in taxation law]**

The Commissioner may make a status ruling on whether the amendment or repeal of a taxation law has changed the way that the law applies in a private or a product ruling whether or not reference was made to that taxation law in the application.

#### **91GB(3) [Circumstances where no status ruling to be made]**

The Commissioner may not make a status ruling if—

- (a) The application is frivolous or vexatious; or

(b) The Commissioner considers that the correctness of the private or product ruling would depend on which assumptions were made about a future event or other matter; or

(c) The Commissioner considers that it would be unreasonable to make a ruling in view of the resources available to the Commissioner.

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