TAX INFORMATION BULLETIN

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This TIB has no appendix

Inland Revenue
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This *Tax Information Bulletin* is also available on the internet on PDF format. Our website is at:

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It has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

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THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

Inland Revenue produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents.

Because we are keen to produce items that accurately and fairly reflect taxation legislation, and are useful in practical situations, your input into the process—as perhaps a user of that legislation—is highly valued.

The following draft items are available for review or comment this month, having a deadline of 25 September 2002.

Ref.	Draft type	Description
ED0034	Standard practice statement	Instalment arrangements for payment of tax debt
ED0035	Standard practice statement	Writing off tax debt
ED0036	Question we've been asked	Commencement of the 4-year time bar for taxpayers with non-standard balance dates

Please see page 22 for details on how to obtain copies.

BINDING RULINGS

This section of the TIB contains binding rulings that the Commissioner of Inland Revenue has issued recently.

The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates tax liability based on it.

For full details of how binding rulings work, see our information booklet *Adjudication & Rulings, a guide to Binding Rulings (IR 715)* or the article on page 1 of *Tax Information Bulletin* Vol 6, No 12 (May 1995) or Vol 7, No 2 (August 1995).

You can download these publications free of charge from our website at **www.ird.govt.nz**

PRODUCT RULING – BR PRD 02/05

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Foodstuffs (South Island) Limited ("Foodstuffs").

Taxation Laws

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

This Ruling applies in respect of sections 2 and 8.

The Arrangement to which this Ruling applies

The Arrangement is the receipt of certain rebates by members of Foodstuffs. Further details of the Arrangement are set out in the paragraphs below.

1. Foodstuffs was incorporated on 20 July 1988 as part of the merger of Foodstuffs (Christchurch) Limited and Foodstuffs (Otago Southland) Limited, which was effected in October 1988.

2. Foodstuffs has since been re-registered under the Companies Act 1993. It is also registered under the Co-operative Companies Act 1996. Foodstuffs has, as part of that registration process, adopted a constitution that complies with the Co-operative Companies Act 1996.

3. Foodstuffs mainly operates as a distributor of groceries and other items to banner group supermarkets which are owned and operated by members of Foodstuffs.

   The banner groups include the following supermarkets:

   - Foursquare
   - Pak 'N Save
   - On the Spot, and
   - New World.

4. In addition to the banner group supermarkets, Foodstuffs supplies goods to non-banner group retail outlets and food service customers. Those non-banner group outlets are also owned and operated by persons who became members of Foodstuffs upon entering into a Trading Membership Agreement with Foodstuffs.

5. Foodstuffs only trades with its members who hold either ordinary shares in Foodstuffs or redeemable shares, or both. However, through a subsidiary of Foodstuffs, Trents Wholesale Limited, it also operates a cash and carry warehouse, which is available to persons involved in catering industries, such as schools, catering companies, churches, and various other similar types of organisations. These organisations are not members of Foodstuffs, and have no entitlement to any rebates. Non-members generally purchase goods at a higher price than those paid by trading members except where bulk discounts are negotiated.

Rebates

6. Members receive two types of rebates from Foodstuffs. That is, "monthly trading rebates", which are paid monthly in arrears and "yearly rebates" which are paid after the end of the financial year. Both the monthly trading rebates and the yearly rebates are divided among the members, based on the level of trading undertaken with Foodstuffs by each member.

7. The rebates are determined by resolution of the directors and are calculated with reference to the level of trading in particular types of goods in addition to the profits made by Foodstuffs overall.

8. The payment of two types of rebates evolved over a number of years in order to meet the changing commercial environment in which Foodstuffs' members operate. Historically, Foodstuffs paid only a year end rebate, calculated with reference to the profits of the company. However, as volumes increased and margins at that retail level compressed, it became necessary to pay regular rebates to members to preserve their competitiveness in the marketplace and their cash flow positions.

9. Notwithstanding that the trading rebates and the year end rebates are distinguished, they are essentially the same rebate. The year end rebates are calculated at the end of the financial year once the profit of Foodstuffs has been established. The Board then determines the level of profit which will be rebated back to the members, and the total profit is then divided between the members in proportion to the total purchases made by the members during the year. This gives the entitlement of each member to a rebate from Foodstuffs. However, some of this amount has already been paid to the members through the monthly rebates which have been paid throughout the year. Therefore, the total amount of rebates already paid is deducted from the annual entitlement to provide the balance of rebate payable.

10. The restrictive credit terms that Foodstuffs imposes on members (compared to those received by other similar companies) have made it necessary to pay monthly rebates to members to ensure that they have adequate cash flow throughout the year.

11. The company does not pay dividends on its ordinary shares and distributes most of its profits each year by way of rebates based on members' purchases.

12. There is no contractual entitlement to the rebates and the quantum of the rebates is determined in the sole discretion of the Directors.

13. Two factors determine the right to receive a rebate. Firstly, Foodstuffs must derive surplus funds from its trading with its members before any rebates will be paid. Secondly, rebates will only then be paid to persons who are "members".

14. After paying out rebates the balance of the trading profit (after tax) is retained by the Applicant to pay redeemable preference share dividends and to increase the working capital of the Company.

15. Trading rebates that have been paid out can be demanded back from members and yearly rebates can be withheld or forfeited. The constitution specifically provides for these possibilities in clauses 22.1(h)(vi) and (viii) which state:

> **22.0 Powers and Duties of Board**
>
> **22.1 Specific Powers**
>
> Without limiting the general powers conferred upon the Board by this Constitution or by law conferred upon the Board, the Board shall have the following powers:
> …
>
> **(h) Rebates**
>
> To adopt any scheme for rebates to Foodstuffs' members in respect of the purchase of goods and services from the Company and to make rules to give effect to such scheme and to determine, declare and pay such rebates. Any such scheme may provide for:
> …
>
> (vi) The power for the Board to require any Foodstuffs' member to repay to the Company any amount(s) paid by the Company in advance during any financial year on account of anticipated year end profit and final rebate;
> …
>
> (viii) The power of the Board to withhold or forfeit any rebates;
> …

16. Foodstuffs may require a member to repay any amounts paid by the company by way of trading rebates or in the case of yearly rebates forfeit the payment. However, the action of demanding the repayment of trading rebates would be an extremely difficult process and for the reasons outlined below, unlikely ever to be required.

- Foodstuffs has developed sophisticated management systems to monitor profit on a monthly basis, and in some respects, on a weekly basis. The system enables them to be acutely aware of profits at any particular time, and enables them to establish, with confidence, a regular pattern of rebates to members.

- The rebate policy is to distribute only a specified percentage of the expected profits by monthly rebates. The remaining profit is retained and distributed by way of the year end rebates. This practice provides further assurance to Foodstuffs' members that they will not be required to pay back any monthly rebates in the event of declining profitability.
- The lead time between the commencement of the rebate period and the actual payment of the rebates provides ample time, in conjunction with Foodstuffs' sophisticated management systems, to cancel or reduce future rebates in the event of declining profitability.
- Foodstuffs is a professionally managed organisation which has full insurance to cover most unexpected eventualities; should an unexpected event or a significant expense occur, this would be covered by their insurance policies, thereby preventing any drop in profitability.
- The Directors require a solvency test to be done at every board meeting to ensure that Foodstuffs can afford to pay the rebate.

17. In the event that rebates paid to members exceed Foodstuffs' annual profits from member transactions, the Foodstuffs Board of Directors will require that any such amount exceeding the end of year profits is repaid.

18. Historically rebates have never needed to be adjusted for the reasons detailed above. In any event, if rebates needed to be adjusted, this adjustment would occur during the relevant income year.

Trading rebates (monthly)

19. The level of the monthly trading rebates payable is determined by the directors of Foodstuffs with reference to:
    - the gross level of profit achieved by Foodstuffs on the goods
    - whether the goods are supplied in bulk or repack form
    - the nature of the goods supplied to the individual member, and
    - the frequency of turnover of the particular goods.

20. The Directors set the rate of the monthly rebates which are ratified at Foodstuffs' AGM each year. If necessary, the Directors may review the rate of these rebates during any one financial year.

21. Goods which produce a high gross profit margin to Foodstuffs carry a trading rebate entitlement whereas those which produce a low gross profit margin to Foodstuffs may not carry any trading rebate entitlement. Not all goods carry an entitlement to a rebate.

Yearly rebates

22. The year end rebates are determined by the Directors with reference to a combination of the annual profit of Foodstuffs and the product mix purchased by members. The bulk of the year end rebates must be used to subscribe for five year redeemable preference shares. Paragraph 1.10 of the prospectus makes it clear that some of the year end rebates will not be payable to members who do not elect to re-invest all of those rebates in redeemable preference shares. The remainder of the year end rebates are paid out in cash.

23. At the end of each financial year the Directors assess the likely cash requirements of the Co-operative for the next year(s) trading. It may well be that after providing for the trading rebates and existing year end rebates that there are still undistributed trading profits. In such instances the Directors may resolve to distribute some of these funds to members in a cash rebate that could promote particular trading patterns amongst members. This has a three-fold effect. It distributes surplus cash from the Co-operative to members, encourages members to trade with the Co-operative in a certain way and provides members with extra cash flow to pay tax on their allocation of redeemable preference shares.

Ownership structure of Foodstuffs

24. There are four different types of share ownership in Foodstuffs.

25. Ordinary "A" shares are held by long-standing banner group members. These shares entitle the holder to vote at any meeting of the company, entitle a member to become a director and vote in elections for directors and share any profit on the ultimate winding up of Foodstuffs.

26. "B" redeemable shares ("BRS") confer no voting rights on the shareholder. When each member joins the co-operative, they are immediately allocated one "B" redeemable share. These shares provide a mechanism for Foodstuffs to make rebates to members as a member must be a shareholder in order to receive rebates but beyond this, contrary to the payment of dividends by a traditional company, the calculation of rebates does not have any regard to the holding of shares and is instead based upon the level of transactions that members have with the Applicant.

All "A" shareholders hold "B" redeemable shares; however not all "B" redeemable shareholders hold "A" shares. As noted above, only banner group members can hold "A" shares as the level of trading of other members, with Foodstuffs, is not significant enough to entitle them to hold voting rights.

27. Redeemable preference shares are described in the Constitution as "C" class shares and are issued to all trading members on the basis that they are in place for five years, rank ahead of other classes of shares on issue, do not share in any profit on liquidation, carry a fully imputed dividend and are not subject to early redemption. A dividend is payable on them each year. These shares effectively provide funding to the co-operative.

28. Ordinary "D" shares are held by the Foodstuffs Protection Trust and carry voting rights.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions.

a) All rebates are calculated with reference to profits (or anticipated profits) derived by Foodstuffs.

b) There are no other agreements between the members and Foodstuffs, concerning the rebate scheme, other than the Trading Membership Agreement.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- The rebates are a supply of money and not a supply of "goods" or "services" as those terms are defined in section 2.
- The receipt of the rebates, by the members of Foodstuffs, is not subject to GST under section 8.

The period or income year for which this Ruling applies

This Ruling will apply for the period from 1 December 2000 to 31 November 2005.

This Ruling is signed by me on the 11th day of June 2002.

Martin Smith

General Manager (Adjudication & Rulings)

NEW LEGISLATION

VALIDATION OF RIGHT TO BE EMPLOYED IN NEW ZEALAND

Immigration Amendment Act 2002 - Amendment to the Income Tax Act 1994

Introduction

The Immigration Amendment Act 2002, which received its Royal assent on 17 June 2002, amends the Income Tax Act 1994 by inserting a new section NC 8A. This new section will require Inland Revenue to ensure that its tax code declaration forms contain a means for an employee to state that he or she is entitled under the Immigration Act 1987 to undertake employment in New Zealand. This new requirement will apply for tax code declarations provided after 31 March 2003.

Background

The Immigration Act 1987, amongst other things, sets out the requirements for determining whether a person may undertake employment in New Zealand. To undertake employment in New Zealand, someone who is not a New Zealand citizen must be:

- a holder of a residence permit
- a holder of a work permit
- a holder of any other type of temporary permit which allows the holder to undertake employment
- a holder of a limited purpose permit granted for employment purposes, or
- exempt under the Immigration Act from the requirement to hold a permit.

Under this Act, an employer commits an offence if the employer, knowing that someone is not entitled to undertake such employment, allows or continues to allow that person to do so. The Immigration Amendment Act 2002 amends the principal Act to provide that an employer commits an offence who, without reasonable excuse, allows a person who is not entitled to undertake employment to do so. The Amendment Act also provides that an employer will have a reasonable excuse from such an offence if the employer holds a tax code declaration that states that the person is entitled under the Immigration Act to undertake employment and the declaration is signed by the employee before starting employment.

Parliament's Foreign Affairs, Defence and Trade Committee added the new provision to the Transnational Organised Crime Bill, which resulted in six Acts, including the Immigration Amendment Act 2002.

The new Immigration Amendment Act is not yet in force and will come into force by way of an Order in Council.

Key features

A new section NC 8A has been inserted into the Income Tax Act 1994. It requires Inland Revenue to ensure that all tax code declaration forms (IR 330–the form for employees to complete when starting employment or changing their tax code) contain a means for the employee to state that he or she is entitled under the Immigration Act to undertake employment in the service of the employer concerned.

This requirement will provide a mechanism for employers to have a reasonable excuse from the offence of employing someone who is not entitled to undertake employment under the Immigration Act. The onus will be on the employer to retain the tax code declaration form for Immigration Act purposes.

Application date

The new tax code declaration forms including the immigration employment status statement must be available after 31 March 2003. Inland Revenue is allowed to provide these forms before 1 April 2003.

STANDARD PRACTICE STATEMENTS

These statements describe how the Commissioner will, in practice, exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

REQUESTS TO AMEND ASSESSMENTS

Introduction

This Standard Practice Statement sets out the circumstances when the Commissioner may exercise the discretion to amend assessments to ensure correctness.

Application

This Standard Practice Statement (SPS) applies from 1 September 2002.

This SPS applies to the exercise of the Commissioner's discretion under section 113 of the Tax Administration Act 1994 (referred to as "section 113" in this SPS) and section 27(2) of the Goods and Services Tax Act 1985 (referred to as "section 27(2)" in this SPS).

This SPS replaces all previous statements on the Commissioner's practices when exercising the discretion under section 113, including those contained in SPS INV-300 *Acceptance of late objections under section 126 of the Tax Administration Act 1994* (March 1997).

SPS INV-500 *Taxpayer amendments to tax returns (Tax Information Bulletin* Vol 11, No 9 (October 1999)) is withdrawn from the above application date.

This SPS should be read in conjunction with SPS INV-490 *GST returns - correcting minor errors (and clarification) (Tax Information Bulletins* Vol 10, No 6 (June 1998) and Vol 11, No 2 (February 1999) respectively) and SPS INV-251 *Voluntary Disclosures (Tax Information Bulletin* Vol 14, No 4).

Legislation

Section 113 of the Tax Administration Act 1994 provides:

> 113 Commissioner may at any time amend assessments.
>
> 113(1) [Amendments at any time] The Commissioner may from time to time and at any time make all such alterations in or additions to an assessment as the Commissioner thinks necessary in order to ensure its correctness, notwithstanding that tax already assessed may have been paid.
>
> 113(2) [Fresh liability] If any such alteration or addition has the effect of imposing any fresh liability or increasing any existing liability, notice of it shall be given by the Commissioner to the taxpayer affected.

Section 27(2) of the Goods and Services Tax Act 1985 provides:

> 27(2) [Alterations] Subject to sections 108A and 108B and Part IVA of the Tax Administration Act 1994, the Commissioner may from time to time and at any time make all such alterations in or additions to an assessment made under this section as the Commissioner thinks necessary to ensure the correctness of the assessment, notwithstanding that tax already assessed may have been paid.

Summary

Section 113 and section 27(2) enable the Commissioner to amend assessments to ensure correctness. This allows the Commissioner to amend assessments when the Commissioner considers an assessment contains an error or following the application of the disputes provisions contained in Part IVA of the Tax Administration Act 1994 (TAA).

Inland Revenue considers section 113 and section 27(2) operate alongside the disputes resolution process provisions (disputes provisions) contained in Part IVA of the TAA. The disputes provisions provide the procedures for resolving disputes between the Commissioner and taxpayers. Accordingly it is not appropriate for the Commissioner to exercise his discretion under section 113 and section 27(2) when the amendment is the subject of a dispute, however an assessment can be amended following completion of the disputes process or to reflect an agreed adjustment.

When the Commissioner considers an assessment contains a genuine error, and there is no dispute, the Commissioner can exercise the discretion to amend the assessment to correct the error. Inland Revenue considers section 113 and section 27(2) provide the power to amend assessments where genuine errors have been made.

This SPS is directed at those instances where genuine errors have been made. It does not provide a mechanism for circumventing the disputes resolution process.

The Commissioner will amend an assessment, on a case by case basis, when the Commissioner is satisfied that a genuine error was made and that none of the limitations outlined in this SPS apply.

This SPS has been prepared to assist with consistency and understanding of how the Commissioner will exercise the discretion to amend assessments following taxpayer requests.

Discussion

Section 113 and section 27(2) contain a broad discretion allowing the Commissioner to amend assessments to ensure correctness. They provide little guidance as to how the Commissioner should exercise this discretion in practice. Accordingly it is also necessary to look at the scheme of the legislation and at case law.

Decision to consider request

Case law indicates the Commissioner cannot be compelled to either amend an assessment or investigate a claim that an assessment is in error. The power in that regard is for the Commissioner to voluntarily exercise. See *Commonwealth Agricultural Services Engineers Ltd (In Liquidation) v CIR* [1926] 38 CLR 289, *CIR v Wilson* (1996) 17 NZTC 12,512 and *Lawton v CIR* (2002) 20 NZTC 17,531.

Where the Commissioner is not satisfied that an assessment contains an error, the Commissioner cannot be compelled to amend an assessment. See *Wood v CIR* (1999) 19 NZTC 15,255. Case law also indicates that if the Commissioner does decide to consider a claim by a taxpayer that an assessment is in error the Commissioner does not have an absolute obligation to amend the assessment when an error has been verified. See *CIR v Wilson* (1996) 17 NZTC 12,512 and *Lawton v CIR* (2002) 20 NZTC 17,531.

Case law further indicates section 113 can be invoked after a dispute has been initiated or where there is no dispute that an assessment is in error. See *O'Neil & Ors v CIR* (2001) 20 NZTC 17,051.

These cases refer specifically to section 113, however the principles are applicable to the exercise of the discretion in section 27(2).

Limitations

The Tax Administration Act 1994 contains provisions that impose time limits on increasing assessments.

- sections 107A & 108 (time bar for amendment of assessments)–the Commissioner cannot increase tax assessments after four years from the end of the income year in which the taxpayer provides the tax return. Section 113 is subject to these legislative time limitswhen increasing tax liabilities.
- section 108A (time bar for assessment of GST)– the Commissioner cannot increase an assessment of GST after four years from the end of the GST period for which the return was provided or assessment made.

Furthermore, through the operation of section MD 1(1) of the Income Tax Act 1994 (ITA), the Commissioner is prevented from refunding amounts of overpaid tax (excluding GST) after eight years from the end of the year in which the original assessment was made. Any refunds arising from the operation of section 113 are also subject to this legislative time limit.

Section 45 of the GST Act prevents the Commissioner refunding amounts of overpaid GST after eight years from the end of the taxable period in respect of which the assessment was made. Refunds arising from the reduction of a GST liability under section 27(2) are also subject to this legislative time limit.

In broad terms, the Commissioner cannot be compelled to action a taxpayer's request to amend an assessment. However, the Commissioner does have a duty to correct errors verified by the Commissioner where to do so is consistent with the Commissioner's duty under sections 6 and 6A (care and management provisions) of the TAA and such amendment is within the limits set out in this Standard Practice Statement.

Care and management considerations

It is important to recognise that the Commissioner does not have unlimited resources to undertake lengthy verification processes to determine whether assessments should be amended. When meeting the duty to collect over time the highest net revenue that is practicable within the law, section 6A(3) of the TAA requires the Commissioner to consider: the resources available to the Commissioner; promoting compliance, especially voluntary compliance, by all taxpayers; and compliance costs. Accordingly it is consistent with the Commissioner's duty under section 6A(3) for the Commissioner to limit the amount of time that will be spent investigating a request for an assessment to be amended. Ensuring a balance between time spent considering requests to amend assessments and other activities is consistent with the duty to protect the integrity of the tax system under section 6 of the TAA. By providing full information to evidence their requests, taxpayers are assisting the Commissioner to uses resources efficiently.

By having a practice of amending assessments to ensure correctness where genuine errors have been made, the Commissioner is ensuring fairness to all taxpayers—to those taxpayers who have made a genuine error and to those taxpayers who get their returns or assessments correct the first time. This also promotes integrity in the administration of the tax system.

Principles

The following principles have been established as the basis for the Standard Practice set out below.

- Generally, arithmetic, transposition and other types of genuine errors verified by the Commissioner will be corrected—subject to statutory time limits, care and management considerations and other limitations set out in this SPS.
- Where a taxpayer is requesting the Commissioner to amend an assessment, the taxpayer must provide all relevant information with the request.
- All relevant factors must be taken into account when the Commissioner is considering a taxpayer's request to amend an assessment. In some cases the length of time that has passed since the error was made may be a relevant factor, however it may not necessarily determine whether the Commissioner will amend or not.
- Taxpayers cannot compel the Commissioner to amend an assessment.
- If the Commissioner is satisfied that an assessment contains a genuine error the Commissioner does not have an absolute obligation to amend the assessment.
- Whether something is a genuine error is determined by the Commissioner. A genuine error in an assessment is something that has resulted in the taxpayer paying the incorrect amount of tax—either too much or too little.
- Generally the Commissioner will not amend an assessment while the proposed amendment is the subject of a dispute. However an assessment can be amended to reflect an agreed adjustment.
- Interest will apply to tax that has been underpaid or overpaid.
- A taxpayer is liable to a shortfall penalty where they have not met the requisite standards of care.

Standard Practice

The following standard practice has been developed from the above principles.

Taxpayer's requests

A taxpayer or their agent requesting the Commissioner amend an assessment to correct a genuine error, is required to supply the Commissioner with all relevant information to evidence the claim at the time the request is made, including:

- tax type and period containing the error
- amount of tax in error
- nature of the error
- how the error occurred
- how and why the error was identified
- action required to ensure correctness.

Types of errors

Common errors may be arithmetic or transposition errors. There may also be other types of errors which are clear and genuine.

Considering requests

When considering taxpayer requests to amend assessments the Commissioner must take into account all relevant factors on a case by case basis.

Where a taxpayer or their agent claims an assessment contains a genuine error, Inland Revenue will:

- determine whether the request is clear
- request the taxpayer or their agent clarify a request that is not clear.

The Commissioner will amend an assessment when the Commissioner considers *all* of the following are met:

- the request is clear
- all information has been provided
- the error has been verified by the Commissioner
- the amendment is within the time limits (see below)
- none of the other limitations apply (see below).

Where the Commissioner is not satisfied that a genuine error exists or considers one or more of the limitations apply, the Commissioner will not amend an assessment. Where such a decision is made, Inland Revenue will advise the taxpayer or agent of the decision and the reasons for the decision.

Limitations

The following are limitations on the exercise of the Commissioner's discretion to amend assessments.

Time limits

The Commissioner can only increase a tax assessment within four years from the end of the income year in which the taxpayer provided the tax return. For GST, the four year period runs from the end of the GST return period for which the GST return was provided or the assessment was made.

The Commissioner can only make a refund of excess tax/GST within eight years from the end of:

- the year in which the assessment was made in the case of tax (excluding GST), or
- the taxable period in respect of which the assessment was made in the case of GST.

Interpretation of legislation in issue

When the interpretation of legislation is in issue, the Commissioner does not consider it appropriate to amend an assessment outside the disputes resolution process. Interpretations of legislation should properly be considered in the disputes resolution process.

Not a genuine error

If, after considering all relevant information, the Commissioner is not satisfied that a genuine error was made, the Commissioner will not amend an assessment. For example, the facts may indicate a tax position was adopted rather than a genuine error having occurred.

Requests following Court, TRA or adjudication decisions, or Rulings

When a taxpayer requests amendment of an assessment to reflect a decision affecting the same or another taxpayer, the Commissioner will generally not amend the assessment. However when exercising the discretion, the Commissioner will take into account all relevant factors including:

- whether the taxpayer has consistently asserted that they are entitled to a deduction (in contrast to a taxpayer who never sought a deduction in the past, but who becomes aware of a decision affecting another taxpayer and tries to avail themselves of it)
- whether the taxpayer has been associated with a claim or action against Inland Revenue on an issue relevant to the request
- whether Inland Revenue has told the taxpayer that the outcome of a particular issue would be applied to the taxpayer.

Requests following change in Commissioner's practice

When a taxpayer requests amendment of an assessment to reflect a change in Commissioner's practice, the Commissioner will generally not amend the assessment. However, the Commissioner will take into account all relevant factors and taxpayers will be notified when the Commissioner will exercise his discretion to amend assessments in these circumstances.

Current dispute

When the requested amendment is the subject of a current dispute the Commissioner will not make the amendment unless the amendment is to reflect an agreed adjustment.

Regretted choice (choice between valid options)

Where a taxpayer requests the Commissioner to change an assessment from one valid option to another, there is no error to correct. Accordingly the assessment will not be amended. This is a matter of regretted choice. An example of regretted choice is where a taxpayer chooses one of several options for the calculation of a tax liability and subsequently requests to change that option.

If however, the taxpayer can prove that the taxpayer's return erroneously reflected their choice then the Commissioner may consider the request to amend the assessment.

Amended returns

Although a taxpayer's request does not have to be in any particular form, Inland Revenue will not accept amended returns to correct errors. However, an amended tax calculation may be provided in support of a request to amend. When correcting minor errors in GST returns, see Standard Practice Statement INV-490 *GST returns—correcting minor errors (and clarification)* (*Tax Information Bulletins* Vol 10, No 6 (June 1998) and Vol 11, No 2 (February 1999) respectively).

Tax agents may use the Inland Revenue form *Tax agents' request form* (IR 796) when requesting amendment of assessments. However, to ensure all relevant information is provided to Inland Revenue, it may be necessary to provide information in addition to the information provided on the form.

General

Shortfall penalties

Where the request to amend an assessment meets the requirements for a voluntary disclosure, any applicable shortfall penalties will be reduced pursuant to section 141G of the TAA.

Fresh liability

If any alteration or addition to an assessment imposes a fresh liability or increases an existing liability, then the Commissioner will give notice to the taxpayer affected.

This Standard Practice Statement was signed by me on the 8th day of August 2002

Margaret Cotton

National Manager

Technical Standards

LEGAL DECISIONS – CASE NOTES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, the Court of Appeal and the Privy Council.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision. Where possible, we have indicated if an appeal will be forthcoming.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

DISCOVERY AWARDED AGAINST THE COMMISSIONER

Case: Glenharrow Holdings Limited v CIR

Decision date: 3 July 2002

Act: Tax Administration Act 1994

Keywords: Section 138G (evidence exclusion rule), discovery

Summary

Master Venning awarded discovery against the Commissioner, though not in respect of documents already provided by him under Official Information Act requests.

Facts

This case was an interlocutory hearing before Master Venning. Glenharrow Holdings Ltd ("Glenharrow") sought orders for general discovery against the Commissioner and particular discovery against certain non-parties (the Commissioner's expert witnesses). The Commissioner opposed the applications because the case had been through the disputes resolution procedure.

At an initial telephone conference Glenharrow indicated that it wanted discovery from the Commissioner. The Commissioner indicated that such an application would be opposed because section 138G of the Tax Administration Act 1994 and the decision of *CIR v Dick* (2001) 20 NZTC 17,396 meant that discovery was not necessary or appropriate.

The Commissioner considered that as section 138G of the Tax Administration Act 1994 limited the parties to raising in the challenge only the facts and evidence, and the issues arising from them, and the propositions of law, contained in their respective statements of position discovery would not be appropriate.

Any documents obtained from the discovery process could not be used in the substantive hearing, so it would not be appropriate to order discovery.

Glenharrow argued that an order for general discovery was necessary, discovery was not precluded by section 138G of the Tax Administration Act 1994 and that it was irrelevant that numerous Official Information Act requests had been responded to.

Decision

Master Venning accepted Glenharrow's submission that the discovery process is a more general process than the disclosure process in Part 4A of the Tax Administration Act 1994, and that discovery may disclose documents relevant to the facts and evidence, and the issues arising from them, already stated in the statements of position. The Master considered that an order for discovery should not be seen as offending, or as contrary to, the purpose of section 138G. The Master also noted that *Dick* related to an application for particular discovery as opposed to the application for general discovery in this case.

Master Venning ordered the Commissioner to provide a list of documents relating to the matter in question, though not documents that had already been supplied in relation to Official Information Act requests.

ABUSE OF PROCESS

Case:	CIR v Abattis Properties Limited
Decision date:	31 July 2002
Act:	Judicial Review
Keywords:	Issue Estoppel and Abuse of Process

Summary

Strike out application granted.

Facts

1. The detailed background of this case can be found in the Court of Appeal proceedings *CIR v Abattis Properties Ltd* (2001) 20 NZTC 17,013.

2. Following the making of an assessment in May 1999, the CIR demanded the tax due from the taxpayer. This demand was not met and the CIR accordingly issued proceedings to put the taxpayer into liquidation. The taxpayer defended those proceedings on the basis that the assessment was statute barred and that the CIR was not entitled to issue an assessment when a matter had been referred to adjudication. At the hearing a further defence was raised, namely that the taxpayer had not received notice of the assessment prior to the issue of a demand for payment.

3. Master Thomson in the High Court held that:
    1. The assessment was made on 27 May 1999.
    2. The CIR was not estopped from issuing an amended assessment regardless of the fact that disputes resolution procedures were in process.
    3. Liquidation should not be ordered because the CIR was not able to prove that the assessment had been served in time.

4. The CIR appealed to the Court of Appeal. The Court of Appeal accepted that the assessment was made on 27 May 1999 and held that, as a matter of law, liability existed once the assessment was made. The court held that notice of assessment is a separate issue from validity, and that the CIR's failure to give notice did not affect the validity of the assessment. The court held that the Master was wrong to conclude that the assessment had to be served prior to the expiry of the limitation period but held that in the special circumstances of the case, the Master was entitled to dismiss the application for liquidation in his discretion.

   The court also considered that the sensible course in relation to the assessment would seem to be for the Commissioner to set a new date for the response period to run.

5. The CIR did this and granted the taxpayer a further two months to challenge the assessment by notice dated 27 February 2001. The taxpayer has made this challenge in separate proceedings. At the same time this present application for judicial review was filed upon grounds of want of proper process. The taxpayer seeks a declaration that the assessment made by the CIR on 27 May 1999 is invalid. The grounds on which it is alleged to be invalid are:
    1. That the assessment was made after 31 May 1999 and is therefore statute barred.
    2. The CIR failed to comply with statutory procedures in that the parties exchanged statements of position but the matter did not proceed to adjudication whereas the taxpayer had a legitimate expectation that it would do so.
    3. The notice of assessment given by the CIR was invalid.
    4. The delay between making the assessment and giving notice of it was prejudicial to the taxpayer.

6. The CIR applied to strike out the taxpayer's application for judicial review.

High Court Decision

1. His Honour Justice Durie found that the process complained of by the taxpayer relates to steps taken or not taken as a necessary prelude to the formation of the decision to reassess the taxpayer. In addition a challenge is made to the efficacy of the notice of 27 February 2001. The taxpayer also contends that the CIR cannot establish the date on which the assessment was made and whether it was before or after 31 May 1999.

2. His Honour held that the Court of Appeal did not decide that the assessment was valid but only that any validity it may have had was not affected by any subsequent imperfection over the dispatch of notice.

   His Honour stated:

   > "The Court of Appeal held (at paragraph 3) that as a matter of law, liability existed once the reassessment was made. No umbrage is taken with that, as a general proposition, in the current proceedings for review. Liability exists from the moment the reassessment is made, but equally, it ceases to exist if later the reassessment is shown to be wrong, whether inherently through lack of process, or whether because it is wrong in fact.

> In any event the main question here is whether the reassessment was ever validly made in the first instance and before any notice was due to have been given."

3. Further, it was agreed that matters not raised and pursued in litigation, when the opportunity presented, cannot generally be raised for determination in later proceedings. However, according to His Honour that is not what occurred in the present case. In this case, the earlier proceedings were focused upon a different question, that is, whether good cause existed to dismiss an application to have the taxpayer wound up because of a genuine dispute over liability. There was no room for the taxpayer to have introduced the issues it is now raising.

4. In regards to the second issue, His Honour held that even though there is a need to respect and maintain the integrity of the statutory process for challenging reassessments it is important that the issues should be kept distinct, with questions of substance reserved for the statutory process and questions of the process itself kept within the separate area of judicial review.

5. Accordingly, His Honour dismissed the CIR's application to strike out the taxpayer's judicial review proceeding. The Commissioner appealed to the Court of Appeal.

Decision

The Court of Appeal found for the Commissioner on both issues.

On the issue **estoppel point**, Her Honour Justice Glazebrook (who delivered the decision), stated that if a matter has been put at issue in prior proceedings and has been finally decided against a party then issue estoppel precludes that party from contending the contrary of the point that has been decided.

In this case, Master Thomas had held that the making of the assessment had occurred on 27 May 1999. Abattis had not cross-appealed against that finding and therefore the Court of Appeal (at first instance) based its decision on that assumption.

Master Thomson also found that the failure to complete the adjudication process had not invalidated the assessment. Again this point was not appealed by Abattis.

The Court held in appeal from Master Thomson's decision that the failure to give notice did not affect the validity of the assessment. As a matter of law liability existed once the assessment was made. The validity of the assessment was therefore upheld by the Court. It therefore follows that it is no longer open to Abattis to contend that defects in the giving of notice affected the validity.

Further it was at this Court's suggestion that further notice of the assessment be given to Abattis and it was in accordance with this suggestion that the 27 February 2001 notice was issued. The purpose of this was to give Abattis an opportunity to issue challenge proceedings, a purpose which must be seen as to be of benefit to Abattis. Her Honour held that Abattis cannot succeed in its challenge to actions the Commissioner took where those actions were at the suggestion of this Court.

Her Honour went on to state that the issues Abattis seeks to raise in the judicial review proceedings were raised specifically by it by way of defence to the liquidation application, and either the Master made specific findings that were not appealed or this Court made findings which must be accepted as final by Abattis. The Court therefore held that Abattis is estopped from raising any of the issues it seeks to raise in the judicial review proceeding and that the CIR's strike out application should have been granted.

In regards to **the second issue on the use of judicial review**, the Court made some brief helpful comments as, given its finding on the first issue, it was not strictly necessary to deal with the second issue:

The Court reiterated and supported the comments made by the Privy Council in *Miller v CIR* that it will only be in exceptional cases that judicial review is appropriate where the challenges can be addressed in the statutory objection procedure.

Her Honour stated that issues as to process and validity can be dealt with under any challenge proceeding in court and should be, save in exceptional circumstances. In the Court's view it amounts to an abuse of process to commence judicial review proceedings unless the taxpayer can point to exceptional circumstances justifying that course. Her Honour also added that if procedural issues arise before the statement of position stage then taxpayers who fail to include them in their statement of position do so at their peril. If the procedural issues occur after the formal disputes resolution process has been completed, even where a disclosure notice has been issued, there should be no difficulty in having an application granted pursuant to sec 138G(2) of the Tax Administration Act 1994 to raise those matters.

Her Honour held that there were no exceptional circumstances put forward in this case justifying the judicial review proceeding so on this ground too the Court considered that the proceeding should have been stuck out.

REGULAR FEATURES

DUE DATES REMINDER

August 2002

5 Employer deductions and employer monthly schedule

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

20 Employer deductions

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due

Employer deductions and employer monthly schedule

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

30 GST return and payment due

September 2002

5 Employer deductions and employer monthly schedule

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

20 Employer deductions

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due

Employer deductions and employer monthly schedule

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

30 GST return and payment due

These dates are taken from Inland Revenue's Smart business tax due date calendar 2002 - 2003

YOUR CHANCE TO COMMENT ON DRAFT TAXATION ITEMS BEFORE THEY ARE FINALISED

This page shows the draft binding rulings, interpretation statements, standard practice statements and other items that we now have available for your review. You can get a copy and give us your comments in these ways.

By post: Tick the drafts you want below, fill in your name and address, and return this page to the address below. We'll send you the drafts by return post. Please send any comments in writing , to the address below. We don't have facilities to deal with your comments by phone or at our other offices.

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		Comment deadline
	Draft standard practice statement	
☐	ED0034: Instalment arrangements for payment of tax debt	25 September 2002
	Draft standard practice statement	
☐	ED0035: Writing off tax debt	25 September 2002
	Draft question we've been asked	
☐	ED0036: Commencement of the 4-year time bar for taxpayers with non-standard balance dates	25 September 2002

Items are not generally available once the comment deadline has passed

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