COMMISSIONER OF INLAND REVENUE - ASSESSMENT, OBJECTION, DISCRETION

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SUBMITTED BY HOLGER RONALD SORENSEN.

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HOLGER RONALD SORENSEN

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INTRODUCTION

The assessment of taxes has an ultimate effect of separating a man from his wealth. To that man, at least, it is desirable that the establishing of his tax liability by assessment should not be indiscriminate and arbitrary. This sentiment and the special character of taxing statutes is recognisable in the repeated reminders of the courts that revenue statutes are to be interpreted strictly and applied according to their letter rather than their supposed spirit or intendment.(1)

The public official appointed to administer the revenue Acts in New Zealand(2) is called the Commissioner of Inland Revenue(3). Of this official, Isaacs, J. said, in Moreau v. F.C. of T. (1927) R. & McG. 84, 85 "His function is to administer the Act with solicitude for the public treasury and with fairness to the taxpayers."

Because of their nature, it would not be unusual to find complaints of injustice in tax legislation(4). One provision in the New Zealand legislation which might be suspected of having a heavy bias in favour of the Commissioner and a corresponding prejudice against the taxpayer is s.25 of the Land and Income Tax Act 1954(5). Section 25 provides that "the validity of an assessment shall not be affected by reason that any of the provisions of this Act have not been complied with."(6)

Despite any prima facie indications to the contrary, the effect of this section is not to whitewash every act or

omission of the Commissioner which would otherwise render an assessment invalid. The section does not validate an invalid assessment(7). It is submitted that s.25 operates only in respect of irregularities which do not affect the substance of the assessment, such as, failure to give notice of an assessment(8), or, describing what is in truth a new assessment an amended assessment(9); in other words, s.25 does not absolve irregularities affecting the quantum of the assessment, or which go to the basis upon which the particular assessment is made. In Danmark Pty. Ltd. v. F.C. of T. (1944) 2 A.I.T.R. 517 the Commissioner issued assessments made under one particular provision of the Tax Act, then attempted to defend the assessments as having been made under another provision of the Act. Latham, C.J. & Starke, J. expressed the opinion, at pp.544-5 & 554, that the Commissioner could not support an assessment upon the basis of provisions other than those which he stated to be the basis of the assessment(10).

The words of s.25 seem to suggest that the section refers only to the procedural requirements of an assessment, with the result that non-compliance with any statutory procedural requirements necessary for the making of an assessment does not, ipso facto, invalidate the assessment.

The purpose and intention of this paper is to examine the nature of the Commissioner's assessment under the

Land & Income Tax Act 1954, and how the public is either prejudiced, protected, or both, by the Act in relation to this assessment. In the course of this paper, it is proposed to examine what is included in the term "assessment", and how and to what extent the Act and general law provides, on the one hand, protection for the assessment, and on the other, procedure for disputing the legal correctness of the Commissioner's acts and omissions in making this assessment.

(1) Partington v. A.-G. (1869) L.R. 4 H.L. 100, 122 per Lord Cairns, L.C.; Cape Brandy Syndicate v. I.R.C. (1921) 1 K.B. 64, 71 per Rowlatt, J.; Ormond Investments Ltd. v. Betts. (1928) 13 T.C. 400, 431 (H.L.) per Lord Atkinson.

(2) Land & Income Tax Act 1954, Estate & Gift Duties Act 1968, & Stamp & Cheque Duties Act 1971 are the principal revenue Acts.

(3) S.4(1) Inland Revenue Department Act 1952. Refer too definition of "Commissioner" in 1954 Tax Act s.2

(4) E.g. "Injustice in Taxation", by F.A.A. Russell K.C. (1931) 4 A.L.J. 374, and 5 A.L.J. 6 (part 2); Article in (1965) 38 A.L.J. 323.

(5) References in this paper to sections and "the Act" relate to the Land & Income Tax Act 1954, unless the context otherwise requires.

(6) C.f s.28(2).

(7) 11 C.T.B.R. Case 103 (1944). See too 13 C.T.B.R. (N.S.) Case 78 (1967) especially page 524. Note, s.175 of the Australian Income Tax Assessment Act is identical to the New Zealand s.25.

(8) C.f s.28(2).

(9) Cadbury-Fry-Pascall Pty. Ltd. v. F.C. of T. (1944) 3 A.I.T.R. 156, 175 per Williams, J.

(10) These opinions were explained by Kitto, J. in F.C. of T. v. Wade (1951) 5 A.I.T.R. 214, 224.

THE ASSESSMENT

The Land and Income Tax Act 1954 does not define the term "assessment." At a time when the Australian Income Tax Assessment Act was similarly silent, the following definition was given by Isaacs, J. in The King v. Deputy F.C. of T. (S.A.); Ex parte Hooper. (1926) 37 C.L.R. 368,373.

> "An 'assessment' is not a piece of paper; it is 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.' That is and remains the act or operation of the Commissioner."(11)

The Commissioner's assessment involves two procedures; first, the determination of the taxable sum; second, the determination of the tax payable on that sum. This is borne out by the wording of s.17, "make assessments... of the amount on which tax is payable and of the amount of that tax", and s.19, "make an assessment of the amount on which in his judgment tax ought to be levied and of the amount of that tax."

It is submitted that an "assessment" is made only where both procedures are completed. Thus, where the Commissioner has determined that a person has derived no taxable income[12] there is no "amount" upon which the second determination[13] can or need be made, accordingly, there is no "assessment" in such a situation.

Assessments made "tentatively" or "subject to revision" or "to be finalised" are not "assessments" within the contemplation of the Act. In F.C. of T. v. Hoffnung & Co. Ltd. (1928) 42 C.L.R. 39; 1 A.T.D. 310 Isaacs, J. considered[14], "If an assessment definitive in character is made, it assumes that, so far as can there be seen, a fixed and certain sum is definitely due, neither more nor less. In short, it ascertains a precise indebtedness of the taxpayer to the Crown. But if an assessment is made which recognises that one matter is unsettled and remains for settlement, and until it is settled ... then, if that is the basis of the assessment, it is not the assessment contemplated by the Act. Every assessment, of course, contemplates that it may appear thereafter that an alteration or addition is necessary. But that is a different thing - there is no then existing matter known to be a presently necessary factor and put aside for future adjustment." Higgins, J., in the same case, reiterated[15] Isaacs, J.'s conclusion, "The Act contemplates an assessment which is definitive, so as to bind the taxpayer subject to the power of the

Commissioner to make all such alterations in or additions to any assessment as he thinks necessary."[16] The views expounded by Isaacs and Higgins JJ. were extensively quoted, with approval, by Carson, S.M. in 3 N.Z.T.B.R. Case 18[17].

His Worship had to consider whether an assessment described by the Revenue's letter to the taxpayer as a "protective assessment"[18] was an "assessment" and in fact so decided on applying the test of a valid assessment in Hoffnung's case (supra).

It would seem that a "protective" assessment is to be equated with the same status as an ordinary assessment provided it is "definitive in character."

The High Court of Australia in Batagol v. F.C. of T. (1963) 109 C.L.R. 243, concluded, after considering the particular wording of various provisions in the Australian Income Tax Assessment Act 1936-1956 (Cth), including the definition in s.6 of that Act[19], that "assessment" there includes notification of the liability to the taxpayer[20]; the issue of the notice represented the final necessary step for creating a debt due and payable[21]; the term contemplated the completion of the process by which the provisions of that Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case[22].

The reasoning in the Batagol case. (supra) would not

be authority to support the view that in New Zealand "assessment" includes notification of the liability to the taxpayer. This view would be precluded because of vital differences between the assessment provisions of the two jurisdictions, e.g., the Australian s.171 "oddly enough by its very infelicity of expression shows that a notice of assessment is essential to the existence of the assessment. It speaks of "any assessment issued."" (23). There is no similar provision in the New Zealand Act. In addition, the notice of assessment, s.28, is not ipso facto the final step in creating a debt due and payable. In New Zealand, the date for payment of taxes is fixed by the Governor General in Council (24), and the debt becomes due on that date, even though an assessment has not been made. (25)

Since a necessary companion to any assessment is an assessed person, identification of this person would reveal further characteristics of the Commissioner's assessment.

By s.2 of the Act "taxpayer" is defined to mean, unless the context otherwise requires, "a person chargeable with land tax or income tax ..." In relation to land tax, the definition refers only to those persons who own land having an aggregate unimproved value exceeding that exempted by s.54 (26). In relation to income tax the definition has reference to either assessable income (27) or taxable income (28); as a person cannot be charged

income tax unless he has derived taxable income[29], the latter must be the proper alternative.

"Taxpayer" is defined by s.6 of the Australian Income Tax Assessment Act 1936-1971 as meaning "a person deriving income." In Australian Income Tax Law & Practice[30], the following comment appears[31], "This definition was inserted in s.6 to facilitate drafting so as to permit the word to be used in referring to persons in receipt of income who may not be chargeable with income tax. A taxpayer is a person who derives income, NOT a person who pays tax." A previous Act[32] used the definition "any person chargeable with income tax." Australian Income Tax Law & Practice[33] suggests the change may have been prompted by the doubt expressed in British Imperial Oil Co. Ltd. v. F.C. of T. (1926) 38 C.L.R. 153[34].

Using the given definition, it would appear that the "every taxpayer" required to furnish annual returns[35], and in respect of whom the Commissioner is obliged to make an annual assessment[36], and forward a notice of assessment to[37], are only those persons who either derive taxable income or own land assessable for land tax. This idea attracts support from the terms of s.19 which permits the Commissioner to make an estimated assessment in respect of a person he "has reason to

suppose ... is a taxpayer"; this person can avoid the default assessment by showing "that he is not chargeable with tax."

Interpretation of the relevant sections[38] with a view to reconciliation does seem to evoke the conclusion, that in its use of the term "assessment" the Act contemplates some liability being placed on the taxpayer. The High Court in the Batagol case. (supra) adopted this view after considering the Australian provisions, which are, it is submitted, not so dissimilar to their New Zealand equivalents as to render that Court's reasoning untenable in the New Zealand context.

A proper conclusion would seem to be that an "assessment" can only be made where there exists, in the form of assessable land or taxable income, an "amount on which tax is payable."[39]. In other words a determination that there is no amount on which tax is payable is not an "assessment" within the contemplation of the Act. Even if this conclusion be incorrect and a determination of a loss by the Commissioner is an "assessment",[40] the person who receives this nil assessment gains nothing; the Commissioner's determination being labelled "assessment" does not endow that person with any of the rights conferred by the Act in respect of assessments.[41].

At this point it would be as well to indicate the significance of a loss, and the importance of having the quantum, as determined by the taxpayer, accepted by the Commissioner.

Section 137 is a special provision permitting a taxpayer who has incurred a loss to claim that the loss be carried forward and deducted from or set off against future assessable income provided that had a profit been made rather than the loss incurred, that profit would have been assessable income(42). Sub-section (2) requires the taxpayer to satisfy the Commissioner that a loss has been incurred; it follows, that the quantum of loss to be carried forward would have to be established to the satisfaction of the Commissioner(43).

If in the course of his being satisfied of the quantum of the loss the Commissioner disallows a deduction claimed by the taxpayer, thereby reducing the loss to be carried forward under s.137, then following what has already been said, this adjustment cannot be an "assessment." The result of this conclusion will be made clear later.(44).

(11) C.F. s.28 which requires the Commissioner to "cause notice of the assessment to be given to the taxpayer", and provides further, by sub-section (2), that "the omission to give any such notice shall not invalidate the assessment or in any manner affect the operation thereof."

(12) The residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled. - s.2.

(13) "... the amount of that tax ..." - s.17 and s.19.

(14) At p.55 & p.319.

(15) At p.58 & p.321.

(16) C.f. Stanley v. I.R.C. (1944) 1 All E.R. 230, 236; 26 T.C. 12, 17 per Lord Greene, M.R. - "There can be no such thing as a conditional assessment ...."

(17) At p.229.

(18) The purpose of the so-called "protective" assessment was to ensure the existence of an assessment before any statutory limitation could take effect so as to preclude the making of an assessment in a particular case. The present practice of the Inland Revenue Department is not to describe any assessment as "protective" and at the same time the practice is to ensure that any assessment issued is "definitive in character."

(19) "Assessment" is defined by s.6(1) of the Australian Act to mean "the ascertainment of the amount of the taxable income and of the tax payable thereon."

(20) This same conclusion was reached by the Australian Board of Review in 9 C.T.B.R. (N.S.). Case 43. (1960).

(21) In Gordon Edgell & Sons Ltd. v. F.C. of T. (1949) 4 A.I.T.R. 229, it was held that until the taxpayer is served with a notice of assessment there is no tax which can be paid under the Act.

(22) Refer page 251-252 per Kitto, J.

(23) Batagol v. F.C. of T. (1963) 109 C.L.R. 243, 252 per Kitto, J. Section 171 provides:

> (1) Where a taxpayer has duly furnished to the Commissionera return of income, and no notice of assessment in respect thereof has been served within twelve months thereafter, he may in writing by registered post request the Commissioner to make an assessment.
>
> (2) If within three months after the receipt by the Commissioner of the request a notice of assessment is not served upon the taxpayer, any assessment issued thereafter in respect of that income shall be deemed to be an amended assessment, and for the purpose of determining whether such amended assessment may be made, the taxpayer shall be deemed to have been served on the

last day of the three months with a notice of assessment in respect of which income tax was payable on that day.

(24) S.204.

(25) S.208. Refer Cunningham & Thompson's Taxation Laws of New Zealand, 1970 Ed., paragraph 1417; see too Cockerline & Co. v. I.R.C. (1930) 16 T.C.1, 19.

(26) S.53.

(27) Income which is not exempted from income tax otherwise than by way of special exemption. - Refer s.2.

(28) Refer footnote (12).

(29) S.77.

(30) 1969 Edition (Gunn).

(31) Refer paragraph 185/2.

(32) Income Tax Assessment Act 1922-1927. A copy of this Act, and its definition of "taxpayer", is reproduced in R. & McG. page 523 (under s.4).

(33) At paragraph 185/2.

(34) "I may say that I am not at all satisfied that a person assessed wrongly (e.g., a charitable institution) could not wait till he be sued and then defend the action." per Higgins, J. at page 208.

(35) S.6 and s.7.

(36) S.17.

(37) S.28.

(38) Part II of the Act.

(39) S.17.

(40) This could only occur in an income tax situation; "loss" is an alien concept in relation to land tax for which positive (as opposed to negative or loss) assessments only are possible. Refer s.53 and s.54.

(41) Refer - Who can object? Post.

(42) S.137(2A).

(43) Note, the use of the term "taxpayer" in s.137 cannot be definitive. However, its use is probably more appropriate than a term such as "person", because the loss can only be carried forward and deducted from future assessable income - s.137(2); save in the exceptional case of the quantum of the assessable income being less than or the same as the allowable special exemptions, this assessable income would include taxable income. In other words, but for the loss carried forward, the person would in the normal course be chargeable with income tax.

(44) Refer - Who can object? Post.

NOTICE OF ASSESSMENT

As soon as conveniently may be after an assessment is made the Commissioner "shall cause notice of the assessment to be given to the taxpayer."(45); there is no requirement that any notice be given to a non "taxpayer." However, failure to give notice does not invalidate or affect the operation of the assessment(46).

Where an amended assessment within the meaning of s.22 becomes necessary and any alteration or addition to the previous assessment has the effect of imposing any fresh liability or increasing any existing liability, "notice thereof shall be given by the Commissioner to the taxpayer affected."(47).

It is interesting to note that the notice of an amended assessment required by s.22 (2) becomes necessary only where the adjustment has the effect of imposing any fresh liability or increases any existing liability.(48). There can only be a liability where there is tax due. There can only be tax due where there is a taxable amount. This is in accord with the conclusion already expressed that the determination of a loss is not an "assessment." It should be noted that "fresh" liability in s.22 (2) refers to a liability which is new in character rather than a movement from a status of no liability to one of liability(49).

At first sight, it appears that the notice has no particular vitality, particularly in view of s.28 (2) and s.25[50]. However, as will be seen later, the notice is important in relation to the taxpayer's rights in respect of the assessment.

(45) s.28(1). This notice is required to be in writing; refer definition of "notice" in s.2 of the Act.

(46) s.28(2).

(47) s.22(2).

(48) A "fresh" liability means a liability which is new in character - such as income from a source not disclosed by the taxpayer in his return. An "increased" liability as distinguished from a fresh liability refers only to the subject of amount - the liability appears from a prior assessment, but the Commissioner increases the amount of income from that source; refer Trautwein v. F.C. of T. (No.1) (1936) 56 C.L.R. 63 at p.95 per Latham, C.J., & p.108 per Dixon & Evatt, JJ.

(49) See footnote (48) supra.

(50) s.25 - "The validity of an assessment shall not be affected by reason that any of the provisions of this Act have not been complied with."

OBJECTIONS AND THE NOTICE OF OBJECTION

Just as the Commissioner can be dissatisfied with a return or information furnished by a taxpayer(51), the taxpayer can be dissatisfied with the Commissioner's assessment. The taxpayer's dissatisfaction is ventilated by way of objection to the assessment(52), however, in order to have his objection allowed(53), the taxpayer must discharge the onus of showing the assessment to be wrong, why it is wrong and by how much it is wrong(54). Because an assessment made under s.17(55) is founded on established figures as opposed to an estimate (of the Commissioner) in the case of assessments under s.19, and sometimes s.22, what the taxpayer considers to be the extent of the error and therefore what the assessment should be, is axiomatic thus, any onus that might be on the taxpayer to show what the assessment should be would be satisfied by his establishing the existence of an error. The objection is not limited to matters relating to the amount of the assessment, but extends to all matters of principle or law(56).

The notice of objection, provided for by s.29, is not required to be in any particular form(57), s.29(1) merely requires the grounds of objection to be stated shortly in a written notice. In The King v. Deputy F.C. of T. ex parte Copley (1923) 30 A.L.R. 86; R. & McG. 47, the High Court of Australia

pointed out that the use of the word "objection" or "object" was not necessary, but that the notice should be in sufficiently clear terms to convey to the Commissioner:

(i) that the objector contends that the assessment is not in accordance with law, and

(ii) the grounds upon which the contention is based.

A similar approach in respect of the content of a notice was adopted by Moller, J. in Lancaster v. C.I.R. (1969) N.Z.L.R. 589, where His Honour accepted that the language used should be sufficiently explicit to direct attention to the particular respects in which the taxpayer contends the assessment is erroneous. In each particular case however, the sufficiency of the grounds is a matter for the Court(58).

A notice of objection which merely stated "that there is in the opinion of the liquidator no taxable income", was held to be a valid notice which covered all the items in the assessment(59). However, when using such a succinct notice, care should be taken to ensure that a ground of objection is in fact disclosed. In 4 N.Z.T.B.R. Case 23 (1969) the Board of Review complained that the notice in the case before them which stated, "Please take notice that on behalf of the taxpayers we object to the two assessments including the profit on the sale of

F. street", did not even indicate the grounds of the objection; as a result this warning was issued[60]:

> We regard that situation as being less than satisfactory and as not being in accordance with the requirements of the statutory provisions[61] .... If such a situation should again arise we may well find it necessary to decline jurisdiction for the reason that, in our view, jurisdiction does not exist."

An assessment can be re-opened and an amended assessment issued on the grounds that the returns furnished are fraudulent or wilfully misleading[62]. It has been held that an allegation by a taxpayer, in response to such an amended assessment, that there has been no fraud or wilful misleading is a "ground of objection" which cannot be raised merely by implication. In Lancaster v. C.I.R. (supra) the Commissioner re-opened assessments beyond the previous four years after forming the opinion that the relative returns were fraudulent or wilfully misleading. Counsel for taxpayer submitted that although an objection against the allegation of fraud or wilful misleading did not expressly appear in the notice, such a ground of objection was nevertheless to be implied from it. Counsel argued that the taxpayer had received assessments which covered eight years,

and which surely, therefore, implied that fraud or wilful misleading was involved[63]; thus, affirmation of the correctness of the returns and a notice stating "I object to the assessments" inferentially challenged the Commissioner's opinion of fraud or wilful misleading. The Court rejected this submission on the ground that inference did not fulfil the requirements of a notice as set down by the Act.

In Ex parte Martin (1971) T.R. 391[64] counsel for taxpayer pointed out that in criminal proceedings alleging fraud the accused could submit "no case to answer" (thereby placing the onus on the prosecution to prove fraud), and so contended that a similar submission should suffice in the present tax appeal because, in counsel's opinion, the liability for penal tax which would arise on a finding of fraud gave the appeal the character or nature of criminal proceedings. The English Court of Appeal (Lord Denning, M.R., Megaw and Stephenson, L.JJ.) rejected the contention and held the submission of "no case to answer" was not competent in the hearing of an appeal against an assessment to tax[65],[66].

Care must be taken when drafting the notice because its content operates to define the matters which may be argued by the taxpayer. By s.20 of the

Inland Revenue Department Amendment Act 1960, on the hearing and determination of his objection, the objector is limited to the grounds stated in his notice of objection(67).

Various decisions of the High Court of Australia considering a provision similar to s.20 of the 1960 Amendment Act(68) appear to accept that an objector cannot rely on grounds which are not sufficiently stated in his objection(69); yet, Windeyer, J. in Mercantile Credits Ltd. v. F.C. of T. (1971) 45 A.L.J.R. 105, 108-109 varied the assessments, after finding them erroneous, in spite of the fact that the grounds on which he found them excessive were not precisely covered by any of the taxpayer's stated grounds of objection!

Windeyer, J. explained "The variation I shall make was not propounded by the taxpayer, but that I consider, does not prevent my making it." The justification for this view and statement was the Australian s.199 which provides that "The Court hearing the appeal may make such order as it thinks fit, and may by such order confirm, reduce, increase or vary the assessment." The similarity of this provision to the New Zealand s.31(1)(a) and s.32 (11)(a) describing, respectively, the power of the Board of Review and the Supreme Court on hearing

objections has led at least one writer to the suggestion that a similar conclusion might be reached by the Board of Review or Supreme Court in New Zealand(70).

A recent article in the Australian Tax Review(71) doubted that the general statement of Windeyer, J. would be accepted as authoritative. Whilst admitting that s.199 is expressed in very broad terms the article nevertheless suggests that "There is much to be said for the view" that the Court should consider its discretion under s.199 to be restricted by implication by s.190 (which limits the taxpayer to the grounds stated in his objection.) In Molloy v. F.C. of Land Tax. (1938) 59 C.L.R. 608, 610 Isaacs, J. noted s.190 to be a provision "made for the purpose of protecting the public revenue, and the Court is bound to give effect to it"; and in North Australian Cement Ltd. v. F.C. of T. (1969) 43 A.L.J.R. 303, 307 Menzies, J. stated:

> "The purpose of s.190 of the Act ... is, no doubt, to ensure that the Commissioner, in allowing or disallowing objections which have been made, will have before him the matters upon which the objections depend and that, in the event of a reference or appeal, the Board of Review or the Court will not go outside the essential matters brought to

the attention of the Commissioner for his consideration."

In 17 C.T.B.R. (N.S.) Case 96 (1972) the Board noted, "no concession by the Commissioner's representative can enlarge the ambit of the document (the objection), the scope of which has to be determined by the tribunal which has the duty of considering it." This appears to imply that since the duty of the tribunal is only to consider the matters fairly raised in the objection the authority to vary an assessment would only be exercised in relation to the objection. The objector seeks relief by variation of the assessment on the grounds fairly raised by his objection; if these grounds are not established as a valid objection to the assessment, then surely this failure to establish a case precludes granting relief.

It is submitted that the statement of Windeyer, J. cannot be confidently relied on as the correct approach in this matter.

The Taxation Institute of Australia has made submissions to the Australian Federal Treasurer requesting a change to s.190 (which limits the taxpayer to the grounds stated in his objection.) In their letter (72) the Institute state, "It is submitted that it is indefensible that assessments,

possibly for large amounts of tax, should be upheld by an appellate body because of the technicality that there has been some error or omission in the notice of objection. The objective of the Act should surely be to ensure the collection of the correct amount of tax but not to lend itself to the collection of tax which would not have been payable but for some omission of a technical nature or because the taxpayer was unaware of some factor taken into account by the Commissioner in making the assessment." The Institute suggest an amendment to s.190 providing that the Court or Board of Review hearing the objection "may permit any addition or alteration to the grounds of any objection in writing, under s.185 of the Act (New Zealand s.29), in any matters that appear to such Court or Board of Review to be essential to a determination of the tax liability of the objecting taxpayer based on the merits of the case."

In his reply, the Federal Treasurer said, "The Commissioner of Taxation has informed me that, in practice, it is very rare indeed for taxpayers to suffer any real disadvantage because of the operation of s.190. Grounds of objection are not construed narrowly and, almost invariably, it is found that the taxpayer is in a position to dispute any aspect of his assessment which he

really intended to challenge at the time of lodging his objection." In the main, the Federal Treasurer's reply is true of the situation in New Zealand.

Though it may be considered that s.20 of the Inland Revenue Department Amendment Act 1960 (which limits the taxpayer to the grounds stated in his objection) might give rise to injustice, it should be remembered that the purpose of the section is to prevent a taxpayer wishing to go beyond the claims that he set out to make in his objection against the assessment and put before the appeal tribunal some quite different argument which has occurred to him or his advisers at a later date(73). Just as the taxpayer is limited to the grounds stated in his objection, it seems that the Commissioner would be limited by the Court to the grounds given for his assessment. In James v. C.I.R. (1973) 2 N.Z.L.R. 119; 3 A.T.R. 505, Cooke, J. declined to hear any argument from the Commissioner on any question other than the one that had been stated for the determination of the Court, thus the Commissioner was confined to the reasons given to the taxpayer for his (the Commissioner) making the assessment in dispute.

When examining the question of objections to assessments the Ross Committee on Taxation(74) made no comment as to the injustice or otherwise of

confining an objector to the grounds stated in his notice of objection. The only recommendation made by the Committee in respect of objections was that certain specified discretionary powers[75] hitherto immune from objection due to s.35(f), should be subject to objection. - This recommendation was subsequently substantially[76] adopted by s.6 of the Land & Income Tax Amendment Act 1968.

(51) Hunt & Co. v. Joly (Inspector of Taxes). (1928) 14 T.C. 165.

(52) S.29.

(53) If the Commissioner does not acquiesce in the taxpayer's contentions as to the defects of the assessment, then following a formal notice of objection (s.29) and disallowance of that objection, the allowance or otherwise of that objection is determined (at the written request of the taxpayer) by the Board of Review (s.30) or the Supreme Court (s.32) by way of case stated. - This sequence of events is set out in the judgment of McCarthy, J. in Reckitt & Coleman (NZ) Ltd. v. Taxation Board of Review. (1966) N.Z.L.R. 1032, 1045.

(54) Lancaster v. C.I.R. (1969) N.Z.L.R. 589, 591; Babington v. C.I.R. (1957) N.Z.L.R. 861, 872. See too s.19 of the Tax Act, s.20 Inland Revenue Department Amendment Act 1960, and C. of T. v. McCoard (1952) N.Z.L.R. 263, 266.

(55) That is, made on the basis of the return furnished and any other information in the possession of the Commissioner.

(56) C. of T. v. Everitt. (1896) 21 V.L.R. 481; R. & McG. 186. See too s.35 of the Act which sets out the circumstances in which the objection procedure does not apply.

(57) The Land & Income Tax Regulations 1923 provided a suggested form of notice in the Schedule (Forms 8 & 9), but use of this form of notice was not mandatory - refer Reg. 12(2). No

suggested form of notice has been incorporated into the 1946 Regulations (S.R. 1946/74), which are the Regulations at present in force.

(58) H.R. Lancey Shipping Co. Pty. Ltd. v. F.C. of T. (1951) 25 A.L.J. 145; 5 A.I.T.R. 135.

(59) British Australian Wool Realisation Association Ltd. (In liquidation) v. C. of T. (1929) R. & McG. 240.

(60) At page 269, lines 43-47.

(61) S.29(1), and s.20 Inland Revenue Department Amendment Act 1960.

(62) See s.24.

(63) Prima facie, an assessment cannot be increased after the expiration of 4 years from the end of the year in which it was made - s.24(1). This prohibition does not apply in cases where the Commissioner is of the opinion that the returns which were the basis of his original assessment are fraudulent or wilfully misleading - s.24(2).

(64) Also reported as R. v. Special Commissioners, Ex parte Martin in (1971) 50 A.T.C. 409.

(65) This would follow from the fundamental principle that the Commissioner is not required to prove his assessment correct; the onus is on the taxpayer to prove it incorrect.

(66) The Court also held, that it was unnecessary for the Revenue to give particulars of fraud at the outset of the appeal hearing, as it was sufficient if the fraud appeared from the evidence as it emerged. Lord Denning said the only thing that was necessary was that the taxpayer should have a fair opportunity of knowing the case against him, and then of answering it.

(67) See 1 N.Z.T.B.R. Case 5, and 1 N.Z.T.B.R. Case 19.

(68) S.190 Income Tax Assessment Act.

(69) e.g. F.C. of T. v. Western Suburbs Cinemas Ltd. (1952) 86 C.L.R. 102; North Australian Cement Ltd. v. F.C. of T. (1969) 43 A.L.J.R. 303.

(70) (1968) N.Z.L.J. 503 at p.504. In this article the writer was referring to McClelland v. F.C. of T. (1967) 118 C.L.R. 353 where Windeyer, J. stated, at p.364, obiter, that relying on s.199 the Court could alter an assessment which was made on a wrong basis even though this basis was not challenged in the objection.

(71) November 1971 issue, p.69 "Limitation to Grounds of Objection" by Dr I.C.F. Spry.

(72) Refer "Taxation in Australia" April 1969 issue at p.1207. See too July 1972 issue p.36 and August 1972 issue p.112.

(73) In Brown v. F.C. of T. (1969) 1 A.T.R. 82, 84 it was held by Menzies, J. that "the appeals fail because each is now substantially based upon a matter not fairly within the taxpayer's grounds of objection."

(74) Refer Report of October 1967, chapter 74.

(75) Refer sections 181, 187(2), 194, 223, and 223A.

(76) Sections 223 and 223A were not made subject to objection. See s.35(f) - these sections confer a discretion to make a refund of overpaid tax, and to allow tax paid in excess to be set off against additional tax when an assessment is reopened.

NOTICE OF ASSESSMENT AND THE RIGHT TO OBJECT

The real importance of the notice of assessment is its relationship with the right to object.

An objection is made by the delivering or posting to the Commissioner of a written notice of objection "within such time as may be specified in that behalf in the notice of assessment, not being less than 14 days after the date on which the notice of assessment is given"(77). Section 29(2) invalidates a notice of objection "given after the time specified in the notice of assessment."

Extant legislation does not provide any specific form for the notice of assessment. The Land & Income Tax Regulations 1946(78), by Reg. 20, merely authorises the Commissioner to precribe a form of notice(79). The proviso to s.28(1) specifies three circumstances(80) in which it is not necessary to set forth in the notice of the assessment any particulars other than particulars as to the amount of the tax to be paid by the taxpayer or the amount of tax to be refunded, as the case may require.

Whatever the content of the notice may be in any particular case, presumably it should at least (apart from details of tax payable or refundable, as the case may be) specify the date by which any

objection must be made.

Until a notice of assessment specifying an objection date is issued, the right to object is, it seems, not subject to a time limitation, in spite of the fact that the assessment may be valid(81).

If the Commissioner issues a notice which is either not received or received after the objection period has expired, is the right of objection obviated?

Regulation 18(1), of the 1946 Regulations, requires a person furnishing a return to state his address, and give notice of any change in address. Regulation 18(2) states:

> "The posting of any notice addressed to a person at the last address given by him pursuant to this regulation shall be sufficient service of notice on him for the purposes of the Act and these regulations."

By s.2 of the Act "notice" is defined to mean, unless the context otherwise requires:

> "a notice in writing given by causing the same to be delivered to any person, or to be left at his usual or last known place of abode or business in New Zealand or elsewhere, or to be sent by post addressed to

that usual or last known place of abode or business, or if there are several such places of business, then to any of them."

The question of what happens when a notice of assessment is lost in the post arose in Rutherford v. Lord Advocate. (1931) 16 T.C. 145, but was not answered. If the notice is properly addressed and posted or delivered as described by Reg. 18 and s.2, then it does seem that the right to object is extinguished on expiration of the objection date in spite of the notice not being received before that date. However, in a bona fide case, the Commissioner would probably exercise his discretion under s.29(2) to extend the time for objection specified in the lost or undelivered notice.

If the notice is not properly addressed or delivered, late receipt would not obviate the right to object; one reason being that that notice is not a "notice" as defined by the Act. In Berry v. Farrow. (1914) 1 K.B. 632, taxpayer was the manager of a limited company. A notice of assessment in respect of his salary and a written demand for payment was left at the company's office, but were not received by, and did not come to the knowledge of, the taxpayer. The Court held, inter alia, that under the Act notice of an assessment and a demand for payment

must be given to the person sought to be charged, and that the company's office was not taxpayer's "usual or last known place of abode"[82] within the Act, and therefore, no valid assessment had been made upon the taxpayer.

(77) S.29(1).

(78) S.R. 1946/74.

(79) The 1923 Regulations provided a form of notice in the Schedule (Forms 6 & 7) the use of which was mandatory - refer Reg. 12(1).

(80) "... where -

(a) The taxpayer has, in his return to which the assessment relates, calculated the amount on which tax is payable or the amount of the tax; or

(b) The assessment has been made on default by the taxpayer in furnishing any return for the year to which the assessment relates; or

(c) The Commissioner causes a separate statement in relation to the assessment to be given to the taxpayer setting forth the amount on which tax is payable and the amount of the tax, ..."

(81) Refer s.25 and s.28(2).

(82) C.f. the definition of "notice" in s.2.

WHO CAN OBJECT?

Only those persons who have been assessed for land tax or income tax may object to that assessment(83). It is axiomatic that unless a person has assessable land or taxable income, he cannot be assessed for land tax or income tax respectively.

Section 31 prescribes the power of the Board of Review on hearing objections to assessments (viz., to confirm, or vary, or cancel, or reduce, or increase); the corresponding power of the Supreme Court is set out in s.32(11). This power (and provision) can only have meaning where there is tax assessed, because this is the only situation in which the Board, or the Court, can confirm, or vary, etc. an assessment. If the Board, or Court, agrees with the Commissioner's action, it confirms the assessment, in any other case it uses its powers to change the assessment. Where a loss returned is adjusted by the Commissioner, an objection raised is an objection to the adjustment, not the assessment, because the tax payable remains at nil, whatever the Board, or the Court, might think of the adjustment; the "assessment" (determination of taxable income and tax payable) in these circumstances is static. - The necessary corollary of this is of course that the Commissioner similarly has no recourse to have

any adjustment in the guise of an "assessment" confirmed by the Board or the Court.

If a determination of a loss is an "assessment", then it is an assessment for which there is no right of objection under s.29. This is also the position in Canada, as is evident from the following passage in Wurz v. M.N.R. (1972) C.T.C. 2299, 2300; "It is also well established that no appeal lies from a notification by the Minister that no tax is payable by a taxpayer."(84) The reasoning adopted in the Canadian cases was, there being no amounts in issue there was therefore no grounds for appeal.

(83) S.29(1).

(84) See too Newfoundland Minerals Ltd. v. M.N.R. (1969) C.T.C. 639; Lazis v. M.N.R. (1970) Tax A.B.C. 605; Falconbridge Nickel Mines Ltd. v. M.N.R. (1971) C.T.C. 789, 795-6.

THE COMMISSIONER'S DISCRETION

Not every action of the Commissioner in relation to his assessment can be objected to by persons eligible to object under s.29.

A right of objection is excluded by s.35, except so far as expressly provided to the contrary in the Act, with respect to:

> "Any matter which by any provision in section 70 or in Part II (except sections 20 and 24), Part VII(except sections 181, 187 and 194), Part VII.B., Part VIII, Part IX, Part X, or Part XI of this Act is left to the discretion, judgment, opinion, approval, consent or determination of the Commissioner."
> - refer s.35(f).

Save in relation to the particular excepted circumstances, there can be no appeal against the Commissioner's exercise of a discretion, judgment, opinion, etc.(85).

If an opinion is reviewable, it is considered that the assessment to which it relates is still an "assessment." By holding the opinion the Commissioner satisfies that requirement for making that assessment(86) and further, the opinion being part of the procedural requirements of the assessment, any defect in it

would not ipso facto, by virtue of s.25[87], invalidate that assessment.

Where an opinion[88] is reviewable e.g., an opinion that a return is fraudulent or wilfully misleading[89], then certain other conditions must be satisfied before the Court will allow the appeal.

In Sleeman v. C.I.R. (1965) N.Z.L.R. 647, Wilson, J. held[90] that where the extent of a taxpayer's liability to income tax depends on an opinion formed by the Commissioner and that opinion is reviewable by the Court on appeal, an appeal can succeed only if it is shown that the necessary opinion was not held by the Commissioner, or that it was based on a misconception as to the meaning of the relevant section of the Act, or that it was arrived at capriciously or fancifully upon irrelevant or inadmissible grounds[91]. It was pointed out in the recent Australian High Court decision of Thomas v. C. of T. (1972) 46 A.L.J.R. 397 that it must be shown that the Commissioner's opinion is one which must have been formed because of some mistake or misconception and that the Commissioner has failed to discharge his function according to law[92].

The Court can decide whether or not the Commissioner held the requisite opinion. It can determine whether

the opinion was held bona fide, and whether or not it was formed arbitrarily or fancifully, or upon facts or considerations which could not be regarded as relevant(93).

Macfarlan, J. explained in Perpetual Executors Trustees & Agency Co. (W.A.) Ltd. (John Turnbull Trust) v. F.C. of T. (1953) 3 A.T.D. 132 that the Commissioner's opinion is examinable in order to see whether he has acted according to law in forming that opinion, that is whether he has had regard to circumstances to which he as a matter of law is entitled to have regard. The Court will interfere if there is no material at all on which to base his (the Commissioner's) opinion, or if the opinion is not really an opinion at all but is a mere guess or conjecture. Macfarlan, J. also stressed(94) that the Court would not examine the opinion merely to ascertain whether it would come to the same opinion.

The Commissioner's discretion is examinable if he fails to address himself to the question which the section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration, or excludes from consideration some factor which should affect his determination. The fact that the Commissioner has not made known the reasons why he was not satisfied will not prevent the review of his decision. It is

not necessary to be sure of the precise particular in which he has gone wrong. It is enough to see that in some way he must have failed in the discharge of his exact function according to law.(95).(96).

It should be noted that it is the validity of the exercise of the Commissioner's discretion, as opposed to the correctness of his opinion, that is examinable.(97).

An interesting aspect of the exercise of discretion was considered in the recent Australian decision of Finance Facilities Ltd. v. C. of T. (1971) 45 A.L.J.R. 241. In that case a "Keighery" company(98) was formed to avoid a dividend tax. A prima facie consequence of the scheme was the attracting of a dividend rebate for the shareholders of the subsidiaries of the Keighery company. The Commissioner was authorised by the relevant provision to allow the rebate if he was satisfied as to certain specified matters. The Commissioner refused the rebate on taking the view that it was not reasonable to allow it because, inter alia, the facts before the Court disclosed what was in his view a tax avoidance scheme - which scheme was not rendered void by s.260, the Australian equivalent to New Zealand's s.108(99). Gibbs, J. held that the Commissioner was entitled to consider the fact that, although the case satisfied the requirements of the section, it only did so because

the parties had implemented a scheme for the purpose of ensuring that dividend tax was not attracted, and to form the view that although the scheme was lawful and proper it was nevertheless an artifice designed to take advantage of a loophole in the Act, and acting on that view to refuse to allow the rebate which the Act left within his discretion. "Once this conclusion is reached, I can find no ground for holding that the Commissioner did not make a proper exercise of his discretion."(1). However, on appeal(2) the Full High Court, by majority, decided that the provision in question which Gibbs, J. accepted as conferring a discretion on the Commissioner in fact conferred a power or authority which had to be exercised if the circumstances were such as to call for its exercise. The majority went further and said in effect that even if there was a discretion the Commissioner was not justified in refusing to exercise it. The dissenting judge, McTiernan, J., considered that there was a discretion and that the Commissioner was justified in withholding its exercise.

(85) Refer Legarth v. C.I.R. (1967) N.Z.L.R. 312, 315.

(86) George v. F.C. of T. (1952) 86 C.L.R. 183, 203.

(87) Refer Introduction supra.

(88) In Sleeman v. C.I.R. (1965) N.Z.L.R. 647 Wilson, J. expressed his view that an opinion was different from the Commissioner's discretion.

(89) S.24.

(90) Following Fullager, J. in Australasian Jam Co. v. F.C. of T. (1953) 88 C.L.R. 23, 37.

(91) See too Ferron v. F.C. of T. (1972) 3 A.T.R. 249.

(92) See too Duggan & Ryall v. F.C. of T. (1972) 3 A.T.R. 413.

(93) Giris Pty. Ltd. v. F.C. of T. (1969) 119 C.L.R. 365, 374 per Barwick, C.J.

(94) At page 135.

(95) Avon Downs Pty. Ltd. v. F.C. of T. (1949) 78 C.L.R. 353, 360 per Dixon, J.

(96) Lord Thankerton in I.R.C. v. Ross & Coulter. 1948) 1 All E.R. 616, 629 (Bladnock Distillery case) took the view that generally speaking, the Court would not be entitled to interfere unless the discretion was exercised either without compliance to the conditions of the statutory provision which created it, or was not exercised judicially.

(97) Australasian Scale Co. Ltd. v. C. of T. (1935) 53 C.L.R. 534, 555 per Rich, A.C.J., and Dixon, J. An illustration of the distinction between the correctness and the validity of a determination is the decision in F.C. of T. v. Brian Hatch Timber Co. (Sales) Pty. Ltd. (1972) 46 A.L.J.R. 111, 112.

(98) Refer Keighery Pty. Ltd. v. F.C. of T. (1957) 100 C.L.R. 66.

(99) Refer Keighery case (supra) and C. of T. v. Casuarina (1971) 45 A.L.J.R. 213.

(1) At page 249.

(2) (1971) 2 A.T.R. 573.

LODGMENT OF OBJECTION - EFFECT OF LODGMENT ON LIABILITY

Once the existence of a right to object under s.29 is established, an objection must be lodged within the time specified otherwise the right to object lapses(3). A notice of objection given out of time is of no force or effect unless the Commissioner in exercise of his discretion accepts that late notice(4). This discretion to extend the time for objecting is not itself subject to objection(5). If no objection is made, or objection is made out of time, the assessment becomes conclusive(6).

The mere fact that an objection has been lodged, or an appeal or case stated initiated, does not relieve the taxpayer of his liability to pay (and the Commissioner of his right to receive and recover) the tax due as indicated by the assessment, including penal tax ("additional tax") under s.208 for late payment. That is, the effect and operation of the assessment in quantifying the tax due, is not suspended by its (the assessment) being in dispute(7).

(3) Mudgway Estate Co. Ltd. v. C. of T. (1911) 31 N.Z.L.R. 148; 14 G.L.R. 315.
(4) S.29(2).
(5) S.35(a).

(6) Mudgway Estate Co. Ltd. v. C. of T. (supra); Anson v. C. of T. (1922) N.Z.L.R. 330, 338; Macfarlane v. C. of T. (1923) N.Z.L.R. 801, 836 per Salmond, J. (dissenting judgment).

(7) S.33; see too Clifford v. C.I.R. (1966) N.Z.L.R. 201. The equivalent Australian provision is s.201; refer Deputy C. of T. v. Hissink. (1966) 10 A.I.T.R. 102.

EXCLUSION OF A RIGHT OF OBJECTION

There are two clases of person who are impliedly excluded by s.29(1) from objecting by objection to the actions of the Commissioner(8).

Take a person who has incurred a trading loss. He cannot immediately object under s.29 to any action of the Commissioner which reduces the amount of that loss(9) since, because no taxable income has been derived, he cannot properly be described as, in the words of s.29(1), a "person who has been assessed for ... income tax"(10). If in a future income year this person derives taxable income then, the Commissioner's action of, e.g., disallowing a deduction, in that previous year can be objected to by disputing the assessment of the current year by challenging the quantum of losses allowed by the Commissioner for carrying forward under s.137(11). Thus, in these circumstances, there is no immediate right of objection. The right of objection is suspended until some future income year in which there is taxable income to attract an "assessment" which can be the subject of an objection. The prejudice to the taxpayer becomes obvious where the opportunity to object does not arise for some years after the Commissioner's doubtful (in the eyes of the taxpayer) decision(12). Each passing

year does not make any easier the taxpayer's task of producing accurate and all relevant evidence for sustaining his objection(13).

The other class of person denied a right of objection (immediate or otherwise), is a person who carries on an activity which the Commissioner considers to be of a non-commercial or hobby nature. It is well established that profits from such activities are not assessable, and conversely losses or outgoings are not deductible items(14) - Not only is there no assessment to be objected to, the objection procedure is inadequate in that there is no provision for the Commissioner's determination that the activity is a hobby venture from being disputed; the reason, lack of any assessment as required by s.29. The significance of this point becomes evident where the Commissioner disallows the carry forward of an operating loss for the purpose of set off against future profits of that venture (which the Commissioner regards as a hobby) or some "business", within the meaning of the Act(15).

The Commissioner's determination of hobby can indirectly be the subject of an objection. This arises where the person as well as carrying on the so-called hobby, derives assessable income from a business; the Commissioner disallows the

"hobby" losses as a deduction against the business income when calculating that person's assessable income for the year. The person then has an assessment to object to(16).

(8) R. v. Deputy F.C. of T.; Ex parte Hooper. (1926) 37 C.L.R. 368; R. & McG. 70, held that an amendment to an assessment which reduces the amount of tax payable could not be objected to.

(9) The importance of establishing the quantum of a loss arises in relation to s.137 which allows the carrying forward of losses for setting off against future income.

(10) He might fit the description of a person who has been assessed for income tax purposes, but this is not the wording of the section.

(11) The taxable income of the current income year is determined after consideration of, inter alia, the losses available to be carried forward and set off against the current assessable income.

(12) This would occur where losses were suffered in successive income years.

(13) Note, in South Africa, the Income Tax Act, by s.1(ii), defines "assessment" to mean, inter alia, "(b) the determination of any loss ranking for set off." - Refer Silke on South African Income Tax, 6th edition, page 874.

(14) Martin v. F.C. of T. (1953) 90 C.L.R. 470; 5 A.I.T.R. 485; Hawes v. Gardiner. (1957) 37 T.C. 671; C.I.R. v. Watson. (1960) N.Z.L.R. 259.

(15) The profits of a business are assessable, and losses and outgoings deductible - s.88(1)(a), and s.111.

(16) This was the situation in Harley & Anor v. C.I.R.; Jenkins v. C.I.R. (1971) N.Z.L.R. 482 (C.A.).

REMEDIES OTHER THAN OBJECTION[17]

There are examples in English tax law of the granting of the prerogative writs of mandamus[18], prohibition[19], and certiorari[20], but the English decisions also indicate that these remedies are refused where the appropriate remedy is appeal against the assessment[21]. Too much reliance should not be placed on the English cases in seeking authority for a remedy other than objection in respect of assessments. When looking at the English decisions it should be remembered that the functions of the English General and Special Commissioners are not wholly comparable to those of the New Zealand Commissioner; their functions embrace duties of an appellate nature[22]. The English Inspector of Taxes has a function similar to that performed by the Commissioner in New Zealand; his duty includes the sending of notices requiring returns, examining returns, preparing assessments, issuing notices of assessment[23].

In R. v. Kingsland I.T.C.; Ex parte Pearson. (1922) 8 T.C. 327, orders of certiorari and mandamus were sought against an inspector of taxes. The Court refused to issue the prerogative orders after finding that the Statute prescribed the procedure for appealing the actions in respect of which the orders were sought.

(17) See Tax Appeals by de Voil (Butterworths, 1969.)

(18) R. v. Brixton I.T.C. (1913) 6 T.C. 195.

(19) Kensington I.T.C. v. Aramayo. (1916) 6 T.C. 613.

(20) R. v. Brixton I.T.C. (supra).

(21) Mandamus is refused where there is another remedy which is convenient and sufficient. Stepney B.C. v. Walker (John) & Son Ltd. (1934) A.C. 365.
R. v. St. Marylebone I.T.C.; Ex parte Schlesinger. (1928) 13 T.C. 746, 759 per Lord Hewart, C.J. in relation to prohibition. In respect of refusal of certiorari see Ex parte Hood Barrs (1947) 27 T.C. 506; R. v. Kingsland I.T.C.; Ex parte Pearson (1922) 8 T.C. 327.

(22) 20 Halsbury's Laws of England, 3rd edition, pages 724, 728; refer article entitled "The Special Commissioners of Income Tax," by R.S.W. Fordham, in (1966) 14 Canadian Tax Journal at page 455.

(23) 20 Halsbury, (supra) page 729.

CONCLUSIVENESS OF AN ASSESSMENT AND s.26

Any likelihood of a remedy other than by way of objection under Part III of the Act[24] in respect of the acts or omissions of the Commissioner in relation to his assessment would seem to be completely negated by the express words of s.26, which states:

> "Except in proceedings on objection to an assessment under Part III of this Act, no assessment made by the Commissioner shall be disputed in any Court or in any proceedings (including proceedings before a Board of Review) either on the ground that the person so assessed is not a taxpayer or on any other ground; and, except as aforesaid, every such assessment and all the particulars thereof shall be conclusively deemed and taken to be correct, and the liability of the person so assessed shall be determined accordingly"[25].

The Act, by s.223, provides that, "In any case where the Commissioner is satisfied that tax has been paid in excess of the amount properly payable, he shall refund the amount paid in excess." In Rathbun v. A.G. (1966) N.Z.L.R. 428 (S.C. & C.A.)[26] the plaintiff brought an action based on s.223 and sought a writ of mandamus to compel a refund of tax claimed to have been overpaid. For the defendant[27], it was

argued that where tax had been paid in accordance with an assessment the only legal remedy was by way of the objection procedure; an action under s.223 could not be used as an alternative route for challenging tax liability. Argument centred on the meaning of the words "tax has been paid in excess of the amount properly payable." The defendant contended that they meant the amount of the assessment to which no objection was taken at the time; the plaintiff submitted that it was the amount of tax which, on the law and the facts, should have been paid. The plaintiff's submission raises, prima facie, a conflict with the apparent effect of s.26 no such conflict follows from the defendants' contention. In the Supreme Court, Hutchison, J. accepted the plaintiff's submission and held that s.26 did not apply so as to preclude the challenge based on s.223[28]. It was unnecessary for the Court of Appeal to decide this point (because of their decision on another point heard in the appeal), however, the Court expressly doubted[29] the interpretation of Hutchison, J. and favoured the defendants' submission. Because of the strong dicta of the Court of Appeal, it is doubtful whether s.223 provides an avenue whereby an assessment can be challenged without the aegis of s.26 outside the objection procedure.

The two inevitable conclusions of the clear words of s.26 are, first, the Commissioner's assessment is immune from any dispute unless that dispute is incorporated in an objection under Part III of the Act[30]; second, an undisputed assessment becomes conclusive against the taxpayer. Such a view is consistent with the understanding of the scheme of the Act as stated in such cases as Anson v. C. of T. (1922) N.Z.L.R. 330; Hawkes Bay Farmers Co-op. Assoc. v. Gower. (1925) N.Z.L.R. 189; Kirkpatrick v. C.I.R. (1962) N.Z.L.R. 493; and in perhaps its fullest statement, in the judgment of Salmond, J. in Macfarlane v. C. of T. (1923) N.Z.L.R. 801 at page 836.[31]

In Maxwell v. C.I.R. (1962) N.Z.L.R. 683, at page 703, North, J. said "In my opinion the right of the Commissioner to alter earlier assessments so as to increase the amount of tax can only be challenged (if at all) in proceedings on objection pursuant to Part III of the Act." At page 707, Cleary, J. referred to the fact that any "disputing" of the Commissioner's assessment (outside the objection procedure) was precluded by the terms of s.26, and that the remedy, if taxpayer chose to dispute, was to invoke the objection procedure; His Honour then commented, "I think it is equally true to say of the New Zealand Act what was said of the Australian

Act in McAndrew v. F.C. of T. (1956) 6 A.I.T.R. 359, in the judgment of Dixon, C.J., and McTiernan and Webb, JJ., at page 361: "It is the manifest policy, one may now almost say the historical policy, of the legislation on the one hand to give the taxpayer full opportunity on objecting to his assessment of contesting his liability in every respect before a Court or before a Board of Review, but on the other hand to require that in proceedings for the recovery of the tax the taxpayer will be concluded by the assessment and will not be entitled to go behind it for any purpose."

It was suggested by Higgins, J., obiter[32], that it might be open to a person who is assessed wrongly (e.g. a person not chargeable with tax - a non "taxpayer") to circumvent the objection procedure by waiting till he be sued for the tax assessed in a recovery action by the Commissioner and then defend the action. This possibility must be denied in view of the plain words of s.26 which expressly prohibit dispute of an assessment outside the objection procedure "either on the ground that the person so assessed is not a taxpayer or on any other ground."[33]

One result of s.26 seems to be that if an assessment remains unchallenged at the expiration of the

objection period, then the assessment and the particulars thereof become conclusive and are deemed correct though they might otherwise be incorrect or invalid.(34). In Allen v. Sharp (1848) 2 Exch. 352, an assessment on a person assessed to duty imposed on horse dealers became final and conclusive, and it was held that, however erroneous, it could not be quetioned in an action. Philip, J. was moved to remark, in Brown v. F.C. of T. (1956) 11 A.T.D. 246, that "many assessments made on entirely wrong bases owe their force and validity solely to the fact that the proper objection was not taken to them." The Court of Appeal held in Maxwell v. C.I.R. (1962) N.Z.L.R. 683, that by virtue of s.26 the validity of an amended assessment could not be challenged in the instant proceedings, as they were not proceedings on objection against the assessment.

In Marks, Morrin & Jones Ltd. (in liquidation) v. Louis Marks. (1931) N.Z.L.R. 756, 762 Smith, J. stated, "The object of (s.26), as appears from its concluding words, is to determine the liability of the person who, has been assessed for tax.... It applies only to a case in which the liability of the person assessed is in question in respect of that particular assessment." Thus, the Commissioner's mistake, in this instance, in describing the company assessed as "agent for the debenture holder" was

held not to be conclusive as against the debenture holder. This decision would seem to suggest that the assessment and the particulars thereof are not conclusive in respect of a person who was not a party to it - it (s.26) does not make the assessment conclusive in favour of anyone but the Commissioner(35). A consistent view was expressed by McCarthy, J. in Maxwell v. C.I.R. (1959) N.Z.L.R. 708, 712 where he stated that s.26 is "directed and restricted to the enforcement of a monetary liability to pay tax."

There are two clear instances in which an assessment is not conclusive against the assessed person. Gideon Trading Co. Ltd. v. C.I.R. (1961) N.Z.L.R. 440, held that s.26 does not make a final assessment of tax conclusive against a taxpayer in a prosecution under the penal provisions of the Act, in other words, the provision cannot be invoked in criminal proceedings against the taxpayer(36). It is also established that the provision does not apply to deem correct an original assessment which has been reduced by the Court or Board of Review(37).

Since the assessment is, prima facie, conclusive against the taxpayer, the question arises whether it is similarly conclusive against the Commissioner. Salmond, J. in Macfarlane v. C. of T. (1923) N.Z.L.R. 801, 836 stated that the assessment is conclusive

against the taxpayer unless he appeals within the time limited in that behalf in the notice of assessment "But it is not conclusive as against the Commissioner." In the same case, Stout, C.J.(38), and Stringer, J.(39), (Adams, J., at page 839, concurred in the conclusion of Stringer, J.), were of the opinion that if there was an estoppel on the part of the taxpayer (by the assessment being conclusive), there ought to be an estoppel on the part of the Commissioner; the estoppel ought to be mutual. Following what was said by Stout, C.J., and Stringer, J., Barrowclough, C.J. in Kirkpatrick v. C.I.R. (1962) N.Z.L.R. 683, held that the Commissioner was estopped by the particulars of an assessment.

The conclusion of Salmond, J. does not conflict with that of the Kirkpatrick case. (supra), and Stout, C.J., and Stringer, J. It is submitted that the conclusions to be drawn from the judgments in Macfarlane's case. (supra) and Kirkpatrick's case (supra) as to the Commissioner's relationship to the assessment is as follows:-

(1) the assessment is not conclusive against the Commissioner in the same way that it is conclusive against the taxpayer. Under s.22 the Commissioner can alter

the assessment as he thinks necessary in order to ensure the correctness thereof. After 4 years from the end of the year in which the assessment was made, s.24(1) precludes further alterations which increase the amount of the assessment; there is no similar limitation in respect of alterations which decrease the amount of the assessment. In the case of fraud, or wilful misleading, or the omission in the return of items of income which should have been returned, s.24(2) allows the reopening and amendment of past assessments, again without any restrictive limitations as to time: - refer Macfarlane's case (supra) at page 836, per Salmond, J.;

(2) in any given case, where the Commissioner is not seeking to amend the assessment, then he is estopped by the particulars of that assessment.

Before this discussion on s.26 can be concluded, it is considered that two further cases first need consideration:

(a) St. Lucia Usines & Estates Co. Ltd. v. Colonial Treasurer of St. Lucia. (1924) A.C. 508, a Privy Council case, suggests that an assessment may not be conclusive

against a person altogether outside the charge to tax. "Inasmuch as ... the company was in the year 1921 not assessable at all, it was not a person "required by the Ordinance to make and deliver a return", but was outside the Ordinance altogether, and action taken under the Ordinance cannot result in anything "final and conclusive" against the company."(40). In this case interest was payable to the company in 1921, but was not in fact paid until a subsequent income year (after the company had obtained a judgment against the debtor.) The interest would have been subject to tax if it was "income arising or accruing" in 1921. This was found not to be the case, thus the interest was held not to be taxable because at the date at which it was "income arising or accruing" the company was not a person chargeable with income tax by virtue of its being a non-resident at that date (the company was a resident in 1921.)

Two points. First, it appears that the company was not questioning the assessment in recovery proceedings but rather, in an appeal. Page 509 of the Report recites that the Treasurer "took out a summons under

ss.36 & 37 of the Ordinance requiring the appellants to show cause why they should not be ordered to pay" the tax assessed. Lord Wrenbury, delivering the judgment of the Privy Council, stated that the question before the Council was whether under the Ordinance the company was liable to be assessed for income tax in respect of the 1921 income year. Second, the clarity of the New Zealand provisions indicate that this decision could not be relied on in New Zealand (on the question of the conclusiveness of an assessment.) Under s.19 the Commissioner can make default assessments in respect of a person whom he has reason to suppose is a taxpayer and that person then becomes liable to pay the tax assessed save insofar as he establishes <u>on objection</u> that the assessment is excessive or that he is not chargeable with tax. Section 26 specifically declares that assessments cannot be disputed on the ground that the person assessed is not a taxpayer, other than by objection.

(b) <u>C. of T. v. Mooney</u>. (1905) 3 C.L.R. 221; R. & McG. 147. By majority (Griffith, C.J. and Barton, J., O'Connor, J. dissenting) the High Court of Australia held, inter alia, that an assessment is only conclusive as to

matters within the jurisdiction of the Commissioners[41]. This holding was neither confirmed nor disapproved by the Privy Council[42] in their judgment which reversed the High Court decision on other grounds. In the context of their findings, the High Court holding in question amounts to this: an assessment made in excess of the Commissioners' jurisdiction is, by reason of that invalidity, not conclusive[43].

Section 26 expressly prohibits disputing an assessment in proceedings other than by objection either on the ground that the person so assessed is not a taxpayer or on any other ground. It is submitted that these words are sufficiently wide to preclude disputing an assessment by questioning its validity in proceedings other than objection[44] - as long as the Commissioner has made a determination of "the amount on which tax is payable and of the amount of that tax", then there is an "assessment" within the meaning of s.26, which, subject to a successful objection[45], is deemed to be conclusive regardless of its validity or accuracy.

Accepting that the High Court holding (that an invalid assessment is not conclusive) is correct does not assist the assessed person.

Any attempt in any proceedings, not being objection proceedings (the most likely being the recovery action), to establish that the assessment is invalid (due to the Commissioner's acting ultra vires) and therefore not conclusive, would have the effect and result of "disputing" the assessment. Thus in spite of any invalidity, the assessment is deemed conclusive and the liability of the person assessed is determined accordingly.

(24) S.29 - s.35 inclusive. Note, s.36 - s.45 which fall within Part III (Part IV begins with s.46) were repealed by s.2(1) of the Land & Income Tax Amendment Act 1960.

(25) The section refers to "assessment", thus, presumably it only applies to "assessments" as contemplated by the Act.

(26) Also reported in 9 A.I.T.R. 551 (S.C.) and 10 A.I.T.R. 46 (C.A.).

(27) The Commissioner and the Attorney-General were joined as defendants in the action.

(28) Refer (1966) N.Z.L.R. at p.434 and 9 A.I.T.R. at p.557 for the reasons for this holding.

(29) (1966) N.Z.L.R. at p.446; 10 A.I.T.R. at p.51.

(30) Mudgway Estate Land Co. Ltd. v. C. of T. (1911) 14 G.L.R. 315, 316 per Chapman, J. "I am unable to accept Mr Gray's answer that "on objection" in that part of the clause means on objection wheresoever or whensoever raised. The words are "proceedings on objection against the assessment", which refer to the next following part of the Act, and to the last words of (s.26) in which "objection" has the specific meaning of a step in procedure in connexion with the mode of appeal provided by the Act."

(31) Refer Rathbun v. A. - G. (1966) N.Z.L.R. 428, 434 per Hutchison, J.

(32) British Imperial Oil Co. Ltd. v. F.C. of T. (1926) 38 C.L.R. 153, 208 - see Foot Note (34) supra. Note, in Webb v. England (1897) 23 V.L.R. 260; R. & McG. 188, the Victorian Supreme Court held that although a person assessed for income tax has not given any notice of objection to the Commissioner of Taxes, he may, in proceedings in the County Court to recover the tax, show that he is a person not liable to be taxed. In C. of T. v. Mooney. (1905) 3 C.L.R. 221, the High Court of Australia by majority held, inter alia, that an appellant was not bound to appeal from an invalid assessment, but was entitled to wait until sued for the tax and dispute his liability in the action. On appeal, the Privy Council found, (1907) A.C. 342, that the assessment in this case was in fact valid; however, at p.350 decided that it was unnecessary to consider the above holding of the High Court.

(33) See e.g. Ingle v. Farrand. (1925) 11 T.C. 446, and I.R.C. v. Pearlberg. (1953) 34 T.C. 57, where the taxpayers had attempted to object to their assessments in recovery proceedings. The objections were disallowed on the ground that the assessments had become final and conclusive.

(34) The Queensland Supreme Court in C. of T. v. Parks. (1933) 2 A.T.D. 349, held, inter alia, that when a taxpayer is sued in a competent court, provided that the notice of assessment or a signed copy is put in evidence he is not entitled to question the due making of the assessment or the correctness of the amount and particulars. The Court of Review alone has jurisdiction to examine questions as to the validity of the assessment itself, questions as to the amount and particulars shown therein, and questions depending on these, including questions as to the application of the Act to the facts disclosed by the assessment.

(35) Refer Gideon Trading Co. Ltd. v. C.I.R. (1961) N.Z.L.R. 440 at page 444.

(36) See Rathbun v. A. - G. (supra) at page 434.

(37) F.C. of T. v. Finn. (1960) 8 A.I.T.R. 145.

(38) At page 810.

(39) At page 823.

(40) (1924) A.C. at p.513. Refer too, Halsbury's Laws of England vol. 20, p.669, 3rd edition.

(41) This holding arose from their initial finding that the default assessment issued by the Commissioners had been made in excess of their jurisdiction and was invalid. On appeal, the Privy Council decided, after referring to Regulations which had not been brought to the attention of the High Court, that the default assessment was in fact valid.

(42) (1907) A.C. 342; 4 C.L.R. 1439; R. & McG. 147.

(43) Refer Foot Note (41).

(44) Maxwell v. C.I.R. (1962) N.Z.L.R. 683.

(45) Refer s.33.

THE "ADMINISTRATIVE DISCRETION"

In administering the Act the Commissioner has at times made the decision to apply or not apply the Act in the particular circumstances before him. It is not here being suggested that the Commissioner has acted mala fides in these instances (any liberal application has favoured the taxpayer concerned), there is no question of an exacting of taxes beyond the jurisdiction conferred by the Act. The question here relates to the validity of such an act or omission by the Commissioner and the rights of all other taxpayers.

The Court of Appeal in Reckitt & Coleman (N.Z.) Ltd. v. Taxation Board of Review. (1966) N.Z.L.R. 1032, held that the Commissioner could not waive the provisions of s.29 of the Inland Revenue Department Amendment Act 1960, prescribing the time within which a taxpayer must file a notice of appeal from a decision of the Commissioner, because "it is inescapable that the taxpaying public generally has an interest in seeing that the Commissioner acts in accordance with the requirements imposed by s.29"(46). In much the same vein was the following comment from Molloy v. F.C. of Land Tax. (1938) 59 C.L.R. 608, 610 "Section 190 provides that on every reference to a Board of Review or on appeal the

taxpayer shall be limited to the grounds stated in his objection. This is an imperative direction to the Court, not ... a provision merely for the benefit of the Commissioner which he is in a position to waive. The provision is made for the purpose of protecting public revenue, and the Court is bound to give effect to it."

It was held in F.C. of T. v. Wade. (1951) 84 C.L.R. 105 that no act of the Commissioner could operate as an estoppel against the operation of the Act. This same conclusion was reached by both the Supreme Court and Court of Appeal in Europa Oil (N.Z.) Ltd. v. C.I.R. (1970) N.Z.L.R. 321, 363.

Wisheart, McNabb & Kidd v. C.I.R. (1969) 1 A.T.R. 434 (S.C.); (1972) N.Z.L.R. 319 (C.A.) provides a recent example of the Commissioner allowing concessions to a taxpayer. In the Supreme Court, Wild, C.J. did not question the Commissioner's action and in fact seems to give tacit approval to it, however, two members of the Court of Appeal expressed doubt as to the validity of the Commissioner's action. In this case, the taxpayers (a law firm) effected by certain transactions an arrangement whereby its office equipment and library were sold to a service company and its staff (after being dismissed) were employed by the

service company. For an agreed service fee, the service company then supplied the staff and office equipment necessary for the taxpayers to carry on their law practice. These arrangements were treated by the Commissioner as being void under s.108 as being arrangements having the purpose of tax avoidance; however, in his assessment, the Commissioner allowed a deduction in respect of the staff wages and salaries even though the expenditure for the wages and salaries was incurred by the service company and not the taxpayers. (The arrangement between the taxpayers and the company in relation to the staff is void only as against the Commissioner under s.108.)[47]. Of this action, Turner, J. (in the Court of Appeal) commented[48], "It seems to me at least doubtful whether, where s.108 is invoked, the Commissioner must or can take this course. He may hold the transaction void, or he may accept it; but may he take a middle course?" Turner, J.,[49], noted that the taxpayers had neither raised the matter nor objected to the assessment on that ground, and so considered that the Court should not "of its own motion disturb the commonsense course adopted ..." but added, "I will content myself with noting that in law the Commissioner might possibly have made a more drastic assessment.

It may be ... that the Commissioner should receive some statutory authority to make an allowance of such an amount as may be fair, in the circumstances of the particular case, as in fact he seems to have done in this case without such authortiy."

The strict approach of applying the Act "however harsh it appears to the judicial mind to be"(50), was reiterated with reasons by Ungoed-Thomas, J. in, I.R.C. v. Clifforia Investments Ltd. (1962) 40 T.C. 608, 615, where His Honour said the deeper objection to the Revenue applying a provision only when it considered it equitable to do so on the ground that application leads to an unjust result, was that, "Such a discretion in the Revenue would go far beyond that degree of discretion which is inevitably involved in applying and administering the Statutes. It would be a wide and arbitrary discretion applied without publicly established principles and, of course, without legislative authority. It would imply that the Revenue could exempt from, and was, therefore, entitled to disregard and overrule, the legislation. This offends our fundamental conception of the rule of law."(51)

Barrowclough, C.J., spoke of a taxing statute as being one "in which every member of the public is

concerned. Every person in New Zealand is interested in seeing that all taxation which Parliament has authorised is in fact levied and collected"[52].

Since members of the public would, on the whole, be unaware of the instances in which the Commissioner has made concessions in the course of making his assessment[53], it is unlikely that a taxpaying member of the public would ever contest the Commissioner's right to so act; the taxpayers in the Wisheart case. (supra) did not object to the practice and it is certainly doubtful that a taxpayer finding himself in similar circumstances would act differently. Nevertheless, there does not appear to be any reason precluding a third person (one who was not a party to the assessment) questioning the propriety of making concessions. The making of an unauthorised concession does seem to conflict with the Commissioner's duty to administer the Act "with solicitude for the public treasury and with fairness to (all?) the taxpayers"[54]; or, as it was put in another case[55], the Commissioner "shall not claim for the Crown more than he sees the Crown is entitled to, and he is not to allow any taxpayer to escape payment of any amount which the law intends him to be liable to pay."

In order to contest the Commissioner's action, the objecting member of the public would have to proceed by way of relater action with the consent of the Attorney-General(56); the objector could not proceed directly against the Commissioner because, inter alia, not being the person assessed he would lack the necessary locus standi(57). Proceeding ex relatione the Attorney-General could then apply to the Court for an order of mandamus directed to the Commissioner(58) requiring him to apply the Act according to law.

(46) At page 1039.

(47) See Mangin v. C.I.R. (1971) N.Z.L.R. 591, 595 (P.C.).

(48) At page 332.

(49) At page 332.

(50) Partington v. A.-G. (1869) L.R. 4 H.L. 100, 122.

(51) In Slaney v. Kean. (1969) 3 W.L.R. 249; (1970) 1 All E.R. 434, the Crown and taxpayer agreed between themselves that an appeal on a question of law should be allowed, and requested an order accordingly. This was rejected. The Act required the Court to hear and determine any questions of law arising on appeal - but here no argument was presented. Megarry, J. stated (at page 436) that "The law is a matter for decision by the Court after considering the case, and not for agreement between John Doe and Richard Roe, with the Court blindly giving its authority to whatever they have Agreed."

C.F. Cameron v. C.S.D. (1942) N.Z.L.R. 574, 576 per Smith, J.

(52) New Zealand Insurance Co. v. C.S.D. (No.2). (1954) N.Z.L.R. 1011, 1019. Reiterated by Barrowclough, C.J. in McGovern v. C.I.R. (1964) N.Z.L.R. 396, 397.

(53) The Wisheart case. (1972) N.Z.L.R. 319, is a rare example of a circumstance in which evidence of the making of a concession appears in a record (the law reports) which is available, or at least accessible, to the public.

(54) Moreau v. F.C. of T. (1927) R. & McG. 84, 85 per Isaacs, J.

(55) Commonwealth Agricultural Service Engineers Ltd. (in liquidation) v. C. of T. (1926) 38 C.L.R. 289; R. & McG. 318, per Isaacs, J.

(56) See Code of Civil Procedure 1908, Rules 508-511.

(57) In Walsh v. Social Security Commission. (1959) N.Z.L.R. 1113, the Supreme Court held that a taxpayer does not have a special interest in challenging the invalid action of the national Government which affects all taxpayers equally, such as the granting of a deserted wife's benefit, even though the grant be made to the taxpayer's estranged wife.

(58) In Metropolitan Gas Co. v. F.C. of T. (1932) 47 C.L.R. 621; 2 A.T.D. 178, the Commissioner was found by the Court to have wrongly applied the Act. The company sought, inter alia, mandamus directing the Commissioner to consider and determine their claim according to law. Gavan Duffy, C.J., and Starke, J., answered "yes" to the question "In view of the circumstances is the writ of mandamus available to the company?" The other two members of the Court (Rich and McTiernan, JJ.) considered it unnecessary to answer this question.
In the Commonwealth Agricultural Service case. (supra) and Ex parte Carpathia Tin Mining Co. (1924) 35 C.L.R. 552; R. & McG. 62, the Court appears to accept that mandamus can be directed to the Commissioner. Mandamus was refused in these two cases on the ground that the Commissioner had a statutory discretion in respect of the acts sought to be enforced by the taxpayer in his favour.
These cases are cited to support the contention that the Commissioner is susceptible to mandamus in appropriate circumstances.
See too Maxwell v. C.I.R. (1962) N.Z.L.R. 683, 690 per Haslam J. and also R. v. F.C. of T. ex parte Sir Kelso King (1930) 1 A.T.D. 17 where mandamus requiring the Commissioner to consider and determine according to law was granted.

CONCLUSION

Admittedly, the Commissioner has wide powers, but, as Isaacs, J. noted in Moreau v. F.C. of T. (1927) R. & McG. 84, 85 because of the nature of his function "He (the Commissioner) is necessarily armed with great powers"(59). Though there is a procedure for disputing the exercise of these wide powers the invoking of it does not always produce (if only in the mind of the objector) a fair and just result. This is particularly so in relation to discretions, opinions, determinations (where these are subject to objection) e.g. in Finance Facilities Ltd. v. C. of T. (1971) 45 A.L.J.R. 241 the Commissioner exercised a discretion because he thought it was proper to do so in the circumstances, and because the Court found that he was acting bona fide it would not upset the exercise of that discretion(60). It is also established that the exercise of a discretion can only be upset on the ground of invalidity, not incorrectness(61), that is, the Court will not substitute the opinion or determination of the Commissioner with the opinion or determination that it would have made in those circumstances. Where the Commissioner has acted validly yet produces an unjust result the assessed person still has an opportunity for correcting the injustice (assuming that the

Commissioner does not recognise injustice in his actions and has taken no administrative measures to correct the anomaly.)

The Ombudsman is authorised by s.11 of the Parliamentary Commissioner (Ombudsman) Act 1962 to investigate, inter alia, any decision, or any act done or omitted, relating to a matter of administration and affecting any person, by any officer, employee or member of any Department named in the Schedule to that Act[62] in the exercise of any power or function conferred on him by any enactment. If in the opinion of the Ombudsman the decision, act or omission was, inter alia, "(b) ... unreasonable, unjust, oppressive, or improperly discriminatory ... " or "(d) ... wrong"[63] ("wrong" is not defined), then he is to report to the Department with his recommendations in relation to the matter investigated[64]. In point of fact the Ombudsman has made recommendations to the Inland Revenue Department following investigations of administrative acts in respect of taxpayers.

When pointing to an example of harshness arising from the Commissioner discharging his duty in making an assessment, it would be as well to keep in mind what was said by Higgins, J. in

British Imperial Oil Co. Ltd. v. F.C. of T. (1926) 38 C.L.R. 153, 208.

> "Even if one should regard the course taken by the Commissioner as harsh and autocratic, it is the course authorised by the Parliament, and validly authorised; and Parliament has power to act unjustly"(65).

(59) Much the same conclusion was reached by the Ross Committee. Refer October 1967 Report, chapter 74 para. 1022.

(60) Refer The Commissioner's Discretion supra at Foot Note(2).

(61) Refer Foot Note (97) supra.

(62) Inland Revenue is one of the Government Departments named in the Schedule.

(63) S.19.

(64) S.19(3).

(65) C.f. Partington v. A.- G. (1869) L.R. 4 H.L. 100, 122 per Lord Cairns L.C. "If the person sought to be taxed comes within the letter of the law he must be taxed however harsh it appears to the judicial mind to be."

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