Deemed Acceptance of Taxpayers' Notices of Proposed Adjustment

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COMMENT: Deemed Acceptance of Taxpayers' Notices of Proposed Adjustment

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The statutory disputes procedure has been operating for nine years but there is still no consensus over whether Inland Revenue is bound by its own deemed acceptance of a taxpayer's Notice of Proposed Adjustment (NOPA). While the Commissioner of Inland Revenue (Commissioner) is obliged to give effect to the adjustments proposed, it is argued that Inland Revenue may be able to commence a new dispute or raise a new assessment covering the same subject matter as the taxpayer's NOPA. This comment examines the legal and policy arguments flowing from the Commissioner's deemed acceptance and concludes that, whatever the perceived unfairness, Inland Revenue cannot be bound to its own deemed acceptance if it concludes that the taxpayer's NOPA results in an incorrect assessment.

1.0 INTRODUCTION

Inland Revenue policy states that it will not dispute an assessment of tax proposed in a taxpayer's Notice of Proposed Adjustment (NOPA) that has been accepted or deemed to be accepted by the Commissioner of Inland Revenue (Commissioner) pursuant to s 89I(2)Tax Administration Act 1994 (TAA 1994).

If a taxpayer issues a NOPA and Inland Revenue fails to respond with a Notice of Response (NOR) within the two-month statutory response period, the Commissioner must issue an assessment in favour of the taxpayer pursuant to s 89J TAA 1994. Inland Revenue's policy states:

> "Once a NOPA, Notice of Response or Statement of Position is accepted or deemed [to be] accepted, the Commissioner may not subsequently amend issues contained in it."

Many practitioners consider this statement to be authoritative, and that Inland Revenue has no power to further dispute an adjustment in a NOPA that has been accepted or deemed to be accepted by the Commissioner. It has even been asserted by practitioners that it would be either ultra vires or in breach **[(2005) Vol 11:4 NZJTLP 397, 398]** of s 6A TAA 1994 for the Commissioner to later issue a NOPA to further dispute an assessment that he has been deemed to have accepted.

Support for this view comes from Inland Revenue's policy setting out its view of the scope and application of the statutory disputes procedure. Included in that statement, using a question and answer format, was an explanation of the effect of acceptance or deemed acceptance by the Commissioner of a taxpayer's NOPA. The passage states:

> "Q. Can the Commissioner amend an assessment for an issue following written agreement or deemed acceptance of that issue?"A. The Commissioner has an overriding duty to ensure assessments are correct, provided that this function is completed within the statutory four year time limit. A written agreement does not generally limit the Commissioner's ability to subsequently amend an assessment."Once a NOPA, Notice of Response or Statement of Position is accepted or deemed [to be] accepted, the Commissioner may not subsequently amend issues contained in it. Once an issue is determined by formal disputes procedures … that determination is final unless the Commissioner has been wilfully misled or a fraud has been committed."

If strictly followed, this policy would preclude the Commissioner from exercising his statutory power of assessment under s 113 TAA 1994 to dispute the correctness of an assessment issued under s 89J TAA 1994 regardless of whether that assessment is, or is believed by the Commissioner to be, incorrect.

But is that policy correct? This comment considers whether the Commissioner can ever "re-dispute" the correctness of that assessment on the same or similar grounds to that set out in the taxpayer's NOPA.

2.0 STATUTORY CONSEQUENCES OF COMMISSIONER'S DEEMED ACCEPTANCE

By virtue of s 89H(2) TAA 1994, if the Commissioner fails to issue a NOR within the two-month statutory response period, he is deemed to have accepted the adjustments proposed in a taxpayer's NOPA. Whether or not the Commissioner agrees those adjustments are correct, he *is deemed to accept the proposed adjustment and s 89J TAA 1994 applies*.

Following that deemed acceptance, s 89J TAA 1994 requires the Commissioner to issue a notice of assessment that *must include or take account of the adjustment*. Accordingly, the dispute initiated by the taxpayer under Part IVA of the TAA 1994 by the taxpayer issuing a NOPA is resolved in favour of that taxpayer and a reassessment reflecting the taxpayer's proposed position is issued.

But having issued the reassessment in accordance with s 89J TAA 1994, the question remains whether the Commissioner may ever dispute the correctness of that assessment. Does resolution of *that* dispute in favour of the taxpayer preclude the Commissioner from instigating a *new* dispute regarding the same or related issues? Would any new dispute breach the scheme and purpose of Part IVA of the TAA 1994, or contravene the Commissioner's duty under s 6A TAA 1994 to uphold the integrity of the tax system? **[(2005) Vol 11:4 NZJTLP 397, 399]**

3.0 CAN THE COMMISSIONER COMMENCE A NEW DISPUTE?

It may come as a surprise but some officers within Inland Revenue appear to consider the Commissioner is entitled to re-instigate a dispute regarding an assessment issued following its deemed acceptance of a taxpayer's NOPA. Although not publicly acknowledged, the thinking is that an assessment issued pursuant to s 89J is no different to, and has no more standing than, an assessment issued on any other basis. It has even been suggested by some officers within Inland Revenue that the failure to issue a NOPA when faced with what Inland Revenue believes is an incorrect assessment may actually breach the statutory duty imposed on the Commissioner to assess the correct amount of tax.

The statutory basis for all reassessments by the Commissioner is found in s 113 TAA 1994. Accordingly, Inland Revenue considers that it may review all assessments (including those resulting from its deemed acceptance of a taxpayer's NOPA) to ensure that they are correct any time before the expiration of the four-year statutory time bar. This review would include the issue of a further NOPA to propose adjustments to that assessment if necessary. Accordingly, Inland Revenue appears to believe it may use Part IVA of the TAA 1994 to re-dispute an issue that it was already deemed to have accepted, despite its policy stipulating that *that determination is final*.

4.0 ABSENCE OF "FINALITY" FOR ASSESSMENTS ISSUED UNDER PART IVA

There is nothing in the wording of s 89H(2) or s 89J TAA 1994 that stipulates that the adjustment deemed to be accepted by the Commissioner is "correct" or that he is precluded from later disputing the correctness of the assessment. The only limitations on the Commissioner under Part IVA of the TAA 1994 are contained in s 89B(4) TAA 1994 which precludes the issuing of a NOPA in relation to a matter already subject to challenge by the taxpayer or after expiry of the time bar. By contrast, the provision dealing with deemed acceptance by taxpayers expressly precludes them from challenging the correctness of that proposed adjustment.

The consequence of acceptance or deemed acceptance of a NOPA is therefore different as between the taxpayer and the Commissioner. While the Commissioner must *take account* of a deemed acceptance by issuing a Notice of Assessment only, the taxpayer is expressly prohibited from challenging that reassessment.

These different consequences were explained in a Discussion Document reviewing Part IVA of the TAA 1994. The relevant passage stated:

> "**Acceptance of Notice of Proposed Adjustment**"If the adjustment is accepted in writing, or the adjustment is deemed to have been accepted, because either Inland Revenue or the taxpayer has not responded in time, the disputes process ends and an amended assessment is issued or the assessment stands. No further challenge may be made to that adjustment."

The reference to *no further challenge* is clearly a reference to the statutory challenge procedure in Part VIIIA of the TAA 1994 regarding taxpayer litigation against the correctness of an assessment. The **[(2005) Vol 11:4 NZJTLP 397, 400]** statutory basis for this limitation is set out in ss 89I and 138B TAA 1994. However, there appears to be no equivalent statutory limitation on the Commissioner's ability to later dispute that assessment.

In the absence of any provision preventing the Commissioner from disputing the assessment if he concludes that the assessment issued under s 89J TAA 1994 is incorrect, the question is whether the scheme and purpose underlying the disputes resolution procedure is breached by the Commissioner seeking to re-dispute a matter he has already been deemed to have accepted. Resolving this question contrasts the efficacy of the disputes procedure in Part IVA (and s 89J TAA 1994 in particular), against the Commissioner's duty under s 113 TAA 1994 to assess the correct amount of tax owing by a taxpayer.

Recent case law recognises that the Part IVA process is "iterative" and "almost dialectic". It also recognises that in the context of one dispute, multiple successive NOPAs can properly be issued by the Commissioner. In the light of those sentiments, it would not seem contrary to policy for the Commissioner to have accepted (or been deemed to have accepted) a taxpayer's NOPA and then, as a result of more information or further analysis of the issue, to subsequently issue a new NOPA to reinitiate that dispute. Such a process can be seen as another, acceptable manifestation of a process of dialogue between Commissioner and taxpayer directed towards attaining a final, correct assessment within the statutory time bar.

5.0 PRIMACY OF COMMISSIONER'S STATUTORY DUTY TO RAISE A CORRECT ASSESSMENT

New Zealand Courts at all levels have uniformly upheld the primacy of the Commissioner's assessment function. Courts have repeatedly found that duty cannot be subordinated or compromised by prior statements of Inland Revenue or by any contrary expectation by taxpayers.

The case most directly applicable is the Court of Appeal's decision in *Brierley Investments Ltd*. There, the taxpayer sought to judicially review Inland Revenue for conducting a further investigation of its tax affairs on the grounds that an earlier agreement with the Commissioner should not be revisited. In deciding that the Commissioner was entitled to carry out the investigation (and presumably issue reassessments contrary to that earlier agreement if warranted), Richardson J stated:

> "The Commissioner cannot contract out of the responsibilities imposed by the Act. He cannot tie his hand. He cannot create no-go areas for himself. To confine in advance the scope of any future investigation would be to derogate from the generality and breadth of the Commissioner's powers conferred in aid of the statutory functions. The effect would be to require the Commissioner to make any re-assessment for past years and to approach assessments for current and future years under the handicap of less than full knowledge of relevant circumstances. Any agreement or understanding which precluded the Commissioner from re-investigation and possibly re-assessing so as to tax what the Act requires to be taxed would be in dereliction of the Commissioner's statutory responsibilities. … **[(2005) Vol 11:4 NZJTLP 397, 401]** Taxpayers must be taken to know that while the four-year period still operates they cannot safely rely on the general practice of the Commissioner or on any indication to them as to how particular matters will be dealt with by the Department or on the way their returns have been processed in the past."In short, where, as here, the Act calls for the Commissioner to exercise judgment in quantifying the statutory liability for taxation with very narrow and limited powers to provide relief from that liability and where, as here, the Act provides for assessment within a four-year limitation period irrespective of whether and how the assessments have already been made, there can be no estoppel or waiver since it is envisaged that any statutory power of the Commissioner may be re-exercised from time to time up to the four-year limit so as to ensure the correctness of the assessment."

This passage of Richardson J's judgment raises the question of whether an assessment issued following the actual or deemed acceptance by the Commissioner of a taxpayer's NOPA has a different quality to an assessment reached following the "private bargain" at issue in the *Brierley* case. Is the acceptance or deemed acceptance of a NOPA somehow more binding on the Commissioner than his actual agreement?

The author contends that the reasoning in the *Brierley* decision applies equally in both instances. Each situation leads to the issue of an assessment reflecting an agreement (whether deemed or otherwise) with the taxpayer. Furthermore, it would be strange if the deliberate and considered agreement of Inland Revenue in favour of the taxpayer (as in the *Brierley* case) is less binding on the Commissioner than the deemed acceptance of a NOPA due to inadvertence. In the author's view, it would be bad tax policy for a deliberate act to carry less weight than an omission.

As expected, most instances of deemed acceptance result from system failure within Inland Revenue or oversight by individual officers. Taxpayers must therefore be on notice that any deemed acceptance by the failure of Inland Revenue to respond to a taxpayer's NOPA is the result of inadvertence, not actual agreement with the adjustments they proposed. Accordingly, there would appear to be little factual basis for a "legitimate expectation" by the taxpayer that an assessment issued pursuant to s 89J TAA 1994 would never be revisited.

6.0 NO "LEGITIMATE EXPECTATION"

Whether taxpayers can ever rely upon a legitimate expectation that their tax affairs will be treated in a certain manner by the Commissioner remains uncertain. The best authority in support of that expectation is the decision of Casey J in the *Brierley* case. While ruling against the taxpayer, his **[(2005) Vol 11:4 NZJTLP 397, 402]** Honour held that, in rare cases, the actions of Inland Revenue may give rise to a "legitimate expectation" that a taxpayer will not be subject to further investigation and/or reassessment. His Honour explained:

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

As explained above, the author considers it doubtful that deemed acceptance would give rise to the "something more" required to create a legitimate expectation in taxpayers that they are immune from further investigation regarding the adjustments proposed in their NOPA. Rather, it appears taxpayers are seeking to take advantage of Inland Revenue "foot faults" to preclude the Commissioner from re-examining matters that the taxpayer may be aware was never accepted.

7.0 TAXPAYER'S "LEGITIMATE EXPECTATION" CANNOT BIND THE COMMISSIONER

While Casey J's decision serves as the high watermark for legitimate expectation, the Court of Appeal's decision in *CIR v New Zealand Wool Board*, which itself cited the *Brierley* decision, is strong authority that no expectation by taxpayers can be permitted to limit the Commissioner's power of assessment.

In the *Wool Board* case, the Court found that the Commissioner's statutory duty to make an honest assessment of the taxpayer's liability within the four-year time bar overrode any legitimate expectation that its present assessment would be respected or that any particular process, such as consultation, would be followed before that assessment could be amended. Richardson P stated:

> "… Clearly, the Commissioner is not entitled to stand by and allow the statute bar to expire and thus preclude any assessment of tax that in his judgment at the time was due. As well, consistently with the statutory scheme, it is impossible to read into the legislation an obligation on the Commissioner to set a timetable that would always allow time for consulting before making an assessment within the time bar."

His Honour also considered the difficulties faced by a taxpayer who alleges a legitimate expectation that its current assessment will be treated in a certain way:

> "… It is sufficient for present purposes to emphasise that any scope for involving legitimate expectation is necessarily limited by the scheme and purpose of the income tax legislation. Legitimate expectation cannot frustrate an honest appraisal by the Commissioner of the income tax **[(2005) Vol 11:4 NZJTLP 397, 403]** liability of the taxpayer by means of an assessment of that liability. Faced with the time bar, if the Commissioner concludes that there is a proper basis for making an assessment the Commissioner is required to make an assessment."

In the absence of statutory authority or an express statement by the Commissioner to the taxpayer that its tax affairs would never

again be reviewed, it appears taxpayers must rely upon Inland Revenue's public statements as binding on the Commissioner in this matter. However, New Zealand Courts have never found Inland Revenue's public statements to be binding upon the Commissioner. Courts at all levels, even when faced with assessments directly contrary to Inland Revenue policy, have recognised that such policy cannot preclude or limit the Commissioner's assessment function.

While it is always bad practice for the Commissioner to act contrary to Inland Revenue policy, the Courts have uniformly upheld the primacy of the assessment function, unfettered by policy statements or public assurances. For example, in *CIR v MacNab*, Eichelbaum J stated:

> "Before continuing further it is desirable to say something as to the scheme of the Act, so far as is relevant. The charge for tax is imposed by the statute itself, tax being payable independently of assessment; s 38 and s 39, and *CIR v Lemmington Holdings Ltd*, where the earlier authorities are cited in the joint judgment of Woodhouse P and Richardson J at p 61,272. The Act itself having imposed the obligation, the Commissioner's statutory functions are directed to the quantification of that liability (ibid). In *CIR v Lemmington Holdings Ltd* Woodhouse P and Richardson J, after referring to s 19, 21 and 22, and to double tax agreements, continued at p 61,272:
>
> > 'All these provisions provide methods for quantification of the taxable income in particular circumstances. And s 23(1) provides that the Commissioner may from time to time and at any time make all such alterations in or additions to an assessment as he thinks necessary in order to ensure the correctness thereof, notwithstanding that tax already assessed may have been paid. It is ancillary to s 19 and provides the means for the Commissioner to ensure that the assessment as amended reflects what in his judgment is the statutorily imposed liability for tax in the particular case. It is his judgment that counts under the statutory scheme in all these situations and it is a judgment which must be exercised from time to time unfettered by any views that he may have previously expressed either generally or in relation to a particular taxpayer or matter and unconstrained by an assessment he may have previously made.'
>
> "… the nature of the Commissioner's duty, as set out in their Honours' exposition, is consonant with the view that there is no need for any restrictive interpretation of the powers of amendment conferred on the Commissioner."

Later, his Honour stated:

> "… pleas of estoppel or waiver against Commissioners of Taxes, raised in various contexts, have consistently failed. I think the underlying principle must be that the Commissioner is obliged to carry out the duty of assessing and collecting the tax imposed by the statute; see 16 *Halsbury* 4th ed para 1515:
>
> > ' **[(2005) Vol 11:4 NZJTLP 397, 404]** Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory power.'
>
> "The authority cited is *Maritime Electric Co Ltd v General Dairies Ltd*[1937] 1 All ER 748, a decision of the judicial committee of the Privy Council. See also *IR Commrs v Brooks*[1915] AC 478, per Lord Parker of Waddington at p 491; *Europa Oil (NZ) Ltd v CIR*[1970] NZLR 321 at pp 352, 393 and 418; and … *CIR v Lemmington Holdings Ltd*[(1982) 5 NZTC 61,268] …"

A more recent example of this judicial stance was the Privy Council decision in *O'Neil v CIR*. In that case, their Lordships rejected the taxpayer's claim that an assessment applying s 99Income Tax Act 1976 was invalid because it was contrary to the Commissioner's policy statement. Their Lordships dismissed this argument by stating:

> "… A more fundamental point is that their Lordships do not think that the Policy Statement was intended to lay down conditions at all. They do not consider that the parts of the document relied upon by the appellants do more than to reassure the public that the Commissioner and his officers will think very carefully about whether s 99 applies to any particular case. But his statutory duty is to reassess the taxpayer in any case in which s 99 applies and this duty cannot be made subject to internal conditions."

All of the above cases were cited by the Court of Appeal in *Dandelion Investments Ltd v CIR* as support for the primacy of the assessment function over a claim by the taxpayer to a legitimate expectation based on Inland Revenue policy.

8.0 ANY LEGITIMATE EXPECTATION LIMITED ONLY TO CONTENT OF NOPA

At most, any legitimate expectation by taxpayers must be limited to the actual content of their NOPA. Section 89F(3) TAA 1994 prescribes the content of the NOPA, requiring taxpayers to identify the facts, tax laws and significantly relevant documents regarding the adjustments proposed. This raises the possibility that the taxpayer's NOPA may (either deliberately or inadvertently) fail to identify all possible arguments relevant to the matter in dispute.

Taking a non-contentious example, a taxpayer may issue a NOPA asserting the non-taxability of a receipt from the sale of land on the grounds that the property was not acquired for the purpose or intention of sale, and therefore is not liable for tax under s CB 5 Income Tax Act 2004 (ITA 2004). Based on the facts and law contained in the NOPA, the Commissioner may accept or be deemed to accept that adjustment as correct. However, if it is later discovered that the taxpayer was associated with a person who was in the business of dealing in property, the taxpayer would nevertheless be liable for tax upon that receipt under s CB 6 ITA 2004. As the taxpayer did not identify the facts and law relevant to that ground of assessability in its NOPA, the taxpayer can have no legitimate expectation that the Commissioner will be precluded from re-examining its taxability on that ground. In short, while the taxpayer may argue the Commissioner cannot now dispute the applicability of s CB 5 ITA 2004 to that receipt, the taxpayer can have no complaint if the Commissioner disputes the taxability of that receipt on any other ground not addressed in the taxpayer's NOPA.

[(2005) Vol 11:4 NZJTLP 397, 405] The same issue arises in the more contentious area of tax avoidance. A taxpayer's NOPA may address all relevant facts and tax laws regarding the "black-letter" arguments but entirely omit reference to s BG 1 ITA 2004 and cases decided there under. Based on the black letter law, the Commissioner may accept or be deemed to accept that NOPA. However, again the Commissioner may later wish to apply s BG 1 ITA 2004 to deny that adjustment. In those circumstances, the taxpayer would be forced to argue that, despite its omission from the NOPA, the Commissioner has implicitly accepted the non-applicability of s BG 1 ITA 2004.

Given the requirement in s 89F(1) TAA 1994 that the NOPA "identify the issues arising between the Commissioner and the disputant", it is unlikely that the Commissioner will be bound to have accepted a matter not expressly contained in the NOPA. As a result, it appears the strength of any claim to legitimate expectation would largely turn on the comprehensiveness of the taxpayer's NOPA.

9.0 COMMISSIONER'S POWER TO RE-NOPA

Courts at the highest level have found that, absent clear and unambiguous statutory provisions limiting or precluding the Commissioner from making an honest assessment of the correct tax liability, the statutory assessment duty has priority over any contrary expectation by the taxpayer.

By contrast, taxpayers cannot point to a statutory provision, either in Part IVA or elsewhere in the TAA 1994, limiting the Commissioner's power of assessment following a deemed acceptance of a NOPA. While the Commissioner is obliged by s 89J TAA 1994 to issue an assessment that "must include or take account" of the taxpayer's proposed adjustment, having done so there appears to be no statutory basis from preventing the Commissioner from ever revisiting that assessment. Certainly, any limitation on that power would require the clearest possible language before a deemed acceptance had the effect of abrogating the Commissioner's assessment function.

Accordingly, the Commissioner appears empowered to re-investigate that assessment, despite his policy to the contrary. If, as a result of any further investigation, the Commissioner concluded that the assessment was incorrect and warrants reassessment in terms of s 113 TAA 1994, he would be entitled to propose his own adjustment to that assessment. Ironically, that further dispute would itself be determined in accordance with the statutory disputes procedure in Part IVA of the TAA 1994.

10.0 CONCLUSION: AN EXPANDED ROLE FOR PART IVA?

Those who contend for the finality of any assessment required under s 89J TAA 1994 are compelled to adopt an expansionist interpretation of Part IVA. This reasoning appears to reject the classical approach to the Commissioner's assessment function:

That the Commissioner can only raise an assessments that represents his honest view of the correct tax liability, and

- That the Commissioner cannot be stopped (and must not estop himself) from raising such assessments.

[(2005) Vol 11:4 NZJTLP 397, 406] But can such a "purist" view survive the enactment of Part IVA of the TAA 1994 untrammelled? Section 89J TAA 1994 itself represents a substantial inroad into the principle set out in *Canterbury Frozen Meat*. In that case, Richardson J stated that the Commissioner "is not entitled to act arbitrarily or in disregard of the law or facts known to [him]". More pertinently, McKay J also stated:

> "… The Commissioner is not empowered, however, to issue an assessment which does not represent his own honest opinion. He cannot say, for example, 'on the information available to me I think the taxable income is $X, but I will nevertheless issue an assessment for $10X'. Such a purported assessment would not be a true assessment within the powers conferred by [s 92 TAA 1994]."

This is clear judicial authority that the Commissioner may not raise an assessment that does not reflect his honest belief of the taxpayer's correct tax liability. However, where a taxpayer's NOPA remains unanswered through negligence or neglect on the part of the Commissioner's officers, the Commissioner is obliged to issue an assessment to "take account" of the adjustments proposed, even though he disagrees with the contents of that NOPA. Such an assessment obviously does not reflect the Commissioner's own view of the law or facts known to him (and thus may be at odds with the reasoning in *Canterbury Frozen Meat*).

Nevertheless, such an assessment is undoubtedly valid and effective in accordance with Part IVA of the TAA 1994. Thus, it may be argued that the enactment of Part IVA represented a change away from the primacy of the Commissioner's duty to raise a correct assessment in all cases to an assessment (whether "correct" or otherwise) that is the result of the disputes resolution procedure. If so, it is a change that neither the Courts nor Inland Revenue have fully recognised.

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FOOTNOTES

1 The assistance and collaboration of Mike Lennard, Barrister (and former Director of Inland Revenue's Litigation Management Unit) is gratefully acknowledged.

1 TIB Vol 8:3 (August 1996), Questions and Answers, Agreements, p 28.

2 See n 2, p 28.

3 TIB Vol 8:3 (August 1996), Questions and Answers, pp 26-36.

4 See n 4, p 28.

5 See s 89I TAA 1994.

6 Inland Revenue, *Resolving Tax Disputes: A Legislative Review*, (Wellington, July 2003), A Government Discussion Document.

7 See n 7, Ch 2: The Disputes Resolution Process, p 8, para 2.18.

8 *CIR v Delphi Fishing Co Ltd*(2004) 21 NZTC 18,525 (HC), 18,531; para 52.

9 *PLM Software Ltd v CIR*(2001) 20 NZTC 17,336 (HC), 17,342; para 20.

10 See, for example, *Brierley Investments Ltd v Bouzaid*[1993] 3 NZLR 655; (1993) 18 TRNZ 1, also reported as *Brierley Investments Ltd v CIR*(1993) 15 NZTC 10,212 (CA).

11 See n 11.

12 See n 11, p 662; pp 7-8; p 10,217.

13 It should be noted that in TIB Vol 17:3 (April 2005), Standard Practice Statement SPS-05/04: Disputes Resolution Process Commenced by a Taxpayer, 53, Inland Revenue states (at p 65):

> "**Deemed acceptance**"104. If the Commissioner does not issue a NOR within the two-month response period, the Commissioner is deemed to have accepted the proposed adjustments in the taxpayer's NOPA. Section 89H(2) states:
>
> > 'If the Commissioner does not, within the response period for a notice of proposed adjustment issued by a disputant, reject an adjustment contained in the notice, the Commissioner is deemed to accept the proposed adjustment and section 89J applies.'
>
> "**Exception to deemed acceptance**"105. Notwithstanding section 89H(2), the Commissioner may apply to the High Court for an order allowing him to issue a NOR outside the two-month response period. Section 89L applies only if an exceptional circumstance applies or has prevented the Commissioner from issuing the NOR to the taxpayer within the response period."

14 The other judgments either rejected the basis for legitimate expectation in New Zealand or were silent on the matter.

15 *Brierley Investments Ltd v Bouzaid*[1993] 3 NZLR 655; (1993) 18 TRNZ 1, also reported as *Brierley Investments Ltd v CIR*(1993) 15 NZTC 10,212 (CA), 670; 17 10,225.

16 *CIR v New Zealand Wool Board*(1999) 19 NZTC 15,476 (CA).

17 See n 16.

18 See n 17, p 15,491, para 58.

19 See n 17, p 15,492, para 62.

20 As discussed in section 1 of this comment.

21 The most recent example being the Court of Appeal decision in *Allen v CIR*(CA204/04, 8 September 2005, William Young, O'Regan and Robertson JJ).

22 *CIR v MacNab*(1984) 6 NZTC 61,703 (HC).

23 See n 23, pp 61,704-61,705.

24 See n 23, p 61,709.

25 *O'Neil v CIR*(2001) 20 NZTC 17,051; (2001) UKPC 17, also reported as *Miller v CIR*[2001] 3 NZLR 316*(PC)*.

26 See n 26, p 17,060; p 330, para 26.

27 *Dandelion Investments Ltd v CIR*(2003) 21 NZTC 18,010 (CA).

28 Or neglect to make reference to s BG 1 ITA 1994, as may be relevant.

29 Examples of this approach are found in *CIR v Lemmington Holdings Ltd*[1982] 1 NZLR 517; (1982) 5 NZTC 61,268; (1982) 5 TRNZ 776 (CA); and *CIR v Canterbury Frozen Meat Co Ltd*[1994] 2 NZLR 681; (1994) 16 NZTC 11,150; (1994) 18 TRNZ 645 (CA).

30 *CIR v Canterbury Frozen Meat Co Ltd*[1994] 2 NZLR 681; (1994) 16 NZTC 11,150; (1994) 18 TRNZ 645 (CA).

31 See n 31, p 690; p 11,158; p 655.

32 See n 31, p 693; p 11,160; p 658.