The Settlement of Tax Disputes: The Commissioner is Able But Not Willing

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The Settlement of Tax Disputes: The Commissioner is Able but not Willing

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In Accent Management Ltd v CIR, the Court of Appeal strongly confirmed the Commissioner's power to settle tax disputes on a compromise basis. This decision brings Inland Revenue into line with the Australian Taxation Office (ATO) practice by allowing it to take account of public policy, the allocation of scarce resources and litigation risk in order to make "rational decisions" when settling tax disputes. Unfortunately, Inland Revenue has been slow to explain the grounds upon which it will settle cases. Unlike the ATO, which has published a comprehensive Code of Settlement Practice, Inland Revenue has not promulgated a policy regarding when settlements might be suitable, nor established a procedure for such settlements. A series of draft policies over the past ten years have never been confirmed. Having triumphed in the Trinity litigation and established a wide discretion to enter into settlements on a commercial basis, Inland Revenue should establish clear policy and procedures regarding how it will exercise that power. The absence of such a policy has caused uncertainty and frustration for taxpayers, resulting in the unnecessary litigation of disputes that would be appropriate for settlement. In that regard, the Commissioner of Inland Revenue is failing to fully comply with his obligation under s 6ATax Administration Act 1994 to best utilise Inland Revenue's resources to collect the highest revenue practicable.

1.0 INTRODUCTION

It is a fundamental constitutional principle that Parliament imposes tax while the Commissioner of Inland Revenue (the Commissioner) merely has responsibility for collecting tax in accordance with the statute. Section 1Bill of Rights Act 1688 (UK) stipulates that there is no "dispensing power" allowing the Commissioner to waive the collection of tax properly imposed by legislation.

Despite that principle, since 1991 the Australian Federal Commissioner of Taxation (the Australian Commissioner) has recognised the ability to negotiate settlements of tax disputes based on the "good management rule". This principle allows the Australian Taxation Office (ATO) to take account of public policy, the allocation of scarce resources and litigation risk to settle tax disputes on a compromise basis.

[(2009) Vol 15:4 NZJTLP 323, 324] By contrast, the New Zealand Commissioner was slow to take advantage of the power to settle tax disputes. Initially ignoring legislative amendments specifically granting him "care and management" over the collection of taxes, the Commissioner argued that he was not permitted to settle tax disputes on an "unprincipled basis".

In a series of judgments culminating in *Accent Management Ltd v CIR*, the New Zealand Courts confirmed the Commissioner's power to settle tax disputes on a compromise basis. These decisions bring Inland Revenue into line with ATO practice by allowing it to make "rational decisions" over how tax is collected and which disputes should be pursued.

Despite this judicial endorsement of the power to compromise tax disputes, Inland Revenue has been slow to explain the grounds upon which it will settle cases. Unlike the ATO, Inland Revenue has not promulgated a policy regarding when settlements might be suitable, nor established a procedure for such settlements. As a result, all settlements to date appear to have been conducted on an ad hoc basis. A series of draft policies released over the past ten years by Inland Revenue on its power to settle disputes have never been confirmed. This absence of any policy or procedure has caused uncertainty and frustration for taxpayers, resulting in unnecessary litigation.

This article examines in section 2 the various decisions in Australia and New Zealand upholding the Commissioner's right to settle tax disputes. In section 3, it compares the ATO's *Code of Settlement Practice* with the approach taken by the New Zealand Courts. Section 4 examines when settlement is not possible. In section 5, the article suggests how the power to settle tax disputes may best advance the interest of both Inland Revenue and the taxpayers involved. Section 6 concludes.

2.0 A REVIEW OF THE NEW ZEALAND APPROACH CONCERNING THE COMMISSIONER'S RIGHT TO SETTLE TAX DISPUTES

2.1 The Inherent Power to Administer Taxes

From its earliest history, the practicalities of collecting income tax have always involved an element of discretion by tax authorities. This discretion was first given judicial recognition by the House of Lords in *R v IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd*, popularly **[(2009) Vol 15:4 NZJTLP 323, 325]** **[(2009) Vol 15:4 NZJTLP 323, 325]** known as the "Fleet St Casuals" case. That case concerned the right of the UK Inland Revenue to offer an amnesty to a category of non-compliant taxpayers in the expectation of their future compliance, thereby alleviating the need to conduct numerous and resource-intensive investigations of those taxpayers.

The decision to grant the amnesty was challenged by a group of compliant taxpayers, who disputed the UK Commissioner's power to absolve other taxpayers of the usual consequences of non-compliance. In effect, the compliant taxpayers sought to compel the UK Commissioner to enforce the law in full and to therefore conduct whatever investigations were necessary to ensure full compliance. In response, the UK Commissioner argued that the obligation to ensure compliance and collect taxes was not absolute. Rather, as a matter of practicality, decisions had to be made by way of "care and management" to collect as much tax as practicable using cost-effective methods.

In a seminal decision, the Law Lords endorsed the UK Commissioner's discretion to manage the collection of taxes. Given the limited resources available to the UK Inland Revenue, it was both impractical and impossible to collect every potential dollar of tax owing. Accordingly, it was reasonable for the UK Commissioner to apply his resources in a responsible manner to collect the most tax possible. It was therefore a matter for the UK Commissioner's discretion as to how those resources were applied. Lord Scarman explained:

> "… in the daily discharge of their duties inspectors are constantly required to balance the duty to collect 'every part' of due tax against the duty of good management."

This decision is taken as confirming the UK Commissioner's discretion over the care and management of tax collection. However, it was noteworthy that the case concerned the application of UK Inland Revenue resources to investigations generally. It did not involve identified taxpayers and, therefore, did not raise the question of whether, if a particular taxpayer had been investigated, the UK Commissioner could still choose not to collect taxes that that taxpayer properly owed. As a result, the case did not endorse a general dispensing power and the application of the discretion regarding care and management to individual taxpayers was uncertain.

2.2 Inland Revenue's Insistence on Principled Settlements

In contrast to the Australian position (discussed below), prior to 1999 the New Zealand Commissioner considered that he had no power to settle disputes or litigation with taxpayers on a compromise basis. Rather, Inland Revenue considered that only settlements on a principled basis could be agreed. In practice, this meant that:

- Where an element of apportionment was provided in the Income Tax Act (ITA), the Commissioner could agree with the taxpayer over the quantum of that apportionment. For instance, a dispute over the extent to which an item of expenditure should be disallowed could be settled by agreeing to the correct apportionment.
- Where no apportionment was provided in the ITA, the Commissioner could only settle with the taxpayer on an all-or-nothing basis following the concession by either party as to the correctness of the other's position. Inland Revenue would not "split the difference" with the taxpayer. For instance, **[(2009) Vol 15:4 NZJTLP 323, 326]** a dispute over the taxability of a single amount received for the sale of shares could not be settled by agreeing to treat part of the proceeds as capital and part as income.

This view was explained by Inland Revenue in *Finalising Agreements in Tax Investigations*. It stated:

> "It is important to recognise that [final agreements] will need to be based on an assessment that conforms to the legislation. As the Commissioner is under a statutory obligation to assess and collect the correct amount of tax, it is inappropriate that the risks of litigation be factored into the final agreement. … Agreements are based on the same statutory criteria as that for making other assessments. The process of final agreements should not be regarded as an opportunity for issuing an assessment that does not conform to the legislation."

This position applied the reasoning of the Court of Appeal in *Brierley Investments Ltd v CIR*, where Richardson J observed:

> "The income tax legislation proceeds on the premise that in the interests of the community the Commissioner is to ensure that the income of every taxpayer is assessed and the tax is paid … The Commissioner cannot contract out of those obligations … [The] Commissioner does not have a general dispensing power. He (or she) cannot opt out of the obligation to make the statutory judgment of the liability of every taxpayer under the Act."

This rigid stance led the Commissioner to litigate many disputes that might otherwise have been settled by way of a compromise between the parties. Inland Revenue was forced to change this doctrinaire position following the decision in *Auckland Gas Co Ltd v CIR*. There, the Court of Appeal unanimously rejected the Commissioner's insistence on settling tax disputes only on a principled basis and ruled that Inland Revenue was entitled to enter into compromise settlements. Richardson P stated:

> "This brings us to the third matter, the nature of tax litigation. The right to challenge assessments for tax is central to the functioning of the tax system in our society. So, too, are the principles underlying ss 6 and 6A which are designed to protect the integrity of the tax system in an environment where the Commissioner is required to operate within limited resources in the care and management of all the functions committed to the Commissioner's charge. …"[Both] the taxpayer and the Commissioner operating under the care and management responsibilities imposed by ss 6 and 6A are entitled to make sensible litigation, including settlement, decisions. We do not endorse the restricted view of the Commissioner's ability to settle a taxation dispute contended for in Mr Arnold's submissions."

Likewise, William Young P advised:

> " **[(2009) Vol 15:4 NZJTLP 323, 327]** Major tax litigation is expensive and places a heavy strain on the human resources available to the Commissioner. The Commissioner must be permitted to make rational decisions as to how those resources can be best deployed. Further, 'sensible litigation, including settlement, decisions' must necessarily allow for litigation risk."

This decision relied upon, and recognised the significance of, ss 6 and 6ATax Administration Act 1994 (TAA 1994), which had been enacted in 1995 on the recommendation of the Working Party on the Reorganisation of the Income Tax Act 1976. That Working Party recommended that the Commissioner be expressly given the duty of care and management of the tax system and, therefore, should be able to enter into compromise settlements. The Working Party's report explained:

> "IRD will be entitled to enter into compromise settlements with taxpayers, rather than pursue the full amount of tax assessed, in cases where there are legitimate differences of view about the facts in dispute and the costs of litigation are high."

The effect of s 6A had been considered in a number of subsequent cases involving compromises or settlements regarding the collection of less tax. In each instance, the decision by the Commissioner was upheld.

In *Attorney-General v Steelfort Engineering Co Ltd*, Blanchard J noted:

> "[In] exercise of a managerial discretion, the Commissioner now has a broad power to enter into compromises where that

course is consistent with his duty under ss 6 and 6A [TAA 1994]."

Likewise, in *Fairbrother v CIR* William Young J observed:

"[There] is now no scope for an argument based on an absolute obligation to collect the right amount of tax."… I have reached the view that the Commissioner is entitled to compromise proceedings in relation to a taxation liability outside the four corners of the statutory provisions as to relief and remission."

More recently in *Foxley v CIR*, when discussing the application of the statutory disputes procedure, Miller J recorded:

"I note in passing that it is now settled that the Commissioner may settle tax litigation on a basis that need not correspond to his view of the correct tax position."

2.3 Inland Revenue Policy on Settling Tax Disputes

Strangely, despite entering into a range of settlements with taxpayers using the authority granted in *Auckland Gas*, Inland Revenue publicly maintained its stance that such settlements were impermissible. **[(2009) Vol 15:4 NZJTLP 323, 328]** Inland Revenue's original settlement policy was released in August 1998. However, even at the time of publication this policy was hopelessly out of date, reflecting the law before the enactment of s 6A TAA 1994. Its stance that settlements could take place only "in accordance with the law" was almost immediately disapproved of by the Court of Appeal in *Auckland Gas*. However, after more than ten years that policy has been neither officially withdrawn by Inland Revenue nor superseded by another policy.

Presumably, in response to the Court of Appeal's criticism, in 1999 Inland Revenue released two further draft statements:

- ED0007: *Settlement of Disputed Tax Litigation* is a draft standard practice statement for litigation disputes. This draft policy acknowledged that Inland Revenue could settle litigation on a compromise basis, that settlements are more likely to be made when there is a clear factual dispute, and proposed for a panel of Inland Revenue officials and external counsel to consider settlement proposals so as to ensure consistency; and
- ED0008: *Finalising Agreements in Tax Investigations* is the draft standard practice statement for other (pre-litigation) disputes. This draft policy effectively restates the policy in *Finalising Agreements in Tax Investigations*, precluding the compromise settlement of pre-litigation disputes, and thereby treating pre- and post-litigation settlements differently without any justification.

Those draft policy statements were never finalised. Instead, in December 2005 Inland Revenue issued a draft Interpretation Statement INS0072: *Interpretation of Sections 6 and 6A of the Tax Administration Act 1994: Care and Management of Taxes*, which in part dealt with Inland Revenue's power and discretion to settle tax disputes. This draft policy confirmed that Inland Revenue could enter into true compromise settlements with taxpayers, having taken into account potential litigation risk. However, again, that draft policy was never finalised. It is currently described by Inland Revenue as a "Work in progress – considering consultation submissions and undertaking further work."

Most recently, in August 2008 Inland Revenue issued an updated draft Interpretation Statement INS0072: *Care and Management of the Taxes Covered by the Inland Revenue Acts*, explaining the Commissioner's powers of settlement under s 6A(2) and (3) TAA 1994. The updated policy explains two major differences between it and the earlier versions:

(a) The earlier exposure draft considered that in seeking to discharge the s 6A duty, the Commissioner could not override, or mitigate the effect of, statutory provisions that apply to a taxpayer because this would amount to dispensing with the law. This draft takes the view that if s 6A TAA 1994 **[(2009) Vol 15:4 NZJTLP 323, 329]** authorises the Commissioner to enter a compromise settlement, the law is not dispensed with because the Commissioner would be acting within the law.

(b) The earlier exposure draft contained an extensive discussion on whether the Commissioner was authorised to enter

> settlements under ss 6 and 6A TAA 1994. This draft does not contain similarly extensive discussion on settlements. An extensive discussion was considered unnecessary given that the New Zealand case law now clearly supports the view that the Commissioner can enter settlements and agreements with taxpayers.

Accordingly, the most recent draft policy now recognises the development in case law supporting and encouraging the Commissioner's power to settle. However, this draft policy too has yet to be finalised.

2.4 Litigation Confirming Inland Revenue's Right to Compromise with Some Taxpayers

Presumably acting in accordance with its draft policy, it has been widely reported that Inland Revenue has entered into a range of compromise settlements. The most contentious of those settlements arose in respect of the *Trinity* litigation. This fact was confirmed in *Accent Management Ltd v CIR*, where Venning J stated that:

> "Mr Lennard, who was director of litigation for Inland Revenue … has deposed that following the decision in *Auckland Gas* the Commissioner has regularly settled tax litigation. In his experience, since the delivery of that decision, one third or fewer of the cases commenced in the Taxation Review Authority or High Court each year have been resolved by the Court or Authority decision. Of the remaining two thirds the majority would have involved settlement on a compromise basis rather than either the taxpayer or the Commissioner conceding the case entirely. Mr Lennard also confirmed that the Commissioner has settled multi-party litigation on a number of occasions including the ACTONZ joint venture."

In that case, Inland Revenue settled with some but not all taxpayers that participated in the *Trinity* tax avoidance arrangement. Taxpayers that did not settle the dispute applied to the High Court for a recall of the test case judgment on the basis that settlement with some taxpayers had cast doubt on the correctness of the assessment issued to them. The taxpayers argued that, as Inland Revenue had subsequently reassessed the settling taxpayers to reflect the compromise settlement, the original assessments issued to the litigating taxpayers (which were inconsistent with the terms of the settlement) could not stand.

This argument was based on the long-standing principle that the Commissioner is under a clear duty not to differentiate amongst taxpayers. In the words of Turner J in *Reckitt & Colman (NZ) Ltd v Taxation Board of Review*: "He (the Commissioner) must with Olympian impartiality hold the scales between the taxpayer and Crown giving to no one any latitude not given to others." While that judgment had not expressly dealt with the power of settlement during a dispute, the different **[(2009) Vol 15:4 NZJTLP 323, 330]** assessment of the various *Trinity* taxpayers appeared to undermine the principle established in that case.

One problem faced by the *Trinity* litigants in winning this argument was that both the High Court and the Court of Appeal had already upheld the Commissioner's reassessment of them as correct. Nevertheless, their application directly raised the question of whether the Commissioner could compromise not only over the collection of tax but also over its actual assessment. More importantly, it examined whether the Commissioner was entitled to assess the settling taxpayers differently than the litigating taxpayers, even though their circumstances were exactly the same.

The High Court rejected the taxpayers' application and strongly endorsed the Commissioner's power to enter into compromise settlements. Venning J ruled:

> "In *Auckland Gas Co Ltd* the Court of Appeal referred to the settlement of litigation. In *Attorney-General v Steelfort* the Court of Appeal referred to compromises and did so after referring to the Commissioner's powers of assessment and re-assessment."In light of the strong dicta of the Court of Appeal in both of those cases I accept the submission made for the Commissioner that in tax litigation, where the validity of assessments are in issue, the Commissioner is entitled, during the course of the litigation, to take account of factors including litigation risk and cost to reach a settlement with one or more taxpayers."

In the particular circumstances of the *Trinity* case and the Commissioner's decision to settlement with some but not all taxpayers, his Honour stated:

> "Having regard to those considerations [in ss 6 and 6A TAA 1994] the Commissioner must as a matter of principle be able to settle complicated multi-party tax litigation with some, but not all objectors/plaintiffs, where only some seek to settle.

> Otherwise, the considerations set out in s 6A(3) could be thwarted by the unreasonable attitude of one of a number of taxpayers."

On the question of whether the Commissioner was entitled to assess the settling taxpayers more leniently than the litigating taxpayers, Venning J took a practical approach. His Honour noted that the litigating taxpayers had the opportunity to settle but elected not to. They presumably were willing to risk the outcome of the litigation in the hope that it was better than the terms reached by the settling taxpayers. Having made that commercial decision, they were bound by the outcome of the litigation and could not now seek to obtain the benefit of the settlement.

The taxpayers appealed Venning J's decision. After reviewing the circumstances giving rise to the enactment of s 6A TAA 1994 and the subsequent cases interpreting that provision, the Court of Appeal **[(2009) Vol 15:4 NZJTLP 323, 331]** unanimously concluded that "the Commissioner may settle tax litigation on a basis which does not necessarily correspond to the Commissioner's view of the correct tax position."

Examining the rationale for entering into compromise settlements, William Young P noted:

> "Major tax litigation is expensive and places a heavy strain on the human resources of the Commissioner. The Commissioner must be permitted to make rational decisions as to how those resources can be best deployed. Further, 'sensible litigation, including settlement decisions', must necessarily allow for litigation risk."

On the question of whether the Commissioner was entitled to assess the settling and litigating taxpayers differently, his Honour declined to second-guess the terms or rationale for the settlements and concluded:

> "Nor is it appropriate to allow the appellants (who, after all, lost the case) to achieve a judicial review of the Commissioner's decision … not to settle with them on discounted terms. …"[They] did not approach the Commissioner with a view to settling their cases. Having lost the case, they now seek to be treated as if they had settled."

The taxpayers' approach was described by the Court as "far from meritorious". The *Trinity* decision strongly endorses a wide discretion by the Commissioner to enter into settlements on commercial terms even if it meant assessing similar taxpayers differently. This result therefore goes further than the discretion the ATO has assumed under the *Code of Settlement Practice*, which expressly stipulates that it would be inappropriate to enter into settlements if "the settlement would involve inconsistency of treatment for taxpayers in comparable circumstances." It therefore appears that Inland Revenue is able to enter into settlements that the ATO would not countenance.

The only possible reconciliation between these two positions is that the very willingness to settle constitutes a difference in the circumstances of different taxpayers. In effect, the decision to enter into a settlement justifies the Commissioner's different treatment of taxpayers. This view appears to have been endorsed by William Young P:

> "… it does seem likely that the Commissioner's willingness to settle and the terms he was prepared to accept were influenced not only by the timing of settlement (in relation to the progress of the High Court proceedings) but also his perception of the culpability of particular taxpayers."

The Court of Appeal described the approach applied by Inland Revenue as "the earlier the settlements, the better the terms for the investors." Despite the ability to offer favourable treatment to taxpayers who settle a dispute early, the Court of Appeal in *Miller v CIR* appears to direct the **[(2009) Vol 15:4 NZJTLP 323, 332]** Commissioner to extend the benefits of a settlement entered into by some JG Russell template taxpayers to others who had previously rejected that settlement. All taxpayers had originally entered into a settlement offered by the Commissioner, which the High Court subsequently ruled to be ultra vires (explained below). Most taxpayers then entered into new, less favourable settlements, while Miller and some other taxpayers chose to litigate (albeit unsuccessfully) the dispute instead.

First, the Court of Appeal felt that the litigating taxpayers should not face the full measure of costs that would normally be imposed following their unsuccessful litigation, as this would be too harsh compared with the non-litigating taxpayers. But more importantly, the Court stated:

> "We note as an aside at this point that we understand that the appellants have not been given a reduction on core tax of $50,000, unlike the *Kemp* litigants. We would have thought that the appellants, being in same position as the *Kemp* litigants, should have been treated the same in respect of the $50,000 concession."

As a result, the taxpayers who had elected to litigate their dispute rather than enter into new settlements were nevertheless ultimately granted the benefit of the $50,000 settlement given to all other taxpayers. The Court gave no explanation of why such leniency was warranted but it seems inconsistent with the harsher line taken with the *Trinity* litigants.

2.5 Repeated Calls for Clear Inland Revenue Policy on Settling Tax Disputes

After more than a decade, Inland Revenue is still yet to finalise its policy on settlements. One commentator has noted: "[u]nfortunately, however, the CIR's progress in this area has been leisurely; some would say glacial."

This lack of clear policy undermines one of the chief aspects of Inland Revenue's power to settle tax disputes first envisaged by the Valabh Committee when it recommended that the Commissioner be given the power to compromise with taxpayers. Such power to enter into sensible, commercial-based settlements was considered an important part of the tax system and led to the enactment of ss 6 and 6A TAA 1994. However, many critics consider that that power has been wasted.

In 2008, the Tax Committees of the New Zealand Law Society (NZLS) and the New Zealand Institute of Chartered Accountants (NZICA) issued a rare joint submission to the Minister of Revenue, strongly criticising the disputes process and recommending extensive reform. The submission advised that the Committees "both have serious concerns about the current procedures, and believe changes are required urgently". These concerns included Inland Revenue's practice regarding entering into settlements:

> " **[(2009) Vol 15:4 NZJTLP 323, 333]** Formal guidance needs to be given to Inland Revenue officials and taxpayers about the Inland Revenue's ability to settle disputes both pre-assessment and post-assessment, and officials need to act consistently with that guidance."

The Appendix to the submission, setting out the NZLS's and the NZICA's views more fully, expanded on this concern:

> "Cases which should be resolved still reach the Courts. This is because there is no actual resolution process built into the disputes resolution procedures. … In addition, no guidance has been provided to Inland Revenue officials as to their settlement powers, and as a consequence both pre-assessment and post-assessment it is extremely difficult to reach sensible commercial settlements with Inland Revenue."

Finally, the submission concluded:

> "Another area of concern is in relation to the Inland Revenue's ability to settle cases pre-assessment. Practitioners have consistently commented that Inland Revenue seems unable to reach sensible settlements (including for instance by not imposing penalties or use of money interest) in the course of the disputes resolution procedures. Practitioners say that there is inconsistency between Inland Revenue offices and Inland Revenue officers within an office, a lack of clarity about who the ultimate sign-off or decision maker is in a settlement, and a perception that Inland Revenue officers still believe that a settlement is impossible except where it reflects that correct tax outcome."… it has been clear for some time and case law continues to reiterate that the Inland Revenue is able to reach settlements with taxpayers, including in the course of the tax disputes procedures. Guidance really needs to be given to Inland Revenue staff, and consistently applied."

Interestingly, while Inland Revenue is yet to finalise a policy on settlement, its policy regarding how it conducts tax disputes clearly envisages that compromises may be reached during that process. Standard Practice Statement SPS 08/01 on the disputes resolution process records that:

> "A NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties. If possible, the taxpayer will be given the opportunity to settle a dispute by entering into an agreed adjustment with Inland Revenue before the Commissioner issues a NOPA."

Unfortunately, unlike our Australian cousins, New Zealand taxpayers are still waiting for clear guidelines from Inland Revenue as to when and how Inland Revenue may settle tax disputes.

3.0 THE AUSTRALIAN "GOOD MANAGEMENT RULE"

The Australian Courts have long recognised the Australian Commissioner's discretion regarding the administration of taxes. The statutory authority for this discretion is currently found in s 44Financial Management and Accountability Act 1997 (Aust) (FMAA 1997 (Aust)). That provision requires the Australian Commissioner to manage the ATO in an efficient, effective and ethical manner. This provision imposes what is known as the "good management rule", which requires the ATO's sensible use of Commonwealth resources. As such, s 44 FMAA 1997 (Aust) creates an equivalent administrative power to that recognised in the "Fleet St Casuals" case.

[(2009) Vol 15:4 NZJTLP 323, 334] However, the Australian Courts have had no hesitation in interpreting the Australian Commissioner's administrative discretion as including the power to settle or compromise individual tax disputes. While basing that power on the discretion to manage the collection of taxes generally, the Australian Courts have always been willing to apply that discretion to particular taxpayers.

In *Precision Pools Pty Ltd v FCT*, the Federal Court referred to the Australian Commissioner's inherent power in administering the tax system. Spender J found that such administration included "a wide power … to compromise proceedings in which he was a party or to make agreements or arrangements concerning the efficient management of a dispute in which he was involved."

Likewise, in *Grofam Pty Ltd v FCT* the Full Federal Court recognised that the Australian Commissioner's general administrative powers are extremely wide and encompassed the ability to make commercial decisions regarding the settlement of individual tax disputes. In fact, the Court went so far as to encourage the Australian Commissioner to consider such a settlement in the case before it:

> "Perhaps further discussions between the parties and their legal advisers will result in a sensible adjustment of the matters …"The alternative is probably further protracted litigation with its consequent delay and expense."

Of particular importance in that case was, while the Court recognised the Commissioner's "important public duty which he has in administering the Acts", it nevertheless held that he was empowered to compromise and settle tax disputes on a commercial basis:

> "[If] this was a commercial dispute, there would be much to be said for the view that further attempt at settlement should be made … We see no reason associated with the Commissioner's powers and duties which should dissuade him from that course if he thought it otherwise an appropriate one for him to follow."

The most recent case endorsing the ATO's power to settle tax disputes was *Pantral Pty Ltd v FCT*. There, the Australian Commissioner wrote to the taxpayer during the substantive litigation pointing out the various possible outcomes of the ongoing case and offering terms of settlement. The taxpayer refused the settlement. During the subsequent hearing, the taxpayer complained that the Commissioner's conduct in offering to settle was unlawful and beyond power, and in breach of the statutory requirement to assess only the correct amount of sales tax.

Conti J rejected the taxpayer's argument on the grounds that "[t]he Commissioner's power and authority to bona fide compromise controversial assessments or claims of tax had never been doubted." The Federal Court therefore ruled that it was not only permissible but proper for the **[(2009) Vol 15:4 NZJTLP 323, 335]** Australian Commissioner to consider the risk inherent in the litigation and draw that to the taxpayer's attention while offering them a compromise settlement.

Following these strong judicial statements, the ATO released its *Code of Settlement Practice* in February 1991. That Code was subsequently revised and updated in January 2001 and again in February 2007.

The Code explains that "[the] basic duty of the [Australian] Commissioner is to administer tax law" and that the good management rule has a "broad application". It states:

> "Settling disputed matters is consistent with good management of the tax system, overall fairness and best use of [ATO] and other community resources. This has become known as 'the good management rule', which has been endorsed by the courts."

However, most importantly, the Code both recognises the ATO's authority to enter into compromise settlements with individual taxpayers and provides a procedure regarding how such settlements may occur. As such, the Code provides helpful guidelines on when and how taxpayers may approach the ATO seeking to settle a tax dispute.

The Code was also accompanied by two Practice Statements detailing the mandatory procedure ATO officers must follow when negotiating and completing settlements. These are intended to ensure that settlements only occur in appropriate cases using a transparent and accountable procedure.

3.1 When Settlement is Appropriate

The Code notes that, in most instances, the ATO will raise assessments based on its own interpretation of the application of the law to the relevant facts. Where taxpayers dispute the correctness of that assessment, the case will ordinarily be pursued through to litigation. This stance is required because the basic duty of the Commissioner is to undertake a genuine process of assessment and calculation of tax, and taxpayers may then contest that assessment using the statutory procedure. The Code states simply:

> "The basic duty of the Commissioner is to administer tax law. This duty includes assessing and collecting taxes and delivering entitlements arising under that law. The general rule, therefore, is that the Commissioner does not forego tax properly payable …"

However, that general position may be departed from in circumstances where there is a "need for reasonable and sensible administration and good management of the tax system." Accordingly, the Code concedes that settlement may be appropriate when:

- **[(2009) Vol 15:4 NZJTLP 323, 336]** The cost of litigating the dispute is out of all proportion to the amount of tax in dispute and the prospects of success;
- There are complex factual or quantum issues in dispute;
- There are evidentiary difficulties that will make litigation problematic,
- The resolution of matters in dispute regarding past periods would likely have an ongoing application to future periods,
- The merits of the opposing positions are each reasonably arguable,
- The agreement relates to the steps necessary to unwind a tax avoidance arrangement,
- Settlement will achieve future compliance by the taxpayer(s) involved.

These indicia are a sensible mix of commercial and principled considerations that would make continuing with a dispute either unnecessary or cost ineffective. As such, those criteria are largely the same as would be considered by ordinary commercial litigants when making settlement decisions.

The Code expressly acknowledges that settlements may be possible where the dispute involves an all-or-nothing issue. While some disputes involve questions of quantum or apportionment that would allow for varied assessments to be made under the same statutory provision, other disputes are more clear-cut. In those instances, tax is either payable under a particular provision or not payable. Examples include whether a single receipt is income or capital, and whether the taxpayer was engaged in a business activity. In those types of dispute, the taxpayer is either liable for tax or not liable, depending upon the facts – there is no possibility of apportioning or “splitting the difference”. Accordingly, any settlement will necessarily involve a compromise by both parties, which will then result in an assessment that does not accord with the statutory provisions. Nevertheless, such compromise settlements are expressly contemplated by the Code.

By contrast, the Code indicates circumstances where settlement would not be considered. This includes when:

- The ATO has a clear, articulated policy on the matter in dispute, and the settlement would require the Australian Commissioner to depart from that policy;
- The matter is subject to internal escalation to determine the ATO’s considered position;
- The dispute is unmeritorious or the matter is clear-cut;
- The settlement would involve inconsistent treatment of taxpayers in comparable circumstances;
- The matter in dispute is sufficiently important that it would be in the public interest to have judicial consideration and clarification; and
- Resolution of the dispute by litigation would have a flow-on effect of promoting compliance by other taxpayers.

[(2009) Vol 15:4 NZJTLP 323, 337] In particular, the Code cautions that “care is necessary to ensure the settlement practice does not encourage frivolous objections and appeals.” The ATO does not want to create perverse incentives whereby taxpayers are encouraged to engage in unmeritorious disputes in the hope of reaching a settlement that reduces their tax liability.

In summary, the Code explains that “settlements usually involve the need to balance competing considerations, and call for the application of discretion and good sense.”

3.2 The Australian Procedure for Settling Disputes

In addition to describing when settlement of a dispute may be appropriate, the Code also sets out the procedure under which such settlements may be reached. First, the Code envisages that settlement can take place at any stage of a dispute. While the cases authorising the Commissioner’s settlement power all arose out of ongoing litigation, the ATO recognises that it would be inefficient to restrict settlements only to the litigation process. In particular, it advises that:

> “Issues between the Commissioner and taxpayers can generally be discussed and resolved … at any stage. …“By way of example, settlement discussions can occur where taxpayers make settlement overtures prior to formal assessments being raised. This often happens during an audit, usually following a taxpayer’s consideration of [an ATO] position paper.“Where settlement is sensible and appropriate in relation to a matter, it would make little sense to go through a formal process of assessment, objection and amendment in order to reflect the agreed outcome.”

This stance recognises that, if the power to settle exists, then there is no principled reason it can only be exercised at a particular point in the dispute. This is a commendably realistic position for the ATO to take, as it recognises that disputes are more likely to settle early in the process before the parties have been forced into entrenched positions.

Most notably, the Code takes great care to ensure that the process is transparent and contains the necessary checks and balances.

The Code stipulates that all settlement negotiations will be conducted on a “without prejudice” basis so that neither party is prejudiced if the negotiations fail. It also requires at least two ATO officers to be present during any negotiations because there is “a basic principle that there should be no unilateral decision making.” Even then, settlement meetings should be electronically recorded and the process must be fully documented. The Code also confirms that “it is [ATO] policy that officers must never use threats, either implied or actual, of imposing penalties or interest as a lever to settle cases.”

[(2009) Vol 15:4 NZJTLP 323, 338] The procedure also requires “priority technical issues” to be escalated to more senior officers, and that final settlement of those issues can only be achieved with the approval of that senior officer. Likewise, all officers are encouraged to obtain independent legal advice regarding any settlement:

> “In any substantial matter, where external counsel has been engaged and understands the substantive issues, the normal expectation is that the advice of counsel would be obtained on the merits of the Commissioner’s position and the reasonableness of the proposed settlement.”

In a very enlightened view, the procedure also allows for taxpayers to engage in the settlement considerations. The Code advises:

> “Where internal advice is obtained on some aspect of a settlement …, it will usually be good practice … for the taxpayers or their representatives to be given the opportunity of explaining their case to the [internal adviser].”

As a result of this procedure, any settlement will be concluded only after appropriate oversight by both legal counsel and specified senior ATO officers. Likewise, it confirms that all settlements will be appropriately documented and signed by a senior officer before it will be effective.

Finally, the Code requires all agreements to be recorded on a prescribed deed of settlement. This deed will record:

- The issues in dispute and how they were resolved;
- Any undertakings made by the parties;
- Any treatment of those issues in the future; and
- Payment arrangements.

The deed will make clear that the settlement is conditional upon full disclosure by the taxpayer, and that the settlement becomes void if payment of the agreed sum is not made by the taxpayer. This would presumably permit the ATO to pursue the defaulting taxpayer for the full liability originally assessed.

The Code then concludes with a checklist of items that must be considered, resolved and documented as part of any settlement. The Australian Code is therefore a comprehensive and useful guide to both ATO officers and taxpayers regarding what disputes may be settled and how. Perhaps the best measure of the efficacy of the Code is the absence of substantial litigation regarding settlements in Australia in the past 10 years.

3.3 The Australian Taxation Office’s Power to Settle with Some Taxpayers

In practice, the Australian Courts have endorsed a similar position to that in New Zealand, permitting the ATO to settle with some taxpayers but not with others. *Young v FCT* followed the investigation of **[(2009) Vol 15:4 NZJTLP 323, 339]** a large-scale tax avoidance arrangement. The ATO offered all participants a settlement permitting them a small part of the deductions claimed under the arrangement and reduced penalties. Such offers were a relatively common way for the ATO to deal with such arrangements and were provided for in ATO policy.

The taxpayer rejected the settlement and sought judicial review of the ATO’s policy determining the terms offered. Gyles J rejected the application on the grounds that the taxpayer's refusal to settle meant that he was not adversely affected by the policy because he retained his full objection rights. The offer simply gave the taxpayer an opportunity to settle the dispute without litigation, and the fact that he had to make a decision whether or not to settle was not adverse to him.

While Gyles J acknowledged that the ATO's policy regarding terms for this type of settlement was inflexible, his Honour nevertheless found that it was not amenable to judicial review. In a sentiment commonly expressed in the Australian cases, his Honour concluded that the administration of the Income Tax Assessment Act 1936 (Aust), including the power to settle and upon what terms, was vested in the Commissioner and he was not answerable to the Court for that administration.

Likewise, in *Gruber v FCT* the ATO made a settlement offer to numerous participants in a tax avoidance scheme but the taxpayer alleged that the terms offered to him were less generous than those offered to other taxpayers. Apparently, the Commissioner considered him more culpable on the basis that he was a sophisticated investor and, therefore, imposed harsher settlement terms. The taxpayer rejected the offer and no settlement was reached. During the subsequent substantive litigation, the taxpayer complained of this inconsistent treatment but the Administrative Appeals Tribunal concluded that the terms offered to other taxpayers and the terms rejected by the taxpayer "[were] of little if any relevance" in the litigation determining the correctness of the taxpayer's assessment.

Finally, in *Barham v FCT* the taxpayer sought to support his substantive proceedings by pointing to the terms of settlement reached by the ATO with other taxpayers. However, the Administrative Appeals Tribunal declined even to consider that aspect of the taxpayer's argument:

> "Contrary to what the applicant claims … no issue can or does arise as to whether the applicant should have access to the terms of a settlement offer announced in February 2002 to participants in the project. The role of the Tribunal is to review the merits of the objection decisions before it … How the respondent may have settled disputes with other taxpayers is not relevant to any issue which arises in this application."

It therefore appears that Courts in both countries have recognised that the Commissioner may draw a distinction between taxpayers who agree to settle and those who do not. By upholding the Commissioner's right to make such distinctions, the Courts have effectively freed the Commissioner from the "Olympian impartiality" that would normally be expected. However, the Commissioner **[(2009) Vol 15:4 NZJTLP 323, 340]** remains aware of perceptions of unfairness in reaching settlements with some taxpayers while excluding others. The most recent draft policy statement in New Zealand reflects:

> "The exercise of this choice can impact on the integrity of the tax system, including perceptions of that integrity. In particular, what may be seen as flexibility that achieves a practical and sensible outcome by one taxpayer may be seen as inconsistency or favouritism by other taxpayers."

This concern has been reflected by a number of commentators. For instance, the editors of the *Australian Tax Review* stated:

> "Commentators are rightly wary of discretion being granted to administrators. Discretion can be dangerous. But it can also sensibly provide remedies to impractical and problematic situations, so long as the extra statutory concession is applied only where its application is in favour of taxpayers, and only on a consistent basis to all affected taxpayers – not just some."

Despite these concerns, the Courts appear willing to permit tax authorities to reach different settlements with different groups of taxpayers without questioning whether that different treatment was warranted.

4.0 WHEN IS SETTLEMENT NOT POSSIBLE?

While the Courts recognise the Commissioner's wide power to negotiate and settle tax disputes with taxpayers as part of the care and management function, there are some instances when settlement is not possible. In particular, settlements that contravene an express statutory provision have been repeatedly found to be ultra vires and, therefore, unenforceable by taxpayers. While s 6A TAA 1994 stipulates that it will apply "notwithstanding any other provision in this Act", it would be ultra vires of the Commissioner to attempt to settle a matter in excess of the clear statutory limits. For instance, s 177C(3) TAA 1994 prohibits the Commissioner from writing off outstanding tax relating to a shortfall penalty for an abusive tax position or evasion. A settlement purporting to write off those shortfall penalties would therefore be precluded.

In *Kemp v CIR*, the Commissioner agreed to compromise the collection of the full tax liability owing by taxpayers who had been reassessed following their participation in the JG Russell tax avoidance arrangement. In particular, he had agreed to compromise the amount of tax owing from particular taxpayers, effectively writing off large amounts of disputed tax. Crucially, at the time, the statutory scheme contained an explicit monetary limit on the Commissioner's power to write off tax. Section 414AIncome Tax Act 1976 then permitted the Commissioner to write off a maximum of $50,000 in unpaid tax – but required any greater amount to be authorised by the Minister of Revenue.

Apparently in ignorance of this section, Inland Revenue entered into settlement deeds with a number of JG Russell template taxpayers, writing off disputed tax in excess of the $50,000 limit. The error was not identified until long after the settlements were finalised, and in some instances not until the agreed amounts of tax had been paid. Nevertheless, once the error became known, somewhat embarrassingly, **[(2009) Vol 15:4 NZJTLP 323, 341]** the Commissioner was obliged to apply to the High Court for authority to resile from the settlements and pursue the original assessments for the full amount of disputed tax.

The Commissioner argued that the settlements writing off more than the statutory maximum of $50,000 were ultra vires and, therefore, unenforceable. Importantly, this case pre-dates the enactment of both s 6 and s 6A TAA 1994. Nevertheless, the taxpayers claimed the benefit of the settlements and argued that they remained enforceable on general principles despite exceeding the maximum statutory limit on remission of taxes.

The High Court ruled in favour of the Commissioner on the grounds that, if a general power to enter into settlements with taxpayers exists, then it would not override the specific requirements laid down by Parliament for remitting tax under the Income Tax Act 1976. Accordingly, as the statutory requirements were not complied with, the Commissioner did not have power to enter into the settlements. His action in doing so was ultra vires and, therefore, unenforceable. Despite the obviously unfortunate situation, whereby Inland Revenue was effectively seeking to resile from its own settlements, the High Court refused to exercise its discretion to uphold an ultra vires settlement made in breach of the express power to enter into such settlements:

> "To allow such an unbridled discretion can not have been the intention of Parliament. I agree with the Commissioner that this would allow through a 'back door' that which does not meet the explicit statutory requirements."

Importantly, the Court acknowledged the competing interests in the case:

> "I accept there is a public interest in the taxpayers being able to rely on agreements made with the Department. However the public also has an interest in seeing that laws are not ignored with impunity, particularly by those who are given power to exercise discretion as between taxpayers. Accordingly I am satisfied that the Commissioner had no option but to resile from the settlements which were made without lawful authority."

The settlements in *Kemp* were entered into prior to the enactment of ss 6 and 6A TAA 1994, and there is some uncertainty regarding whether its reasoning is still applicable under those sections. As noted above, those sections were intended to give the New Zealand Commissioner similar powers of care and management of the tax system to that long recognised as applying in the UK. Accordingly, the decision in *Al-Fayed v Advocate General for Scotland* strongly indicates that *Kemp* remains good law in New Zealand.

In that case, the UK Inland Revenue had entered into a number of agreements with Mr Mohamed Al-Fayed, his brothers and associated entities regarding their tax affairs. Some of those agreements settled **[(2009) Vol 15:4 NZJTLP 323, 342]** the amount of tax owing in previous years that either had been or would be subject to investigation (known as "back tax agreements"). Other agreements purported to settle the amount of tax owing in future years (known as "forward tax agreements"). The forward tax agreements effectively set the amount of tax that would be paid by the Al-Fayed group regardless of their actual income or the true tax position. Given the complexity of the group's tax affairs, the UK Inland Revenue considered that agreeing to a fixed amount of tax both provided a degree of certainty and was an effective use of scarce resources.

Eventually, the UK Inland Revenue resiled from the forward tax agreements and commenced investigations of the Al-Fayeds' actual tax liability. Al-Fayed brought judicial review seeking to bind the UK Inland Revenue to the forward tax agreements.

In reaching its unanimous decision, the Scottish Inner Court of Session considered the nature of settlements with taxpayers and the power granted to the Commissioner to compromise over the amount of tax to be assessed. Lord Cullen of Whitekirk stated:

> "A back tax agreement relates to a situation in which the taxpayer has already incurred the liability, but its amount has not been determined. Fundamental to the legality of such an agreement is that the respondents have the power to require the taxpayer to pay what is due. As an alternative means to the same end they are regarded as having the power, in the exercise of their managerial discretion, to enter into a contract with the taxpayer for a payment in satisfaction of that liability. In that context they have power to arrange a compromise with the taxpayer, taking into account such factors as may be relevant."

Accordingly, the back tax agreements were within the Commissioner's power and were enforceable. However, the forward tax agreements, under which the Commissioner purported to agree on what tax would be imposed in future years, was not enforceable. In statements similar to that found in *Kemp*, the Court then concluded:

> "The decisions in relation to extra-statutory concessions make it plain that it is not lawful for the respondents to make a concession where it would be in conflict with their statutory duty. …"Termination of the forward tax Agreement could not be seen as an abuse of power on the part of the respondents. Having reached the conclusion that the Agreement was ultra vires of the respondents, he considered that it could not be unfair to the petitioners to be deprived of the benefits resulting from it."

Finally, the Court concluded:

> "We have already reached the conclusion that, as the [forward sale] Agreement was ultra vires, the respondents did not have any discretion to continue to abide by the Agreement once they knew that it was ultra vires. A decision taken at that stage to continue to be bound by the Agreement for the remainder of its contractual duration would, in our opinion, have been out with the powers of the respondents. … There can be no legitimate expectation that a public body will continue to implement an agreement when it has no power to do so."

[(2009) Vol 15:4 NZJTLP 323, 343] by Based on that decision, the Commissioner's power of care and management to settle disputes is not unlimited. Accordingly, the reasoning in the *Kemp* decision would continue to apply.

This understanding is reinforced by the House of Lords' decision in *R v IRC, ex parte Wilkinson*, involving the right of a widower to claim an antiquated tax concession expressly granted only to widows by the UK Income and Corporation Taxes Act 1988. The widower claimed the widows' concession but this was rejected by the UK Inland Revenue. The widower appealed on the grounds that, despite the restriction in the statute, the UK Inland Revenue should have granted him the concession on human rights grounds.

The House of Lords rejected the widow's claim. Their Lordships confirmed that the UK Inland Revenue's care and management powers did not extend to granting extra-statutory concessions not provided for under the statute. Lord Hoffman explained that the discretion granted to the UK Inland Revenue by the general administrative power "does not justify construing the power so widely as to enable the commissioners to concede, by extra statutory concession, an allowance which Parliament could have granted but did not grant".

4.1 Settlement by Reduced Assessment or by Writing off Payment?

There are a number of ways that settlement can occur. Imagine a dispute about the correctness of the taxability of a receipt of $100, leading to a disputed tax of $33. A 50 percent settlement could be implemented in three ways:

(a) Assess tax on 50 percent of the receipt, so $50 × 33% = $16.50

(b) Assess tax on the whole of the receipt but at a reduced rate, so $100 × 16.5% = $16.50

(c) Leave tax assessed at the statutory rate on the whole sum, so $33 tax is owing, but write-off or remit the obligation to pay half.

The cases indicate that settlements reached to date have been made using each of those methods. The first two methods effectively require the Commissioner to knowingly assess the taxpayer on an extra-statutory basis, that is, on a basis that does not accord with the strict application of the statute. Presumably, all such reassessments to give effect to compromise settlements were issued under the Commissioner's general reassessment power under s 113 TAA 1994 – even though this section expressly authorises reassessments to be issued "to ensure its correctness". Despite this apparent contradiction, the reassessments issued to the *Trinity* taxpayers that settled their litigation involved this kind of compromise settlement and was expressly endorsed by the Court of Appeal.

The extra-statutory nature of most settlements was confirmed by the Full Australian Federal Court in *Grofam Pty Ltd v FCT*. That case concerned a dispute over the terms of an unfortunately worded settlement deed. The parties had settled all but one issue in dispute and recorded that agreement in a deed. When the Australian Commissioner raised assessments regarding the remaining matter, the taxpayers contended that the assessments breached the terms and limits contained in the deed.

The Full Federal Court rejected the taxpayers' construction of the deed and confirmed the Australian Commissioner's ability to raise the assessments on the disputed matter. While the case was decided as a matter of pure construction of the deed, Sheppard, Foster and Whitlam JJ made some interesting obiter comments regarding the nature of any settlement with the Australian Commissioner.

One of the matters settled in the deed was the amount of loss carried forward by the taxpayers from previous years. The deed expressly reduced the amount of loses available. On how those losses should be dealt with, the Court noted:

> "[The terms of settlement] had nothing to do with what deductions might properly be claimed by any of the relevant companies or trusts in any particular year of income. [It was] not an agreement [as to how the Income Tax Assessment Act 1936 (Aust) correctly applied]. … All it did was to prevent the loss which was incurred being carried forward for the benefit of the trust in later years …"

This obiter statement appears to confirm that the settlement figure bore no relationship with the correct application of the legislation but was merely a figure acceptable to both parties. This statement effectively endorses the extra-statutory nature of settlements, which need not reflect the applicable legislation but, instead, may include an amount that would not otherwise arise under the statute. One commentator has concluded: "a compromise does not necessarily reflect a 'correct' assessment".

4.2 Remission of Tax Properly Owing

The third method of settlement involves the remission of tax properly assessed. Unlike the power to settle a disputed assessment, a remission of tax is generally determined under Part XI of the TAA 1994, which deals with remission, relief and refunds. In particular, s 183D TAA 1994 expressly permits Inland Revenue to remit outstanding tax properly assessed if to do so is "consistent with the Commissioner's duty to collect over time the highest net revenue that is practicable within the law." The wording of this power clearly reflects the general care and management power in s 6A(3) TAA 1994 and, therefore, incorporates the three express factors stipulated in that section, namely:

- The resources available to Inland Revenue;
- The importance of promoting voluntary compliance by all taxpayers; and
- Taxpayers' compliance costs.

There have been a number of cases examining the scope of this explicit power of remission, particularly involving taxpayers who for various reasons are unable to pay their properly assessed tax liability. Such taxpayers generally offer a lesser sum in satisfaction of their full liability on the grounds that even less would be recovered if the full debt was pursued, and therefore accepting the reduced amount will maximise Inland Revenue's return.

[(2009) Vol 15:4 NZJTLP 323, 345] Despite the financial merits of many of these proposals, all the cases have arisen because Inland Revenue rejected the settlement as inappropriate. Inland Revenue's stance has been that, when considering any settlement, the Commissioner must obviously be conscious that his primary obligation is to assess and collect the correct amount of tax, and to uphold the integrity of the tax system. In some cases, these factors will militate against settlement of tax arising in certain circumstances or with certain taxpayers.

A number of High Court decisions have endorsed the Commissioner's refusal to compromise under s 183D TAA 1994 over the payment of outstanding tax during debt recovering proceedings against defaulting taxpayers who Inland Revenue considered had failed to show the necessary degree of voluntary compliance with their tax obligations. Those cases were *Raynel v CIR*, *Clarke v CIR*; *Money v CIR*, and *McLean v CIR*.

Taking the *McLean* case as an example, the High Court agreed that the Commissioner was correct to consider the following factors when declining to agree to a compromise payment:

- The taxpayer had participated in a tax avoidance arrangement;
- The taxpayer had taken steps to hide assets in order to prevent recovery of the outstanding tax by Inland Revenue; and
- The taxpayer had failed to make a full and true disclosure of all material facts.

By contrast, in *Chesterfields Preschools Ltd v CIR* the High Court upheld a taxpayer's application for judicial review of the Commissioner's failure to exercise his discretionary powers under s 183D TAA 1994 to enter into a settlement regarding an outstanding debt. While the taxpayer was itself gravely remiss in its tax affairs, the Court found that the Commissioner's prolonged delay in processing the GST returns and refusal to consider a settlement constituted a breach of duty.

One of the difficulties in that case was that Inland Revenue had apparently not complied with its own policy on the application of s 183D TAA 1994. While it is yet to finalise a general policy regarding the power to settle disputes, Inland Revenue does have a published policy on the application of its discretion under s 183D. That policy (which is yet to be finalised) explains the scope and effect of the power to remit taxes on the grounds of facilitating the collection of the highest net revenue over time:

> "The words 'over time' require the Commissioner to balance the short- and long-term implications of the available means of administering the tax system. The practical effect of these words is that the Commissioner is authorised to forgo collecting the highest net revenue in the short-term or from **[(2009) Vol 15:4 NZJTLP 323, 346]** particular taxpayers if he considers that this would result in the collecting of more net revenue in the long-term or from all taxpayers."

Inland Revenue's Standard Practice Statement SPS 06/02 on writing off outstanding tax explains when and how Inland Revenue will waive the collection of taxes properly assessed. It states:

> "Inland Revenue has a duty to maximise the recovery of outstanding tax from a taxpayer pursuant to section 176(1). Inland Revenue is therefore obliged to compare the value of the likely recovery from accepting taxpayers' proposals with any other viable options for recovery. In some cases, it is clear which option will maximise recovery. In other cases, there may be options that could yield similar returns. Accordingly, it is necessary to determine which option will maximise recovery."

To assist with difficult cases, the Standard Practice Statement explains the relationship between ss 6(1), 6A and 176(1) TAA 1994. It states:

> "While Inland Revenue must maximise recovery of outstanding tax from taxpayers, this duty is subject to the overriding obligations in section 6 to protect the integrity of the tax system and section 6A to collect over time the highest net revenue that is practicable within the law."In *Raynel v CIR*, Randerson J referred to the following general principles in respect of sections 6 and 6A:

Section 6A(3) is to prevail over other provisions in the Inland Revenue Acts including section 176.

- “ The obligation to collect the highest net revenue is not absolute. Inland Revenue is only required to take steps to recover that are practicable and lawful.
- “ Inland Revenue is required to have regard to the resources available, the importance of promoting compliance (especially voluntary compliance) by all taxpayers, and the compliance costs incurred by taxpayers.
- “ Sections 6 and 6A(3)(b) emphasise that there is a broader public interest in the integrity of the tax system and in ensuring that taxpayers meet their obligations.”

This “broader public interest” is emphasised within the policy, which repeatedly asserts that the decision under s 183D TAA 1994 is not only a financial analysis of whether the settlement will recover the highest amount of tax:

> “Although Inland Revenue will consider each application for financial relief on its own merits, the duty to protect the integrity of the tax system will in certain cases require Inland Revenue to take action that (in the short term) might not be considered to maximise recovery of the revenue.“… as Randerson J noted in *Raynel v CIR* Inland Revenue may take enforcement actions against the taxpayer and may not enter into a negotiated agreement. This would be done, for example to preserve the integrity of the tax system and promote voluntary compliance by other taxpayers. This may be where there is a ‘flagrant and on-going failure to comply with the taxpayer’s obligations and where recovery is dubious or is likely to result only in a relatively minor proportion of the overall debt being recovered.’ ”

As a result of this policy, taxpayers will generally be able to understand and anticipate how Inland Revenue will apply its power under s 183D TAA 1994. It was this clarity that allowed the taxpayer in *Chesterfields* to identify that Inland Revenue had failed to follow its own procedure in determining its application for remission. Accordingly, it is tempting to speculate that Inland Revenue’s reluctance to produce a finalised policy on settlements generally is partly due to its reluctance to bind itself in the way it approaches settlements with taxpayers.

4.3 Requirement for Taxpayer to Pay Agreed Sum

It appears from the cases that most compromise settlements are recorded in a deed entered into between Inland Revenue and the taxpayer concerned. It is understood that these deeds routinely impose a requirement on the taxpayer to actually make payment of the compromised tax liability – and that failure to pay the agreed tax may void the settlement.

Such a requirement would appear to be both sensible and necessary. This practice has received judicial support in Australia, where the Courts have consistently enforced the terms of settlement agreed by taxpayers. In *Collie v FCT*, the taxpayer negotiated a settlement of his tax debt for a lump sum payment of A$250,000. However, the taxpayer failed to pay the agreed sum of A$250,000 and the Australian Commissioner took action to recover the total amount owing under the original assessments. The Administrative Appeals Tribunal had no hesitation in upholding the Australian Commissioner’s right to recover the unpaid debt.

Likewise, in *Greenslade v FCT* the Supreme Court of South Australia readily enforced the terms of the settlement against a taxpayer who later changed its mind. The taxpayer had been the named plaintiff in a test case on behalf of 80 other taxpayers. The taxpayer eventually settled its own dispute but subsequently attempted to renege on that agreement and continue litigating the dispute on behalf of the other taxpayers.

Relying on the earlier decision in *Harvey v Phillips*, the Court confirmed that when a valid settlement is reached, “a court does not appear to possess a discretion to rescind it or set it aside.” Importantly, Mitchell J determined that, once a settlement has been reached, the ATO is in the same position as any other litigant in proceedings that relate to recovery of the agreed sum, and therefore was entitled to enforce any settlement or compromise reached with the debtor.

This analysis was recently confirmed by the Federal Court in *Bilborough v FCT*. In that case, a taxpayer who had neglected to respond to an offer of settlement from the Australian Commissioner for two years **[(2009) Vol 15:4 NZJTLP 323, 348]** subsequently attempted to accept that offer. When the Australian Commissioner refused to be bound by the terms of the belated compromise, the taxpayer attempted to enforce the alleged settlement.

The Federal Court confirmed that the taxpayer was too late to accept the Australian Commissioner's original offer. The belated attempt to settle the dispute was, at best, a new offer to settle on the same terms. However, due to the wording of the Australian legislation, the Australian Commissioner's decision to refuse that offer was not amenable to judicial review. Rather, Kiefel J ruled that any settlement was a contractual agreement and enforceable (or not) according to the general law. Accordingly, the decision whether or not to enter into a settlement was not the exercise of a statutory power.

The sole (rather unusual) case declining to enforce a settlement was *Caratti v DFCT*. There, the Full Supreme Court of Western Australia considered a taxpayer's allegation that it had compromised its tax dispute under economic duress imposed by the Australian Commissioner. Apparently, the taxpayer maintained its substantive argument was correct but capitulated after a long dispute under pressure from the tax office because it could not pay the full amount of tax in dispute if it lost its case. In particular, he alleged that the Australian Commissioner's representatives informed them that unless they agreed to pay the Australian Commissioner the sum of A$455,000 the Australian Commissioner would claim A$800,000.

The majority of Ipp and Wallwork JJ rejected the Australian Commissioner's application for summary judgment on the grounds that:

> "The matters alleged by [the taxpayers] are sufficient to satisfy [us] that there is a possibility of the [taxpayers] being able to establish that illegitimate pressure … was brought to bear upon them and they should be allowed to defend the claim brought against them."

By contrast, Pidgeon J dissented on the more general grounds. His Honour held that the Australian Commissioner's indication – that if settlement could not be reached, then he would claim the full amount for which assessments had been issued, together with late tax – could not be classified as illegitimate pressure or as duress.

The dispute was referred back for a full hearing of the taxpayer's allegations. Ironically, as there is no record of that full hearing ever taking place, it can be assumed that the dispute over the nature of the settlement was itself ultimately settled – presumably, this time in a manner acceptable to the taxpayer.

4.4 Settlement of Disputes Prior to Litigation

Although Inland Revenue appears to consider that it can settle cases in litigation, there is no clear reason why it rarely settles disputes that are progressing through the disputes procedure. For instance, **[(2009) Vol 15:4 NZJTLP 323, 349]** the 2005 Exposure Draft is written so as to apply to taxpayers in the challenge process and remains non-committal as to whether a settlement can be entered into prior to litigation. It states:

> "[It] might be suggested that there would be a risk to the integrity of the tax system (in terms of possible inconsistency of treatment to taxpayers), if settlements could be entered into throughout the organisation and at any stage in the disputes process. However, if settlement of a dispute is justified on the basis that litigation would result in a large cost and uncertain outcome … and if in particular circumstances the Commissioner is fully informed and able to take broad perspectives into account, it is counter intuitive to restrict the ability to make such decisions only to the situation where the litigation process has commenced and costs have already been incurred. Accordingly, the Commissioner may employ his managerial discretion … to determine the appropriate stage at which settlement agreements will be entered into and by which delegated officer."

As a result, while settlement with Inland Revenue is possible during the pre-litigation disputes process, in practice it rarely occurs. According to one knowledgeable commentator:

> "The justification for Inland Revenue's cautious and grudging approach to settling cases before litigation appears to revolve around a lack of certainty or precision as to the strength of the respective parties' cases before litigation has commenced. [But] choosing the litigation stage as a cut-off is arbitrary and in many cases may mean that potential settlement opportunities are delayed for months or years."

Another commentator suggested that the wide authority to settle tax litigation on a pragmatic basis should equally be applied to pre-litigation disputes:

> "… it would appear that such pragmatism is not confined to the settlement of litigation where challenge proceedings have already been issued. Any genuine dispute between the Commissioner and a taxpayer ought to be able to be compromised on the same basis as formal litigation. Even before the commencement of litigation, rational decisions are still required as to the best deployment of resources and there must be a proper assessment of the risk of taking the dispute further."

There appears to be no principled reason Inland Revenue would restrict its power to settle disputes only to those in litigation. Inland Revenue's practice is at odds with the ATO's *Code of Settlement Practice*, which expressly contemplates settlements at all phases of a dispute.

5.0 WHEN IS SETTLEMENT WITH THE COMMISSIONER APPROPRIATE OR POSSIBLE?

When considering any settlement, the Commissioner must obviously be conscious that his primary obligation is to assess and collect the correct amount of tax, and to uphold the integrity of the tax system. In some cases, these factors will militate against settlement of certain types of dispute or with certain taxpayers. For instance, the High Court has endorsed the Commissioner's refusal to compromise over the payment of outstanding tax during debt recovering proceedings against defaulting **[(2009) Vol 15:4 NZJTLP 323, 350]** taxpayers who Inland Revenue considered had failed to show the necessary degree of voluntary compliance with their tax obligations.

In an address to the Legal Research Foundation Conference entitled *The Modern Reality of Dealing with Commercial Regulators*, Inland Revenue's Director of Litigation Management summarised the approach to settling litigation this way:

- The Commissioner will not settle litigation cases that do not involve a genuine dispute. Voluntary compliance is not promoted where a taxpayer can seek to obtain an advantage through a protracted dispute of an unmeritorious issue.
- The Commissioner is also reluctant to settle litigation which involves tax evasion or similar conduct.
- Expect to pay use-of-money interest (UOMI). This reflects the purpose of UOMI, which is to compensate the Commissioner for the loss of use of money through taxpayers paying too little tax.
- Payment of the agreed settlement amount must be made.
- Those that settle early in litigation with the Commissioner are likely to achieve more favourable terms (from that taxpayer's perspective) than those that settle on the Court steps or after an unsuccessful hearing.
- In terms of multi-party litigation, the Commissioner is conscious of the need for consistent treatment for taxpayers in like position. Therefore, the Commissioner will be prepared to accept settlements on the same basis from other taxpayers in the same position and, conversely, will not entertain settlement offers inconsistent with the terms of settlement for taxpayers in materially the same position. Any settlement will reflect the circumstances of that litigation and, therefore, does not provide a precedent for how similar or identical issues will be treated by the Commissioner in the future.

Obviously, Inland Revenue is sensitive to inconsistency or any perception of favouritism when entering into the settlement process, as this would undermine the very integrity of the tax system under which such settlements are authorised. These concerns were first recognised by the Working Party that proposed the enactment of the care and management provisions. The Working Party's report noted:

> "[There is always scope for abuse in the administration of the tax system. … It is important that the professionalism and impartiality of those charged with administering the tax system is not called into question. This could happen if the discretion were extended beyond the limited scope suggested by the Working Party and if the administrative arrangements do not involve adequate guidelines and other safeguards."

[(2009) Vol 15:4 NZJTLP 323, 351] Interestingly, thejoint submission by the NZLS and the NZICA seeks not only clear guidance on Inland Revenue's settlement policy but also the safeguard that all settlements are subject to independent review. The submission recommended:

> "In the disputes resolution context we would suggest that guidance provide that settlement discussions need to involve an official other than the official who has initiated the dispute, or who is dealing with a taxpayer initiated dispute. Practitioners have consistently commented how difficult it is to reach a settlement on a sensible basis during the disputes resolution procedures. An independent review [of the proposed settlement] is needed."

Obviously, independent oversight is an important aspect of any settlement procedure. As noted by one commentator:

> "[There] is probably more need for guidance on settlement at an earlier stage of disputes. It is also here that lack of consistency across the IRD is apparent: the availability or otherwise of an early settlement for an appropriate case should not depend on the personality of the investigator assigned to a taxpayer, but it often does. Published policy and guidelines would help remove the personal element from the equation."

6.0 CONCLUSION

In the absence of any final policy, it appears that the Commissioner's current stance regarding what disputes can be settled and when, is still fluid. Accordingly, settlement of disputes appears to be decided on an ad hoc basis. Having triumphed in the *Trinity* litigation and established a wide discretion to enter into settlements on a commercial basis, Inland Revenue should now move to establish clear policy and procedures regarding how it will exercise that power. Such a policy should address:

- When settlements may be entered into;
- How a settlement can be proposed; and
- To whom that proposal should be directed.

The current absence of clear guidelines from Inland Revenue poses unnecessary practical difficulties for New Zealand taxpayers. This failure is in stark contrast to the clear policy by the ATO.

The transparency and accountability required under the ATO's Code should serve as a model for Inland Revenue to adopt. Unless Inland Revenue is prepared to establish a procedure for entering into such settlements, it will miss the opportunity to settle many disputes that would otherwise be appropriate for settlement. In that regard, the Commissioner is failing to fully comply with his obligation under s 6A TAA 1994 to best utilise Inland Revenue's resources to collect the highest revenue practicable.

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FOOTNOTES

1 The Bill of Rights 1688 also forms part of New Zealand law by virtue of the Imperial Laws Application Act 1988.

2 See Australian Taxation Office, *Code of Settlement Practice*, (Canberra, 2007). The Code was first issued in 1991. It was updated in 2001 and 2007.

3 Section 6ATax Administration Act 1994.

4 *Accent Management Ltd v CIR*[2007] NZCA 231; (2007) 23 NZTC 21,366 (CA).

5 See ED0007: *Settlement of Disputed Tax Litigation* (issued in October 1999), a draft standard practice statement for litigation disputes; ED0008: *Finalising Agreements in Tax Investigations* (issued in October 1999), a draft standard practice statement for other (pre-litigation) disputes; and INS0072: *Interpretation of Sections 6 and 6A of the Tax Administration Act 1994: Care and Management of Taxes* (issued in December 2005), a draft policy on the "care and management" provisions in s 6A TAA 1994. Following public submissions, a modified draft Interpretation Statement INS0072: *Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act 1994*, was released on 20 August 2008 but this also has yet to be finalised.

6 This could in part be because the authority for the Commissioner to single-handedly make decisions of settlement of matters in litigation has been in debate, because Crown Law (and more specifically the Solicitor-General) are responsible for litigation for the Crown. Recently, the Commissioner and the Solicitor-General have agreed on a protocol for dealing with Tax Litigation, which includes some comments on Settlement. This document (at para 5.4) states that settlement of litigation will be a joint decision to give effect to the Commissioner's obligations under the care and management provisions and the statutory duties of the Solicitor-General (the document, entitled *Protocols between the Solicitor-General and [the] Commissioner of Inland Revenue*, and dated July 2009, is available at <http://www.ird.govt.nz/resources/1/a/1aa56d004f32a3a3918ad342d98f1b86/ir-protocols.pdf> (as at 15 January 2010)).

7 *R v IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd*[1982] AC 617; [1981] 2 All ER 93 (HL).

8 See n 7, p 651; p 111.

9
For instance, the general deduction permission in s DA 1Income Tax Act 2007 (ITA 2007) and the general prohibition in s DA 2 ITA 2007 both provide for apportionment "to the extent to which" expenditure meets the statutory criteria.

10 See Inland Revenue, "Finalising Agreements in Tax Investigations: Standard Practice Statement INV-350", (1998) Vol 10:8 *Tax Information Bulletin* 4.

11 See n 10, p 4.

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

13 See n 12, p 10,215; p 659; p 4.

14 *Auckland Gas Co Ltd v CIR*[1999] 2 NZLR 409; (1999) 19 NZTC 15,027; (1998) 12 PRNZ 481 (CA).

15 See n 14, p 417; p 15,034; p 489.

16 *Accent Management Ltd v CIR*[2007] NZCA 231; (2007) 23 NZTC 21,366, 21,370, para 15 (CA).

17 Organisational Review Committee, *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on Tax Policy, also to the Minister of Finance) from the Organisational Review Committee*, (Wellington, April 1994), Part II: Text of the Report, Ch 8: Objective of Tax Administration.

18 *Attorney-General v Steelfort Engineering Co Ltd*(1999) 1 NZCC 61,030 (Court of Appeal, CA143/98, 3 March 1999, Richardson P, Henry, Thomas, Blanchard and Tipping JJ).

19 See n 18.

20 *Fairbrother v CIR*[2000] 2 NZLR 211; (2000) 19 NZTC 15,548 (HC).

21 See n 20, p 219; p 15,555, para 27, and p 220; p 15,556, para 31.

22 *Foxley v CIR*(2008) 23 NZTC 21,813 (HC).

23 See n 22, p 21,820, para 42.

24 See Inland Revenue, “Finalising Agreements in Tax Investigations: Standard Practice Statement INV-350”, (1998) Vol 10:8 *Tax Information Bulletin* 4.

25
See n 24.

26 Inland Revenue, *Interpretation of Sections 6 and 6A of the Tax Administration Act 1994: Care and Management of Taxes – Exposure Draft for External Consultation* (INS0072), (Wellington, December 2005), paras 207-237.

27 See <http://www.ird.govt.nz/public-consultation/expired/>.

28 Inland Revenue, *Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act 1994* (INS0072), (Wellington, August 2008).

29 See the Introduction to the August 2008 version of INS0072, n 28.

30 *Accent Management Ltd v CIR*(2006) 22 NZTC 19,758 (HC).

31 See n 30, pp 19,773-19,774, para 82.

32 *Reckitt & Colman (NZ) Ltd v Taxation Board of Review*[1966] NZLR 1032, 1042 (CA).

33 Strangely, the *Trinity* taxpayers did not seek to overturn the (allegedly invalid) settlements reached with the other taxpayers. Nor did they seek to have the benefit of that settlement extended to them. Rather, they sought to have the reassessments issued to them reversed (even though these had been determined by the Court to be correct) and, instead, have the (incorrect) assessments in their original returns reinstated.

34 *Accent Management Ltd v CIR*(2005) 22 NZTC 19,027 (HC).

35 *Accent Management Ltd v CIR*[2007] NZCA 230; (2007) 23 NZTC 21,323 (CA).

36 The assessments were also subsequently confirmed by the Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR*[2008] NZSC 115; [2009] 2 NZLR 289; (2009) 24 NZTC 23,188 (SC).

37 *Accent Management Ltd v CIR*(2006) 22 NZTC 19,758 (HC).

38 See n 37, p 19,772, paras 72-73.

39 See n 37, p 19,773, para 81.

40 *Accent Management Ltd v CIR*[2007] NZCA 231; (2007) 23 NZTC 21,366 (CA).

41 See n 40, p 21,370, para 13.

42 See n 40, p 21,370, para 15.

43 See n 40, p 21,371, paras 22 and 24.

44 See n 40, p 21,371, para 23.

45 Australian Taxation Office, *Code of Settlement Practice*, (Canberra, 2007), para 25.

46 See n 40, p 21,371, para 21.

47 See n 40, p 21,368, para 8.

48 *Miller v CIR; Managed Fashions Ltd v CIR*(2002) 20 NZTC 17,826 (CA).

49 The Privy Council resolved both the substantive dispute regarding the application of the general anti-avoidance provision and the procedural wrangles in *O’Neil v CIR*(2001) 20 NZTC 17,051; also reported as *Miller v CIR*[2001] 3 NZLR 316 (PC).

50 M Lennard, “Peace in Our Time: Part 2”, (2008) Issue 5 *Taxation Today* 16, p 16.

51 Taxation Committee of the NZLS and National Tax Committee of the NZICA, “The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994”, (Wellington, August 2008).

52 Covering letter to the joint submission of the Taxation Committee of the NZLS and the National Tax Committee of the NZICA (n 51), p 1, para 1.

53 See n 51, p 2, para 4(d).

54 See n 51, p 7, para 2.1(f).

55 See n 51, p 19, paras 3.48-3.49.

56 Inland Revenue, “SPS 08/01: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue”, (2008) Vol 20:6 *Tax Information Bulletin* 38, p 46, para 88.

57 *Precision Pools Pty Ltd v FCT*[1992] FCA 445; (1992) 37 FCR 554; 24 ATR 43 (FCA).

58 See n 57, p 567; p 54.

59 *Grofam Pty Ltd v FCT*36 ATR 493 (FCAFC).

60 See n 59, p 512.

61 See n 59, p 512.

62 *Pantral Pty Ltd v FCT*[2002] FCA 636; 50 ATR 78; 2002 ATC 4519 (FCA).

63 Section 76Taxation Administration Act 1953 (Aust), which has similar in wording an effect to s 92Tax Administration Act 1994.

64 See n 62, pp 87-88; p 4528.

65 The current policy can be found at <http://www.ato.gov.au/corporate/content.asp?doc=/content/8249.htm>.

66 Australian Taxation Office, *Code of Settlement Practice*, (Canberra, 2007), para 17.

67 See n 66, para 20.

68 See n 66, in the section headed “Background”.

69 Australian Taxation Office, “Practice Statement Law Administration PS LA 2007/5: Settlements”, (Canberra, 2007), and Australian Taxation Office, “Practice Statement Law Administration PS LA 2007/6: Guidelines for Settlement of Widely-Based Tax Disputes”, (Canberra, 2007).

70 See n 66, para 17.

71 See n 66, para 17.

72 See n 66, para 26.

73 Australian Taxation Office, *Code of Settlement Practice*, (Canberra, 2007), para 16.

74 See n 73, para 25.

75 See n 73, para 25.

76 See n 73, para 2.

77 See n 73, paras 22-24.

78 See n 73, para 66.

79 See n 73, para 61.

80 See n 73, para 52.

81 Australian Taxation Office, *Code of Settlement Practice*, (Canberra, 2007), para 53.

82 See n 81, para 59.

83 See n 81, para 54.

84 See n 81, para 73.

85 See n 81, paras 74-75 – see the discussion on this point below.

86 *Young v FCT*[2000] FCA 122; 44 ATR 9; 2000 ATC 4133 (FCA).

87 *Gruber v FCT*[2005] AATA 1305; 61 ATR 1152; 2006 ATC 2015 (AAT).

88 See n 87, p 1163; p 2025, para 19.

89 *Barham v FCT*[2007] AATA 1824; 68 ATR 328; 2007 ATC 2633 (AAT).

90 See n 89, p 347; p 2648.

91 See *Reckitt & Colman (NZ) Ltd. v Taxation Board of Review*[1966] NZLR 1032, 1042 (CA).

92 Inland Revenue, *Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act 1994* (INS0072), (Wellington, August 2008), para 1.

93 See C Evans, "Disclosure, Disintegration and Discretion", (2009) Vol 38:3 *Australian Tax Review* 133, p 134.

94 *Kemp v CIR*(1999) 19 NZTC 15,110 (HC).

95 The Privy Council confirmed that the arrangement was tax avoidance in *O'Neil v CIR*(2001) 20 NZTC 17,051; also reported as *Miller v CIR*[2001] 3 NZLR 316 (PC).

96 The High Court expressly did not determine whether such a general power to compromise tax disputes existed but, for the purposes of the case, simply proceeded on the assumption such a power existed. A general settlement power under ss 6 and 6A TAA 1994 was confirmed by the Court of Appeal in the *Trinity* litigation, discussed above.

97 See n 94, p 15,117.

98 See n 94, p 15,120.

99 Section 6A TAA 1994 was in force as from 10 April 1995. The Kemp litigation commenced in late 1997, with the final judgment in 1999. However, because the disputed agreement was entered into prior to 1995, s 6A TAA 1994 was inapplicable to the decision.

100 *Al-Fayed v Advocate General for Scotland*[2004] ScotCS 278; 2004 SC 745; 2004 SLT 798. The full judgment is also available at <http://www.scotcourts.gov.uk/opinions/P686.html> (as at 19 January 2010).

101 The Inner Court of Session is Scotland's highest Civil Court, hearing appeals from the Outer Court.

102 *Al-Fayed v Advocate General for Scotland*[2004] ScotCS 278; 2004 SC 745, 768; 2004 SLT 798, 813, para 76.

103 See n 102, p 769; p 813, para 78, and p 770; p 814, para 83.

104 See n 102, p 780; pp 820-821, para 119.

105 *R v IRC, ex parte Wilkinson*[2005] UKHL 30; [2006] 1 All ER 529; [2005] 1 WLR 1718 (HL).

106 The concession in s 262Income and Corporation Taxes Act 1988 (UK) was repealed with effect from 1999 and the UK Government settled a number of challenges in the European Court of Human Rights to the lawfulness of restricting the tax concession only to woman on the grounds that it breached Article 14 of the European Convention on Human Rights.

107 See n 105, p 536; pp 1724-1725, para 21.

108 This example is taken from M Lennard, "Peace in Our Time: Part 2", (2008) Issue 5 *Taxation Today* 16.

109 Interestingly, the Court of Appeal did not refer to s 113 TAA 1994 in its decision. Rather, the Court relied upon s 89C(d) TAA 1994, which permits the Commissioner to raise an assessment that "reflects an agreement reached between the Commissioner and the taxpayer". However, that provision simply authorises the Commissioner to raise an assessment without completing the disputes procedure, and does not appear to be a separate power of assessment.

110 *Grofam Pty Ltd v FCT*36 ATR 493 (FCAFC).

111 See n 110, p 511.

112 A Beck, "Compromises with the Commissioner", (2007) No 3 *New Zealand Tax Planning Reports (Online Edition)*.

113 Sections 91 and 113 TAA 1994.

114 Sections 6 and 6A TAA 1994.

115 *Raynel v CIR*(2004) 21 NZTC 18,583 (HC).

116 *Clarke v CIR; Money v CIR*(2005) 22 NZTC 19,165 (HC).

117 *McLean v CIR*(2005) 22 NZTC 19,231 (HC).

118 *Chesterfields Preschools Ltd v CIR*(2007) 23 NZTC 21,125 (HC).

119 Inland Revenue, *Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act 1994* (INS0072), (Wellington, August 2008), para 4.

120 Inland Revenue, "SPS 06/02 – Writing Off Outstanding Tax", (2006) Vol 18:5 *Tax Information Bulletin* 55.

121 See n 120, pp 56-57, para 17.

122 See n 120, p 57, paras 18-19.

123 See n 120, p 57, paras 20-21.

124 It is noteworthy that, in some instances, Inland Revenue implements the settlement by reassessing the taxpayer for the agreed amount. In those circumstances, it is uncertain whether, if the taxpayer defaulted on payment, Inland Revenue could reverse that reassessment to (presumably) increase the reassessment to its pre-settlement level. Such a reassessment would "increase the amount assessed" and, therefore, may breach s 108 or s 108A TAA 1994.

125 *Collie v FCT*35 ATR 1204; 97 ATC 2058 (AAT).

126 *Greenslade v FCT*(1978) 19 SASR 474; 9 ATR 246; 78 ATC 4625 (SASC).

127 *Harvey v Phillips*[1956] HCA 27; (1956) 95 CLR 235 (HCA).

128 See n 126, p 478; p 249; p 4628, quoting from *Harvey v Phillips*, n 127, p 243.

129 *Bilborough v FCT*[2007] FCA 773; (2007) 162 FCR 160; 240 ALR 588; 66 ATR 644; 2007 ATC 4552 (FCA).

130 See both the Administrative Decisions (Judicial Review) Act 1977 (Aust) and s 39B(1)Judiciary Act 1903 (Aust).

131 *Caratti v DFCT*27 ATR 448; 93 ATC 5192 (WASC).

132 As per the headnotes.

133 See n 131, p 457; p 5199.

134 See n 131, p 453; p 5195.

135 Inland Revenue, *Interpretation of Sections 6 and 6A of the Tax Administration Act 1994: Care and Management of Taxes – Exposure Draft for External Consultation* (INS0072), (Wellington, December 2005), para 226.

136 M Lennard, "Peace in Our Time: Part 2", (2008) Issue 5 *Taxation Today* 16, p 18. Mr Lennard was Inland Revenue's Director of Litigation Management from 1995-2004.

137 A Beck, "Compromises with the Commissioner", (2007) No 3 *New Zealand Tax Planning Reports (Online Edition)*.

138 Sections 91 and 113 TAA 1994.

139 Sections 6 and 6A TAA 1994.

140 See *Raynel v CIR*(2004) 21 NZTC 18,583 (HC), *Clarke v CIR; Money v CIR*(2005) 22 NZTC 19,165 (HC), and *McLean v CIR* (2005) 22 NZTC 19,231 (HC).

141 The address was delivered by Karen Whitiskie, and the Conference was held in Auckland in September 2006.

142 Working Party on the Reorganisation of the Income Tax Act 1976, *First Report*, (Wellington, July 1993), p 8.

143 Taxation Committee of the NZLS and National Tax Committee of the NZICA, "The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994", (Wellington, August 2008), pp 19-20, para 3.49.

144 M Lennard, "Peace in Our Time: Part 2", (2008) Issue 5 *Taxation Today* 16, p 18.