The Use of the Commissioner's Powers During Litigation

Citation: (2007) 13:2 NZJTLP 195
Publication: New Zealand Journal of Taxation Law and Policy
Author(s): Keating, Mark
Year: 2007
Classification: • Taxation

Comment: The Use of the Commissioner's Powers during Litigation

(2007) Vol 13:2 NZJTLP 195

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Inland Revenue is increasingly exercising its statutory powers to gather information about taxpayers, both as part of its investigations and during the statutory disputes procedure in Part IVA of the Tax Administration Act 1994. However, it now appears that Inland Revenue is also exercising the same powers even after litigation has started. Where previously Inland Revenue foreswore the use of its powers in favour of relying upon the Court's normal discovery procedure to obtain information, it has recently exercised its statutory powers in what amounted to a self-help remedy to gain immediate access to taxpayer information. This use of statutory power during the litigation process was resisted by taxpayers — and resulted in three High Court decisions in 2005 and 2006 concerning the extent to which the Commissioner of Inland Revenue (CIR) may use statutory powers when a dispute is before the Courts. Those decisions, each first instance judgments on very different factual circumstances, all upheld the CIR's use of his powers. However, the decisions are somewhat contradictory and place different limits on when the CIR's powers may be used. This comment discusses those cases and identifies the appropriate limits of the CIR's statutory powers in this "important matter of principle", as described by Priestley J in Re Next Generation Investments Ltd (in liq); Mason v CIR(2006) 22 NZTC 19,775 (HC).

1.0 INTRODUCTION AND BACKGROUND

The Commissioner of Inland Revenue (CIR) has a wide range of statutory powers at his disposal to request information from taxpayers. It is by using these powers whenever it considers necessary that Inland Revenue obtains information it requires to progress disputes with taxpayers. The powers are generally used by the CIR either:

- When the CIR is considering commencing or has commenced a dispute following the investigation of a taxpayer; or
- When the CIR is responding to a dispute commenced by the taxpayer.

[(2007) Vol 13:2 NZJTLP 195, 196] In either instance, the CIR will invariably require information about the taxpayer's affairs in order to determine the correct tax liability. For disputes commenced by Inland Revenue, information will generally be requested by Inland Revenue prior to the CIR's Notice of Proposed Adjustment (NOPA) being issued. However, Inland Revenue's investigation often carries on after a NOPA has been issued and may continue right throughout the disputes process.

Likewise, Inland Revenue may immediately require information from a taxpayer in order to respond to the taxpayer's own NOPA, and will generally request information as the dispute progresses. Requests for information may therefore come before, during, and even after the statutory disputes procedure is completed. This continued use by Inland Revenue of its statutory powers is a feature of the disputes process of which all practitioners must therefore be aware.

As the Court of Appeal held in *Brierley Investments v CIR*, the CIR must be able to make reassessments with a full knowledge of the taxpayer's circumstances. Accordingly, Inland Revenue is not confined in the scope of its investigation or its access to information. Richardson J stated:

> "To confine in advance the scope of any future investigation would be to derogate from the generality and breadth of the Commissioner's powers conferred in aid of the statutory functions. The effect would be to require the Commissioner to make any re-assessments for past years and to approach assessments for current and future years under the handicap of less than full knowledge of relevant circumstances."

Likewise, in *Chesterfield Preschools Ltd v CIR (No 2)* the High Court recognised Parliament's purpose in granting the CIR wide-ranging powers to gather information:

> "The special powers to obtain information given in statutes such as the Tax Administration Act … are granted in order to counter the advantage persons have to avoid the reach of the law by behaving secretively."

Inland Revenue's current policy on the use of s 17 information requests implies that resort to its statutory powers will be a last resort. It states:

> "Inland Revenue will usually request information, books or documents without expressly relying on section 17. This practice fosters a spirit of reasonableness and mutual cooperation."If information is not provided voluntarily or in a timely manner Inland Revenue will use the statutory authority in section 17 to demand the information. In this case Inland Revenue issues a section 17 notice."

However, anecdotally, it seems that Inland Revenue is increasingly exercising its statutory powers when gathering information about taxpayers, even when those taxpayers have previously complied **[(2007) Vol 13:2 NZJTLP 195, 197]** with voluntary requests. Where previously informal requests for the voluntary provision of information and informal interviews were the norm, it now seems that Inland Revenue is much quicker to exercise its statutory powers. This change in approach appears to be the result of a number of different factors.

First, the strict time-limits imposed by the legislation at various stages of a dispute require Inland Revenue to expeditiously gather all relevant information. The need to progress the dispute in order to complete the full process within those timeframes compels Inland Revenue to impose strict time limits on taxpayers to provide information. These time limits can only be imposed by the use of Inland Revenue's statutory powers.

Second, the need for the CIR to progress the dispute in a timely manner has been reinforced by the new requirement to complete the mandatory stages of the procedure before raising an assessment. In most instances, this requirement means that, if the entire procedure has not been completed, Inland Revenue is unable to reassess the taxpayer regardless of the merits of the dispute. However, in order to prevent taxpayers from deliberately dragging out the dispute with this intention, an exception has been created allowing Inland Revenue to make an immediate assessment if the taxpayer fails to provide the requested information. As only formal statutory requests for information will invoke this exception, there is an incentive on Inland Revenue to make all requests for information an exercise of statutory power.

Finally, the requirement for all information to be exchanged between the parties during the process compels the CIR to take every practicable step to obtain all relevant and necessary information regarding the matter in dispute. The evidence exclusion rule in s 138G TAA 1994 ensures that only "… facts and evidence … and propositions of law that are disclosed in the … Statement of Position…" may be admissible in any subsequent challenge proceedings. This limitation applies to all information gathered during the dispute except where the parties "… could not … with due diligence, discover those facts or evidence or discern those propositions of law or issues". Faced with that restriction, Inland Revenue appears to consider that "due diligence" requires it to have exercised its statutory powers to request information in order to put it on safe ground to invoke that exception in the event that new information subsequently becomes available.

Given the increased use of the statutory power to request information, it is useful to remind oneself of the Courts' repeated confirmation of the scope of that power.

The leading case in New Zealand is the Court of Appeal decision in *CIR v NZ Stock Exchange; CIR v The National Bank of NZ*, which was upheld by the Privy Council. This case concerns whether two **[(2007) Vol 13:2 NZJTLP 195, 198]** financial institutions had to provide Inland Revenue with the names and details of their clients who had undertaken particular kinds of transactions — what the taxpayers described as "a fishing expedition".

In reaching its decision that the s 17 notices issued to the institutions were valid, the Court of Appeal discussed the wide wording of s 17 and why a broad interpretation was warranted. The Court of Appeal stated:

> "Section 17 is intended to facilitate the proper discharge of the Commissioner's statutory functions. Its subject is the

> gathering of information to that end. Nothing in the language used or in the general scheme of the section suggests that a closely confined approach is intended. On the contrary, it is expressed in the widest terms. The obligation is imposed on 'every person'. It applies to both the furnishing of information and the production of books and documents. It is both requisite and sufficient that the Commissioner considers such information (or books or documents) 'necessary or relevant' for either of the stated purposes. Those purposes are not related to the liability of any particular person for any tax — which by contrast is one of the justifications for an inquiry before a District Court Judge (section 18), or by the Commissioner (section 19)."The statutory criterion is simply whether or not the Commissioner considers the information sought necessary or relevant (i) for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts, or (ii) for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner. Section 17(1) empowers the Commissioner to have access to information where either of those purposes is satisfied."

In *Russell v Latimer*, Mr Russell argued that it was improper for the CIR to use s 17 TAA 1994 to request information that did not relate to an already identified issue regarding a named taxpayer. Rejecting that argument, the High Court accepted that the CIR has the authority to make general enquiries to ensure compliance with the Revenue Acts:

> "All those authorities establish quite clearly in my view that there is nothing improper in the Commissioner and his Officers engaging in a fishing expedition or a roving inquiry for the purposes of checking to see whether a particular category of taxpayer or group of taxpayers or a specific taxpayer have been paying the tax they ought to pay under the relevant legislation."

These cases demonstrate that a s 17 TAA 1994 request does not need to be related to a particular issue or to the liability of a particular person. For example, in *Smorgon v FCT* Mason J stated:

> "The strong reasons which inhibit the use of curial processes for the purposes of a 'fishing expedition' have no application to the administrative process of assessing a taxpayer to income tax. It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this he may need to make wide-ranging inquiries, and to make them long before any issue of fact arises between him and the taxpayer … It is to the process of investigation before assessment that section 264 [Income Tax Assessment Act 1936 (Aust)] is principally, if not exclusively directed."

[(2007) Vol 13:2 NZJTLP 195, 199] The CIR may therefore exercise his statutory powers for the purpose of obtaining any information relevant to the carrying out of any of his functions. Consequently, those powers can be exercised at any stage of the investigation/audit/debt recovery process. While obviously the information must be relevant and in the possession or control of the taxpayer to be enforceable, the only recognised limit on issue of a s 17 notice was when litigation was already underway.

The remainder of this comment is set out as follows. In section 2, the CIR's exercise of his statutory powers during litigation is considered, with section 3 examining whether this exercise breaches the New Zealand Bill of Rights Act 1990 (NZBORA 1990). Section 4 reviews three recent cases with conflicting decisions regarding the use of s 17 TAA 1994 during litigation. Section 5 has the concluding comments.

2.0 THE EXERCISE OF STATUTORY POWERS DURING LITIGATION

An issue that the cases had not clearly resolved is when (if ever) the CIR's statutory powers ceased to be lawfully available during the conduct of litigation. For example, could the CIR undertake an interview of the taxpayer's witnesses pursuant to s 19 TAA 1994 the day before the trial started as a dress rehearsal of the intended cross-examination? Though common sense suggests not, the case law has become less clear in the past year or so.

The starting position can be found in *Green v Housden*. That case examined the validity of s 17 notices issued by Inland Revenue to a taxpayer's advisers after an assessment had been raised but before Court proceedings had been filed. The Court held that the notices were invalid for other reasons (ie, because they requested irrelevant information). However, when reaching that conclusion the Court made two further (strictly, obiter) observations that:

> "Once a case stated is filed, discovery is available against the taxpayer through the ordinary curial processes: *Cates v CIR* [1982] 1 NZLR 530. It may be arguable that the Commissioner should thereafter rely on those curial processes to elicit information rather than invoke s 17. However that point does not arise in the present case where the objections to the assessments have not reached the High Court or the Taxation Review Authority. …"The Commissioner was entitled to invoke s 17 to require the production of documents in anticipation of proceedings for hearing and determining the objections following notification of the disallowance of the objections."

Green v Housden was long understood to impose a de juris limit on the CIR's exercise of statutory powers. The CIR could issue s 17 notices to seek information at any time prior to litigation, even when that litigation was imminent and the information was sought for that purpose. But once a taxpayer's challenge was filed and litigation had commenced, the CIR would respect the Court's jurisdiction and foreswear his statutory powers in favour of the discovery process.

3.0 [(2007) Vol 13:2 NZJTLP 195, 200] DOES THE USE OF STATUTORY POWERS DURING LITIGATION BREACH THE NEW ZEALAND BILL OF RIGHTS ACT 1990?

The understanding in *Green v Housden* was seen as both reasonable and fair as it put the CIR and the taxpayer on the same footing regarding the gathering of information during the challenge process. This reflected the general principle of "equality of arms" between the state and its citizens before the Courts. This principle is enshrined in the "Right to Justice" provision in s 27(3) NZBORA 1990, which states:

> "(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals."

The *White Paper* on the proposed Bill of Rights Act discussed the intention behind, and effect of, this section at the time of its introduction. It stated:

> "An individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional privileges."

The effect of s 27 NZBORA 1990 was discussed in each of the recent cases on the use of s 17 TAA 1994. In the fullest discussion on this point, Fogarty J described the principle of equality of arms as follows:

> "It is now practically a constitutional position that the Crown should be in no better position in civil proceedings than any other litigant. That is indeed the underlying premise of the Crown Proceedings Act and it is the proposition underpinning s 27(3) … The genesis of the concept that the Crown should be in no better position than any other person in civil proceedings has its place in the fact that the Crown does business along with other persons. It enters into contracts. It buys and sells property. It also can sometimes be negligent and cause loss and so is liable for tort. The concept was that inasmuch as the Crown acts as a private person doing business and sometimes accidentally causes harm it should be in no better position than any other private person in the civil proceedings. There is a natural justice to the proposition."

There are a number of cases in New Zealand, Australia and the United Kingdom (UK) that have acknowledged the limitation on the use of statutory powers by government agencies and office-holders that are actively engaged in civil litigation. For instance, in *Re Spiraflite Ltd* a liquidator sought Court orders for examination of the insolvent company's former auditor. A creditor of the insolvent company was simultaneously suing the former auditor, and that creditor had representatives on the liquidation inspection committee. The auditor resisted the examination, claiming that it was, at least in part, motivated by an attempt by the creditor to gain information to support its suit.

[(2007) Vol 13:2 NZJTLP 195, 201] On the evidence, Megarry J rejected the auditor's arguments. His Honour held that the purpose of the liquidator's examination was to further its general investigation and not to assist in the creditor's suit against the auditor. In so

holding, Megarry J stated:

> "I subscribe wholeheartedly to the view that the courts should not allow the [statutory examination] to be used so as to enable a litigant in an action that is in being to obtain an advantage over his opponent, as in the North Australian case. … "The essence of the matter is that the powers conferred by the section are given to the court in order to enable the liquidator the better to discharge his functions as such: they are not given in order to enable a litigant to improve his prospects of litigious success by giving him rights which other litigants lack, even if he is a liquidator. In all normal circumstances, to give such rights to a litigant as such is to misuse the section. What may properly be given to a liquidator qua liquidator will not be given to a liquidator-litigant qua litigant."

Likewise, in *Re Bletchley Boat Co Ltd* the liquidators had commenced an action against the director, and had then discontinued it after they had issued their summons seeking a Court order for the use of their information-gathering powers. Even though the liquidators had discontinued their action, it was held that it was improper for them to have applied to use their information-gathering powers while litigation was extant.

Another relevant decision in the New Zealand tax context is *Miller v CIR.* This case concerned the CIR's power to review or alter earlier assessments that were then before the Court as part of the case stated procedure. While not directly concerning the use of information-gathering powers, the case is noteworthy for the statements made by Baragwanath J regarding the role of the CIR once litigation has commenced. His Honour stated:

> "… I am of the view that [the BASF principle] applies from the date of the objector's notice requiring that the objection be heard and determined by an Authority. From that point it is the duty of the Commissioner to facilitate the appeal, rather than to exercise powers inconsistent with the Authority's having assumed control of the matter. It follows … that the Commissioner cannot supersede an assessment under appeal by one made on an inconsistent basis."

It can be argued that the ratio in this case supports the application of a general principle that the CIR is precluded from exercising statutory powers (be they of assessment or of information gathering) once the matter in dispute is subject to litigation. Put at its highest, it could be argued that, whenever the CIR is in litigation, he should not use statutory powers in a manner that is inconsistent with his status as a litigant.

If this view is correct, this position would dramatically inhibit Inland Revenue's ability to gather information. The breadth of information that can be requested under s 17 TAA 1994, and the absence of a privilege against self-incrimination under that section, make it a much more effective (and invasive) information-gathering power. Accordingly, the CIR would obviously be reluctant to surrender Inland Revenue's right to invoke his statutory powers during an ongoing investigation, even when litigation is in train.

4.0 [(2007) Vol 13:2 NZJTLP 195, 202] THE END OF THE UNDERSTANDING IN *GREEN V HOUSDEN*

The understanding from the decision in *Green v Housden*, which appears to have been respected by the CIR for more than a decade, was apparently abandoned during 2005 and 2006. In a series of cases, Inland Revenue issued s 17 notices to a number of taxpayers at various stages of the litigation process. These notices directly called into question the CIR's practices and asked whether the statutory powers to request information were available once litigation had commenced.

4.1 First Case on the Use of Section 17 — *Vinelight Nominees Ltd*

The first case where a s 17 notice was issued during litigation was *Vinelight Nominees Ltd v CIR*. In that case, the taxpayer attempted to challenge a decision by the CIR to reopen time-barred years when the substantive reassessments for those time-barred years had not yet been made.

While that challenge was pending, Inland Revenue continued its investigation into both the re-opened years and subsequent years that were not time-barred, and therefore not subject to the re-opening litigation. Crucially, the issues under investigation were the same for all years. This similarity meant that information relevant to the Inland Revenue's ongoing investigation into all years were

also directly relevant to the years subject to litigation regarding the reopening decision.

As part of its ongoing investigation, the CIR issued s 17 notices to the taxpayers seeking information that was relevant to all income years — both the reopening issue subject to litigation and the later years. The taxpayers provided information relevant to the subsequent years but refused to provide information relevant to the re-opened years as they claimed that those years were already before the Court. They contended that the CIR was required to conduct that litigation on the same footing as the taxpayers and therefore ought not to be able to exercise his statutory powers to gather information relevant to that litigation. Instead, the taxpayers argued that the CIR should rely on the Court's discovery process rather than attempt to circumvent that process by resorting to s 17 TAA 1994.

The taxpayers acknowledged that the information requested by the CIR was relevant to both litigation and non-litigation years. However, the taxpayers contended that this fact alone should not allow the CIR to exercise his information-gathering powers without restriction. In cases where the information being sought was more than merely incidental to the litigation, the taxpayers argued that recourse to s 17 TAA 1994 was improper.

The CIR countered that the simple existence of litigation by a taxpayer over one issue cannot absolve it from the duty to provide information to Inland Revenue regarding other, unrelated issues. Furthermore, the CIR's need to gather the fullest information in order to carry out the statutory duty of assessment should be paramount, even if the information needed to carry out that assessment was coincidentally relevant to the litigation. Lastly, the CIR argued that the duty to investigate and assess could wrongfully be stymied by taxpayers commencing litigation over that or any related issues.

[(2007) Vol 13:2 NZJTLP 195, 203] The CIR asserted that the new disputes procedure in Part IVA of the TAA 1994 warranted the increased use of statutory powers, even after litigation had commenced. In his judgment, France J states:

> "Mr Coleman [counsel for the CIR] submits that this scheme contemplates an information gathering process that will allow, amongst other things, the Commissioner to confirm or amend his earlier [disputable decisions]. Another part of that information gathering process is a section 17 Notice which the Commissioner can use to ensure that the assessment is taken on the basis of all the relevant information. In his submission it is not correct to seek to circumvent this process by restricting the use of s 17 prior to assessment. It is contrary to the plain statutory scheme."

In the event, both parties agreed that a balancing exercise was required, involving an inquiry into what information was being requested, how relevant it was to the issues under litigation, and the CIR's motive for requesting it.

That need for balance was taken up by France J in his judgment. His Honour stated that "… section 17 is broad in its wording but its use after proceedings have been commenced must be consistent with s 27(3)New Zealand Bill of Rights Act 1990."

His Honour therefore dismissed the extreme positions argued for by both parties:

> "I reject any suggestion that there is some absolute bar, and accordingly it would not be correct to say that s 17 must generally be read down so that the power is not available when the intended subject matter of the Notices is also the subject of concurrent proceedings… On the other hand, I likewise reject any suggestion that s 17 can be exercised without regard to the existence of concurrent proceedings. Each case will require its own analysis of whether in the circumstances the Notices are breaching the principle of litigation on an even basis."

Having recognised the requirement to balance Inland Revenue's power to request information with the citizen's right to expect the CIR to subject himself to litigation on equal footing, France J explained the factors that he considered would tip that balance. These include:

- The motive of the Inland Revenue officer issuing the s 17 notice, particularly whether the information sought was required for the purpose of advancing the CIR's position in the litigation or for some other legitimate, non-litigation purpose;
- The history of the matter, such as the degree of co-operation already provided by the taxpayer in providing information; and

- The timing of the s 17 notice, particularly whether it is issued in response to the litigation or the non-litigation purpose.

His Honour clearly felt that the "true purpose of the Notices" was the most significant factor to be determined. In the present instance, the Inland Revenue officer had sworn an affidavit explaining that **[(2007) Vol 13:2 NZJTLP 195, 204]** the s 17 notices were issued immediately after receipt of the taxpayer's NOR, which detailed the existence of specific new information that was relevant to both the litigation and the ongoing investigation. Accordingly, the Court was satisfied that the notices were not issued in response to the litigation, nor was that stated reason merely a pretext to justify their issue to enhance that litigation:

> "It is, I consider, reasonably clear that Notices could not be issued for the sole purpose of extracting information for the Court proceedings, and this is so, in my view, regardless of whether the Commissioner thinks the Court would be assisted by the collection of such information. If that is the motivation, then the Court's own processes available to both the parties must be allowed to take their normal course."

Based on that reasoning, France J concluded:

> "*Green v Housden* … holds that even when litigation is inevitable, it is open to the Commissioner to use s 17 Notices to obtain further information for the Court proceedings and pending assessments. It follows that Notices in the present case which ask the same questions about the year 2000 must be answered, even if the answers provide evidence about the tax years which are subject to the proceedings."

Finally, his Honour agreed with the CIR's concern that a taxpayer's litigation ought not to fetter Inland Revenue's power to use all statutory powers available to carry out its investigations:

> "[T]he potential for proceedings to be used to thwart the statutory dispute process generally must be borne in mind. It suggests a cautious approach is appropriate."

4.2 Conclusion on *Vinelight Nominees Ltd* — A Balance is required and Litigation cannot be the Dominant Purpose for a Section 17 Request

In summary, France J applied a balanced approach between Inland Revenue's power to request information with the taxpayer's right to expect the CIR to subject himself to litigation on equal footing. Most important in that balance is the true reason for the issue of the s 17 notice. France J stated that the notice would only have been prohibited if the CIR's "dominant reason" had been to advance the litigation. Apparently, a mixed purpose to advance the litigation might therefore be permitted.

4.3 Second Case on the Use of Section 17 — *Chesterfield Preschools Ltd*

The second case on the use of s 17 TAA 1994 was decided only weeks after the *Vinelight* decision. In *Chesterfield Preschools Ltd v CIR (No 2)*, the CIR was seeking a Mareva injunction against a group of associated taxpayers in the hope of recovering some $3 million in unpaid tax. The CIR asserted that these taxpayers had a substantial history of moving assets between associated entities resulting in the dissipation or disposal of assets to prevent collection of tax.

In order to locate and identify each asset within the group, the CIR issued a number of s 17 notices to the taxpayers, the various different entities and their advisers. When opposing the granting of the **[(2007) Vol 13:2 NZJTLP 195, 205]** Mareva orders in the High Court, the taxpayers also requested a judicial review of the issue of the s 17 notices, on the grounds that the issue of the notices was an abuse of process and was contrary to the principle of equality of arms under s 27(3) NZBORA 1990.

After reviewing the affidavit evidence, Fogarty J found that:

> "I am satisfied generally, mainly due to the incredibly complicated transactions going on within the family, swirling around the Chesterfields Preschools business, that the Commissioner has reason to believe that the family is transferring and shuffling assets and with an intent to avoid, where possible, tax liability and ultimately enforcement of any liability sustained by them as a result."

Based on that unsympathetic finding of fact, Fogarty J awarded the CIR the Mareva injunction and other orders sought. It was against that background that his Honour discussed the CIR's use of s 17 TAA 1994 to secure and recover unpaid tax.

First, his Honour examined the role s 17 TAA 1994 played in tax administration. Fogarty J stated:

> "Section 17 is broad in its wording. … It is as broad as Parliament can make it. … It is plain when one reads s 17 that it is intended by Parliament to be an effective instrument for obtaining information, particularly documents. That is its purpose and that is why Parliament has used the broadest words possible in the text referring to any purpose and any aspect of enforcement of the Inland Revenue Acts. For these reasons I can see no basis in the text and purpose of s 17, to suggest that the meaning of s 17 is consistent with a suspension of the power in that section, once some aspect of the proceedings, or all aspects, have become subject to the High Court Rules. …"

His Honour then distinguished the *Vinelight* decision on the basis that it concerned a dispute over the liability for tax, rather than its recovery:

> "With respect to my brother Judge, I see the law as different, by degrees, from the way he stated it in *Vinelight*. I do not think the principle of litigation on an even basis was intended to be pursued in respect of recovery of unpaid tax for the purposes of the Inland Revenue Acts and in particular for the interpretation and application of the Tax Administration Act. …"

After discussing the principle of equality of arms in civil litigation, his Honour stated:

> "There is not, however, a natural inference that the same principle should apply when the Crown is pursuing tax collection. Indeed the Tax Administration Act is full of procedures designed to enable the Crown to obtain information against all persons, not just a potentially defaulting taxpayer, for the purposes of collecting tax. That is the purpose of s 17."

In short, Fogarty J doubted whether the line restricting the CIR's power to use s 17 TAA 1994 was correctly drawn. While France J had required a balance, and would not allow the use of s 17 TAA 1994 for the dominant purpose of litigation, Fogarty J saw no such limit. He held that it was appropriate for **[(2007) Vol 13:2 NZJTLP 195, 206]** Inland Revenue to use s 17 TAA 1994 to obtain documents from either the taxpayer or third parties to directly assist with the litigation for recovery of tax:

> "In short, I am not persuaded that the principle of 'equality of arms' or the principle of litigation 'on an even basis' applies to the enforcement of the Inland Revenue statutes, by reason of s 27(3) of the New Zealand Bill of Rights Act. To do so would, ironically, give an advantage to defaulting taxpayers. It seems to me that to apply such a principle would defeat the clear purpose and meaning of s 17 of the Tax Administration Act."

In reaching that conclusion, Fogarty J found that:

> "There may be occasions when it is more appropriate, particularly as a courtesy for the Court, for the Commissioner to use the Court supervision to obtain discovery of documents and pursue interrogatories after litigation has been commenced. But in this particular case … it is entirely appropriate for the Commissioner to have used s 17, or inferentially to have s 17 as a backstop, in order to obtain the information."

4.4 Conclusion on *Chesterfield Preschools Ltd* — No Balancing Exercise is Required

It is impossible to know the extent to which the unsympathetic view of the facts of the particular taxpayers in *Chesterfield* influenced Fogarty J's decision. While his Honour did not expressly refer to the fear that taxpayers may bring proceedings in order to stymie the CIR's information-gathering powers, it is clear from the tone of his Honour's judgment that it was a factor taken into account. Thus, when faced with the taxpayers' alleged dissipation of assets to avoid payment of tax, he clearly felt that the existence of the litigation should not hamper the CIR's access to all relevant information.

Although the case dealt with the risk of dissipation of assets during debt recovery, Fogarty J's reasoning on the scope and the use of s 17 TAA 1994 would potentially have a wider application. In particular, his Honour was expressly not referring only to the particular facts before him when he stated that "… section 17, on any view of it, cannot be read as pursuing the principle of litigation on an even basis."

On its face, this statement appears to be saying that the deliberately wide breadth of the power Parliament has given to the CIR under s 17 TAA 1994 allows for no limit upon its use. If so, this stance is directly contrary to the reasoning of France J. The only grounds for reconciling the two decisions is that, where *Vinelight* was concerned with litigation regarding the very liability for tax, *Chesterfield* was concerned simply with the mechanics of recovery. Accordingly, it is suggested that his remarks regarding the unfettered use of s 17 TAA 1994 are best read in that context.

4.5 [(2007) Vol 13:2 NZJTLP 195, 207] Third Case on the Use of Section 17 — *Re Next Generation Investments Ltd (in liq)*

The final case is *Re Next Generation Investments Ltd (in liq); Mason v CIR*. There, the CIR had commenced an investigation into a company that was in financial difficulty. Shortly after the audit began, the company voluntarily went into liquidation. While the CIR filed a proof of debt in the company's liquidation for outstanding tax already owed, Inland Revenue continued its investigation and issued a s 17 notice seeking information to verify the correctness of the company's tax affairs and therefore, indirectly, the quantum of the debt owed to the CIR.

The liquidators opposed the s 17 notice on the ground that access to that information would give the CIR an unwarranted advantage over other creditors, contrary to s 256(1)Companies Act 1993. Instead, the liquidators insisted that the appropriate course was for Inland Revenue to apply to the High Court for an order permitting inspection of the company's records.

In his decision, Priestley J discussed the different reasoning in *Chesterfield* and *Vinelight*, and preferred the balanced use of s 17 adopted by France J. Priestley J stated:

> "The Judge [France J], rightly in my view, rejected a submission that s 17 has to be read down to the extent that it was not available when the subject matter of the s 17 notice was central to proceedings. … But it is apparent that … the Judge is not sanctioning the indiscriminate use by the Commissioner of s 17 in tandem with concurrent proceedings."

His Honour examined the reasons why the s 17 notice had been issued and its relationship with the liquidation. Using the reasoning of France J, his Honour acknowledged that if the CIR had issued the s 17 notice in his capacity as creditor, then it would be unenforceable.

Affidavit evidence provided by Inland Revenue explained that the information was sought "to establish the correct tax position for the company", and that the CIR's status as a creditor was "purely incidental" to the audit being carried out. Based on that evidence, his honour found that "there is no evidentiary basis which would permit me to conclude that the Commissioner is seeking information pursuant to s 17 to gain some advantage over other creditors".

Having reached that conclusion, Priestley J stated that the Court "should not allow s 17 powers to be tantamount to absolute powers" and therefore was entitled to enquire into "the dominant reason for issuing a s 17 notice".

4.6 [(2007) Vol 13:2 NZJTLP 195, 208] Conclusion on *Re Next Generation Investments Ltd (in liq)* — The Exercise of Section 17 is a Reviewable Decision

By adopting that reasoning, Priestley J rejected the unfettered use of s 17 TAA 1994 upheld by Fogarty J in *Chesterfield*. In rather

colourful language, Priestley J dismissed that approach:

> "If Fogarty J's dicta were to be advanced in support of a proposition that section 17 is tantamount to a procedural nuclear weapon which can be deployed by the Commissioner in an unfettered way on a civil litigation battlefield, then I disagree. The power to issue a section 17 notice is a conferred statutory power. As such it is clearly reviewable under the Judicature Amendment Act 1972."

5.0 CONCLUSION

None of the decisions in *Vinelight Nominee*, *Chesterfield Preschools*, or *Re Next Generation Investments* were appealed to the Court of Appeal. Therefore, if this "important matter of principle" is to be clarified, it must await further argument in another case.

Against the background of that uncertainty, the law as it currently stands seems to be:

- It is legitimate for the CIR to exercise his powers under ss 16, 17 and 19 TAA 1994 with a view to putting himself in a good position for litigation, at least before that litigation commences.

- Once litigation is commenced (be it criminal prosecution, civil tax or debt collection), at least in some circumstances, the CIR's powers under ss 16, 17 and 19 TAA 1994 should not be exercised for the sole or even dominant purpose of advancing that litigation. Quite where the boundary line should be drawn is unclear and will probably be a matter of fact and degree in every case.

- Where the dispute involves multiple tax periods, of which only some are subject to litigation, the situation is even less clear-cut. The Court's powers and responsibilities only extend to the matters before the Court. It could not sensibly be suggested, for example, that the CIR can no longer investigate different issues in respect of that taxpayer simply because other issues for earlier years are already before the Court as tax disputes. So, the exercise of the CIR's information-gathering powers in relation to later years seems unobjectionable.

- Ambiguity arises where it is the same issue in dispute in both the earlier and later years, as arose in *Vinelight*. In such cases, the answers in relation to later years will inevitably be relevant to the earlier years that are before the Courts. It could be open to the taxpayers to argue that the CIR is in effect using his powers to further the existing litigation, albeit under the guise of investigating later years. This argument was raised but rejected in *Vinelight*.

- **[(2007) Vol 13:2 NZJTLP 195, 209]** Another area of uncertainty is when the CIR is seeking information from a third party (that is, making inquiries of someone other than the taxpayer or the taxpayer's agents). In such a situation, the CIR is not using his powers in an attempt to elicit any information or documentation in the power or possession of a party to the proceeding. This situation seems conceptually different from the circumstances in *Green v Housden*, where the CIR's powers were being used against a litigant (through the litigant's advisers). In particular, the rules regarding discovery against third parties are uncertain. For instance, there is no power in the High Court Rules to enable a litigant to compel the interview of third parties. Equally, there is nothing to prevent a litigant seeking to interview third parties, and the High Court Rules do not regulate such litigation-related investigations. The CIR's use of statutory powers against such third parties therefore seems unobjectionable, and is consistent with the decision in *Chesterfield Preschools*.

The only certainty to come from the three recent cases is that, while there is no absolute bar to the issue of s 17 notices, there must be some limit to that power. As Priestley J notes, the CIR has the duty under s 6 TAA 1994 to protect the integrity of the tax system and the "… ultra vires or improper use of section 17 … to gain an otherwise unachievable advantage in a civil proceeding might well be amenable to judicial review."

As Priestley J recognised:

> "any indiscriminate use of the broad powers under the provision justified judicial scrutiny. … In cases where the Commissioner is arguably invoking his s 17 power unreasonably or for questionable or improper reasons, then the appropriate redress is to seek judicial review."

However, this review can only be done on a case-by-case basis and would require the taxpayer to produce some evidence of bad faith or ulterior motive on the CIR's part when issuing the s 17 notice. It is suggested that such evidence would be both unusual and difficult to obtain. So while the possibility for review exists, as the three recent cases show, it will seldom be successful. As a result, it appears that there is little practical limit on the CIR's use of s 17 TAA 1994 provided some other plausible ground for requiring that information can be asserted.

This article was accepted for publication on 27 March 2007.

FOOTNOTES

1 The assistance and collaboration of Mike Lennard, Barrister (and former Director of Inland Revenue's Litigation Management Unit), is gratefully acknowledged. The genesis of this comment was a part of the New Zealand Institute of Chartered Accountant presentation, *Managing Disputes with the Commissioner*, by Mike Lennard, Craig Macalister and the author in November 2006.

1 See, primarily, ss 16, 17, 17A and 19Tax Administration Act 1994 (TAA 1994), but also see ss 18, 21 and 44 TAA 1994.

2 See Inland Revenue, "Section 17 Notices — SPS 05/08", (2004) Vol 17:6 *Tax Information Bulletin* 37, p 40, which states:

> "12.6.ii.Section 17 may also be used during the disputes process to ensure that all relevant information is gathered and available to Inland Revenue. The disputes process may be truncated and an amended assessment issued where a taxpayer has failed to comply with a section 17 notice during the disputes process."

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

4 *Chesterfield Preschools Ltd v CIR (No 2)*(2005) 22 NZTC 19,500 (HC).

5 See n 5, p 19,507.

6 See n 3, p 37, paras 7 and 8.

7 For example, in *Re Next Generation Investments Ltd (in liq); Mason v CIR*(2006) 22 NZTC 19,775 (HC), 19,782; para 32, Priestley J notes that: "… professional liquidators have detected in recent times an increased use by the Commissioner of s 17 Notices".

8 See s 89N TAA 1994.

9 See s 89N(1)(c)(iv) TAA 1994, which applies only after "a request under a statute for information" has been issued by Inland Revenue.

10 *CIR v NZ Stock Exchange; CIR v The National Bank of NZ*[1990] 3 NZLR 333; (1990) 12 NZTC 7,259; (1990) 14 TRNZ 761 (CA).

11 *NZ Stock Exchange v CIR; National Bank of NZ v CIR*[1992] 3 NZLR 1; (1991) 13 NZTC 8,147; (1991) 15 TRNZ 824 (PC).

12 *CIR v NZ Stock Exchange; CIR v The National Bank of NZ*[1990] 3 NZLR 333; (1990) 12 NZTC 7,259; (1990) 14 TRNZ 761 (CA), 337; 7,262; 764-765.

13 *Russell v Latimer*(1990) 12 NZTC 7,321; (1990) 15 TRNZ 350 (HC).

14 See n 14, p 7,325; p 355.

15 *FCT v Australia and New Zealand Banking Group Ltd; Smorgon v FCT*[1977] HCA 57; (1979) 143 CLR 499; 9 ATR 483; 79 ATC 4,039, 536; 498; 4,053.

16 See *Green v Housden*[1993] 2 NZLR 273; (1993) 15 NZTC 10,053; (1992) 17 TRNZ 458 (CA), where the s 17 notices were ultimately struck down for requesting irrelevant information.

17 See *Lupton v CIR* (High Court, Wellington Registry, CIV-2005-485-2687, 22 December 2006, Randerson J), where small portions of the s 17 notice were struck out because the information requested was either insufficiently specified or only available from the taxpayer's spouse.

18 See n 17.

19 See n 17, p 281; p 10,060; p 466.

20 *Green v Housden*[1993] 2 NZLR 273; (1993) 15 NZTC 10,053; (1992) 17 TRNZ 458 (CA).

21 G Palmer, *A Bill of Rights for New Zealand: A White Paper*, (Wellington, Government Printer, 1985), para 10.177.

22 In *Chesterfield Preschools Ltd v CIR (No 2)*(2005) 22 NZTC 19,500 (HC), 19507; paras 33-37.

23 *Re Spiraflite Ltd*[1979] 2 All ER 766; [1979] 1 WLR 1096 (HC).

24 See n 24, p 771; pp 1099-1100.

25 *Re Bletchley Boat Co Ltd*[1974] 1 All ER 1,225; [1974] 1 WLR 630 (HC).

26 *Miller v CIR; McDougall v CIR (No 2)*(1997) 18 NZTC 13,127 (HC).

27 See n 27, p 13,134, para 60.

28 *Green v Housden*[1993] 2 NZLR 273; (1993) 15 NZTC 10,053; (1992) 17 TRNZ 458 (CA).

29 *Vinelight Nominees Ltd v CIR*(2005) 22 NZTC 19,298 (HC).

30 Pursuant to s 108 TAA 1994.

31 In a subsequent case, that litigation was struck out on the ground that the CIR's reopening decision was not a disputable decision capable of separate challenge: see *Re Next Generation Investments Ltd (in liq); Mason v CIR*(2006) 22 NZTC 19,775 (HC).

32 See n 32, pp 19,304-19,305, para 31.

33 See n 32, p 19,307, para 52.

34 See n 32, p 19,307, para 55.

35 See n 32, pp 19,307-19,308, paras 57-59.

36 See n 32, p 19,308, para 60.

37 *Re Next Generation Investments Ltd (in liq); Mason v CIR*(2006) 22 NZTC 19,775 (HC), 19,307; para 55.

38 See n 38, p 19,308, para 61.

39 See n 38, p 19,308, para 61.

40 See n 38, p 19,308, para 60.

41 See n 38.

42 *Chesterfield Preschools Ltd v CIR (No 2)*(2005) 22 NZTC 19,500 (HC).

43 See n 43, p 19,504, para 16.

44 See n 43, pp 19,507-19,508, paras 40-41.

45 *Vinelight Nominees Ltd v CIR*(2005) 22 NZTC 19,298 (HC).

46 See n 43, p 19,507, para 34.

47 See n 43, p 19,507, para 38.

48 *Chesterfield Preschools Ltd v CIR (No 2)*(2005) 22 NZTC 19,500 (HC), 19,508; para 45.

49 See n 49, p 19,508, para 46.

50 See n 49.

51 See n 49, p 19,508, para 45.

52 *Vinelight Nominees Ltd v CIR*(2005) 22 NZTC 19,298 (HC).

53 See n 49.

54 *Re Next Generation Investments Ltd (in liq); Mason v CIR*(2006) 22 NZTC 19,775 (HC).

55 See n 49.

56 See n 53.

57 See n 55, p 19,779, para 15.

58 See n 55, p 19,781, para 24.

59 See n 55, p 19,781, para 25.

60 See n 55, p 19,781, para 27.

61 See n 55, p 19,782, para 31.

62 *Re Next Generation Investments Ltd (in liq); Mason v CIR*(2006) 22 NZTC 19,775 (HC), 19,780; para 17.

63 *Vinelight Nominees Ltd v CIR*(2005) 22 NZTC 19,298 (HC).

64 *Chesterfield Preschools Ltd v CIR (No 2)*(2005) 22 NZTC 19,500 (HC).

65 See n 63.

66 As described by Priestley J in *Re Next Generation Investments Ltd (in liq)*, n 66, p 19,782, para 42.

67
See *Miller v CIR; McDougall v CIR (No 2)*(1997) 18 NZTC 13,127 (HC).

68
Contrast this with s 138K TAA 1994.

69
See n 64.

70
See n 64.

71
Green v Housden[1993] 2 NZLR 273; (1993) 15 NZTC 10,053; (1992) 17 TRNZ 458 (CA).

72
See n 65.

73 See n 63, p 19,780, para 17.

74 See n 63, p 19,782, para 32.