Tax administration and practice – part two

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In the first paper on tax administration[1] the view was put forward that although for some time the accepted wisdom has apparently been that liability for income tax is imposed by the Income Tax Act itself, in practice the way in which the Act is administered by the Commissioner and his Department also has an extremely important effect both on day to day tax practice and on any ultimate judicial determination of tax liability. The plethora of administrative discretions in the Income Tax Act 1976 was referred to as were possible methods of controlling the exercise of those discretions. In this paper I propose to follow through a hypothetical dispute relating to the determination of a taxpayer's liability with a view to highlighting some of the practical problems and issues which confront a tax practitioner in the course of his practice. I will conclude by suggesting some reforms which are long overdue.

Take the following situation. The Rental Investment Partnership (R.I.P.) invests in commercial properties which it leases to commercial lessees. It has done this for some 15 years. The partners in the partnership are Jones, Brown, and Smith Company Limited (SmithCo) and each has a one third interest in the partnership. The shares in SmithCo are owned as to 80% by Smith and as to 20% by the Smith Family Trust. SmithCo also carries on a rental management services business and Smith is the main employee of the company. There is a resolution in the company's books which was passed some years ago that all net revenue profits of the company, excluding any capital profits made of it, are to be paid as salary to Smith. For years everything has proceeded smoothly and the partnership and SmithCo have been very profitable. One day the accountant for the partnership, who also happens to be the accountant for SmithCo, receives a letter from the District Commissioner of Inland Revenue at the Auckland office referring to the income tax assessments of the partners for the 1980 income year and stating that it had come to the Department's notice that a property situated in Queen Street, Auckland, which was sold by the partnership in December 1979, gave rise to assessable income. The Department proposed to amend the assessments of the partners for the 1980 income year accordingly.

The accountant immediately contacts a legal tax adviser in order that an appropriate reply can be formulated in response to the Department's letter. She leaves all the background papers with the legal adviser and it is agreed that a response will be made to the Department within a few days. The next day the

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1 R. L. Congreve "Tax Administration and Practice — Part One" ante.

accountant telephones the legal adviser to say that she has received in the mail an amended assessment for SmithCo for the 1980 income year together with an income tax statement of account specifying that certain amounts of tax are due to be paid on 26 August. The date on both the notice of amended assessment and the statement of account is 26 July. As it is 24 August when she calls the legal adviser and no specific date is mentioned in the notice of assessment, but the regular formulation of one month from the due date thereof is provided for the lodging of an objection, the legal adviser realises that the pressure is on. He manages to contact the accountant for Jones, another member of the partnership, who has received a similar amended assessment and statement of account but is unable to contact the accountant for Brown, who is on a skiing holiday. A meeting is immediately arranged between the legal adviser, the accountant for R.I.P. and SmithCo and the accountant for Jones. An associate of the accountant for Brown has advised that no amended notice of assessment or statement of account has been received by his firm on Brown's behalf. There are two main matters which have to be considered at the meeting. First, the formulation of the objection itself and secondly, a determination of how much tax must be paid to the Department the following day. Certain ancillary matters also must be discussed not the least of which is the likely future course of proceedings.

Section 30 of the Income Tax Act 1976 provides that a person may object to any assessment by lodging a written notice of objection stating shortly the grounds of that objection within such time as may be specified in the notice of assessment not being less than fourteen days after the date on which the notice of assessment is given. In the present case the normal time provided on the back of a notice of assessment, namely one month from the date of that notice of assessment, is the period within which the objection must be made. Section 30(2) provides that no notice of objection given after the time specified on the notice of assessment is of any force or effect unless the Commissioner in his discretion accepts that late notice and gives notice of that late acceptance to the objector. There is no set form for a notice of objection.

The grounds of an objection are extremely important because by virtue of section 36 of the Inland Revenue Department Act 1974, on the hearing and determination of any objection the objector is limited to the grounds stated in his or her objection. All that the Department said in its letter to SmithCo's accountants which preceded the amended assessment is that in its view the profits from the particular sale are assessable income. It is not known therefore upon what section or sections of the Act the Department has based its assessment. The advisers decide that a general objection will be filed stating that the grounds of the objection are that the profit in question is not assessable income. In the letter of objection, the late receipt of the notice will be noted and it will be further stated that as no basis for the assessment appeared in the notice of assessment or in the accompanying correspondence then upon the provision of further particulars by the Department fuller grounds of objection will be lodged. The letter of objection also requests that payment of the tax in dispute be deferred on the normal terms.

Under the Income Tax Act 1976 a partnership is not a taxpayer, even though it is a person. Although partners must, under section 10(1)(b), make a joint return of the income of the firm setting forth the amount of the income and the way in which the income is divided between the partners, no assessment is made of the partnership but rather each individual partner is assessed. It is therefore necessary in formulating objections to object on behalf of each individual partner. On the fact situation given this will require that objections be lodged in several different district offices of the Inland Revenue Department with possible different responses to the objection lodged.

In accordance with the decision taken a short letter of objection is drafted on behalf of SmithCo and on behalf of Jones and, because of the time factor, they are delivered by hand and a receipt obtained for each. It is decided that upon receipt of an amended assessment by Brown, and unless fuller grounds are contained in relation to that assessment, a similar procedure will be followed.

As was noted in the first paper, section 34 of the Income Tax Act 1976 provides that the obligation to pay tax is not suspended by any objection, appeal, or case stated. However, so that the system is fair, if the objector succeeds the amount of tax paid to the Commissioner in excess of the amount which according to the decision on the hearing of the objection, appeal or case stated, is properly payable is forthwith to be refunded by the Commissioner. Unfortunately, no interest is payable by the Commissioner. In the ordinary course of events, when it could very well take up to five years or more to finally determine an objection which is appealed through all levels of the court structure, present inflation rates mean that an amount equal to the amount of any tax paid up front on an assessment which is later proved to be wrong is effectively lost. As has been noted, section 34 of the Act is one of those sections which is not applied according to its terms by the Inland Revenue Department. Under the present practice of the Department except where an objection is frivolous the tax on income in dispute may be deferred for a limited period. Total deferment is available until the first to occur of twelve months from the original last date for payment or until the objection is decided. After that period one half of the tax in dispute must be paid, the remaining one half being deferred until the objection has been finally decided. In the event that the Department's assessment is upheld the additional tax for late payment of the tax assessed, that is the 10% penalty, is reduced to an amount equal to interest at 5% per annum but of course this may not exceed the 10% once and for all penalty imposed by the Act. Given the ordinary delays in litigation the effective penalty is therefore 10%.

R.I.P. and SmithCo both have a balance date of 31 March. Thus, in respect of the 1980 income year for which an amended assessment has been made, the due date for payment of the tax in dispute, that is the payment of terminal tax, was 7 February 1981 which again by practice is treated as being 7 March 1981. Thus, the twelve month period from the due date for the payment of tax has expired and one half of the tax must be paid in accordance with the date on the statement of account. Because of the late receipt of the amended assessments and statement of account, the time available to raise the money is very short. If the amount of tax in dispute is considerable this can impose severe cash flow problems on the

particular taxpayers. Although the Department does in some cases extend the time for payment this cannot be guaranteed and the receptiveness to such an arrangement varies from District Office to District Office.

It will be recalled that SmithCo. has normally paid out all of its revenue profits as salary to the employee shareholder. Traditionally, therefore, the company has not paid any provisional tax as its income has been nil in each year. The effect of the assessment of the partnership in regard to the profit on the sale of the Queen Street building is that the company has a greater profit than was originally contemplated. Had that been known at the time, of course, it would have been paid out as salary and taxed in the hands of the shareholder employee, Smith. Had the amended assessment been received earlier, that is before or just after the due date for payment of the second instalment of 1981 provisional tax, a re-estimate of the income for the 1981 income year could have been made[2] (on the assumption that the resolution passed by the company is binding in respect of all revenue profits irrespective of whether or not they arise in the future and that the accounts of the company would be changed accordingly). Thus no provisional tax would have had to be paid. If the amount of income assessed in respect of the sale of the Queen Street property is large the provisional tax payment, that is the payment of the second instalment of provisional tax which for the 1981 year was due on 7 March 1981, could again be substantial compounding the cash flow problem of making tax payments.

If a taxpayer selects the option of retrospectively taking all the subsequently determined profit out of the company as salary no income tax liability will in fact arise for that particular year in the company but the income will be taxed in the shareholder's hands. Therefore only one level of tax will be paid. It would seem that under the scheme of the Act if the provisional tax is not paid a penalty of 10% will be imposed for late payment even though at the end of the day no tax is payable at all for the year in respect of which the provisional tax payment is due. In some cases it may be that the Department will not impose the penalty. However, at the stage when the decision is being taken by the advisers in our example it is unlikely that a District Commissioner will give an undertaking that he will definitely waive any late payment penalty for the provisional tax if all the money is taken out by way of salary.

The preceding situation demonstrates, it is suggested, a defect in the Act. The taxpayer must make a determination at an early stage about retrospective distributions of company profits, always assuming that such determinations are accepted by the Inland Revenue Department. However, if such a determination is made yet the objection proves successful, there would have been no need to declare that salary or wage. In the example given the profits received by the company would have been capital profits and there would be no corporate tax consequences. If the objection were to be successful and a decision had been taken to declare the amount assessed by the Department as salary and wages not only would a tax liability have been potentially accelerated but a liability would have

2 Section 387 Income Tax Act 1976.

been incurred where no tax need have been paid at all. It is suggested that the Act needs amending, so that if an assessment is ultimately upheld and tax imposed at the corporate level when there would otherwise be no such liability, the Commissioner should amend assessments accordingly. In days when the combined rate of tax on money earned through companies is 81% such a procedure becomes even more desirable.

Let us return to our saga. The letters of objection in respect of SmithCo and Jones having been delivered to the Inland Revenue Department, three days later the legal adviser receives a telephone call from the accountant for Brown advising that a similar amended assessment and statement of account has been received by Brown. The date on that amended assessment is exactly the same as that on the amended assessment and statement of account received by SmithCo and by Jones. The consequence of this of course is that when received by Brown, the time for objection had already expired. What can Brown do in such circumstances? As noted above, the Commissioner has a discretion whether or not to accept a late objection. In circumstances where for one reason or another the documents have not been received by the taxpayer or his or her agent until after the time for objection has expired it would seem that the Commissioner should in all circumstances, given adequate proof, permit a late objection. However, if the Commissioner refuses to exercise his discretion no objection can be taken under the objection proceedings in the Act. That is provided by section 36(a) of the Act. It may be that as indicated in the earlier paper certain non-objection procedures are available to challenge the exercise of the Commissioner's discretion in such circumstances. However, that position is not clearly determined.[3]

The decision is therefore taken to write a letter to the District Commissioner at the appropriate office outlining the circumstances and requesting that the Commissioner exercise his discretion under section 30(2) of the Income Tax Act 1976 and accept a late objection. Again, in that letter a general objection that the profit is not assessable income is included together with a statement to the effect that as no grounds were given for the amended assessment it was impossible to draft complete grounds of objection. A few days later a reply is received from the District Commissioner stating that he will not exercise his discretion under section 30(2) of the Act. Representations to Head Office in Wellington do not lead to the position taken by the District Commissioner being changed and as a consequence Brown's position does not look good. Unfortunately, because of other business commitments, Brown does not have the funds to support a High Court challenge based on the Judicature Amendment Act 1972 for the purpose of challenging the refusal of the Commissioner to exercise his discretion to accept the late objection. Reluctantly Brown advises that he can proceed no further. He pays the tax assessed, late of course, but in the circumstances the penalty is waived by the Department.

In due course the District Commissioners respond to the letters of objection lodged by SmithCo and Jones. The Department accepts both letters as being

3 See generally P. L. Reddy *Judicial Control of the Commissioner's Income Tax Discretions* Unpublished LL.M. Thesis, V.U.W., 1979.

objections and as having been made in time. They also advise that in each case the basis for the amended assessments was that section 67 of the Income Tax Act 1976 applies. No further information is given.

At that stage, quite clearly, it is not possible to formulate any better grounds of objection other than referring to each and every provision of section 67 of the Act. Such general bases for assessments by the Department are not uncommon and it makes it extremely difficult, if not impossible, for the adviser to formulate his or her response. As noted, as one is limited to the grounds of objection in future hearings by the Act itself, the grounds upon which an objection are formulated are crucial. In a practical sense it is thought to be unlikely that any court that was faced with a basis for assessment made by the Department such as that outlined above would refuse to permit the taxpayer to proceed on any ground within section 67 of the Act. It is not unheard of for the Department to give as a ground that "the amount is income under the Income Tax Act 1976". That approach must surely act both ways and permit a taxpayer to use any ground of objection which he would wish to take. Nevertheless, should the objection be disallowed and the matter be taken to court the fact is that the onus is on the taxpayer. It is he or she who argues first and who must establish not only that the assessment is wrong but by how much it is wrong. In these circumstances it is very undesirable to be placed in a situation somewhat akin to russian roulette where one does not know upon which section of the Act counsel for the Commissioner is going to place his or her main emphasis. This is particularly so from the point of view of ensuring that proper evidence is led in the case.

Consideration must therefore be given at an early stage as to how best to get further information from the Department. In many cases a discussion with departmental officials can be very productive. These discussions can take place at the District Office of the taxpayer in question, and it is often at that stage that any vague areas can be clarified. Sometimes the response of the Department is not adequate and one must proceed to a conference with the Regional Controller. Sometimes it is even necessary or desirable to endeavour to arrange a discussion with officers at Head Office or with the Commissioner himself. From both parties' point of view it would seem always to be desirable to resolve the issues without recourse to court proceedings if that is at all possible. It is only if all avenues have been explored and agreement cannot be reached as to a proper or appropriate assessment that resort should be had to judicial proceedings. It is usually better to undertake the discussions with the Department at an early stage to minimise both costs and misunderstandings. Very often it becomes clear that one or either party has misunderstood the position and that the true position gives rise to either a further amended assessment or an agreement that the amended assessment is correct.

Should the discussions with the Department not be satisfactory from the taxpayer's point of view difficult questions arise as to what courses of action are open to him or her in order to ascertain what the grounds of assessment are so that a full and complete objection can be made. In circumstances where a section of the Act is merely referred to without more it may be necessary to formulate a range of grounds of objection but make it entirely clear in the letter that it has

been almost impossible to do so because of the lack of specificity in the assessment. In those circumstances a court would probably be amenable to permitting extra arguments to be made notwithstanding they did not specifically appear in the grounds of objection. It should be noted in any event that wherever possible the grounds of objection should be drafted in a broad enough fashion (as well as being appropriately specific) to cover possible points that could be taken by the Commissioner of Inland Revenue.

Once the objection in its final form has been lodged the Commissioner is compelled by the Act to consider the objection and either allow it or disallow it. Sometimes this procedure can take an extremely long time. Depending upon the circumstances of a particular case it may be desirable to have the matter determined as soon as possible — particularly if the tax has been paid. Therefore in extreme cases of tardiness one may again have to consider instituting review procedures to compel the Commissioner to exercise his powers under section 31 of the Income Tax Act 1976. The longer the time taken to disallow, the longer the time one half of the tax in dispute could be non-interest bearing. It seems that at the present time more and more cases are being taken under the Income Tax Act 1976 and therefore the problem of obtaining a prompt disallowance of objection, if that is the course that the Commissioner proposes to pursue, will become more difficult.

Returning to our example, in due course letters are received by the tax adviser stating that the Commissioner has, both in the case of SmithCo and in the case of Jones, disallowed the objections. Both letters contain the usual statement that if the taxpayer wishes to have the matter referred higher or to request a case stated, this must be done within two months of the date of the letter. The two month period is absolute. The Commissioner has no discretion to extend that time. Missing a date where there is no discretion to extend or power to move a court to extend the time is fertile ground for professional negligence actions. In practice serious difficulties sometimes arise in complying with the two month deadline. The notice of disallowance could be sent to the accountant rather than to the lawyer and there could be delays. It may be necessary to analyse very closely indeed the arguments before deciding to go for a case stated. The analysis at that stage may be far more extensive than has taken place in considering whether or not to object. As a result of discussions with the Department extra material may have become available. The safe rule to follow is if in doubt request a case stated and if necessary withdraw.

In determining whether or not to pursue a disallowed objection the first decision which must be taken is whether a case, if it is to be taken, should be for consideration by the Taxation Review Authority or by the High Court. In most cases of substance the obvious tribunal will be the High Court. However in individual cases taxpayers may wish to use the Taxation Review Authority. The main differences between using the Taxation Review Authority and the High Court are that in the Taxation Review Authority costs may not be awarded against either party and the hearings are held in camera. The actual costs incurred in proceeding before the Review Authority may be no less than those in the High Court. As far as secrecy is concerned there are cases which have suggested that the

High Court can also order hearings before it to be in secret.[4] Where sensitive financial information is involved it is sometimes possible to get a court to refrain from publishing such financial information in any written judgment. In a case such as the one being considered where it was eventually ascertained from the Department that they took the view that section 67(4)(b) of the Act applied in that Brown was a dealer in land at the time the particular Queen Street property was acquired and that he was associated with the partnership, it would seem that the High Court would be the better tribunal to determine the complex legal and factual issues involved. This would particularly be so if the taxpayers concerned had already decided to appeal the matter to the Court of Appeal or even beyond if the High Court should find against them.

Having filed the request for the case stated within the statutory period, consideration will probably have to be given as to whether or not yet further information should be sought from the Department. The question of discovery against the Commissioner or requesting further particulars may be contemplated. Until recently, very few requests for discovery have been made against the Commissioner. In Australia such proceedings have in the past been successful, particularly in the context of the equivalent of section 99 of the Act. Recently two cases have been heard in New Zealand relating to discovery and further particulars. In the case of *Jarman* v. *C.I.R.*[5] it was held that the Taxation Review Authority did not have power to order further particulars. However, Roper J. stated that there can be no doubt that the High Court in New Zealand has the inherent jurisdiction to order further particulars.[6] In the case of *Cates* v. *C.I.R.*[7] Sinclair J. held in the High Court that there was no statutory or inherent jurisdiction for the court to order discovery in relation to a case stated before the court. That decision was overturned in August 1982 by the Court of Appeal which held that in certain circumstances discovery is available, although those circumstances would be unusual.[8]

It may be an extremely useful tactic to apply for further particulars or discovery against the Commissioner. If the documents in the Commissioner's possession and the grounds upon which a particular assessment are based are seen it may well be that it is decided not to proceed further and costs can be minimised. Conversely, a taxpayer's determination may be increased once the fragility of the Department's view is revealed for analysis. It can be anticipated that in the light of the *Cates* case the use of the procedure of discovery could increase. It is, after all, only logical that where the Department has extensive powers of investigation and powers to compel the production of documents the taxpayer, who starts from behind scratch in so many respects, shculd be able to obtain the basis for the Department's view and a clear and unambiguous reason for any assessment or amended assessment that has been made.

4 See *Hall* v. *I.R.C.* (1979) 9 A.T.R. 595, 597 per Chilwell J.
5 (1980) 11 A.T.R. 18.
6 Ibid. 21.
7 (1982) 11 A.T.R. 731.
8 (1982) 5 N.Z.T.C. 61, 237.

Once the request for the case stated is filed some time can then elapse before a draft case is prepared by the Department and forwarded to the tax adviser for consideration. The normal procedure is for the counsel arguing the case for the Commissioner to draft the case and to request comments from the tax adviser together with suggested contentions of the objector to be inserted in the case stated. This procedure again is not strictly in accordance with section 33 of the Act which requires the Commissioner to file a case and provides, where a case stated is not on a question of law only, for the objector to provide an answer asserting the facts as the objector contends them to be. It is especially provided by section 33(9) of the Act that neither the case stated as filed by the Commissioner nor any answer filed by the objector are conclusive as to the matters set forth therein against either party, except so far as is agreed to in writing by or on behalf of the Commissioner and the objector. Thus, there is no requirement to provide contentions for the case stated filed by the Commissioner. The facts as stated in that case are not binding on the objector even if no answer is filed. It is of course desirable to arrive at a case stated which is acceptable to both parties as it provides a useful basis from which argument can proceed.

Once the case stated is filed in the High Court and a ready notice is duly signed, one awaits in the normal way for a fixture to be allocated. During this time of course counsel for both sides will be considering how best to proceed at the hearing. As indicated above, from the taxpayer's point of view he or she is in an inferior position to that of the Commissioner. He or she is bound by the grounds stated in the objection. Furthermore, he or she has the onus in court of showing not only that the assessment is wrong, but by how much it is wrong. It is an onus on the balance of probabilities. Nevertheless, the taxpayer will argue first and will not necessarily know when presenting his or her case what precise grounds the Commissioner will rely upon. He or she will lead evidence first and will not know what evidence the Commissioner will produce. He or she will, when leading evidence, have no idea of the cases which the Commissioner's counsel will rely on, although there is of course a right of reply.

The importance of evidence in tax cases cannot be stressed too strongly. The fact that the onus is on the taxpayer, except in certain limited circumstances where the Department changes an established practice,[9] means that even though a taxpayer succeeds on the legal issue involved he or she may lose the case if the court does not have the evidence before it. The assessment of precisely what evidence is required is an extremely difficult and important task. Not only must one prepare a foundation of evidence for the High Court but also for the Court of Appeal and possibly the Privy Council, which may well take a slightly different approach to the particular case. The findings of fact are of course binding on the higher appellate courts except in so far as those courts are concerned with drawing inferences from those facts. Thus, considerable time must be taken in researching the law in order to determine what likely results could be reached by the various courts in question. If those results require a body of evidence so that a favourable

9 See e.g. *C.I.R.* v. *National Bank of New Zealand* (1976) 7 A.T.R. 282 and *C.I.R.* v. *Farmers' Trading Co. Ltd.* (1982) 5 N.Z.T.C. 61, 200.

result can be achieved for a taxpayer given a particular interpretation it is important to obtain such evidence even though at the time the evidence is introduced the reason for so introducing it may not be readily apparent to the judge in question. In some cases, particularly where it is thought that a taxpayer is being selected for attack by the Department as a test case and it is suspected or known that other taxpayers have been treated differently, consideration could even be given to requesting the Commissioner in person to appear in court to give evidence.

Although as noted above under the terms of section 36 of the Inland Revenue Department Act 1974 the objector is bound by the grounds of the objection, from time to time the Commissioner endeavours to alter the grounds of argument in court from those which have been referred to in discussions and correspondence with the taxpayer. This could possibly be because counsel who argues the case has not been involved with the departmental discussions and sees possible extra grounds upon which the assessment could be maintained. Obviously, if the Commissioner can so amend his grounds at the last moment this puts him in a preferred position compared to the position of the taxpayer. Thankfully, from the taxpayer's point of view, there are certain cases which suggest that the Commissioner may not raise in court grounds to support the assessment other than those reflected in the correspondence and discussions with the taxpayer. It has been suggested in some cases that to permit the Commissioner to do otherwise would be to prejudice the taxpayer.

Perhaps the leading case is the case of *Edgar and Fay* v. *I.R.C.*,[10] a case concerned with estate duty. In that case estate duty was assessed on a particular basis and the case stated only made reference to that basis as did the question posed in the case stated for the court to decide. At the hearing of the objection the Commissioner attempted to use a different section of the Act altogether. Somers J. held that it was not open to the Commissioner to use a different basis of assessment. His Honour concluded that the scheme of the Estate and Gift Duties Act 1968 necessarily involved the limitation that the Commissioner is expressly confined to the ground of assessment just as the objector is limited by his ground of objection.

A distinction is drawn in the foregoing authorities between argument and assessment under a new section and undisclosed grounds to support an assessment under a particular section in the Act. It is suggested that this distinction is not necessarily a satisfactory one unless it is more limited. In our example an assessment merely referring to section 67 of the Act covers an extremely wide range of possible bases of assessment. More so an assessment which merely referred to section 65 of the Income Tax Act 1976. The point is, however, that taxpayers should always be prepared to contest any attempt by counsel for the Commissioner to support an assessment on grounds other than those which have been the subject of discussion between the parties or referred to in the case stated.

10 (1978) 8 A.T.R. 530.

To return once more to our example. In due course the High Court hands down its judgment finding in favour of SmithCo and Jones. The Commissioner lodges an appeal and the case on appeal is prepared by him and served on the taxpayer. In due course a fixture date is obtained and the case is argued in the Court of Appeal. Ultimately the Court of Appeal dismisses the appeal confirming the decision of the High Court and refers the assessments back to the Commissioner to be amended in accordance with the court's judgment. The taxpayers are elated. They have been proved correct and it has only cost them substantial professional fees and the loss of interest on one half of the tax in dispute for the period for which the Department had use of that money. They have been awarded costs by the Court of Appeal but those costs are well below the actual costs incurred. Brown too is elated. He automatically assumes that the order of the Court of Appeal will mean that his amended assessment too will be further amended so that it is in accord with the assessments of SmithCo and Jones. His accountant writes a letter to the Inland Revenue Department requesting that the Department amend Brown's assessment. A letter comes back from the Department stating that the Commissioner is under no obligation to amend Brown's assessment and that it stands. Brown's accountant contacts the tax adviser who points out to the accountant that as Brown had not filed an objection he had no right to have the assessment further amended. He also points out that section 27 of the Income Tax Act 1976 provides that except in proceedings on objection to an assessment no assessment may be disputed in any court and every such assessment and all particulars thereof shall be conclusively deemed and taken to be correct and the liability of the person so assessed determined accordingly. He further points out that although the Commissioner may not amend an assessment after the expiration of four years from the end of the year in which the assessment was made to increase a liability, absent fraudulent or wilfully misleading returns, the Commissioner may amend an assessment at any time to reduce part of the assessment but such power is the Commissioner's alone to exercise under section 23(1) of the Act.

SUGGESTED CHANGES

The above outline of a hypothetical case shows quite clearly that there are several areas of tax administration and practice which require consideration and reform. It was pointed out in the first paper that the Task Force on Tax Reform did not deal adequately with the administration of the Income Tax Act 1976. At the tax workbench the Commissioner's discretions under the Act and extra-statutory practices have a substantial effect. In some areas I would suggest that changes are urgently needed. Those areas are the following.

1. Greater recognition must be given to the complexity of many tax cases. The time for requesting an objection and requesting that a case stated be filed must both be extended and be made more flexible so that rights, which in these days of very high taxation can involve large sums of money, both absolutely and relatively, are protected to the greatest degree possible. It is just not practicable in many circumstances to lodge an objection, the grounds of which are going to be binding on the taxpayer, within the thirty day period

allowed by the Act. Given delays in the mail, the necessity for discussion between accounting and legal advisers and the perusal of what may often be vast numbers of documents it is essential that more time be given. Similarly in relation to cases stated, very often a great deal of work has to be done before a request can be finally decided upon. At the very least the court should be given jurisdiction to extend the time for requesting a case stated beyond the two months presently provided for in the Act.

2. As far as payment of tax in dispute is concerned some suggestion for reform was made by the Task Force.[11] The Task Force recommended that tax in dispute should be treated in the same way as late payments were recommended to be treated, namely a 10% penalty with a rolling monthly penalty significantly in excess of marginal borrowing rates.[12] Thus, if the tax in dispute were not paid, and the taxpayer lost, the penalty plus the rolling penalty would be imposed. If the taxpayer won, and he had paid the tax in dispute the Commissioner would refund the tax plus an interest payment equal to the monthly rolling penalty. One could ask, why no 10% penalty? It is suggested that that reform does not go far enough. The second level effects referred to earlier should be considered. One could also question whether a proposal such as that of the Task Force adequately deals with problems of delay in determining a dispute. There is also still a lack of equality between the taxpayer and the consolidated fund.

3. As indicated in the first paper, it would be desirable that a pre-proceeding conference take place to isolate the issues in dispute between the parties concerned. It is very undesirable that a taxpayer should, bearing the onus that he or she does, go into contentious proceedings blindfolded with an extremely broad barrelled blunderbus pointed at him or her by the Commissioner. Such a conference should be used, in the same way as the conference procedure under the Judicature Amendment Act 1972, to isolate the issues for determination by the court. This would avoid any possibility of the Commissioner raising new grounds and using the somewhat broad statements to be found in some of the cases to support those grounds. It might even be desirable to permit the grounds of objection to be finally determined at such a conference.

4. A procedure should be introduced whereby the Commissioner is compelled to amend the assessments of persons who have not objected in relation to assessments made where a court has determined that the Department has been incorrect in its view. This should at least be done in respect of returns and assessments made in the same and subsequent years to that in which a particular decision is made by the court on a point of law or practice. To do otherwise is, it is suggested, unfair and arbitrary as between taxpayers.

11 *Report of the Task Force on Tax Reform* (Government Printer, Wellington, 1982).
12 Ibid. 58-59.