

Objecting to discretionary determinations by the Commissioner of Inland Revenue

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Taxpayers frequently find that their liability to income tax depends not on whether they satisfy express statutory criteria, but upon the opinion of the Commissioner of Inland Revenue. If liability for tax is imposed by the Act alone, safeguards are necessary to ensure that these discretions are exercised properly and correctly. This article considers whether the High Court's powers to hear and determine objections to assessments provide taxpayers with an effective means of challenging discretionary determinations and suggests possible areas for reform.

I. INTRODUCTION

The Income Tax Act 1976 provides an exclusive statutory procedure to enable taxpayers to object to assessments made by the Commissioner of Inland Revenue. An assessment will often be based on the existence of facts and circumstances which bring a taxpayer within the taxing provisions of the Act. In many cases, however, the obligations of a taxpayer depend expressly upon the state of mind, or opinion, of the Commissioner. This occurs where the statutory provisions which impose liability are made subject to "the satisfaction of" or "the opinion of" the Commissioner. Where a taxpayer is dissatisfied with an assessment which is based wholly or partly on this type of provision, his objection will involve a challenge to the Commissioner's exercise of a statutory discretion. For example, a taxpayer who is dissatisfied with the amount of a depreciation allowance provided in his assessment for fair wear and tear to his business premises, will in fact be challenging the Commissioner's opinion, as section 108 provides that the Commissioner may "allow such deduction as he thinks just".

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The use of discretionary powers is prevalent in all areas of government and administration. One writer has justified this on the basis that:¹

The scope of modern Government is so wide, its subject matter so complex and its problems so interrelated, that it is simply not practicable to legislate in detail for the future.

However, it is generally conceded that the ideal for all fiscal laws should be certainty, so that taxpayers can discern the limits of their liability.² Liability to tax should be imposed by the Act alone.³ The conferral of a large number of discretions upon the Commissioner appears to be inconsistent with this principle. Yet in Australia the Taxation Review Committee, which reported its findings on the Australian Commonwealth taxation system in 1975, saw the discretions conferred on the Commissioner as⁴

. . . [t]he only practical means . . . of coping with the cases of hardship and of providing an equitable result for the inevitable departure from the norm so that the Revenue should not obtain more than in all fairness it is entitled to and . . . of ensuring that at the same time the taxpayer should not, at the expense of his fellow taxpayers, escape payment of his just liabilities

As well as seeing them as a necessary evil to ensure the fair administration of the Act, the Committee considered that the discretions conferred by the Australian Income Tax Assessment Act were generally desirable. It was stated:⁵

The vesting in the Commissioner of powers of discretion, opinion, satisfaction and determination . . . is regarded by the Committee as a more satisfactory alternative to both the Revenue and the taxpayer than lengthy and complex provisions which can themselves be infected with the vice of uncertainty.

A brief survey of the discretions conferred upon the Commissioner in New Zealand by the Income Tax Act 1976 does not give much support to this view. The wide range of phrases used alone makes for unnecessary complexity and uncertainty.⁶ In some cases different phrases conferring discretions appear in the same section.⁷ In other sections, several discretionary phrases are used together.⁸ The variety of phrases used appears to be a result of different draftsmen with

1 R.S. Milne, quoted in Robson (ed.) *New Zealand: The Development of its Laws and Constitution* (2nd ed., Stevens & Sons, London, 1967) 120-121.

2 See e.g. the Report of the Australian Taxation Review Committee (the Asprey Report) (1975) para 22.5.

Also the Report of the Royal Commission on Taxation in Canada (the Carter Report) Queens Printer, Ottawa, 1966).

3 This principle was recognised in *Reckitt & Colman v. T.B.R.* [1966] N.Z.L.R. 1032, 1045.

4 The Asprey Report, supra n.2, para 22.6.

5 Ibid., para 22.7 c.f. the criticisms of the types of discretions conferred and the courts' ability to control their exercise in Ryan, "Curbing the Commissioner's Discretionary Powers" in O'Neill (ed.) *1 Tax Essays*, (Butterworths, Sydney, 1979) 1.

6 For example, what is the difference between requiring the Commissioner to determine what is "fair and equitable", or "fair and reasonable", or "just and reasonable", or "just and equitable", or "reasonable", or "equitable", or "just"?

7 Thus in s. 99(3) the Commissioner must "consider appropriate" and then "consider proper."

8 For example, by s. 80(1), the Commissioner "may, if he thinks fit in his discretion" apportion income.

TABLE OF DISCRETIONS

The Commissioner may: 4, 11, 16, 18, 23, 31, 45, 53, 59, 61, 65, 66, 67, 69, 73, 74, 76, 77, 78, 81, 83, 84, 86, 87, 93, 97, 99, 106, 108, 111, 112, 114, 115, 117, 118, 125, 129, 130, 134, 135, 136, 137, 139, 141, 142, 143, 144, 149, 150, 152, 153, 156, 158, 159, 160, 63, 64, 169, 680, 81, 188, 199, 214, 216, 219, 223, 227, 238, 240, 253, 257, 261, 262, 272, 273, 289, 290, 291, 295, 302, 314, 315, 321, 332, 334, 350, 351, 353, 354, 359, 361, 364, 367, 374, 383, 384, 385, 387, 388, 389, 390, 392, 400, 403, 412, 413, 414.

Where the Commissioner is/is not satisfied: 3, 4, 21, 22, 37, 40, 42, 43, 45, 47, 53, 54, 55, 56, 59, 6, 65, 67, 68, 71, 73, 74, 77, 82, 85, 92, 93, 94, 95, 99, 106, 108, 110, 112, 113, 114, 115, 116, 117, 118, 127, 128, 138, 149, 150, 151, 152, 152, 153, 154, 156, 157, 158, 160, 163, 167, 176, 180, 188, 190, 191, 192, 194, 200, 202, 203, 204, 205, 212, 213, 214, 216, 218, 220, 221, 223, 248, 263, 272, 273, 278, 291, 322, 323, 335, 358, 359, 363, 364, 369, 370, 378, 384, 385, 386, 388, 389, 400, 409, 410, 412, 414, 427.

In the opinion of the Commissioner: 2, 4, 22, 25, 40, 42, 53, 56, 58, 59, 61, 65, 67, 68, 71, 84, 93, 97, 99, 100, 106, 107, 111, 112, 113, 117, 118, 122, 127, 128, 148, 151, 154, 155, 156, 157, 158, 159, 160, 156, 167, 188, 196, 197, 214, 215, 216, 218, 219, 223, 226, 234, 247, 257, 263, 289, 293, 381, 387, 390, 410.

As the Commissioner determines: 6, 22, 45, 60, 68, 72, 74, 79, 83, 85, 90, 93, 94, 98, 107, 113, 114, 117, 151, 155, 167, 188, 191, 197, 199, 200, 202, 203, 214, 216, 219, 234, 241, 337, 343, 344, 356, 362, 390, 393.

The Commissioner may, in his discretion, allow/determine: 6, 30, 33, 45, 59, 70, 74, 76, 83, 85, 89, 92, 93, 94, 95, 113, 114, 115, 117, 119, 125, 126, 127, 128, 130, 132, 133, 138, 150, 156, 157, 158, 172, 176, 179, 180, 181, 191, 213, 214, 216, 219, 344, 356, 359, 381, 383, 386, 388, 410, 411, 427.

As the Commissioner thinks/considers reasonable: 12, 68, 89, 97, 118, 127, 128, 151, 152, 158, 159, 166, 190, 214, 389.

Where the Commissioner thinks just and reasonable: 3, 4, 92, 106, 238, 245.

As the Commissioner deems just and reasonable: 61.

As the Commissioner thinks just: 83, 108.

As the Commissioner thinks just and equitable: 142, 335.

As the Commissioner considers fair and equitable: 53, 214.

As/where the Commissioner considers it equitable: 65, 69, 86, 164, 200, 216, 257, 350, 361, 383, 410, 413.

As the Commissioner thinks/considers fair and reasonable: 22, 70.

If/as the Commissioner thinks fit: 12, 17, 55, 69, 77, 113, 117, 129, 130, 136, 139, 142, 143, 144, 156, 201, 203, 214, 216, 314, 315, 320, 344, 350, 351, 353, 354, 366, 374, 383, 384, 391, 403, 427.

As the Commissioner thinks/considers necessary: 11, 45, 53, 67, 125, 272, 295, 384,

As the Commissioner deems necessary: 105.

As the Commissioner requires: 14, 82, 89, 93, 95, 344, 359, 431, 432.

As the Commissioner considers proper: 99, 118, 286.

As the Commissioner considers appropriate: 99, 156.

At the option of the Commissioner: 358.

It it appears to the Commissioner that: 219, 381, 383.

If the Commissioner has reason to believe: 362, 387, 384.

different approaches at the times when the various sections were brought into the Act. This is, of course, no justification. The result must be confusing even for the Commissioner.

Another notable feature of the Commissioner's discretions is their great abundance. The table on page 127 gives an indication of both the variety and frequency of the Commissioner's discretions in the Income Tax Act. Many of the discretions listed, appear several times in the subsections of the sections noted, giving even more discretions to the Commissioner.

It is not the purpose of this article to review the merits or desirability of the Commissioner's statutory discretions. It is unrealistic to suggest that the Commissioner should not be given discretions at all, although their frequency and inconsistency is difficult to justify. However, the ability of the courts to supervise and control the Commissioner's powers is vital. It is therefore necessary to consider whether the objection procedures provide an effective means of control.

II. THE STATUTORY OBJECTION PROCEDURES

A. *Jurisdiction of the High Court*

Part III of the Income Tax Act 1976 lays down the following steps for objecting to an assessment.

- (a) The taxpayer must deliver or post to the Commissioner a written notice of objection within the time specified on the assessment.⁹ The notice must state shortly the grounds of his objection. The Commissioner must consider all objections and may allow the objections wholly or in part, or decline them.¹⁰
- (b) If the taxpayer's objection is declined or allowed in part only, he may require by notice in writing that the objection be heard by the Taxation Review Authority¹¹ or the High Court.¹²

The Taxation Review Authority was established by the Inland Revenue Department Act 1974 and replaced the Taxation Board of Review. It is a judicial authority and a Commission of Enquiry. The powers conferred upon it by the Inland Revenue Department Act 1974 and the Income Tax Act 1976 are also conferred upon the High Court for the purpose of hearing and determining objections. However, the inherent powers of the court, which are not shared by the Review Authority, mean that the High Court has in practice wider powers.

An example of the difference in the powers exercisable by the two bodies is demonstrated by *Jarman v. C.I.R.*¹³ In this case Roper J. held that a Taxation

9 See s. 30(1). The time specified must be at least 14 days. In practice it is usually one month.

10 See s. 31(1).

11 See s. 31(2).

12 See s. 33(1).

13 (1980) 11 A.T.R. 18.

Review Authority does not have jurisdiction to order the Commissioner to supply further particulars of the basis of his assessment to an objector. In discretion cases this power can be vital, in order to allow the objector to prepare his case thoroughly. This is an important reason why the High Court will often provide a more suitable forum for hearing objections to a discretionary determination.¹⁴

A taxpayer who chooses to have his objection heard in the High Court must satisfy either subsection (2) or subsections (3) and (4) of section 33. They provide:

- (2) Where an objection relates to a question of law only, —
 - (a) The objector may, within 2 months . . . , the Commissioner to state a case for the opinion of the High Court
- (3) Where an objection relates to a question of fact (whether or not it also relates to a question of law), —
 - (a) The objector may, within 2 months . . . , give notice in writing to the Commissioner that he desires the Commissioner to state a case for the opinion of the High Court
- (4) Where any notice is given by the objector or the Commissioner under subsection (3) of this section, the objection shall be referred directly to the High Court if both the Commissioner and the objector consent thereto, or with the leave of that Court granted on the application of the objector or the Commissioner, as the case may be, upon the ground that in the opinion of the Court, by reason of the amount of tax in dispute between the parties or of the general or public importance of the matter or of its extraordinary difficulty or for any other reason, it is desirable that the objection be heard and determined by the High Court instead of by a Taxation Review Authority.

The Commissioner has a discretion in either case to refer an objection directly to the High Court.

The wording of these sections seems to contemplate that there are only two categories of questions to which objections can relate — fact and law.¹⁵ Accordingly, it must be determined whether an exercise of a statutory discretion fits within these categories.

B. Discretion: Fact, Law or Neither?

The categorisation of the various statutory discretions conferred upon the Commissioner is not easy. Factors such as the nature of the challenge mounted by the taxpayer and the type of discretion exercised must be taken into account. For example, a challenge to the way in which the discretion was exercised, on the basis that it was exercised “capriciously or fancifully, or upon irrelevant or

14 This must be balanced against the advantages of cost and confidentiality offered by the Review Authority. This article deals only with objections heard in the High Court. Except where expressly noted however, all comments on jurisdiction are equally applicable to proceedings before the Review Authority.

15 Cf. s. 31(2), which provides for objections to be heard by the Review Authority, as follows: “If an objection is not wholly allowed by the Commissioner, the objector may . . . require that the objection be heard and determined by a Taxation Review Authority, and in that event the objection shall be heard and determined by an Authority” No categories are mentioned.

inadmissible grounds"¹⁶ is an attack upon the validity or procedural correctness¹⁷ of the exercise of discretion. This would be examinable as a question of law.¹⁸ Thus if the Commissioner disallowed a claim for depreciation of premises which could not be made good by repair because he considered, but could not prove, that the taxpayer was avoiding tax, the taxpayer could challenge the validity of this exercise of discretion. He could argue that the Commissioner's refusal to allow any depreciation was based on an improper purpose and was therefore invalid. In other words, the Commissioner had erred in law in applying the statutory discretion to the facts and thus the objection should be heard in the High Court as of right.

On the other hand if, in the same example, the Commissioner allowed 5% depreciation and the taxpayer considered 10% to be a more reasonable amount, his objection would relate to the correctness of the Commissioner's exercise of discretion. There would not necessarily be any argument that he had not exercised his discretion according to law, but rather that he had come to the wrong conclusion. It is really a question of degree. If the Commissioner's action or inaction is so extreme that it could be attacked as arbitrary or capricious, then it can be seen as improperly exercised. Where it is possible to regard his action as that of a reasonable man acting according to law, then the objection must simply relate to the correctness of his opinion.¹⁹ This may be classed as a question of fact.

The courts are often reluctant to review the merits of discretionary decisions,²⁰ and the classification of an appeal from a discretion as a question of law or fact may depend on whether the judge wishes to intervene.²¹ If the objection is characterised as relating to a question of law, a court will generally be readier to intervene than where it is characterised as a question of fact or discretion.

16 *Australasian Scale Co. v. Commissioner of Taxes* (1935) 53 C.L.R. 534, 555 per Rich and Dixon JJ.; followed in *Australasian Jam Co. Pty. Ltd. v. F.C.T.* (1953) 88 C.L.R. 23, 37, per Fullagar J.; adopted by Wilson J. in *Sleeman v. C.I.R.* [1965] N.Z.L.R. 647, 651.

17 Validity may not in fact be in issue. The error may not always be jurisdictional and thus cause the determination to be found invalid. See e.g. *Yukich v. Sinclair* [1961] N.Z.L.R. 752.

18 See *Sleeman v. C.I.R.* [1965] N.Z.L.R. 647, an appeal under s. 35 Land and Income Tax Act 1954, which allowed appeals on questions of law only. Wilson J. adopted the test of Fullagar J. in *Australasian Jam Co. Pty Ltd. v. F.C.T.* (1953) 88 C.L.R. 23 and held that the court was entitled to consider whether '... the opinion was not in fact entertained, or that it was based upon a misconception of the meaning of the [words in the section] or that it was arrived at 'capriciously, or fancifully, or upon irrelevant or inadmissible grounds'', at 651.

19 This distinction can be seen in *C. of T. (Qld) v. Ford Motor Co.* (1942) 66 C.L.R. 261 where the High Court of Australia considered that it was impossible to regard the deduction allowed by the Commissioner as representing what any reasonable person could regard as a reasonable deduction and thus he had no authority in law for forming such an opinion, which was set aside as invalid.

20 See Keith, "Appeals from Administrative Tribunals" (1968) 5 V.U.W.L.R. 123, 135.

21 See de Smith, *Judicial Review of Administrative Action* (3rd ed., Stevens, London, 1973) 112-113.

Thus the judge may characterise the exercise of discretion as the step of applying the law to the facts, and on that basis assailable as a question of law.²² This approach is particularly appropriate where there is no dispute as to the facts, but the objector simply wants the court to reconsider the way in which the particular discretion was exercised in relation to those facts.

For example, a taxpayer who is disputing the depreciation allowance determined by the Commissioner under section 113(2) will not necessarily be disputing the facts upon which the determination was made, but rather the Commissioner's conclusion in relation to those facts. In other words, he will be objecting to the amount that the Commissioner "thinks fit" in his case.

It is difficult to summarise the position as to the jurisdiction of the High Court in any precise way. Depending on the circumstances, there are varying approaches which can be adopted and the courts appear to be intent on keeping their powers as flexible and therefore as indefinable as possible. Also, it seems that the Legislature itself has no clear understanding of the categories of fact and law, or where discretion fits into these categories, if at all.

The Minister of Finance, the Hon. A. H. Nordmeyer, in introducing the second reading of the Inland Revenue Department Amendment Bill of 1960, which established the present objection procedures, stated:²³

There is, in general, no right of objection or appeal against various decisions which the Commissioner makes, despite that (sic) fact that such decisions may have a bearing on the amount of tax payable. The principal purpose of establishing a Board of Review in New Zealand is to give the taxpayer a right of objection against these discretionary determinations of the Commissioner.

Later in his speech, the Minister referred to the court's powers to hear an objection in terms which make it clear that the Government thought that such challenges to the exercise of discretion would be questions of fact and thus within the scope of section 33(3).²⁴

To sum up, questions of law may be taken to the higher Court, and *questions of fact, including objections to decisions within the Commissioner's discretion*, will almost entirely be determined by the board, but in special cases may be referred direct to the Supreme Court.²⁵

From this statement it seems that the Minister considered that an objection to a discretionary determination would come within the "question of fact" category, and more importantly that such objections could be referred directly to the High Court.²⁶

As previously discussed, an exercise of discretion is quite likely to be regarded as involving a question of law, rather than one of fact. Whichever category it is considered to fall within, there seems little justification, in the context of the

22 Keith, *supra* n. 22, develops this view in particular at 134-153.

23 N.Z. Parliamentary debates, Vol. 324, 1960:2295.

24 *Ibid.* 2296 (emphasis added).

25 Now known as the High Court, pursuant to s. 12 of the Judicature Amendment Act 1979.

26 The "special cases" are presumably those where the parties consent or the Court grants leave under s. 33(4).

income tax objection procedures, to hold that objections to the exercise of the Commissioner's statutory discretions would not come within the High Court's jurisdiction at all.

C. Legislative History of Section 36(i)

The legislative history of the objection procedures supports the view that the Commissioner's discretion is examinable by the court. Section 36 lists a range of matters with respect to which a taxpayer has no right of objection. Most of them relate to the exercise of discretions by various persons. The most wide-ranging of these, with regard to the Commissioner's discretionary powers, is subsection (i) of section 36. It reads:

. . . this Part of this Act shall not confer any right of objection with respect to — . . . Any matter which by any provision in section 6 or in Part II (except sections 22 and 25), Part VII (except sections 273, 278, and 283), Part VIII, Part XI (except section 361), Part XII, Part XIII, Part XIV, Part XV, or Part XVI of this Act is left to the discretion, judgment, opinion, approval, consent or determination of the Commissioner;

The predecessor of this subsection first appeared in the Land and Income Assessment Amendment Act 1912.²⁷ It was cast in a very wide form, removing from the objection procedures any question relating to the exercise of a statutory discretion by the Commissioner. It remained in this form until 1960. In the Land and Income Tax Amendment Act of that year the objection procedures were completely replaced and the Taxation Board of Review was established to hear objections.²⁸ This provision was considerably limited in its scope,²⁹ as part of the Government's plan to revise and improve taxpayers' rights of objection. It has remained substantially in this form to the present.³⁰

27 It read: The foregoing provisions as to objections and appeals shall have no application to an objection . . . to any matter which by the principal Act or this Act or any amendment thereof, is left to the discretion, judgment or determination of the Commissioner. (s. 34).

28 Prior to this, objections were heard in the Magistrates (now District) Courts.

29 It read:

Any matter which by any provision in s. 70 or in Part II, Part VII, Part VIIB, Part VIII, Part IX, Part X, or Part XI of this Act is left to the discretion, judgment, opinion, approval, consent or determination of the Commissioner. (s.35(f)).

In the Land & Income Tax Amendment Act 1962 (No. 2) s. 3, the words "(except s. 24)" were interted after "Part II". This followed *Maxwell v. C.I.R.* [1962] N.Z.L.R. 683, in which Gresson P. strongly criticised the fact that a taxpayer had no right of objection where the Commissioner altered an assessment under s. 24 (now s. 25). The learned President stated (at 697):

It is somewhat unjust that an individual be so wholly at the mercy of the Commissioner's opinion. Although it may be assumed that the Commissioner would only form his opinion bona fide and with a due sense of responsibility, nevertheless that his opinion should be rendered unchallengeable in any way upon so important and serious a question may well be regarded as contravening the basic principles of justice.

In the Income Tax Amendment Act 1965 s. 12(2) the section was again amended to read ". . . Part II (except sections 20 & 24)." This allowed objections to the various exercises of discretion which could be made by the Commissioner with respect to income tax payable by businesses controlled by non-residents.

During the second reading debate on the Inland Revenue Department Bill 1960 the then Minister of Finance, the Hon. A. H. Nordmeyer, stated:³¹

The principal purpose of establishing a Board of Review in New Zealand is to give the taxpayer a right of objection against . . . discretionary determinations of the commissioner [I]t is not intended to give a right of appeal in every case, and I shall set out some of the administrative matters which are appropriate matters, I think, for the determination of the commissioner himself

It appears from this statement that section 36(i) was considered to remove "purely administrative decisions" which do not "affect the quantum of tax payable" from the objection procedures. Certainly Part IV, which is the main substantive Part dealing with liability to income tax, is not covered by section 36(i). However, it does not follow that the Parts which are excluded from objection do not have any effect on the amount of a taxpayer's assessment. For example, Part XIV deals with refunds and relief from tax, and gives the Commissioner a discretionary power to refund tax paid in excess, Part XII deals with provisional tax and Part VIII with relief from double taxation, all of which can affect liability to tax.

Part II of the Act is also important, as it deals with returns and assessments. The powers the Commissioner can exercise in this area, such as the discretion to amend any assessment within four years of its issue, can have serious consequences for the taxpayer concerned.³²

Section 36(i) assumes much greater importance when looked at in conjunction with section 27.³³ The result of these provisions taken together is to remove all rights of a taxpayer to challenge those exercises of discretion included in section

30 In 1976 s. 35(f) was amalgamated with relevant provisions which had previously appeared in the Income Tax Assessment Act 1957. Careless drafting resulted in the following, very confusing, provision:

(i) Any matter which by any provision in the definition of the term "casual agricultural employee" in section 2 or in section 6 or in Part II (except sections 22 and 25), Part VII (except sections 273, 278, and 283), Part VIII, Part XI (except section 361), Part XII, Part XIII, Part XIV, Part XV, or Part XVI of this Act is left to the discretion, judgment, opinion, approval, consent, or determination of the Commissioner. The confusion was removed for s. 3(2) of the Income Tax Amendment Act 1980, which omitted the words "in the definition of the term 'casual agricultural employee' in section 2 or".

31 N.Z. Parliamentary debates, Vol. 324, 1960:2295.

32 See s. 23 of the 1976 Act. In *Todd v. C.I.R.* (1971) 2 A.T.R. 427, Haslam J. found that the series of reassessments of Europa Oil (NZ) Ltd., made by the Commissioner pursuant to this power, caused a significant loss in the value of the share in Todd Investments Ltd., which owned 96% of the ordinary shares of Europa Oil. This is a striking example of the serious effects which can result from the exercise of such discretions.

33 Section 27 reads:

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

36(i). The reason is that section 27 prohibits any challenge to the correctness of any assessment other than by way of objection. In the vast majority of situations the exercise of discretion challenged by the taxpayer will be reflected in his assessment. In other words, he will in fact be objecting to the amount of tax assessed, and thus challenging the correctness of the assessment. If such challenge can only be made upon objection, and the discretion in issue is one which is excluded by section 36(i), then it seems that no challenge at all can be made.³⁴ However, if the discretion is not excluded by section 36(i) the logical conclusion is that it must be challengeable under the objection procedures, (and hence a question of law of fact, or both); otherwise section 36(i) would be otiose.

D. Summary

Where a taxpayer wishes to challenge the way in which the Commissioner has exercised a statutory discretion, on the basis that he has exercised it improperly or for the wrong reasons, the court is likely to see the challenge as a question of law.³⁵ Where a taxpayer is challenging the conclusion or result of the Commissioner's exercise of discretion, rather than pointing to some irregularity in the method of its exercise, the type of discretion may be relevant. Where there are statutory conditions and criteria to guide the exercise of the discretion, the court may consider the question to be one of law.³⁶ The less fettered and controlled the discretion, the less likely the court will want to adjudicate upon the correctness of its exercise and thus the more likely the issue will be seen as either a question of fact, or outside the law/fact categorisation altogether.

Nevertheless, the fact that the powers exercisable by the court upon hearing an objection are extremely wide, and are identical to those given to the Taxation Review Authority, suggests that the court is able to hear objections relating to the exercise of statutory discretions. The Act clearly contemplates that discretionary determinations, apart from those expressly excluded, are challengeable through the objection procedures.³⁷ Certainly where a question of fact or law is in dispute, the whole objection would be open to review by the court.³⁸

Although the categories are not apt, it is concluded that in most cases an exercise of discretion pursuant to any provision not excluded by section 36(i) will be within the court's jurisdiction, though consent or leave of the court may be needed, under section 33(3).

34 But quare whether judicial review of the validity of the exercise of the discretion would be granted, despite the privative clause in s. 27. It is submitted that the courts would be reluctant to accept a lack of jurisdiction in such a situation, where no other remedy exists.

35 An invalid exercise of a discretion by the Commissioner may result in there being no "assessment," and thus no basis for objection. In this situation the Court will probably grant judicial review, under its inherent supervisory jurisdiction.

36 As the exercise of discretion really involved applying the law to the facts.

37 Otherwise s. 36(i) and (j) are redundant.

38 This is the position in Australia under s. 196 Income Tax Assessment Act. See *Ruhamah Property Co. Ltd. v. F.C.T.* (1928) 41 C.L.R. 148, 157.

E. Statutory Powers of the High Court

Section 33(1) of the Income Tax Act 1976 sets out the powers that the High Court may exercise on hearing an objection. It reads:

On hearing any case stated under this section, the High Court may—

(a) Confirm or cancel or vary the assessment, or reduce the amount thereof, or increase the amount thereof to the extent to which the Commissioner was empowered to make an assessment of an increased amount at the time he made the assessment to which the objection relates,

(b) Make any assessment which the Commissioner was empowered to make at the time he made the assessment to which the objection relates, or direct the Commissioner to make such an assessment,

These powers are identical to those given to the Taxation Review Authority.³⁹ Their effect is to give the court very wide powers, and these are reinforced by section 34(2) of the Inland Revenue Department Act 1974:

For the purpose of hearing and determining any objection, an Authority shall have all the powers, duties, functions, and discretions of the Commissioner in making the determination.

This provision is of particular importance in ascertaining the powers that the court will, or can exercise in determining an objection. Section 33(10) of the Income Tax Act 1976 provides that it shall apply to the High Court when determining objections as if the reference to the Authority were a reference to the court. Accordingly, the court is given all of the functions which were exercisable by the Commissioner in making the original assessment. Where the exercise of discretion by the Commissioner is in issue, does this mean that the court is given the power to exercise that discretion in the place of the Commissioner?

1. *Legarth's case*

The effect of section 34(2) of the Inland Revenue Department Act 1974 was considered by the Supreme Court and the Court of Appeal in *Legarth v. C.I.R.*⁴⁰

Legarth was a case on appeal stated by the Taxation Board of Review pursuant to section 30 of the Inland Revenue Department Amendment Act 1960. The Court was required to determine the power of the Board of Review on the hearing of an objection to the Commissioner's opinion formed under what is now section 25(2) of the Income Tax Act 1976, concerning fraudulently or wilfully misleading returns. It was clear from the written decision of the Board that it had not endeavoured to form its own opinion, but had confined its approach to that of an appellate court hearing an appeal against an exercise of discretion. In the High Court, Perry J. stated:⁴¹

I think it is clear . . . that the Board has regarded its powers as so limited, that its task is to inquire whether there were no grounds or insufficient grounds but not to form an opinion itself as to whether the return was wilfully misleading.

³⁹ Section 32(1) Income Tax Act 1976.

⁴⁰ [1967] N.Z.L.R. 312.

⁴¹ *Ibid.* 318.

His Honour then considered the words of section 18(2)⁴² which, he found, created a fundamental difference from the powers of an appellate court, and were designed to give the Board the same powers as the Commissioner.⁴³

The learned judge went on to discuss Australian authorities because of the similarity between the powers of the Australian Boards of Review and the New Zealand Board. His Honour concluded:⁴⁴

The words of s. 18(2) and the persuasive effect of these decisions on comparable legislation all combine to form my view that the Board has acted on a wrong or too narrow view of its powers; that it has determined the objection on the basis that its powers are restricted to an inquiry as to whether there is no evidence or insufficient evidence upon which the Commissioner could form his opinion instead of approaching the matter *de novo* on the evidence placed before it with the ability to substitute its own opinion for that of the Commissioner under the provisions of s. 18(2) of the Inland Revenue Department Amendment Act 1960.

Perry J. then rejected the narrow approach taken by the Board of Review on the basis that the statutory provision gave it the power to enter upon a *de novo* consideration of the objection, and therefore to do any less was an unnecessary restriction on that power.

The Commissioner appealed from this judgment to the Court of Appeal. The three members of the court gave individual judgments in which they emphasised that the Board of Review, in hearing an objection, was not an appellate body and its jurisdiction was not so confined. The members of the court agreed with Perry J. that the Board had misinterpreted its functions as it had regarded its task as concerned merely with the validity, rather than the correctness, of the Commissioner's opinion. Nevertheless they did emphasise that the Board could not approach the issue on exactly the same basis as the Commissioner had, as section 20⁴⁵ imposed the burden of proof in the objection upon the objector. Woodhouse J. stated:⁴⁶

. . . [W]hile the Board is free to substitute its opinion for that of the Commissioner, should the facts require it, the issue cannot be approached on the basis that the Commissioner's earlier finding (expressed in the form of the statutory opinion) can be disregarded. The taxpayer enters the contest, so to speak, from behind scratch, and the Board must pay due regard to the effect of s. 20.

The conclusion of all of the members of the Court of Appeal was that the Board could substitute its own opinion, or discretion, for that of the Commissioner. This means that the Board must re-determine the question in issue in an objection, although the onus of proof is placed on the taxpayer. This onus does not remove the Board's duty to come to its own determination of the issue.⁴⁷

42 Now s. 34(2) Inland Revenue Dept. Act 1974.

43 [1967] N.Z.L.R. 312, 316.

44 Ibid. 326.

45 Now s. 36 Inland Revenue Dept. Act 1974.

46 [1969] N.Z.L.R. 137, 148.

47 Ibid. 146 per Turner J

2. Effect of Legarth

Legarth's case concerned only the powers and duties of the Taxation Board of Review.⁴⁸ Its implications are much wider, however, because section 33(10) of the Income Tax Act 1976 provides that whenever an objection is taken directly to the High Court, that Court has all of the powers, duties, functions and discretions given to the Authority under section 34(2) Inland Revenue Department Act 1974. Thus the statements referred to from *Legarth's* case are of equal importance and relevance to the jurisdiction of the High Court, when hearing an objection at first instance. This means that the High Court must also substitute its own view, discretion or opinion for that of the Commissioner where, upon re-determining the issue, it comes to a different conclusion. It may thus be of vital importance to an objector whose objection relates to an exercise of discretion by the Commissioner to have his case heard at first instance in the High Court, as this is the only situation in which this Court has the power to look into the correctness⁴⁹ of his exercise of discretion and substitute its own.

III. OBTAINING INFORMATION FROM THE COMMISSIONER

Any taxpayer who desires to challenge an assessment made by the Commissioner will be at a serious disadvantage unless he is able to ascertain the facts and reasons on which that assessment is based.⁵⁰ If the objection of the taxpayer relates to the exercise of a discretion or the formation of an opinion by the Commissioner this is even more important as it is clear that he will not ordinarily be able to succeed unless the Commissioner discloses the steps of, and basis for, his reasoning.

None of the provisions of the income tax statutes require the Commissioner to disclose to the taxpayer the grounds of assessment. Nevertheless, the courts have repeatedly emphasised that the taxpayer must not be unfairly disadvantaged.⁵¹ In *C.I.R. v. Walker* North J. stated:⁵²

... a taxpayer is surely entitled to know precisely the ground or grounds upon which the assessment is based. This is particularly important in view of the fact that on the hearing and determination of all objections to assessments of income tax, the burden of proof lies on the objector.

Earlier in *Louisson v. C. of T.* Blair J. stated:⁵³

The Commissioner is not necessarily confined to the points that he raises, and, in any event, there is in the case of a general claim that the assessment is correct. But it must be remembered that the statement of the facts in any given case always has

48 Now the Taxation Review Authority.

49 That is, the merits of the conclusion rather than simply the way in which it was reached.

50 This is highlighted by the fact that in objection proceedings the taxpayer bears the burden of proof — s. 36 Inland Revenue Dept. Act 1974.

51 See e.g. *Louisson v. C. of T.* [1943] N.Z.L.R. 1, 11 per Blair J.; *Europa Oil (NZ) Ltd. v. C.I.R. (No. 2)* (C.A.) (1974) 4 A.T.R. 455, 488 per McCarthy P.; *C.I.R. v. Walker* (1962) 9 A.I.T.R. 18, 26 per North J.; *James v. C.I.R.* unreported oral judgment of Cooke J., delivered 6 February 1973 at Wellington.

52 (1962) 9 A.I.T.R. 18, 26(C.A.).

53 [1943] N.Z.L.R. 1, 11.



reference to the points in difference as raised; and, if it be intended to rely upon some point not mentioned or fairly to be anticipated, then, in my view, some indication should be given to the taxpayer in the case of all the points upon which the assessment is claimed to be good.

These two quotations identify two different problems which arise with respect to obtaining information from the Commissioner. The first is whether a taxpayer can require the Commissioner to disclose the grounds upon which he exercised the discretion which is under attack and the material he may have in support. The second is whether the Commissioner is entitled to support his case on objection on undisclosed grounds. In other words, must the Commissioner inform the taxpayer of all of the sections of the Act with which he seeks to justify his assessment, or can he rely upon sections not referred to in his case stated?⁵⁴

In order to obtain information from the Commissioner as to the grounds upon which he exercised the discretion under challenge, the taxpayer must seek discovery of documents and/or better particulars.

A. Discovery Against the Crown

Under section 27 of the Crown Proceedings Act 1950 the Crown may be required by the court to make discovery of documents in any civil proceedings to which it is a party, if it could be required to do so if it were a private person of full age and capacity. An order for discovery may not be issued against the Crown as of right, but may only be made pursuant to the discretion given to the court under R. 161 of the Code of Civil Procedure.⁵⁵

Discovery can be obtained for documents which not only would be evidence upon any issue in question, but also for those documents reasonably believed to contain information which may, either directly or indirectly, enable the party requiring the affidavit either to advance his own case, or to damage the case of his adversary.⁵⁶ In principle, there would seem to be little difficulty in making out a case for discovery against the Commissioner in objection proceedings which concern the exercise of discretion.

One obstacle to discovery which can arise is public interest or crown privilege. It is a general rule of law that any document may be withheld on the ground that its disclosure would be injurious to the public interest.⁵⁷ The claim to crown privilege must be made by the Minister in charge of the department concerned or by the permanent head of the department, as long as the Minister has seen the documents and made the decision to object. The court is not bound by a

54 This second issue is discussed in Part IV, *infra*.

55 See *Arataki Honey Ltd. v. Minister of Agriculture and Fisheries* [1979] 2 N.Z.L.R. 311.

56 *Compagnie Financiere v. Peruvian Guano Co.* (1882) 11 Q.B.D. 55, 63.

57 Crown Proceedings Act 1950 s. 27(1)(3) and *Konia v. Morley* [1976] 1 N.Z.L.R. 455 (CA) (*Conway v. Rimmer* [1968] A.C. 910 applied in N.Z.). See also *D v. N.S.P.C.C.* [1977] 1 All E.R. 589. But see now *Sankey v. Whillam* (1978) 21 A.L.R. 505 where the High Court of Australia held there was no absolute right of exemption from disclosure.

ministerial objection to discovery but may overrule such objection if it thinks it right to do so.⁵⁸

There are classes of documents which should never be disclosed, such as when the safety of the state, or diplomatic relations with another state, would be imperilled. It is unlikely that the court would even require to inspect such documents.⁵⁹ Income tax returns and associated documents would not appear to be in a class which can be withheld on the basis of Crown privilege.⁶⁰ This means that in certain cases the specific contents of the documents may be privileged but the court will not necessarily accept the Minister's view that this is so. The recent trend in the New Zealand cases regarding Crown privilege is certainly not to accept the Minister's word without more.⁶¹ Not only have the courts asked to inspect the documents concerned, but often they have rejected the claim to privilege. It is submitted that it would be rare for an objection to disclosure of documents relating to income tax assessments, on the grounds of crown privilege, to succeed in objection proceedings.⁶²

Another potential obstacle to obtaining discovery against the Commissioner is contained in sections 13, 14 and 15 of the Inland Revenue Department Act 1974. They are "secrecy" provisions which require that all officers of the Department shall swear an oath or declaration of secrecy in relation to all matters which come to their knowledge regarding, (inter alia), the Inland Revenue Acts. Section 13(3) is of particular relevance. It reads in part:

. . . it is hereby declared that no officer of the Department shall be required to produce in any Court or tribunal any book or document or to divulge or communicate to any Court or tribunal any matter or thing coming under his notice in the performance of his duties as an officer of the Department, except when it is necessary to do so for the purpose of—

(a) carrying into effect

(i) The Inland Revenue Acts, including all Acts, whether repealed or not, at any time administered by the Department . . .

58 *Konia v. Morley* supra n. 57.

59 *Conway v. Rimmer*, supra; *Rogers v. Home Secretary* [1973] A.C. 388; *Konia v. Morley*, supra, n.57.

60 See *M.N.R. v. Huron Steel Fabricators Ltd.* [1973] C.T.C. 422, where a Canadian Court of Appeal rejected the Minister's claim that income tax returns were in a class immune from discovery. Also see R.A. Green "The Confidentiality of Income Tax Returns" (1972) 20 Can. Tax J. 568, for a discussion of the Canadian position. It is submitted that the position, in relation to crown privilege at least, is the same in New Zealand.

61 See *Konia v. Morley* supra n.57; *Tipene v. Apperley* [1978] 1 N.Z.L.R. 761. See a recent discussion by J.S. Kós "Crown Privilege — Recent Developments in New Zealand" (1979) 10 V.U.W.L.R. 115.

62 Difficulties could arise where the information relied on by the Commissioner is contained in a third party's tax return. However, in *Mobil Oil Aust. Pty Ltd. v. F.C.T.* (1963) 113 C.L.R. 475 the High Court held that information from third parties' returns could be divulged by the Commissioner in objection proceedings, though such information could be excluded at the discretion of the Court or Board. In *M.N.R. v. Huron Steel* [1973] C.T.C. 422, discovery of a third party's tax return was upheld, despite a claim for immunity on the ground of public interest, because this was outweighed by the strong public interest in the proper administration of justice which would be served by their production.

Clearly disclosure of documents and information cannot be required of the Commissioner or any officer of the Department in any court proceedings except those in which the production or disclosure is made for the purpose of "carrying into effect the Inland Revenue Acts."⁶³ Objection proceedings would not be affected by this exclusion, however, as the body hearing the objection, whether it be the Review Authority or the High Court, is vested with the "powers, duties, functions and discretions of the Commissioner".⁶⁴ Also, the objection proceedings are themselves provided by the Inland Revenue Acts, and are presumably considered to carry such Acts into effect. They would be covered by the exemption in section 13(3)(a)(i).

B. Development of Discovery against the Commissioner in Australia

As mentioned earlier, any discussion of the courts' attitude in New Zealand to the question of discovery against the Commissioner must necessarily be hypothetical.⁶⁵ However, the Australian position provides a startling contrast. The issue of obtaining information from the Commissioner has arisen frequently, and the courts, particularly the High Court of Australia, have developed a strong line of precedent.

In *Giris Pty. Ltd. v. F.C.T.*⁶⁶ the High Court considered (inter alia), the powers of the Court to examine the exercise of a statutory discretion. In his judgment, Barwick C.J. noted that unless the Commissioner is required to disclose the factual basis of his opinion on which he exercised the discretion, the taxpayer will be unable to discharge the onus of proof cast upon him by the Act. His Honour concluded:⁶⁷

However, in my opinion, the Commissioner is under a duty in each case to form an opinion and the taxpayer is entitled to be informed of it and upon the taxpayer's request the Commissioner should inform the taxpayer of the facts he has taken into account in reaching his conclusion.

The question next arose in *F.C.T. v. Brian Hatch Timber Co. (Sales) Pty. Ltd.*⁶⁸ In that case the taxpayer was challenging the validity of the decision of the Commissioner made pursuant to a statutory provision which required his satisfaction as to the existence of particular facts. There were two difficulties facing the taxpayer. The first was the jurisdiction of the court, as it could only consider the 'validity' of the exercise of the discretion, and not its 'correctness'. Consideration of the validity of the decision was virtually impossible without a consideration of the material before the Commissioner when he formed his opinion. This created

63 Thus discovery cannot be demanded in proceedings such as criminal cases, see *R. v. Saint-Merat* [1958] N.Z.L.R. 1147 or administration actions — *Honeychurch v. Honeychurch* [1943] S.A.S.R. 31.

64 See s. 34(2) Inland Revenue Department Act 1974 and s. 33(10) Income Tax Act 1976.

65 The only comments made in New Zealand courts in favour of discovery against the Commissioner in principle, have been obiter dicta.

66 (1969) 1 A.T.R. 3.

67 Ibid. 7.

68 (1972) 2 A.T.R. 658.

the second difficulty; that of access to this information. The taxpayer did not attempt to find out from the Commissioner what material he had before him or what his reasons were for failing to be satisfied. It appears that this was because in the past such enquiries had not been answered and so the taxpayer's solicitors considered it to be a waste of time.⁶⁹

In the High Court the taxpayer lost, and the Commissioner's assessment was upheld. All of the judgments refer to the fact that it was impossible to say what evidence the Commissioner may have had before him, as he did not adduce any evidence before the Court.⁷⁰ All of the members of the court saw disclosure by the Commissioner as vital, and supported Barwick C.J.'s suggestion in *Giris* that the Commissioner should inform the taxpayer of all of the facts taken into account in reaching a decision.⁷¹ Because the taxpayer did not even seek that information, it lost.

In *Krew v. F.C.T.*,⁷² in the course of the hearing before Walsh J., a subpoena was issued on behalf of the taxpayer requiring the Commissioner to produce the documents on which his opinion had been based, or which led to or contributed to the formation of the opinion at issue in the objection before the court. The Commissioner objected to the production of the documents on the grounds that:⁷³

. . . in the interests of the proper functioning of the Taxation Department and in the interests of due observance by its officers of their obligations of secrecy and in the interests of aiding the obtaining of information from third parties, that is to say, in the public interest, [the] documents should be protected from production.

Walsh J. held that the court has the power to inspect the documents for which privilege is claimed in order to determine whether:⁷⁴

. . . the production of them may have such an important bearing upon the ultimate decision [in the case] that this ought to be regarded as outweighing in this case the public interest which would require that they ought not to be produced except for compelling reasons.

This conclusion is in accord with the view expressed earlier, that documents relating to income tax objections will not generally come within a class automatically excluded from discovery on the basis of crown privilege or public interest. Their exclusion must be justified by their particular contents and can be determined by the court, weighing the interests considered by Walsh J.

69 This view is put forward by E.P. Kennon "Disclosure by the Commissioner (1972) 1 Aust. Tax Rev. 170, 172; also A.J. Myers, 'Discovery of Documents' (1973) 2 Aust. Tax Rev. 235.

70 (1972) 2 A.T.R. 658, 659 per Barwick C.J.; 663 per Menzies J.; 669 per Owen J. Windeyer J. agreed generally with Owen J.

71 See *ibid.* 669 per Owen J. This case has given rise to speculation that such disclosure may now be required as part of the rules of natural justice.

72 (1971) 2 A.T.R. 230.

73 *Ibid.* 232.

74 *Idem.* After reading the documents Walsh J. ordered their production. This case was followed in *L'Estrange v. F.C.T.* [1973] A.T.C. 4061 and *Master Builders Ltd. v. F.C.T.* (1974) 4 A.T.R. 349.

The next important development was *Tomlinson v. F.C.T.*⁷⁵ which concerned an application for orders of discovery against the Commissioner in connection with the taxpayer's appeal against a default assessment. Jeffrey J. discussed the previous cases and drew a distinction between the situation where the objection relates to assessments made pursuant to the formation of an opinion by the Commissioner, and assessments made on a factual basis, without the Commissioner necessarily forming an opinion or being required to form any opinion as a condition precedent to making the assessment.⁷⁶ In the former situation, his Honour considered that it was appropriate for the court to order discovery of the documents upon which the Commissioner's opinion was based.

All of the preceding cases were considered in a recent High Court decision, *Bailey v. F.C.T.*⁷⁷ In that case the taxpayers sought particulars of why the Commissioner had applied section 260 of the Income Tax Assessment Act,⁷⁸ together with discovery of the documents relating to the assessment. The Commissioner adopted the reasoning in *Tomlinson's* case⁷⁹ and argued that particulars could only be obtained where the assessment was made under a section which made it dependent on his opinion, or on his being "satisfied" as to some matter. It was submitted that section 260 was a self-operating provision, not dependent on the opinion of the Commissioner. All five judges of the High Court rejected this approach. Aickin J. referred to *Tomlinson* and decided that the distinction made in that case was without foundation.⁸⁰

All of the judgments give a strong indication that disclosure by the Commissioner of particulars of the basis of his assessment and the documents relating thereto will be required, in most cases, just as they would be from any other litigant. This point was forcefully made in the leading judgment, delivered by Aickin J.:⁸¹

There is nothing in the policy of the Act nor in general considerations of policy to require that the Commissioner should not inform the appellant prior to the commencement of the hearing of those details so that the case may proceed in an orderly and comprehensible manner. It is not in the interests of the proper administration of justice that, when the matter comes before the court, the appellant should have to speculate about, and adduce evidence to negate, every possible kind of agreement or arrangement and avoidance which the imagination of his advisers can conjure up.

C. Conclusion

As a result of the development relating to disclosure by the Commissioner in Australia, culminating in *Bailey's* case,⁸² it can be seen that in almost every case

75 (1974) 5 A.T.R. 49.

76 To demonstrate this distinction his Honour contrasts s. 170(2)(a) (see N.Z. s. 25(2)) by which the Commissioner must form the opinion that the avoidance of tax is due to fraud and evasion, and s. 167(a) where the Commissioner may make a default assessment where any person makes default in furnishing a return.

77 (1977) 7 A.T.R. 251.

78 This section is similar in operation to s. 99 Income Tax Act 1976.

79 (1974) 5 A.T.R. 49.

80 (1977) 7 A.T.R. 251, 261.

81 *Ibid.*, 260.

82 *Supra.*

the Commissioner must, if requested, give discovery of appropriate documents and particulars of the case against the taxpayer. Certainly this has occurred at a time when a "pro-taxpayer" trend is apparent in the Australian courts.⁸³ Nevertheless there is no reason why this approach, relating to discovery, should not find favour with New Zealand courts. In *Jarman v. C.I.R.*,⁸⁴ in holding that a Taxation Review Authority has no jurisdiction to make an order for discovery against the Commissioner, Roper J. contrasted the position of the High Court and cited *Bailey's* case with approval:⁸⁵

There can be no doubt that if the taxpayer's objection to the assessment is heard by the Supreme Court or High Court in Australia, or the High Court in New Zealand, the inherent jurisdiction of those Courts can be relied on to order further particulars

...

IV. LIMITATION TO GROUNDS OF OBJECTION

A. Introduction

Section 36 of the Inland Revenue Department Act 1974 limits an objector, at the hearing of his objection, to the grounds stated in that written notice of objection. It reads:

On the hearing and determination of any objection, the objector shall be limited to the grounds stated in his objection, and, subject to the provisions of subsection (2) of section 234 of the Land and Income Tax Act 1954, the burden of proof shall be on the objector.

In view of the short period of time available to the taxpayer upon receiving his assessment to draft his notice of objection,⁸⁶ and the difficulties he may encounter in ascertaining the grounds upon which the Commissioner has based his assessment, this requirement that the taxpayer be confined to the grounds contained in his notice of objection has often caused hardship.

As mentioned previously, one of the major difficulties facing a taxpayer in drafting his grounds of objection may be in ascertaining precisely upon what basis the Commissioner has made the assessment which he wishes to dispute.⁸⁷ Although it would seem likely that the taxpayer could obtain discovery of documents and particulars of the assessment against the Commissioner, this may be of little avail. There is nothing that requires the Commissioner to give such

83 See e.g. the "Doctrine of Choice" development which has left s. 260 Income Tax Assessment Act meaningless as a weapon against tax avoidance.

84 (1980) 11 A.T.R. 18.

85 *Ibid.* 19. This is an important reason why a taxpayer may be wise to take his objection to the High Court.

86 S. 30 Income Tax Act 1976. The period allowed must not be less than 14 days and in practice is usually one month.

87 S. 29(1) Income Tax Act provides that the Commissioner shall give a notice of assessment to the taxpayer, but it does not state what information is to be given. However the proviso to the section suggests, by adverse inference, that where neither (a), (b) nor (c) applies the Commissioner must give some particulars. s. 29(2) seems to obviate this by providing that the omission to give any notice at all shall not invalidate the assessment. Quære whether an assessment given without any reasons is an "assessment" at all? See brief note in (1980) 6 N.Z. Tax Planning Report 46.

details of the assessment within the time limit, (usually a month), within which the objection must be lodged. Thus the prospective objector may well be no better off should he seek further particulars.⁸⁸

In view of the very clear words used in the section, and the potentially insurmountable difficulties this can pose for a taxpayer, (particularly where he wishes to challenge an exercise of discretion), the approach taken by the courts where a taxpayer has wished to argue outside the grounds contained in his notice of objection must be considered. The other area to be discussed is whether the Commissioner should be similarly confined to the grounds set out in his case stated.

B. The Courts' Response

Although the courts have generally accepted that a ground not expressly stated in the notice of objection must be clearly implied before the objector can rely on it,⁸⁹ they have tended to be liberal in their interpretation of grounds which are expressed. In *Glausius v. C.I.R.*⁹⁰ Wilson J. stated:

I do not think that the form of an objection should be so strictly construed as to exclude any construction which it can fairly bear, even if another construction is preferable.

Any ambiguities or doubt as to whether a ground is included will, within reason, be resolved in favour of the taxpayer.⁹¹

Nevertheless, in a number of cases the courts have declined to hear arguments from the objectors because it was considered that the grounds of objection were not sufficiently wide.⁹² This is particularly significant when considered in conjunction with the idea that liability for income tax is imposed by the statute itself, and the Commissioner merely quantifies an existing liability.⁹³ Yet, in some cases, an assessment clearly made upon a wrong basis has stood because no proper objection has been made.⁹⁴ If the liability to tax is imposed by the Act, then the court

88 Note that s. 30(2) gives the Commissioner a discretion to accept a notice of objection given out of time. The question arises as to whether a court would or could require the Commissioner to exercise this power where he has delayed in responding to an order for discovery to the extent that a taxpayer is unduly prejudiced in drafting his objection. Consider the attitude taken by Needham J. in *Re Norper Investments Pty. Ltd.* (1977) 7 A.T.R. 488, where he exercised his discretion to grant a stay of proceedings despite a clear statutory provision in the Commissioner's favour, because he considered the Commissioner's conduct to have been "oppressive" and therefore "an abuse of process".

89 *Lancaster v. C.I.R.* [1969] N.Z.L.R. 589.

90 (1970) 1 A.T.R. 588, 591.

91 *New Zealand Flax Investments v. F.C.T.* (1938) 61 C.L.R. 179, 204 and *D v. G. of T.* (1940) 2 A.I.T.R. 119, 135.

92 See e.g. *Brown v. F.C.T.* (1956) 6 A.I.T.R. 418; *Re Income Tax Acts 1924-28* (No. 2) [1933] St. R. Qd. 151; *Case 96* (1972) 17 C.T.B.R. (N.S.), in which it was held that the Commissioner could not agree to a widening of the grounds of objection.

93 See *Reckitt & Colman (N.Z.) Ltd. v. T.B.R.* [1966] N.Z.L.R. 1032, 1045 per McCarthy J., and *Europa Oil N.Z. Ltd. v. C.I.R. (No. 1)* (1969) 1 A.T.R. 151, 179.

94 E.g. *Brown v. F.C.T.* (1956) 6 A.I.T.R. 418; see also *Case 5* (1968) 4 N.Z.T.B.R. 53, which threatens this consequence. Now see *Buckley & Young Ltd. v. C.I.R.* (1978) 9 A.T.R. 106.

should be able to hear all grounds of objection in order to determine whether the Commissioner has quantified the liability of the objector correctly.⁹⁵

Perhaps it was this conflict which influenced Wild C.J. in *King v. C.I.R.*⁹⁶ In that case the objector had stated that his ground of objection related to section 111 of the Land and Income Tax Act 1954. However, at the hearing he wished to rely on section 121 of that Act. The Chief Justice agreed to this, while acknowledging that this was not allowed by the clear words of the Inland Revenue Department Act, on the basis of very tenuous distinctions.⁹⁷

Another judicial attempt to overcome the punitive effects of the Australian equivalent to section 36 has been developed by Windeyer J. in *McClelland v. F.C.T.*⁹⁸ The learned Judge stated that the power in the Court to "make such order as it thinks fit and . . . confirm, reduce, increase or vary the assessment" could allow him to direct the Commissioner to reconsider the matter regardless of the grounds contained in the objection if the taxpayer had had no real opportunity to challenge the assessment effectively. In that case the Commissioner had not replied to the taxpayer's request for information as to how his assessment was arrived at, and thus the taxpayer could not state in his objection precisely why the assessment was wrong. However, the taxpayer succeeded without Windeyer J. having to use this power. In *Mercantile Credits v. F.C.T.*⁹⁹ Windeyer J. put his theory into effect and reduced the assessments even though the ground on which he did so had not been covered by the taxpayer's objection.

This approach is potentially very far-reaching. It seems to allow a judge to substitute his own view, not only of the act or decision of the Commissioner, but of what the taxpayer should have challenged. Is this approach an effective means of curing the defects in an objector's notice of objection? There does seem to be justification for it, particularly in an objection to the exercise of discretion case, where the objector has been unable to ascertain the basis upon which the Commissioner formed his opinion. However, as yet, the approach has not been adopted by any other judge and it has been doubted by at least one commentator.¹⁰⁰ At the least it is difficult to reconcile it with the second limb of section 36, which places the burden of proof on the taxpayer. The safest course is still for the taxpayer to attempt to cover all possible grounds of objection in his written notice.

95 This is especially important in view of s. 27 which purports to exclude any argument, except on objection, which disputes the correctness of the Commissioner's assessment. C.f. s. 31 Taxes Management Act 1970 (U.K.), which provides that a notice of appeal must specify the grounds of appeal, but on the hearing of the appeal the Commissioners may allow the appellant to put forward any ground not specified in the notice and take it into consideration, if satisfied that the omission was not wilful or unreasonable.

96 (1973) 4 A.T.R. 188.

97 His Honour distinguished the case on the basis that it was not an objection, but the hearing of a question of law arising from the objection, and also because it was a test case and accordingly all arguments should be heard.

98 (1967) 10 A.I.T.R. 454.

99 (1971) 2 A.T.R. 141.

100 See Spry, "Limitation to Grounds of Objection". (1971) 1 Aust. Tax Rev. 69. See also *Sarich v. F.C.T.* (1978) 9 A.T.R. 294, where the taxpayer was limited to the grounds of his original objection despite his argument based on the "Windeyer" approach.

C. Can the Commissioner Rely on Undisclosed Grounds?

There is no statutory provision which limits the Commissioner to defending an objection on the provisions upon which he purported to have made the assessment in issue. The question has arisen in several cases, however, as to whether the Commissioner should be confined to supporting an assessment upon the provisions disclosed, because of the fact that the taxpayer will have objected in relation to those provisions and will be confined to those grounds. In *Danmark Pty. Ltd. v. F.C.T.*¹⁰¹ Latham C.J. considered that it would be "manifestly unfair" to allow the Commissioner to support his assessment on new, previously undisclosed provisions. The Australian Commissioner is particularly alert to the possibility that the courts will adopt this view. In *Kolotex Hosiery v. F.C.T.*¹⁰² Gibbs J. referred to a report of an investigating officer for the Commissioner which stated:

I agree with the recommendations [upon which the taxpayer's deductions were disallowed] but consider that in order to avoid limiting the defence of the assessment in the event of an appeal being lodged, the company should not be advised as to the particular section of the Act under which the disallowance of the losses has been made.

In *James v. C.I.R.*¹⁰³ Cooke J. tentatively accepted that the court may have no jurisdiction to allow the Commissioner to put forward new grounds to support his assessment which were not referred to in the case stated. The learned Judge considered that even if the court did have jurisdiction to allow new points taken by the Commissioner, it would be no more than a discretionary jurisdiction.

*Edgar & Fay v. C.I.R.*¹⁰⁴ a case stated under section 92 of the Estate and Gift Duties Act 1968,¹⁰⁵ also gave rise to this issue. The Commissioner amended an assessment without indicating on what basis he did so. At the hearing of the objection, the Commissioner purported to argue the case on entirely different grounds than those set out in the original assessment. Somers J. reviewed the Australian and New Zealand cases dealing with the point.¹⁰⁶ His Honour concluded that there was a distinction between the situation where an assessment was made under one section and the Commissioner later sought to support it under another, and the situation where an assessment is supported under the same section, but upon different grounds than those originally disclosed. His Honour considered that in the first situation, which applied in that case, the court had no jurisdiction to hear the new grounds.¹⁰⁷

Although this approach seems unquestionably fair, in view of the limits placed by section 36 of the Inland Revenue Department Act, it still presents difficulties. In the *Kolotex Hosiery* case, Stephen J. pointed out that a court should necessarily

101 (1942) 2 A.I.T.R. 517, 545. See also *F.C.T. v. Wade* (1951) 5 A.I.T.R. 214, 224.

102 (1975) 5 A.T.R. 206, 230.

103 Unreported judgment delivered on 6 February 1973 at Wellington.

104 (1977) 8 A.T.R. 530.

105 The provisions relating to objections under that Act are almost identical to those of the Income Tax Act 1976.

106 *Supra*, n.104 534-5. Note that the citation given for *James v. C.I.R.* is incorrect, as this issue was discussed by Cooke J. in his prior oral ruling, which is unreported.

107 See also *Europa Oil (N.Z.) Ltd. v. C.I.R. (No. 2)* (1974) 4 A.T.R. 455, 488 per McCarthy P.

have to consider any new grounds put forward by the Commissioner as justifying the assessment.¹⁰⁸ This is because they may assist the court in determining whether the assessment is correct, which is its function.

D. Conclusion

The difficulties caused by the statutory limitation on the taxpayer to the grounds stated in his written objection are not confined to the situation where the objection relates to the exercise of discretion by the Commissioner; they can arise in any objection. However, in objections relating to discretion it is generally more difficult for the objector to ascertain the grounds upon which the Commissioner has formed his opinions.¹⁰⁹ If the objector is limited to his grounds of objection drafted at a time when he was unaware of the information available to the Commissioner, or the basis for the assessment, the powers of the court to review the Commissioner's discretion will be ineffective.¹¹⁰

These cases demonstrate the conflict which arises throughout the Income Tax Act between the idea of liability being imposed solely by the Act, and the wide powers given to the Commissioner to determine this liability. More specifically, they show the conflicts which arise between the statutory duty of the court, (or Review Authority), to exercise all the functions of the Commissioner in determining the objection, and section 36, which can prevent the taxpayer from effectively challenging the assessment. If the function of the court is to determine whether the assessment, at least with regard to the items challenged, is correct, then surely it is entitled to have all of the relevant information before it. This would include all reasonable grounds of argument, both from the taxpayer and the Commissioner.¹¹¹ It is difficult to see any justification for this limitation upon the objector. A far more equitable requirement would be for both sides to give reasonable notice of the grounds to be argued in support of their respective cases.

V. THE ONUS OF PROOF

As well as limiting an objector to the grounds stated in his notice of objection, section 36 of the Inland Revenue Department Act 1974 provides that the objector shall bear the burden of proof. This express requirement has given rise to a large

108 (1975) 5 A.T.R. 206, 239.

109 See e.g. *F.C.T. v. Brian Hatch Timber Co. (Sales) Pty. Ltd.* (1972) 2 A.T.R. 658, discussed in Part III B. *supra*. Note also *C.I.R. v. Castle* (1971) 2 A.T.R. 481, 494-5, where Beattie J. refused to allow an argument by the Commissioner that he had exercised a discretion under s. 113(2) against the taxpayer, because (inter alia) the point had not been raised at the earlier hearing before the Board of Review or in the case stated. His Honour referred to the statement of North J. in *Walker v. C.I.R.*, quoted in Part III, *supra*.

110 Unless of course the "Windeyer alternative" is adopted. See discussion in Part IV B *supra*.

111 This argument can also be taken too far. It is not the court's duty to decide what the issues are as well as determine them. The burden of proof is expressly placed on the taxpayer and thus he must actually raise each relevant issue. He should however have every chance of presenting all relevant arguments, and the limitation to the grounds of his objection may unfairly prevent this.

amount of judicial comment, and has frequently been cited as the reason for the failure of taxpayers in their objections.¹¹²

Generally the cases in which it is the most discussed and creates the most difficulties are those involving assets accretion or betterment assessments. The courts have held that the objector is required to show not only that the assessment is wrong, but by how much it is wrong.¹¹³ The burden of proof has also proved a difficult hurdle in cases where the character of the money in question (capital or income), is dependent upon the purposes or intentions of the taxpayer at the relevant time.¹¹⁴ In *Buckley & Young Ltd. v. C.I.R.*¹¹⁵ the taxpayer's appeal was unsuccessful, despite the fact that the Court of Appeal accepted its argument that the assessment was substantially wrong. The court held that the taxpayer had not satisfied the onus of showing by how much the assessment was wrong.¹¹⁶ Thus an assessment which was found to be incorrect was nevertheless upheld because the onus of proof was not completely discharged by the taxpayer.¹¹⁷ In delivering the judgment of the court, Richardson J. adopted¹¹⁸ the approach enunciated by Moller J. in *Lancaster v. C.I.R.*¹¹⁹

[T]he onus of proof [on the taxpayer in objection proceedings] requires that the final question must always be: "On all the evidence, has the taxpayer discharged the onus of demonstrating that the Commissioner's assessment was wrong, and, if so, why it was wrong, and how far it was wrong?"

Justification for this heavy burden on the taxpayer was seen by Richardson J. as "obvious".¹²⁰

The Commissioner could not sensibly be expected to bear the onus of proof of matters which originate with the taxpayer and which usually are peculiarly within his knowledge and power.

In many cases this will be appropriate. A taxpayer's purposes or intentions at the time of the acquisition of land, for example, are far easier for him to prove than for the Commissioner to disprove.

In *Buckley & Young*, however, the Court of Appeal extended this approach to a different situation. The justification given for it was that the matters in issue were peculiarly within the taxpayer's knowledge.¹²¹ Does this mean that

112 See *Duggan v. C.I.R.* [1973] 1 N.Z.L.R. 682; *C. of T. v. McCread* [1952] N.Z.L.R. 263; *Babington v. C.I.R.* [1957] N.Z.L.R. 861; *Lancaster v. C.I.R.* [1969] N.Z.L.R. 589; *Trautwein v. F.C.T.* (1936) 56 C.L.R. 63; *McEvoy v. F.C.T.* (1950) 5 A.I.T.R. 1; *Buckley & Young Ltd. v. C.I.R.* (1978) 9 A.T.R. 106.

113 See e.g. *C. of T. v. McCoard*, supra n.112.

114 See e.g. *Williams Property Developments Ltd. v. C.I.R.* (1980) 10 A.T.R. 652; *Margan v. C.I.R.* (1978) 9 A.T.R. 19.

115 (1978) 9 A.T.R. 106.

116 Ibid. 118.

117 This case provides another illustration of the difficulties in practice with the principle that 'liability is imposed by the Act alone'.

118 (1978) 9 A.T.R. 106, 118.

119 [1969] N.Z.L.R. 589, 590-591.

120 (1978) 9 A.T.R. 106, 118.

121 (1978) 9 A.T.R. 106, 118.

where the matters in issue are not necessarily within the taxpayer's knowledge he will not have to satisfy this final step?

For example, a taxpayer who owns a computer with a life expectancy of ten years, but which will probably be obsolete within three to five years, will claim a depreciation allowance to take account of the likelihood that it will soon be obsolete. If the Commissioner only allows depreciation based on the longer life expectancy after the first year,¹²² the taxpayer could object to his exercise of the discretion given by section 108. That provision gives the Commissioner a discretion to "allow such deduction as he thinks just". It would be impossible for the taxpayer to show by how much the Commissioner's assessment is wrong, because what is "right" depends on the Commissioner's opinion. All the taxpayer can do is show the court that the Commissioner's determination is defective or unjust, in that he has not taken account of the computer's likely obsolescence, and ask the court to substitute its own discretion as to the "proper" amount. Because no statutory guidelines are given as to how this discretion should be exercised, it is difficult to see how an objector could prove that the Commissioner's determination was wrong. Richardson J's comments should thus be limited to the facts of that case.

Recently the High Court of Australia temporarily adopted a more lenient approach to the objector's burden of proof. In *Gauci & Masi v. F.C.T.*¹²³ Barwick C.J. held that the Commissioner could not merely assert that land had been acquired with the purpose of resale and leave it to the taxpayer to disprove it. Unless the Commissioner could point to evidence from which an inference could be drawn of the requisite intention, then, despite the statutory onus of proof,¹²⁴ the Commissioner's opinion had no greater force than the taxpayer's.¹²⁵ The effect of this approach is to require the Commissioner to bring evidence to support his assessment, instead of requiring the taxpayer to rebut a presumption that the Commissioner's opinion is correct, when the facts themselves are neutral.

This approach has split the Australian High Court.¹²⁶ In *McCormack v. F.C.T.*¹²⁷ The majority rejected Barwick C.J.'s test and specifically adopted the dissent of Mason J. from *Gauci*.¹²⁸

The Act does not place any onus on the Commissioner to show that the assessments were correctly made. Nor is there any statutory requirement that the assessments should be sustained or supported by evidence [U]nless the appellant shows by evidence that the assessment is incorrect, it will prevail.

122 In the first year the taxpayer would be able to claim 25% depreciation under s. 112.

123 (1975) 5 A.T.R. 672. See also discussions by Mason and Priddle "Profits from Land Sales: the Onus of Proof" [1976] N.Z.L.J. 492 and Bassett, "Estate Plans and Arrangements to Avoid Income Tax" (1978) 9 V.U.W.L.R. 217, 240.

124 See the Australian Income Tax Assessment Act s. 190 which is almost identical to s. 36 Inland Revenue Department Act 1974 (N.Z.).

125 See also Barwick C.J.'s judgment in *Steinberg v. F.C.T.* (1975) 5 A.T.R. 565 where he first developed this reasoning.

126 In the High Court, Jacobs and Aickin J.J. have followed the Chief Justice, while Mason, Gibbs, Stephen & Murphy J.J. have preferred the traditional view.

127 (1979) 9 A.T.R. 610. See also the later case *Macmine Pty Ltd v. F.C.T.* (1979) 9 A.T.R. 638.

128 (1975) 5 A.T.R. 672, 676.

The *Gauci* approach has also been rejected in New Zealand. In *Williams Property Developments Ltd. v. C.I.R.*¹²⁹ Richmond P. and Woodhouse J. adopted the traditional approach, as expressed by Mason J. in his dissent in *Gauci*, and rejected the taxpayer's submissions based on Barwick C.J.'s test.

It is submitted that a fairer approach, particularly in discretion cases, would be as follows. The objector must have evidence supporting his assertion that, in his case, the Commissioner should have exercised his discretion differently. If this evidence prima facie supports a different result, the Commissioner should then be required to justify his own conclusion. If the discretion in question gives the Commissioner the power to determine the amount of tax to be paid, then the taxpayer should not be required to show by how much the Commissioner's assessment is wrong. Once prima facie evidence of an error is shown, it should be for the Commissioner to show that his assessment was correct.¹³⁰

VI. CONCLUSION

This discussion has attempted to highlight the powers and possible limitations on those powers exercisable by the High Court in determining taxpayers' objections. In particular, the problems relating to challenging a discretionary determination by the Commissioner have been considered. Although section 36(i) of the Income Tax Act 1976 bars objections relating to a number of discretionary provisions, it is concluded that the court is empowered to exercise unusually wide powers in the majority of cases. The court has all of the powers, duties, functions and discretions given to the Commissioner and thus must substitute its own determination for that of the Commissioner where, upon hearing the objections, it comes to a different conclusion.

In view of the wide-ranging powers of the High Court and the enormous number of discretions exercisable by the Commissioner in determining taxpayers' liability to tax, it is to be expected that many objections would involve challenges to discretionary determinations. Taxpayers must often find that their liability to tax is dependent, in some regard, upon the formation of an opinion by the Commissioner rather than on the words of a section of the Act per se.

Despite this, very few objections have involved challenges to the Commissioner's discretion. In the twenty years since the court has had the power to substitute its own discretion or opinion for that of the Commissioner no great influx of objections relating to the exercise of statutory discretions by the Commissioner has occurred. Even in the few instances where these powers could have been

129 (1980) 10 A.T.R. 652.

130 This approach gains some support from *Walker v. C.I.R.* [1963] N.Z.L.R. 339, which suggests that the Commissioner must be able to bring evidence to show that his assessment is reasonable, and not arbitrary. See also the Court of Appeal decision in *Lowe v. C.I.R.* (1981) 5 N.Z.T.C. 61006, where Cooke and Richardson J.J. intimated that in some cases the Commissioner's assessment might fail because he had not passed the "threshold" of providing a proper and intelligible assessment. This may provide something of a half-way house between the very restrictive traditional approach more appropriate in the assets discretion cases, and that ill-fated Barwick approach.

exercised, no significant change in approach is apparent.¹³¹ This result is puzzling. In Australia taxpayers have frequently challenged the Commissioner's discretion, despite the much more limited powers of their courts.¹³²

There are a number of possible reasons for this:

- (a) One purpose of giving discretions to the Commissioner is their deterrent effect. In this regard they seem to be effective — taxpayers appear to regard the Commissioner's opinion, unless manifestly wrong, as unchallengeable.¹³³
- (b) The Commissioner, at least up until now, has taken a liberal approach to challenges to his discretion, in the sense that if a taxpayer protests at the exercise of a discretion and can give some reason or basis for his dissatisfaction, the Commissioner usually accepts the taxpayer's view, or comes to some mutually acceptable settlement at this informal stage.
- (c) There are several obstacles to effective challenge in the objection procedures themselves. In particular, the express onus of proof and the limitation to the grounds of objection can make the objector's task extremely difficult. Also, the Commissioner's restrictive attitude towards discovery of documents relating to the formation of his opinion may also have handicapped potential objectors.

It is submitted that the possibility for dissatisfaction with assessments which depend upon the opinion and exercise of discretion by the Commissioner must frequently arise. The present statutory objection procedures provide the High Court with adequate powers to review such assessments. Two changes to the procedures should, however, be made to ensure that an objector can properly prepare his case:

1. The onus of proof should be restricted when the objection involves a discretionary determination by the Commissioner. The objector should only need to point to prima facie evidence which would support a different result to shift the burden on to the Commissioner.
2. The limitation to grounds of objection should be altered to require both sides to give reasonable notice of all grounds of argument.

131 In *Felt & Textiles (N.Z.) Ltd. v. C.I.R.* (1968) 10 A.T.R. 743 the taxpayer objected to the Commissioner's discretionary determination disallowing a deduction for interest payments. In resolving the case McGregor J. was clearly exercising the discretion himself. However the Commissioner had agreed that if the taxpayer succeeded on the legal issues his discretion should be exercised accordingly. Because of this 'concession' no question arose as to whether the court would substitute its discretion for the Commissioner's.

132 See e.g. *Denver Chemical Mfg. Co. v. C. of T.* (NSW) (1949) 79 C.L.R. 296; *Avon Downs Pty Ltd. v. F.C.T.* (1949) 78 C.L.R. 353; *MacCormick v. F.C.T.* (1945) 71 C.L.R. 283.

133 From discussions with a senior member of the legal section of the Inland Revenue Department, it appeared that as at 1978 the Department had no record or knowledge of any formal objection relating specifically to the exercise of a statutory discretion by the Commissioner.

At present the Commissioner appears to exercise a wide range of discretions with little threat of challenge. This situation is not inevitable, however. Taxpayers should take a more active and critical interest in the decisions made by the Commissioner which affect their tax liability. In order that the High Court fulfils its role as watchdog over administrative actions, the judges must be made aware of their powers and be called upon to exercise them whenever necessary.

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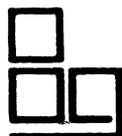
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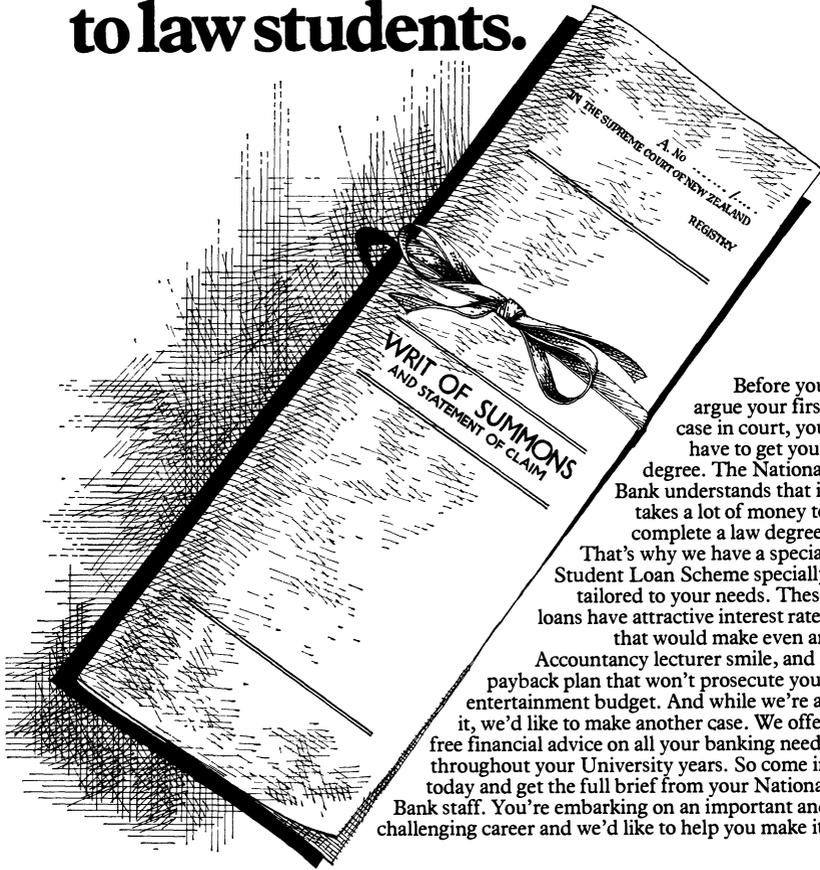
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