**PUNJAS LTD and Anor v COMMISSIONER OF INLAND REVENUE (ABU0099 of 2005S)**

COURT OF APPEAL — CIVIL JURISDICTION

EICHELBAUM, PENLINGTON and SCOTT JJA

3, 10 November 2006

**Practice and procedure — abuse of process — whether agreement and consent order ultra vires — (NZ) Goods and Services Tax Act 1985 — Value Added Tax Decree 1991 Pts VIII, IX, ss 3, 4, 12(1), 15(1), 22, 32(1)(a), 39, 40(3), 44, 44(1)(c), 45, 46, 47, 48(2), 50, 51, 55, 60(1)(a), 61, 70.**

The Appellants were part of the Punja Group of Companies (PGC) and were registered as category A taxpayers under s 32(1)(a) of the Value Added Tax Decree 1991 (VAT Decree). The Respondent audited some of the PGC. The Appellants alleged that the Respondent's auditor assured them that for the internal charging of management fees and lease rentals between the PGC, it was adequate if the transactions were routed through journal entries such that no tax invoice would be required to be issued. There was another audit that concerned the obligations of the Appellants under the VAT Decree. Tax invoices were created for some input claims after queries by the auditors. There was a VAT deficiency of $388,329.72. There was also an undated compliance report for the financial years 1996–2000 revealing a number of discrepancies. The discrepancy report (report) showed $1,176,225.89. Price Waterhouse Coopers (PWC), who was acting for the PGC, alleged that the report contained material errors. The Appellants sought declarations in an originating summons under HBC101/2002L and commenced another action seeking summary judgment for the refunds allegedly due but not paid. The Respondent did not issue and serve a formal assessment to the Appellants. The Appellant appealed the High Court decision setting aside the consent orders made in the originating summons. The issues were whether: (1) the agreement between the Appellants and the Respondent and the subsequent consent order, which was founded on the agreement, was ultra vires and void; and (2) the agreement was invalid and the parties could not confer jurisdiction by consent.

**Held** — (1) It was clear that the judge correctly found that the agreement between the Appellants and the Respondent and the subsequent consent order which rested on the agreement were ultra vires and void. It was properly set aside. In our view, each of the declarations was objectionable simply on the basis of the observations of Megarry VC in *Metzger v Department of Health and Social Security*. The judge made these declarations without hearing any argument.

(2) The agreement was invalid and accordingly, the parties could not confer jurisdiction by consent. The Appellants commenced their proceedings by way of originating summons. They did not apply for judicial review although they now accepted that it might have been better to have done so. Even if the *Fiji Island Revenue and Customs Authority v New Zealand Pacific Training Centre Ltd* case entitled a litigant to maintain or continue a challenge to process in proceedings commenced by way of originating summons (and a view was not expressed upon this point), that is, of no avail if the challenge was not about process but about purporting to fetter the commissioner's statutory power under the VAT Decree and purporting to subject him to the surveillance of the court. The case was in the latter category. The High Court therefore, had no jurisdiction to make declarations and orders of that kind. They were not declarations and orders arising from process.

Appeal dismissed.

**Cases referred to**

*AGC (Investments) Ltd v Federal Commissioner of Taxation* (1991) 21 ATR 1379; *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655; *Brierley Investments*

*Ltd v Commissioner of Inland Revenue (No 2)* (1993) 15 NZTC 10,212; *Fayed v Commissioner of Inland Revenue* (2003) SC 1; *Fiji Island Revenue and Customs Authority v New Zealand Pacific Training Centre Ltd* [2005] FJCA 48; *Paul Finance v Commissioner of Inland Revenue* (1995) 17 NZTC 12,319; *Paul Finance Ltd v Commissioner of Inland Revenue* (1995) 17 NZTC 12,379; *Reckitt & Coleman (NZ) Ltd v Taxation Board of Review* [1966] NZLR 1032; *Wilson & Horton Ltd v Inland Revenue Commissioners* [1996] 1 NZLR 26, cited.

*Attorney-General (NSW) v Quin* (1990) 170 CLR 1; 93 ALR 1; *Commissioners of Inland Revenue v Lemmington Holdings Ltd* [1982] 1 NZLR 517; *Metzger v Department of Health and Social Security* [1978] 1 WLR 1046; [1977] 3 All ER 444; *Vandervell Trustees Ltd v White* [1971] AC 912; [1970] 3 All ER 16, considered.

*B. C. Patel* for the Appellant

*M. J. Scott* for the Respondent

**[1] Eichelbaum, Penlington and Scott JJA.** This is an appeal against the judgment of Finnigan J wherein he set aside on the application of the Commissioner of Inland Revenue (the commissioner) consent orders made on 30 August and 6 September 2002 in HBC0101.2002L (which was an originating summons taken out by the Appellants against the commissioner).

**Background**

**[2]** The first Appellant (A1) is a company which carries on the business of marketing general consumer goods. It was incorporated in 1996. Until then it operated as a department of the second Appellant (A2).

**[3]** The A2 is a company which carries on the business of investment, manufacturing and importing general consumer goods. It was incorporated in 1964.

**[4]** The two companies operate from Lautoka and are substantial businesses. They form part of the Punja Group of Companies, 15 companies in all.

**[5]** Both companies are registered as category A taxpayers under s 32(1)(a) of the Value Added Tax Decree 1991 as amended (the VAT Decree). Other companies in the group were also separately registered for VAT purposes.

**[6]** In 1997 the commissioner carried out a VAT audit of some of the Punja Companies. The Appellants say that the commissioner's auditor at that time assured the Appellants that for the internal charging of management fees and lease rentals between the Punja Companies, it was adequate if the transactions were routed through journal entries and that if that was done no tax invoice would be required to be issued.

**[7]** In February 2001 the commissioner commenced another audit of the VAT affairs of the Punja Group. The audit concerned the obligations of the Appellants under the VAT Decree. It followed an exchange of correspondence concerning substantial refunds which the Punja Group asserted were due to be paid by the commissioner to the group. The audit was an extensive affair. A number of the commissioner's personnel were involved. The group provided facilities at several of their outlets for the commissioner's officers to carry out the audit.

**[8]** From the start of the audit there were many queries by the auditors. One issue would lead to another during their examination and verification of the records. Meetings were held with members of Price Waterhouse Coopers (PWC) who were acting for the Punja Group. Likewise correspondence passed. PWC

maintained that the questions which were posed were promptly answered. Tax invoices were created for some input claims after queries by the auditors.

**[9]** By 26 October 2001, the commissioner's auditors, in a letter to PWC alleged that "revised" VAT deficiency was now $388,329.72. The auditor sought further information and documentation on a number of issues. On 8 November 2001 PWC sent the commissioner's auditors a very detailed reply. PWC disputed the revised discrepancy. In the meantime the commissioner continued to withhold (on the grounds that the audit was still in progress) refunds of VAT which PWC contended were due.

**[10]** According to an undated compliance report by one of the commissioner's auditors (an internal document) it stated that the audit now revealed a number of discrepancies under several headings totalling $1,176,225.89 for the financial years July 1996–June 1997, July 1997–June 1998, July 1998–June 1999 and July 1999 to June 2000. Those headings were:

(a) VAT on personal electricity and water accounts of directors and some staff.
(b) VAT on personal security bills of directors.
(c) VAT on overseas travel.
(d) An absence of supporting invoices or documents in respect of input tax claims.
(e) Input tax overclaimed.
(f) Management fees and rental expenses.
(g) Output tax understated.

**[11]** On 6 March 2002 PWC were advised of the alleged discrepancies referred to above by way of a discrepancy report. The report was not an assessment in terms of the VAT Decree. The commissioner's auditors stated that the audit had now been completed and that "the following specific issues remain disputed". The several matters just referred to were then set out. The alleged VAT discrepancy was now said to be the above sum of $1,176,225.89. The report made it clear that the commissioner intended to hold the Appellants responsible for this outstanding sum together with penalties for non-payment. Representations were invited within 7 days. The report concluded: "The issue of final assessments will be held for a period of seven (7) days from the date of this letter".

**[12]** PWC responded to the discrepancy report in a long and detailed letter dated 20 March 2002. PWC contended that the discrepancy report contained material errors and that it was unreliable and wrong. They stated that the report had ignored PWC explanations which had been offered to matters raised by the auditors during the audit. PWC maintained that the auditors had adopted a method of calculation which disclosed a lack of understanding of the transactions and was unreasonable in the conclusions which had been reached. It noted that the total discrepancy had been increased.

**[13]** PWC concluded its response by stating:

> From your letter it seems that there are a number of issues where our views on the VAT treatment differ substantially and our client is still unable to obtain all the VAT refunds to which they are entitled. Based on this our client believes their only available course of action is to place the matter in the hands of their legal advisors.

**[14]** Events now moved very quickly. On 25 March 2002 the Appellants commenced proceedings by way of an originating summons under number HBC 101/2002L. In that proceeding the Appellants as plaintiffs sought certain

declarations. It was supported by lengthy affidavit from one Philip John Taylor a PWC chartered accountant. On the same day the Appellants commenced another action seeking summary judgment for the refunds allegedly due but not paid.

**[15]** Here, it is to be noted that the commissioner did not at this time or, indeed, at any subsequent time issue and serve on the Appellants a formal assessment. We shall need to return to this point later in the judgment as it is a key point in the Appellants' case.

**The agreement and the consent order**

**[16]** It appears that there was to be a hearing in August 2002. The Appellants intended to instruct overseas counsel to appear on their behalf. In the meantime there were discussions between the representatives of the Appellants and the National Manager Legal of the commissioner's office, a Mr A V Bale. By 7 August Mr Bale had orally informed the solicitors for the Appellants that the commissioner did not intend to resist the proceedings which had been brought against the commissioner provided that there was a reservation as to costs.

**[17]** The solicitors for the Appellants then wrote a letter for the attention of Mr Bale. The letter required written confirmation of the commissioner's position by not later than 2 pm on 9 August 2002. That confirmation was given. It was in the following terms:

> I hereby confirm on behalf of the Commissioner of Inland Revenue that it will consent to:
>
> (i) Summary Judgment in Civil Action No. 100 of 2002; and
>
> (ii) Declaratory Orders sought in Civil Action No 101 of 2002.
>
> With the issue of cost to be reserved in both the matters.
>
> …Sgd…….. ……8/08/02……..
>
> Amani V Bale Date
>
> Manager Legal
>
> For — Commissioner of Inland Revenue

**[18]** The Appellants thereupon, on 26 August 2002, filed a summons to enter judgment in HBC0101.2002L. The letter with the written confirmation endorsed thereon was appended to the summons. That summons came on before Byrne J in chambers on 30 August 2002. There was no argument addressed to the judge who made a number of consent declarations and orders.

**[19]** Several days later on 3 September the Appellants filed a summons to vary the consent order by the addition of some further orders. These additional orders were made by consent on 6 September by the same judge.

**[20]** A formal order was then entered and sealed. A copy of that document is attached to this judgment: Attachment 1.

**Events after the consent order**

**[21]** Following the making of the consent order VAT monies were paid by the commissioner to the Appellants in accordance with orders 10 and 11 in the consent order together with interest at 12.5% per annum. As well, the Respondent paid $75,000 towards the Appellants' costs.

**The summons to set aside**

**[22]** The commissioner obviously had second thoughts about the consent order. As a result on 12 May 2004 the commissioner filed a summons to set aside the consent order on the grounds that it was beyond power, ultra vires and void upon its face.

**[23]** The summons was supported by a short affidavit by a member of the commissioner's staff. The Appellants filed a lengthy affidavit from the financial controller of the Punja Group in opposition. One of the exhibits to that affidavit was the Taylor affidavit in HBC0101.2002L to which we have earlier referred. No affidavit in reply was filed on behalf of the commissioner.

**[24]** The summons to set aside the consent order came on before Finnigan J. There was no oral hearing. Rather the judge dealt with the matter on the basis of the affidavits and written submissions.

**[25]** The Appellants accepted that the High Court had jurisdiction to set aside the consent order where the consent was ultra vires. Otherwise the Appellants joined issue with the commissioner.

**The judgment of Finnigan J**

**[26]** The reserved judgment of the judge was a very short one. He stated that he had delivered it promptly to enable the parties to "move on". He decided in favour of the commissioner and set aside the consent order. While the judge expressed himself tentatively on a number of relevant issues he made two critical findings. First, that the agreement between the parties upon which the consent order was founded was void and of no effect, and second, that the High Court did not have jurisdiction in the original proceedings HBC0101.2002L to determine the tax issues raised therein.

**The appeal**

**[27]** The Appellants thereupon appealed to this court. In their notice of appeal, and later in their written submissions filed ahead of the hearing, they sought to uphold the entire consent order. This stance changed, however, during the course of the oral hearing before us. Ultimately the Appellants accepted that part of the consent order should be struck down. They nevertheless sought to uphold the remainder. We shall later set out and examine the Appellants' stance on the individual declarations and orders contained in the consent order.

**[28]** The essential question for our consideration is whether it has been demonstrated on appeal that the judge was wrong in finding that the agreement between the Appellants and the commissioner and the subsequent consent order, which was founded on the agreement was beyond power, ultra vires and was void.

**Procedural point; no argument**

**[29]** Before embarking on a consideration of the question just posed we refer to a procedural point which we drew to the attention of both sides on the appeal. We have already noted that when the consent order was made neither side placed any argument before the judge, Byrne J. As can be seen from the consent order which was sealed and entered it purports to make no less than nine declarations and five orders.

**[30]** In so far as the nine declarations are concerned the judge should not have made them on the basis of the consent of the parties and without argument. We refer to the statement of Megarry VC in *Metzger v Department of Health and Social Security* [1978] 1 WLR 1046; [1977] 3 All ER 444 at 451 (*Metzger*)

> The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what it has found to be the law after proper argument, not merely after admissions by the parties. There are no declarations without argument: that is quite plain.

## The VAT decree

**[31]** We commence our consideration of this appeal by setting out a summary of the general scheme of the VAT Decree. The validity of that decree was confirmed by this court in *Fiji Island Revenue and Customs Authority v New Zealand Pacific Training Centre Ltd* [2005] FJCA 48 (*NZ Pacific*) judgment 15 July 2005.

**[32]** The decree introduced a Value Added Tax into Fiji. It was based on the New Zealand Goods and Services Tax Act 1985. For a discussion on the scheme of the New Zealand Legislation refer to *Wilson & Horton Ltd v Commissioner of Inland Revenue* [1996] 1 NZLR 26 at 30 per Richardson J, at 34 per McKay J and at 38 per Penlington J: see also *Paul Finance Ltd v Commissioner of Inland Revenue* (1995) 17 NZTC 12,319.

**[33]** The VAT Decree came into force on 1 July 1992.

**[34]** The commissioner is charged with the administration of the decree. Under it he is given the control and management of the collection of the tax charged by the decree.

**[35]** The key provision is s 15 which imposes a tax on the supply of goods and services by a registered person in the course or furtherance of a taxable activity carried out by that person. Section 15(1) opens with the words: "Subject to provisions of this decree, the tax shall be charged in accordance with the provisions of this decree…".

**[36]** Originally the stipulated rate of tax was 10% on the supply. That has subsequently been altered. The alteration is irrelevant for the present purposes. The tax is imposed by reference to the value of goods and services supplied. Section 15(2) provides that where certain goods and services are zero rated they shall not attract any tax. Under s 61 of the decree the tax payable by any person "shall be recoverable as a debt due to the State".

**[37]** The decree lays down a system of registration. Under s 22 persons making taxable supplies must be registered.

**[38]** Section 3 sets out the meaning of the term "supply" while s 4 sets out the meaning of a "taxable activity".

**[39]** A supplier (except where otherwise provided by regulations to the contrary) being a registered person when making a taxable supply to a recipient is required to issue a tax invoice. The tax on a supply *by* a registered person is called an *output tax* while the tax on a supply *to* a registered person is called an *input tax.*

**[40]** Registered persons under the decree are obliged to make returns to the commissioner at the end of the applicable tax period for that person. There are 2 categories. Category A which requires a return every month while Category B requires a return every 3 months. Here, the Punja Group Companies were Category A registered persons. The obligations to make the returns is imposed on the registered person without notice or demand: s 33.

**[41]** Section 39 deals with the calculation of the tax. A registered person in respect of each tax period is required to calculate the amount of the tax payable by that person in accordance with the detailed provisions of that section. Very

broadly speaking, the input tax paid on supplies to a registered person are deducted from the output tax recovered on supplies by that registered person. The balance is payable to the commissioner. The tax is payable not later than the last day allowed for the furnishing of the return for the relevant taxable period. Section 60 stipulates that where there is a default in the payment of the tax the unpaid tax attracts penalty tax.

**[42]** Under s 55 where the commissioner is satisfied that tax has been paid by the registered person in excess of the amount properly payable for any taxable period he is required to refund the amount paid in excess. The section also contains other provisions relating to the making of a refund by the commissioner.

**[43]** Section 40 (3) must be noted as it is relevant to the argument of the Appellants. It provides:

> (3) Subject to Part VIII and Part IX of this decree, the amount set forth as tax payable on any tax return furnished by a registered person shall be conclusively deemed and taken to be correct for the purposes of this Decree.

The opening words of the subsection are important. Section 40(3) *is subject* to Pt VIII and Pt IX. Pt VIII deals with assessment while Pt IX deals with objections.

**[44]** Section 44 appears in Pt VIII. It deals with the assessment of tax. It provides:

> (1) Where —
>
> (a) a registered person liable to pay tax fails to furnish any return; or
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> (b) a registered person is not satisfied with any return furnished by him in respect of any tax paid and within twelve months of furnishing the return, request the Commissioner in writing to make any alteration or addition to that return, or
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> (c) the Commissioner is not satisfied with the return made by any registered person; or
>
> (d) the Commissioner has reason to believe that any person, although that person is not required to make a return, is liable to pay tax; or
>
> (e) any person, not being a registered person, supplies goods and services and represents that tax is chargeable on that supply, —
>
> The Commissioner shall make an assessment of the amount which, in his opinion, is the tax payable pursuant to this Decree and that registered person shall be liable to pay the tax so assessed.
>
> (2) Subject to Section 48 of this Decree, the Commissioner may from time to time and at any time make all such alterations in or addition to an assessment made under this Section as he thinks necessary to ensure the correctness thereof, notwithstanding that tax or further tax may have been paid
>
> (3) The Commissioner shall cause notice of the assessment or amended assessment to be sent to the registered person liable to pay the tax or further tax.
>
> (4) In any case where an assessment is not made until after the due date of the tax payable or is increased after the due date, and the Commissioner is satisfied that the registered person has not been guilty of wilful neglect or default in making due and complete returns for the purposes of that tax, the Commissioner shall fix a new date, being one month after the date of the assessment for the payment of the tax payable or of the increase in the tax payable, as the case may be, and the date so fixed shall be deemed to be the due date of the tax or increase for the purposes of this decree.
>
> (5) The omission to send any such notice under subsection (3) of this Section shall not invalidate the assessment or in any manner affect the operation thereof.

It is to be noted that this provision sets out the powers of the commissioner in relation to assessment. The other sections in Pt VIII deal with the validity of the assessment (s 45) the assessment being deemed to be correct except in proceedings on objection (s 46) evidence of returns of assessment (s 47) and limitation of time for the issue of an assessment or amendment of an assessment: s 48.

**[45]** Section 50 which is contained in Pt IX gives a registered person a right of objection where that person is dissatisfied with an assessment. That person has 28 days to lodge an objection from the time when the assessment is received. The commissioner is required to consider the objection and then allow or disallow it. In the event of a disallowance the registered person has a right of appeal to the VAT Tribunal (which is established under s 51). From the decision of that tribunal, there is a right of appeal to the High Court: s 58.

**[46]** And finally, in this summary we refer to another provision which is relevant to the arguments raised in this appeal, namely s 70, which confers on the commissioner limited dispensing powers to grant relief from tax. Under s 70, the commissioner may in his discretion mitigate or remit any additional tax (other than one exception set out in s 60(1)(a)) penal tax or penalty which may be assessed or imposed under the decree.

**Some relevant general taxation principles**

**[47]** We next set out a number of relevant general taxation principles which have emerged from the decided cases over the years and which affect the operation of the VAT Decree.

(1) The commissioner has the role of administering the VAT Decree 1991 and the control and the management of collection of the taxation charged thereby and all matters incidental thereto. Section 6 VAT Decree. See also *Paul Finance Ltd v Commissioner of Inland Revenue* (1995) 17 NZTC 12,379 especially at 12,382 as to the New Zealand Goods and Services Act 1985.

(2) The VAT Decree, like the Income Tax Act, imposes an imperative statutory duty on the commissioner which is not amenable to judicial restraint *Commissioners of Inland Revenue v Lemmington Holdings Ltd* [1982] 1 NZLR 517 at 521 (*Lemmington*) per Richardson J delivering the joint judgment of himself and Woodhouse P.

(3) The charge for VAT on the supply in Fiji of goods and services (not including an exempt supply) is imposed by the decree itself, namely s 15(1), and the tax is payable independently of assessment *Lemmington* at 521.

(4) The VAT Decree, like the Income Tax Act, proceeds on the premise that in the interests of the community the commissioner is to ensure that VAT is properly assessed and paid. *Brierley Investments Ltd v Commissioner of Inland Revenue (No 2)* (1993) 15 NZTC 10,212 at 10,215 (*Brierley Investments*).

(5) Every tax payer should be treated alike with no concession being made to one to which another is not equally entitled. *Reckitt and Colman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032 per Tuner J at page 104. See also *Brierley Investments* at 1021 per Richardson J.

(6) The commissioner is not able to contract out of his statutory obligations *Brierley Investments* at 10215 per Richardson J. He cannot tie his hand. He cannot create no go areas for himself *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655 (*Bouzaid*) at 698 per Richardson J.

(7) A forward tax agreement cannot be characterised as a collection of tax and is ultra vires the statutory powers and duties of the commissioner under the decree. *Fayed v Commissioner of Inland Revenue* (2003) SC 1 especially at 25.

(8) The commissioner does not have a general dispensing power. He is unable to opt out of the obligation to make a statutory judgment of liability of every tax payer under the decree *Brierley Investments* at 10215 per Richardson J. The special dispensing powers of the commissioner to grant relief from tax contained in the s 70 of the VAT Decree (to which we have already referred) are not applicable to the present case as it does not involve any questions of additional tax or penal tax or penalty. Section 70 can therefore be ignored.

(9) The commissioner is free to resile from a position hitherto taken up by him:

> It is his judgment that counts under the statutory scheme in all these situations and it is a judgment which must be exercised from time to time unfettered by any views that he may have previously expressed either generally or in relation to a particular tax payer or matter and unconstrained by an assessment he may have previously made. *Lemmington* at 522 per Richardson J.

(10) The doctrine of estoppel does not operate to preclude the commissioner from pursuing his statutory duty to assess tax in accordance with law *AGC Investments Ltd v Federal Commissioner of Taxation* (1991) 21 ATR 1379 at 1396 (*AGC*) per Hill J. Likewise, *Lemmington* at 523 per Richardson J:

> As we have said, the Commissioner cannot be estopped by past conduct from performing his statutory obligations to make assessment as and when he thinks proper. It is his present judgment as to the statutorily imposed liability for tax that counts. The correctness of that judgment and of the Commissioner's view of the law and facts which lead him to make his assessment cannot be challenged outside the objection procedures.

See also *Bouzaid* at 662 per Richardson J.

**The Appellants' case**

**[48]** As we have already said, in the High Court and initially in this court the Appellants sought to uphold the whole of the consent order. This stance was, however, changed during the oral argument.

**[49]** Suffice it say as a background to their amended position the Appellants generally accepted the principles which we have just set out relating to the uniqueness of the commissioner's statutory position. That led the Appellants to accept that certain parts of the consent order contravened one or more of those general propositions and tainted in whole or in part some of the declarations and orders. In particular, the Appellants accepted that those declarations and orders which contained an element of futurity and which bound the commissioner to a particular course or which restricted him in the exercise of his statutory powers or which subjected him to the future surveillance of the court were objectionable.

The Appellants recognised that these tainted parts could not stand. At the same time the Appellants sought to preserve the remainder of the consent order.

**[50]** Here we record that we gave the Appellants' counsel a short adjournment to consider his position as the result of these concessions. On the resumption of the hearing, the Appellants' counsel indicated that he still wished to argue that parts of the consent order were not tainted and should stand.

**[51]** The commissioner, in applying to set aside the consent order, had contended that it was beyond power ultra vires and void on its face on three grounds:

(a) It purported to waive or forgo the entitlement of the commissioner for actual tax.

(b) It purported to hold the commissioner bound by the doctrine of estoppel.

(c) It purported (in some declarations and orders) to bind the commissioner and make him subject to the directions of the court.

In short, the commissioner attacked the whole of the agreement which led to the consent order and the consent order itself.

**[52]** Before us the Appellants joined issue on each of these contentions.

**[53]** The Appellants' starting point was that there was, in fact, no tax payable by the Appellants and that, indeed, there were refunds due and payable by the commissioner to the Appellants. Assuming the validity of that proposition the Appellants contended that the commissioner had not either waived or forgone any actual tax. To support these submissions the Appellant's counsel took us through the following sequence of events:

(a) The VAT Returns of the Appellants pursuant to s 39 showed that there was no tax due or payable by them but rather that there were refunds due to them. Here the Appellants relied on s 40(3) of the VAT Decree. They asserted that those returns were deemed to be correct by virtue of that provision.

(b) Notwithstanding those returns the commissioner authorised an investigation and audit under s 12(1).

(c) At the conclusion of the commissioner's audit there were according to the discrepancy record a number of discrepancies.

(d) While threatening an assessment the commissioner called for comment from the Appellants.

(e) PWC on behalf of the Appellants responded to the discrepancy report reasserting the Appellants' fundamental position that no tax was payable and that refunds were due. In PWC's response they answered the alleged discrepancies and criticised some of the methodology of the commissioner's auditors.

(f) At this stage the commissioner had available to him his assessment powers under s 44. In particular under s 44(1)(c) he was empowered, if he was not satisfied with the return made by the Appellants to make an assessment of the amount which, in his opinion, was the tax payable pursuant to the VAT Decree. The Appellants would then be liable to pay the tax so assessed (subject to the objection procedures under Pt IX of the Decree).

(g) The discrepancy report was not an assessment. Under the VAT Decree, there was no procedure to challenge that report. The Appellants could not invoke the s 50 objection procedure as there was no assessment to object to.

(h) At this stage the Appellants commenced proceedings against the commissioner by way of originating summons. The Appellants justified this step on the basis that it was a proceeding "to impugn the legitimacy or validity of the process adopted". For this proposition the Appellants relied on the obiter observations of Richardson J in *Lemmington* at NZLR 522:

> There is, however, a distinction between challenging the correctness of an assessment and impugning the legitimacy or validity of the process adopted in making a purported assessment. The legitimacy of the process by which a purported assessment was arrived at or a proposed assessment is to be made may perhaps be susceptible to challenge in other proceedings on traditional administrative law grounds.

(i) The Appellants also relied a passage in the judgment of this court at [51] in the *NZ Pacific* — a case commenced by way originating summons — which left open to the Respondent in that appeal the pursuit in the High Court of a cause of action based on a estoppel such cause of action having not been previously considered in the High Court.

(j) At this point in the sequence, and significantly so the Appellants contended, the commissioner did *not* make an assessment.

**[54]** The Appellants then submitted that in not taking the assessment step and in entering the agreement which was the foundation of the consent order the commissioner manifested an acceptance of the Appellants' position that no tax was due and payable and that refunds were due. In so doing, the Appellants contended, the commissioner had not purported to exercise any general dispensing power and he had not waived or forgone any tax.

**[55]** The Appellants contended that the parties could confer jurisdiction on the High Court by consent. They relied on *Vandervell Trustees Ltd v White* [1971] AC 912 at 939–40; [1970] 3 All ER 16 at 27 (*Vandervell*) per Lord Wilberforce.

> … it is the assessment which cannot be altered except in accordance with the Income Tax Acts (Income Tax Management Act 1964, s 3) and which ultimately becomes final and conclusive. All this is undoubted and, if necessary, the authority of *Barraclough v Brown* could be invoked to show that the High Court cannot interfere with assessments. But this is not sufficient to make good the trustees' argument. In any but the simplest of cases of assessment to tax there may arise questions of fact or of law which have to be decided. The Special Commissioners can decide them. They may do so after examination of the appellant, or by other lawful evidence (Income Tax Act 1952, s 52(5)). But I see no reason why, if there is consent between the taxpayer and the Revenue, these questions should not be settled by agreement, by arbitration or even by decision of the court whether before or after an assessment has been made, provided of course, that it has not become final after appeal, or after the time for appeal has expired.

The Appellants argued that the commissioner did not challenge the High Court's jurisdiction. Instead he took a step in it by consenting to the declarations and orders set out in the consent order.

**[56]** We are unable to accept the Appellants' submissions. In our view they rest on incorrect premises and are flawed as contended by the commissioner. We now develop that view.

### Our overview of the Appellants' case

**[57]** First we set out an overview of the Appellants' case and state the reasons why we consider that their case is flawed. We shall then examine the consent order, clause by clause.

**[58]** The important starting point, which the Appellants contentions overlook is that the charge for the tax is *imposed by the decree itself,* s 15(1). The tax is payable *independently* of assessment.

**[59]** While s 40(3) states that the returns are presumed to be correct that provision is *subject to* Pts VIII and IX. In other words the returns are subject to the processes of assessment which are a statutory responsibility of the commissioner. It follows that the Appellants are unable to say that because the returns stated that there was no tax payable that was conclusive against the commissioner.

**[60]** The commissioner is not able to contract out of his statutory obligations, which necessarily includes the making of an assessment. That is a process of ascertaining a liability which already exists. It is not a process of establishing a liability which did not previously exist.

**[61]** By entering the agreement and subsequently consenting to the orders and declarations of the court the commissioner contracted out of his statutory obligation to assess. He put a fetter on himself. He precluded himself from pursuing his statutory duty to assess the tax properly due. In our view the agreement was an agreement to forego or waive tax and that is indeed plain on the face of the consent order.

**[62]** The consent order dealt not only with past matters but also with future matters. The agreement precluded the commissioner from resiling from the stance he had hitherto taken up, for example, giving an assurance that the use of journal entries would suffice in lieu of tax invoices. As well the commissioner tied his hands in the future and subjected himself to the surveillance of the court.

**Analysis of consent order**

**[63]** We now turn to the consent order and examine it clause by clause.

**[64]** We have noted that words "assessment" and "reassessment" were used in several parts of the order. The Appellants accepted that those words were used in their popular sense and not in their technical sense. They did not refer to an assessment in terms of s 44.

**[65]** First we refer to each of the nine consent declarations. In our view each of the declarations was objectionable simply on the basis of the observations *Megarry VC* which we have set out earlier in this judgment. The judge made these declarations without hearing any argument.

**[66]** *Declaration 1:*

> 1. In exercising his powers of audit under s 44 and s 48 of the Value Added Tax Decree 1991 the Commissioner of Inland Revenue ("the Commissioner") failed to act in a fair and reasonable manner by adopting a broad "reasonableness" test (involving reconciliation of the aggregated revenue and expense items disclosed in the taxpayers annual financial statements with the input and output claims in its VAT return without understanding the make up and assuming a VAT treatment and extrapolating one month's audit figures over 48 months to determine a discrepancy and using that discrepancy as the basis of an assessment) without making any or sufficient effort to perform a detailed procedures examination of the records kept by Punjas Limited and Punja & Sons Limited which records were available had the Commissioner requested for them.

**[67]** The Appellants did not seek to delete any words in this declaration.

**[68]** It reads as a finding of fact. It is in fact erroneous on its face. The commissioner exercised his powers of audit under s 12 of the VAT Decree. That section authorises him to enter the premises of a taxpayer and to inspect the books of that taxpayer. On the Appellants' own case there was no assessment under s 44 and yet the declaration opens with the words:

> In exercising his powers of audit under section 44 and section 48 …

**[69]** Section 48 is a limitation provision which prevents the commissioner from issuing an assessment or reopening an assessment after 6 years from the end of the taxable period in respect of which the return was furnished. Under s 48(2) the 6-year limitation, where there has been a failure to make a return or there has been a deliberate and fraudulent disclosure does not apply. We are unable to see how s 48 has any relevance.

**[70]** Quite apart from these matters this declaration purports to condemn the commissioner's methodology during the audit which culminated in the discrepancy report. In our view he was imposing a fetter on himself for the future. By consenting to this declaration, he was agreeing that the methodology used during the audit was wrong. He would be precluded from using it in the future with this taxpayer. In the words of Richardson J in *Bozaid*, he was creating a no go area for himself.

**[71]** *Declaration 2*

> 2. — There was no evidence that Punja & Sons Limited had knowingly and fraudulently failed to make a full and true disclosure of any material facts in terms of s 48(2) of the VAT Decree 1991 and therefore the Commissioner did not have powers to undertake a VAT audit for a period in excess of 6 years from the end of the taxable period immediately preceding the date of the reassessment notice ie 20 June 2001.

**[72]** The Appellants did not seek to have any words deleted in this declaration.

**[73]** Once again this declaration reads as if it is a finding of fact by the court, although, of course, there was no argument and no contested hearing. In the declaration the commissioner purports to restrict his powers to assess which he is not entitled to do.

**[74]** *Declaration 3*

> 3. — The Commissioner acted unreasonably and was wrong to reject the VAT input claimed by Punjas Limited (for management fees paid by it to Punja & Sons Limited) on the grounds that Punjas Limited did not hold a tax invoice from Punja & Sons Limited, and the Commissioner should accept the said VAT input claimed by Punjas Limited for the management fees paid as aforesaid.

**[75]** The Appellants did not seek to have any words deleted in this declaration.

**[76]** The first part of this declaration also reads as if it is a finding of fact by the court notwithstanding that there was no argument and no contested hearing. In the last part of the declaration commencing with words "and the Commissioner should accept……", the commissioner has placed a restriction on himself. He has allowed the court to tell him how to do his job. It compromises him in carrying out his statutory duties under the VAT Decree. It authorises him to waive tax invoices which are required by the decree. He has no dispensing powers of that kind which would allow him to agree to such a waiver.

**[77]** *Declaration 4*

> 4. — The Commissioner acted unreasonably and was wrong to assess VAT in respect of the missing tax invoices, *and all such assessments (including any and all subsequent amended assessments)* are wholly set aside and liability of the Plaintiffs in respect thereof is expunged.

**[78]** The Appellants asked for the deletion of the underlined words.

**[79]** The Appellants accepted that those words comprehended a forward agreement and that the commissioner was unable to enter such an agreement. In our view that is a correct appraisal of those words. The concession was properly made.

**[80]** Even if, however, those words are deleted the remainder of the declaration is tainted. Under this declaration the court is purporting to authorise the commissioner to waive tax invoices. He would be acting outside his powers in agreeing to such a waiver. Tax invoices are required by the decree. Second the court is purporting to extinguish a liability for tax which is imposed by the decree. Under the decree the court has no jurisdiction to make such an order.

**[81]** *Declaration 5*

> 5. — The activity undertaken by Punja & Sons Limited of operating an Insurance Division and in arranging insurance covers for the Punja Group of Companies through insurance brokers, Marsh Ltd (by being the insurer of those companies for claims of up to the relevant deductible amount; by processing claims of the various companies; by arranging remedial action; by paying the loss claimed and by undertaking day to day administrative duties incidental to such activity) for which activity Punja & Sons Limited has charged insurance premium to those Companies is a supply of financial services under paragraphs 1 (b) and 1 (g) of the First Schedule and therefore an exempt supply under s 2 of the VAT Decree 1991, and is not a service fee attracting VAT as contended by the Commissioner.

**[82]** The Appellants did not seek to have any words deleted in this declaration.

**[83]** Like declarations 1,2, and 3, declaration 5 is expressed as a finding of fact. In any event it is not within the jurisdiction of the court to rule on a matter which is, at least in the first place, a decision of the commissioner when exercising his powers of assessment. Once again the commissioner has imposed a fetter on himself for the future. As in declaration 3, the commissioner has agreed to the court imposing a particular result on himself for the purposes of exercising his powers of assessment.

**[84]** *Declaration 6*

> 6. — *The Commissioner is bound by and estopped from acting contrary to the advice and assurance given by its VAT auditor, during an earlier 1997 audit, to the Plaintiffs that* for internal charging of management fees and lease rentals between the Companies (including Punjas Limited and Punja & Sons Limited) it was adequate if the transactions were routed through journals and that if that was done no tax invoice was required to be issued.

**[85]** The Appellants sought the deletion of the underlined words. Obviously this was a recognition by the Appellants of the well-established principle set out above, namely, that the doctrine of estoppel does not operate to preclude the commissioner from pursuing his statutory duty to assess tax in accordance with the law. Whatever views the commissioner had previously expressed in the 1997 audit as to the adequacy of inter company transactions within the Punja Group

concerning management fees and lease rentals being routed through the journal and tax invoices not being required he was entitled to resile from those views. We do not consider however that deletion of the underlined words really alters the meaning of the declaration. In its amended form, and without stating that the commissioner is estopped, the remainder of the declaration still fetters his position for the future by purporting to state that journal entries alone and without tax invoices will be "adequate".

**[86]** Here in our view the commissioner has waived the documentary requirements prescribed the decree. He has created another no go area for himself: and this he cannot do. As well we do not accept the Appellants' submission that the order is spent and that it has no continuing effect. Even as amended it is capable of being read as having present and future effect.

**[87]** In order to circumvent the clear effect of cases such as *Lemmington* and *AGC* referred to above the Appellants relied on *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; 93 ALR 1 (*Quin*). Some of the observations of Mason J at CLR 17; ALR 11 were cited to us:

> The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power …. What I have just said does not deny the availability of estoppel against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion.

**[88]** The Appellants submitted that a plea of estoppel was available to them against the commissioner as "an element of justice" arising from the representations made by the commissioner through his VAT auditor in 1997. We are not able to accept that submission. *Quin* was a not tax case. Whether a plea of estoppel might be available against "the Executive" in the circumstances postulated by Mason J, it is well-established tax law, as we have already stated, that it is not available against the commissioner. He cannot be encumbered by any previous position which he had taken up. He must be free to exercise his judgment and discharge his statutory functions as and when he thinks proper. In short, he is entitled to change his mind and take up a new position and disavow one that he has taken up previously

**[89]** *Declaration 7*

> 7. — The Discrepancy Reports in respect of Punjas Limited and Punja & Sons Limited contained in the Commissioner's letter dated 6 March 2002 has such material errors that they are unreliable and wrong and cannot be the basis for Reassessment VAT notice under the VAT Decree 1991, and accordingly those reports *and all assessments and reassessments issued in respect of or arising out of them* are wholly set aside.

**[90]** The Appellant sought the deletion of the underlined words at the end of this declaration. No doubt the deletion was sought on the basis that those words contained an element of the futurity. Even if those words are taken away it is our

view that the remainder of the declaration is equally objectionable. Like the earlier declarations 1, 2, 3 and 5 this declaration is couched as a finding of a fact without argument or a contested hearing. In this declaration the commissioner has, in effect, abandoned the contents of the discrepancy report. The declaration states that the report is "wholly set aside". The VAT Decree does not authorise the court to make such a pronouncement. By abandoning the discrepancy report the commissioner has precluded himself from using all or part of it in the future. On the face of this declaration the court has substituted its view for the views of the commissioner.

**[91]** *Declaration 8*

> 8. — The payments made by Punjas Limited and Punja & Sons Limited for security services provided at the residence of directors and senior managers of those Companies is a business expense of those Companies and is not an employee benefit, and the Commissioner shall so treat.

**[92]** The Appellants did not seek to have any words deleted in this declaration.

**[93]** Our observations on declaration 5 equally apply to this declaration.

**[94]** *Declaration 9*

> 9. — Where a VAT audit is done in May 2001 the Commissioner has no power to subsequently issue a VAT Reassessment Notice for a taxable period earlier than February 1996.

**[95]** The Appellants did not seek to have any words deleted from this declaration.

**[96]** This declaration states a conclusion of law. There was no argument. It is objectionable on the basis on the dictum of Megarry J in *Metzger* to which we have referred above.

**[97]** We have now dealt with the nine declarations. For the various reasons set out each and every one of them cannot stand. The salvage deletions put forward by the Appellants are of no avail. In any event we are not prepared to embark on a "cut and paste" exercise. In effect, the Appellants are asking this court to rectify the agreement. That is simply not possible, the court being of the view that the whole of the agreement is void.

**[98]** We now turn to the orders numbered 10–14.

**[99]** *Orders 10 and 11*

> 10. — The Commissioner will pay to Punjas Limited the sum of $202,143.26 in VAT refunds (due up to February 2002) and interest thereon compounded on a daily basis at the rate of 12.5% calculated from the respective due dates to the date of payment.
>
> 11. — The Commissioner will pay to Punja & Sons Limited the sum of $7,062.66 in VAT refunds (due up to February 2002) and interest thereon compounded on a daily basis at the rate of 12.5% calculated from the respective due dates to the day of payment.

**[100]** Under these orders the commissioner was required to pay monies to the Appellants. Those monies have been paid as stated above. The orders are therefore spent. Having said that we are of the view that commissioner should not have agreed to them as they compromised his statutory position and subjected him to the surveillance of the court.

**[101]** *Orders 12, 13 and 14*

> 12. — The Commissioner his servants or agents or otherwise are restrained from exercising any powers vested in the Commissioner to recover from Punjas

Limited $1,176,225.89 or any part thereof being the amount of disputed VAT and penalties in the Discrepancy Report contained in the letter dated 6 March 2002, as that report and any assessment or penalties arising there from are wholly set aside.

13. — The Commissioner his servants or agents or otherwise are restrained from exercising any powers vested in the Commissioner to recover from Punja & Sons Limited $429,978.11 or any part thereof being the amount of disputed VAT and penalties in the Discrepancy Report contained in the letter dated 6 March 2002, as that report and any assessment or penalties arising there from are wholly set aside.

14. — The Commissioner his servants or agents or otherwise are restrained from withholding any VAT refunds due after 31 December 2001 or which are now or will hereafter become due to Punjas Limited and Punja & Sons Limited and the Commissioner and others as aforesaid are also restrained from applying any part of any such refund against existing or future VAT or income tax liability of either Company without an order of this Honourable Court, and any sum which has been so applied after 31 December 2001 is wholly set aside.

**[102]** The Appellants conceded that all three orders should be deleted. This was a clear recognition by the Appellants that the commissioner was, under those orders, precluding himself for the future from carrying out his statutory duties to collect the tax which was imposed by the decree and that by agreeing to those orders he was subjecting himself to the restraint of the court.

**[103]** Accordingly for the reasons given none of the orders 10–14 can stand.

**[104]** Having reached a similar conclusions in respect of the nine declarations in the consent order it leads us to conclude that the judge was correct in finding that the agreement and the consent order upon which it was based were beyond power, ultra vires and void.

**The Appellants' jurisdiction agreements**

**[104]** Finally we deal with the jurisdictional arguments put forward by the Appellants.

**[105]** The *Vandervell* does not assist the Appellants. Lord Wilberforce did not express the views of the majority but even if Lord Wilberforce's dictum is applicable an agreement purporting to confer jurisdiction by consent must be a valid agreement. If the agreement between the parties is invalid then clearly the parties cannot confer jurisdiction by consent. We have concluded that the agreement was invalid and accordingly the parties could not confer jurisdiction by consent.

**[106]** In this case, as we have noted earlier, the Appellants commenced their proceedings by way of originating summons. They did not apply for judicial review although they now accept that it might have been better to have done so. Even if the *NZ Pacific* entitles a litigant to maintain or continue a challenge to process in proceedings commenced by way of originating summons (and we do not express a view upon this point) that is of no avail if the challenge is not about process but about purporting to fetter the commissioner's statutory power under the VAT Decree and purporting to subject him to the surveillance of the court. This case was in the latter category. The High Court therefore had no jurisdiction to make declarations and orders of that kind. They were not declarations and orders arising from process.

**Final conclusions and results**

**[107]** Our clear conclusion is that the judge correctly found that the agreement between the Appellants and the commissioner and the subsequent consent order which rested on the agreement were beyond power ultra vires and void. It was properly set aside.

**[108]** The result of the appeal is as follows:

(1) The appeal is dismissed.

(2) The Appellants are ordered to pay costs to the Respondent in the sum of $1000 (inclusive of disbursements).

*Appeal dismissed.*