

BETWEEN

CONTRACT PACIFIC LIMITED

Appellant

AND

COMMISSIONER OF INLAND REVENUE

Respondent

Hearing: 3 August 2010

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
Young J

Appearances: R B Stewart QC and G J Harley for the Appellant
M S R Palmer and M Deligiannis for the Respondent

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CIVIL APPEAL

MR STEWART QC:

10 Yes, good morning Your Honours. I appear with Mr Harley for the appellant in this matter.

ELIAS CJ:

Thank you Mr Stewart, Mr Harley.

15 **MR PALMER:**

Tena koutou katoa, my name is Palmer and I appear for the Commissioner of Inland Revenue and with me my colleague Ms Deligiannis.

ELIAS CJ:

20 Thank you. Tena koe Mr Palmer, Mr, I'm sorry, how is the name pronounced? Deligiannis? Thank you. Yes Mr Stewart?

MR STEWART QC:

Your Honours as you may have discerned from the High Court and Court of Appeal judgment my learned junior Mr Harley will have the carriage of the section 42 issue and – sorry, section 46 issue.

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ELIAS CJ:

Section 46.

MR STEWART QC:

10 And I will deal with the savings provisions.

ELIAS CJ:

If it's reached.

15 **MR STEWART QC:**

Yes Your Honour.

ELIAS CJ:

Yes, thank you. Yes Mr Harley?

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MR HARLEY:

Good morning Your Honours. That didn't sound too promising as a beginning Ma'am.

25 **ELIAS CJ:**

Well I really just mean sequentially.

MR HARLEY:

30 No I understand. One housekeeping matter. If I could ask you to turn to the Court of Appeal, page 2. When I filed the Court of Appeal I incorrectly filed the Courts terms of leave, the wrong terms of leave are dated the 4th of March. The correct terms of leave are dated the 5th of March.

ELIAS CJ:

35 I don't think this will bother us very much Mr Harley, thank you.

MR HARLEY:

I just wanted – that's fine. In terms of the argument that I want to address there are six parts to it and I have a note which I'll hand in, in a moment. The first part is by way of preface and chronology introducing from the decision of the Court of Appeal in
 5 *Wilson v Horton Ltd v CIR* (1995) 17 NZTC 12,325 through to the first statutory amendment which was made in May 1999 then the second statutory amendment which was made in May 2001 and it's the May 2001 second amendment which we refer to as the Savings Provision.

10 The second part of the submission orally will deal with the statutory refund mechanism and as none of that is in dispute I'll go through that very quickly.

The third part is really to clear the decks as to what the case is not about. It is not about the Commissioner's powers of assessment. It's not about his powers of
 15 enquiry in terms of section 16 to 19 of the Tax Administration Act. This is more clear from the decision of the Court of Appeal in *CIR v Sea Hunter Fishing Ltd* (2002) 20 NZTC 17,4779 (CA) which we rely on and which Duffy J in the High Court also relied on and made clear in her judgment. The meat is the interpretation of section –

20 **ELIAS CJ:**

Well can't we start with the meat Mr Harley? The rest of it may well not trouble us at all.

MR HARLEY:

25 I'm in your hands Your Honour but –

ELIAS CJ:

Well it is usual to start –

30 **MR HARLEY:**

– for my part –

ELIAS CJ:

– with the statutory provision, is it not?

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MR HARLEY:

I thought it would be helpful to the Court to understand the statutory context in which the refund issue arises and how it was that successive retrospective legislation amendments were made. If that's not helpful I can get straight to section 46.

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ELIAS CJ:

Well if you start with the text and then if it's necessary to take us to the history to explain the text, by all means do so, but really, for my part, it would be a lot more helpful to start with the provision which is in issue.

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MR HARLEY:

I'll follow your direction but we're talking about two different statutory histories here. One is in respect of the retrospective legislation to amend section 11 of the GST Act. The second statutory history is with section 46 itself and so I'll focus, as you've asked me to, on section 46 itself and leave out entirely the statutory amendments and the history in respect of section 11 which is the zero rating provisions. But it is how the refund application came to be made at the time it was and it is absolutely important in terms of the second issue if we get there.

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ELIAS CJ:

Yes.

MR HARLEY:

The note that I have prepared then I can commence dealing with –

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ELIAS CJ:

Do we have that?

MR HARLEY:

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I was just going to hand that up. If I could take you to the foot of page 4 but – yes I'll commence at the foot of page 4 and come to the Commissioner's enquiry powers. The submission that's made for Contract Pacific in respect of section 46 is all it does is to impose 15 day working time limits, 15 working day time limits for refund purposes. The submission that's made is that the Commissioner has four statutory choices in order to withhold a refund sought by a registered person. The first, which isn't conferred or dealt with in section 46 at all, is what I've referred to as the rejected outright. If he were to take that course the Commissioner would, on considering the

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return, form a view that it was for some reason non-compliant and having formed that view he would issue an assessment immediately, the net effect of which would be through his system to register within the system what the amount claimed was and then to cancel it and to issue an assessment on the basis that the person has no
 5 entitlement to any refund at all.

BLANCHARD J:

Is that what he does in practice sometimes?

10 **MR HARLEY:**

Yes he does. And the circumstances, Sir, in which he might do that is if the person has a history of making the same claim or claims which the Commissioner has already resolved either through the Courts or through his dispute process or he's simply come to the view that it's wrong, untenable, won't accept it and out it goes.

15 Then in terms of –

McGRATH J:

Mr Harley, is that in effect a reassessment because it's an initial assessment by a computer or something?

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MR HARLEY:

Yes to all that. It's a little difficult, Your Honour, at this point we are not in what is called the self-assessment regime. At the time the Commissioner mechanically, if I can put it that way, entered into his system what the taxpayer claimed and issues a
 25 notice of account, in those circumstances, and to answer your question directly, if he rejected what the person claimed with the return, he is issuing an original assessment. These days what he does is, and is statutorily authorised to do, is he enters into the system what the person claims as a self-assessment and if he rejects it then he issues what is an amended assessment. But the result is exactly the
 30 same. Out it goes. And then the person if discontented with that then commences the statutory disputes process in the ordinary way.

In section 46(2)(b) I've referred to Option A which is the investigation into the circumstances of the return. Option B, which is the information requisitioned to the
 35 registered person and I've referred to both options because section 42(b) and its common ground can operate so that Option A is independent or Option B is independent or both options can be used conjunctively. In his submission in reply

the Commissioner never refers to the existence of three options except to acknowledge in paragraph 31 that they exist. Thereafter he talks all the way through, and the paragraph is referred to as having independent options only. In the note I have said that Duffy J was correct to identify the three of them and she treated them correctly in her judgment and I've given the passage references in the judgment to 127 to 130 of her judgment. The points are essentially as a result of the use of the colon in section 46(2) the Commissioner has the three separate rights, or options as I've called them, and can choose any one of the three –

10 **YOUNG J:**

How does the assessment option fit in with the language of section 46?

MR HARLEY:

That the Commissioner is not satisfied with the return and determines immediately that it's not compliant as an unlawful. He would then take the view, Sir, that he has no need to invoke any of the three options I've referred to because he will never be satisfied, and he may well have a Court decision in his favour establishing correctness of his dissatisfaction.

20 **YOUNG J:**

It's not a comfortable fit with subsection (2) though is it? Oh sorry, subsection (1), which does suggest there are two options. It's (a) or (b). It maybe implicit that if the Commissioner has reached a view and made an assessment then that, as it were, overtakes the section 46 process.

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BLANCHARD J:

Well the other options are routes to an assessment or to the Commissioner deciding that the return was correct. So presumably the Commissioner can go straight to an assessment without following those routes in the kind of circumstances that you've mentioned Mr Harley.

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MR HARLEY:

My answer to that is yes, and let's take an extreme example, and this one's going to be against me and for you. Glen Harrow No 2. Suppose Mr Glen Harrow were to present a further GST input claim contrary to this Court's decision, I think we'd all agree that the Commissioner would be on reasonably strong ground in saying to

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Glen Harrow, "That's not on," and then he would say in respect of subparagraph (2), I mean the dotted 2 of 46, (1)(b)(ii), "I'm not satisfied, out it goes."

YOUNG J:

5 I suppose the difficulty – I mean it's obvious that the Commissioner, who decides that the GST isn't payable – that the credit isn't refundable, isn't going to refund it, but subsection (1) says, you only get to subsection (1) after the (a) and (b) processes, "Determines the amount is refundable, after first having." Is it not just simply a case where the Commissioner's investigation maybe rather summary?

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MR HARLEY:

Yes.

YOUNG J:

15 I've looked at this return, I've investigated by looking at the fact that this argument's been run before and lost in the Supreme Court, investigation over.

MR HARLEY:

You're gone.

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ELIAS CJ:

But that would make it an investigation, which – so there would only be two routes.

TIPPING J:

25 I rather read the "or" between the capital A and capital B in order to be consistent with 46(2) as and/or.

MR HARLEY:

I agree.

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TIPPING J:

By implication.

MR HARLEY:

35 I agree. And you would read it that way Sir for consistency it's the only way you get to the whole operating as obviously as, well as it's intended, yes.

TIPPING J:

You can do both. But that doesn't take us very far though.

ELIAS CJ:

- 5 I wonder whether that's right because could not subsection (2) simply mirror the two aspects of subsection (1)(a) and (b)?

MR HARLEY:

- 10 And my answer to that is yes they can, and sometimes they will, but they'll still give you the three options.

ELIAS CJ:

But the third option being the, being rejection after summary investigation.

- 15 **TIPPING J:**

No that's the first option.

ELIAS CJ:

Oh, that's the first option.

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TIPPING J:

The three options we're talking about are (A), (B) and (A) plus (B).

ELIAS J:

- 25 Yes. Yes.

MR HARLEY:

Yes. I used the – rejected outright to avoid using the option language because it becomes confusing in terms of (A) and (B) and the and/or.

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ELIAS CJ:

Yes.

YOUNG J:

- 35 Okay so you say there are three options or four options?

MR HARLEY:

Four.

YOUNG J:

5 Okay, but isn't the rejected really just a subset of investigation?

ELIAS CJ:

Yes.

10 **MR HARLEY:**

Well I hadn't thought of it in those terms.

YOUNG J:

Albeit it an abrupt or brief –

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MR HARLEY:

It might be very abrupt.

TIPPING J:

20 It's not going to matter.

MR HARLEY:

It's just decision making and it doesn't alter at all, in my submission, the correct approach to the interpretation of section 46. All I'm trying to do is to paint the picture here in reply to the Commissioner where he says, "That the approach that's been contended for somehow constrains the Commissioner in terms of the exercise of his powers of assessment."

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TIPPING J:

30 I don't think it's argued against you that the Commissioner can't have (A) and (B) together, unless I've misunderstood the stance of the Commissioner. Your essential point at the moment is that you can have either (A), whatever it comprehends, or (B), and (A) plus (B).

35 **MR HARLEY:**

Correct.

TIPPING J:

And that's enough for your present argument isn't it? If that is valid then you build on that to say, "What's coming?" But you've got to invoke both if you want to do both.

5 **MR HARLEY:**

Yes, yes and yes. And all I'm saying in respect of the rejected outright position, is in reply to my friend's submission –

TIPPING J:

10 I think you're over-complicating things Mr Harvey quite frankly.

YOUNG J:

Yes, it's a red herring isn't it?

15 **MR HARLEY:**

Well he makes the point in his written –

TIPPING J:

Well why don't you let him make it and then see how he gets on.

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MR HARLEY:

Very well.

YOUNG J:

25 Can I just ask you this Mr Harley, because it's one aspect of your argument I don't understand. It's perfectly clear that the Commissioner embarked on the 46(1)(b) process. Do you accept that?

MR HARLEY:

30 Yes, with Option A.

YOUNG J:

Yes. At what point did the Commissioner determine that the amount was refundable?

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MR HARLEY:

He never determined that the amount claimed was refundable.

YOUNG J:

Well then how did the Option B process terminate in a way which entitled your client to a refund?

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MR HARLEY:

Because he used, we say, Option B outside of the mandatory 15 day limits.

YOUNG J:

10 But what does that matter?

MR HARLEY:

And as a result he triggered the obligation to pay the refund because he was not within his statutory right to withhold the refund, it being triggered by the failure to comply with the 15 day period, which is the authority of *Sea Hunter*.

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YOUNG J:

But he was still investigating wasn't he? You say the investigation strayed into forbidden territory as soon as he asked the taxpayer a question, which I struggle with, but what brought it, what's the day, you see – I'll start again. Under section 44(1)(b), once that process is embarked on the money doesn't become payable until the Commissioner determines that it is refundable.

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MR HARLEY:

Unless he fails to trigger the 15 working day period, in which case he never gets there, he must pay the refund. That is established by *Sea Hunter*.

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YOUNG J:

But what if he's triggered the investigation power which he can do. Because *Sea Hunter* doesn't deal with that.

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MR HARLEY:

Your Honour he's not triggering his investigation power, this section does not confer statutory powers of an inquiry, it imposes time limits in respect of the exercise of those powers which are conferred by section 16 to 19. That's common ground.

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BLANCHARD J:

Was he carrying out an investigation?

MR HARLEY:

5 Yes.

TIPPING J:

And pursuant to that investigation the submission is that he couldn't ask the taxpayer anything because he hadn't invoked (b)?

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MR HARLEY:

Correct.

TIPPING J:

15 Now that's where I start to struggle.

MR HARLEY:

No just let me qualify the answer. Yes he could ask the taxpayer anything he liked but he couldn't withhold the refund.

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TIPPING J:

Well that's where I start to struggle.

BLANCHARD J:

25 But if he was conducting an investigation, he could withhold the refund. The fact that he might have, invalidly in your view, made a request for further information, wouldn't mean that the investigation was at an end.

MR HARLEY:

30 And I don't contend it was or did come to an end.

BLANCHARD J:

Well why did he have to make the refund, just because he'd asked for some further information, if the investigation was ongoing and the investigation had been
35 commenced within time?

MR HARLEY:

It's common ground that the investigation under the circumstances of the return was commenced within the 15 day period under Option A, that's agreed. The contention that is being made here is that in respect of his requisitions of information from Contract Pacific. In fact he was invoking what is contained in Option B and he did not give notice within the 15 days of that step. It does not invalidate his investigation powers at all. It simply requires him to pay the refund and then if he wants to recover the money he can exercise his powers of assessment as he did in *Sea Hunter*.

10 **BLANCHARD J:**

What if he'd just invoked the investigation power and he'd never asked for any further information?

MR HARLEY:

15 He'd be in compliance with Option A. That is determined –

BLANCHARD J:

Well how can it possibly be the case then that because he chooses also to exercise his power under Option B, but does that outside the 15 days, that that means that somehow the investigation process is not continuing and therefore the refund has to be made?

MR HARLEY:

On that construction, which is the Court of Appeal's construction, overturning Duffy J, there is no reason to have Option B at all.

BLANCHARD J:

Well you could have Option B for when he doesn't want to do an investigation, doesn't think it's necessary. He has a return which he might think is probably valid but he needs further information about it so he simply asks a question.

MR HARLEY:

Yes.

35 **BLANCHARD J:**

And he doesn't have to bother with an investigation. He gets the answer to the question, he's satisfied, that's the end of it, but it might take more than 15 days.

MR HARLEY:

Under Option B?

5 **BLANCHARD J:**

Yes.

MR HARLEY:

He's in compliance if he's given notice under 46(4), Option B.

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BLANCHARD J:

Yes.

MR HARLEY:

15 But what I'm saying is that he cannot use Option A solely and then use Option A solely in terms of the 15 day period to requisition information from the registered person which is what Option B provides for.

BLANCHARD J:

20 Well with respect Mr Harley that sounds barmy. It just doesn't make any sense.

TIPPING J:

He makes a false move under A and that damnifies him under A so that the investigation is deemed to have come to an end. Is that what is –

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MR HARLEY:

It doesn't deem the investigation to come to an end. It simply requires him to pay the refund and/or make –

30 **TIPPING J:**

But why does he have to pay a refund while it's still investigated? He's made a false move, according to the submission, but he's still investigating. Why should he have to pay a refund because A and B are disjunctive?

35 **MR HARLEY:**

Your Honour let's go to the statutory policy of what section 46 is here for.

TIPPING J:

Right.

MR HARLEY:

5 The starting place –

ELIAS CJ:

Have you said everything you want to say on the statutory language of section 46?

10 **MR HARLEY:**

Not yet.

ELIAS CJ:

Can we complete that?

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MR HARLEY:

If you just bear with me for a moment please. The police embodied in section 46 in respect of a registered person is that ordinarily a registered person is entitled to the refund of the input tax because it's the registered person who is recovering the negative cash flow as a result of the tax. The registered person does not bear the incidents of the tax, the consumer does, and so the input/output mechanism is fundamental to preserve the cash flow status of the registered person. I'm not telling you anything that isn't reflected in the Court of Appeal's judgment in *Sea Hunter*. That is the policy of the section. So the starting place is one of entitlement to the refund.

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Now the second point in respect of entitlement to the refund is under section 46 the Commissioner must pay the refund within the 15 days unless he triggers this 15 day working limit powers, Options A, B or both, and with all due respect to Justice Blanchard calling the submission barmy, there is no point to having Option B in the section at all if the Commissioner can simply choose to exercise Option A, he never needs to do anything else. He doesn't have to take any step in respect of the registered person within any 15 day period and let's take the extreme of the refreshment power in section 46(4)(b). The steps that are involved in 46(4)(a) are the Commissioner properly invokes his 15 day notice period and requisitions information from the registered person. The person takes, shall we say 90 days, to comply. The Commissioner then is required to review the information that is

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requested in accordance with subsection (2) and having reviewed that he must make a further decision, within 15 working days following the receipt of that information from the registered person, in order to obtain more from the registered person. That is what the refreshment power is there for and it works then seriatim.

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YOUNG J:

Can I just ask you something about that? I mean there are difficulties with the section but – and one of them is the one you’ve mentioned. Why would the Commissioner ask for further information if satisfied that the refund was appropriate, at that point?

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MR HARLEY:

There are a number of reasons why he might which would be concerned with the registered persons other compliance obligations or with whether the person was solvent so that if there were a dispute subsequently could repay and so he would then have to direct himself, in fact he must direct himself in any event, to section 174A of the Tax Administration Act which says to him, he must not pay a refund in any circumstances where he is concerned with the taxpayer’s solvency.

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YOUNG J:

20 Isn't that tied up with the expression “determines the amount is refundable”?

MR HARLEY:

No I don’t believe it is Your Honour. You could determine that the amount, a million dollars, is on the face of it refundable, satisfied in terms –

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YOUNG J:

I understand that but if it’s not refundable because of solvency concerns is it not – is that not a determination that the converse of a determination of the amount is refundable?

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MR HARLEY:

Well no Your Honour which is why section 174 is – 174A is in the Tax Administration Act.

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YOUNG J:

All right well that’s, perhaps, a side issue. Wouldn’t the Commissioner only want to ask – generally ask for more information if not presently satisfied that the amount is

refundable? And if that's the Commissioner's state of mind the money – under this process the money isn't refundable because it's only refundable once the Commissioner determines that it is refundable. It seems to be a sort of rather a silly process.

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MR HARLEY:

Well I didn't write it but with respect I don't think it is a silly process. What it is saying to the Commissioner is that, for the reasons I've just gone through, the registered person is entitled to the cash flow benefit of the refund within the 15 day period as of right unless you, the Commissioner, form the view that you're not satisfied with the return –

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YOUNG J:

No, well –

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MR HARLEY:

– and you invoke the powers within the 15 day period and that makes perfect –

YOUNG J:

20 When does it have to be invoked within 15 days?

MR HARLEY:

Within 46(1)(a).

25 **YOUNG J:**

Does it say, say I'm the Commissioner, I ask for further information, please give me the – all supporting invoices and other information. I get a response, which I think is a bit murky, but something happens, I don't get onto it. Sixteen working days later I write another request. You say the money became refundable on the 15th working day?

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MR HARLEY:

Yes I do.

35 **YOUNG J:**

Even though as at the 15th day I obviously had not determined that the amount was refundable.

MR HARLEY:

Correct.

5 **YOUNG J:**

So you've got to make that, the definitions work, the statute, section work pretty hard to get that result though don't you?

MR HARLEY:

10 No it doesn't. The section works absolutely in those terms and the reason that it works in those terms is it operates by creating a statutory debt. As soon as it creates the statutory debt, the money is the property of the taxpayer, it has the right to issue summary judgment proceedings and recover it.

15 **YOUNG J:**

But the date, this is where I really don't understand your argument at all on this section. Once you exercise the (b) route, section 46(1)(b), the end point is only when the Commissioner determines the amount is refundable. If the Commissioner hasn't reached that view, how does the refund obligation get triggered? What's the word in
20 the section or words in the section that require that refund to be made?

MR HARLEY:

Your Honour if I could answer you by taking you to the Court of Appeal's decision in *Sea Hunter*.

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YOUNG J:

No, I'd like you to take me to the section for a start.

MR HARLEY:

30 Well the section is explained by Justice Blanchard in that judgment, both authoritatively and fully, if you just bear with me for a minute, I'll take you to it and it'll explain it fully. In paragraph 5 –

YOUNG J:

35 Is this *Sea Hunter*?

MR HARLEY:

This is *Sea Hunter* at tab 9 of the red volume. At paragraph 5 the facts are stated of the Commissioner receiving the return on the 19th of January and that he wrote the letter to the taxpayer on the 10th of February and it wasn't received within the 15 working days and that's the first issue in the case and the Court held that, we don't
5 need to get into the detail of this, but the notice provisions and the delivery under the so-called postal rule, require that notice to be in the hands of the person within the 15 days. It wasn't.

YOUNG J:

10 So *Sea Hunter* was never a Track B case?

MR HARLEY:

Yes it was.

15 **YOUNG J:**

But no notice was given.

MR HARLEY:

It was a non-compliant notice and then the Court –

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BLANCHARD J:

Well it didn't much matter whether it was a notice of investigation or a request for information.

25 **MR HARLEY:**

Correct.

BLANCHARD J:

It wasn't given in time.

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MR HARLEY:

And then the Court has asked to address the Commissioner's second argument, which is at paragraph 17 of the judgment, the proposition for the Commissioner being,. It doesn't matter whether or not the notice was given in time, and the Court
35 expresses the view very firmly, "Oh yes it does."

YOUNG J:

But isn't it, just tell me simply, if I'm wrong, as I understand *Sea Hunter* it is not a Track B case, because notice wasn't given, therefore it's not a Track B case.

MR HARLEY:

- 5 The effect of the Court's decision in *Sea Hunter* is that because of the non-compliant time limit, the refund was automatically a statutory debt and immediately recoverable.

YOUNG J:

It would help me if you answered the question, it is not a Track B case is it?

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MR HARLEY:

It was neither Track A nor Track B nor both options because the 15 day –

YOUNG J:

- 15 No, I'm not talking about the capital A and capital B, I'm talking about section 46(1)(a) and section 46(1)(b). It was never a 46(1)(b) case because the notice wasn't given in the time –

MR HARLEY:

- 20 Correct.

YOUNG J:

So the payment obligation arose under section 46(1)(a)?

- 25 **MR HARLEY:**

Yes.

YOUNG J:

- 30 This case is a section 46(1)(b) case and what I can't understand on your argument is how the 46(1)(b) process became derailed, the point at which it was derailed and how, despite that process having started in the section provided it only finishes once the Commissioner determines the refund is payable, it did terminate in your client's favour, despite the absence of such a determination. Now how do you get that out of the section?

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MR HARLEY:

Let's work backwards from the facts.

ELIAS CJ:

Why don't we go to the words of the section?

5 **MR HARLEY:**

In terms of the words of the section, let's start with subsection (1) "The Commissioner must pay the refund claimed under section 20(5), except where (b) applies, not later than the 15 working days." The question then is whether (b) applies. And in respect of (b), we then are directed from a capital A, capital B, into subsection (2).

10 Subsection (2) gives us the three options. Right?

YOUNG J:

(A), (B) and (A) and (B)?

15 **MR HARLEY:**

Yes, the three options. He gave notice of Option A. He exercised the power to requisition information from the registered person 77 working days later.

YOUNG J:

20 So what?

MR HARLEY:

And if my argument is correct, he is exercising both options and is bound accordingly to use section 46(4).

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YOUNG J:

Well how do you get that?

MR HARLEY:

30 Which part of that Sir?

YOUNG J:

Why is he bound to use subsection (4)?

35 **MR HARLEY:**

Because he's exercised both options. In fact –

YOUNG J:

Well, why can't he use subsection (5), which is where he started off? He notified an investigation, subsection (5) applied.

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MR HARLEY:

And then within what is Option A, in fact he requisitioned information from the registered person.

10 **BLANCHARD J:**

I don't see why that invalidates the fact that he made an investigation, sorry, the fact that he commenced his investigation and notified the fact within the 15 day period. That satisfied the section.

15 **MR HARLEY:**

Well my contention Your Honour is, no it didn't. If he wanted to requisition information from the registered person, he was required to give that requisition within the 15 working day period.

20 **BLANCHARD J:**

So he could exercise all his other investigation powers, he could to the extent that he was authorised, seek information from third parties, but the moment he asked the taxpayer for information, suddenly he had to make a refund.

25 **MR HARLEY:**

Or issue an assessment.

BLANCHARD J:

Well that's what I think is barmy. It just seems to be such a crazy scheme for the section to have set up that I really don't think it can be read that way and it's not a natural meaning of the language.

MR HARLEY:

Well Your Honour the contention is as was argued before Duffy J successfully and in the Court of Appeal unsuccessfully, if you take the approach that commends itself to you and to the Court of Appeal, there's no purpose in having section 46(4) at all, all a Commissioner need do is exercise his notice of investigation.

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ELIAS CJ:

But he may not be investigating, he may simply be requesting information.

5 **MR HARLEY:**

And it's the same thing.

BLANCHARD J:

Not necessarily.

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MR HARLEY:

Well section 16 and 17 both use the expression, "investigation and information gathering."

15 **BLANCHARD J:**

When the Commissioner, forget about GST, in the income tax field asks a question about a return, is he necessarily investigating? He may just be clarifying. He may be asking whether the fact that somebody's name was given incorrectly, means that it's a reference to a different person, or in fact is just a clerical error and I wouldn't have categorised that as an investigation.

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YOUNG J:

Or the box might not have been filled in.

25 **MR HARLEY:**

I don't put any connotation, pejorative or otherwise, on the expression "investigation" or "ask for information". Section 16 uses the expressions interchangeably and –

YOUNG J:

30 Sorry, was it a requisition for information or was it a request for information? That happened 77 days later?

MR HARLEY:

I didn't mean to use those expressions meaning something different.

35

YOUNG J:

Well they are different though, aren't they?

MR HARLEY:

No.

5 **YOUNG J:**

Could you kindly let me know if – “Could you kindly let us have a copy of the underlying contract?” That’s a request. “Under section so and so of the Tax Administration Act I require you to produce on such and such a day and such and such a place, copies of the following documents.” That’s a requisition. Now

10 what did the Commissioner do here?

MR HARLEY:

The former.

15 **YOUNG J:**

The former, a request?

MR HARLEY:

Yes he did not – I’m sorry, I now understand what you mean. He did not issue a formal section 16 –

20

YOUNG J:

Notice.

25 **MR HARLEY:**

– or 17 notice with the statutory set up that says, and if you don’t comply I’ll send you to jail.

McGRATH J:

30 The statute in that connection uses the word “require” does it not?

MR HARLEY:

Yes.

35 **McGRATH J:**

And so the word “request” in this provision in subsection (2) is deliberately not having the compulsive element?

MR HARLEY:

Yes but the person who doesn't respond to the request is then a non-co-operative taxpayer with all of the –

5

McGRATH J:

You take your chances if you get into that but one thing you will not be doing is exposing yourself to prosecution for failing to comply with a compulsory request because it's not compulsory?

10

MR HARLEY:

The answer to that is right, that is correct I mean.

YOUNG J:

15 Say the Commissioner here instead of writing a polite letter had issued a section 16 or 17 notice, would that have been fatal to the section 46(1)(b) process on your theory?

MR HARLEY:

20 We're at cross-purposes. There's nothing to stop the Commissioner –

YOUNG J:

I'm – no we're not at cross-purposes. I'm talking about an investigation that stops time running.

25

MR HARLEY:

Right, okay.

YOUNG J:

30 So we're not at cross-purposes. If the Commissioner instead of writing a police letter had said here's a section 16 or 17 notice, produce these documents forthwith or on such and such a date, would that statutory requisition have stopped the section 46(1)(b) process?

35 **BLANCHARD J:**

That, presumably, is assuming that he's already given notice of an investigation.

YOUNG J:

Yes, yes. So the Commissioner here gives notice of an investigation, 77 days later here's a section 16 or 17 notice, statutory requisition for information. Would that have stopped the section 46(1)(b) process?

5

MR HARLEY:

Do you mean by doing that –

YOUNG J:

10 Yes.

MR HARLEY:

– he had to pay the refund –

15 **YOUNG J:**

Yes.

MR HARLEY:

– because he wasn't within the 15 working day limit?

20

YOUNG J:

Yes.

MR HARLEY:

25 Yes, he would be.

TIPPING J:

So requisition includes a request –

30 **MR HARLEY:**

Yes.

TIPPING J:

– but not vice versa.

35

MR HARLEY:

I don't read in section 46(4) a difference in statutory power between the request for information or a compulsory requisition. The reason I don't is when you stand back and look at the interests of the registered person that is seeking the refund –

5 **TIPPING J:**

I think the difficulty –

MR HARLEY:

– so the statutory imperative is to co-operate in order to be able to satisfy whatever it
10 is that the Commissioner is enquiring about.

TIPPING J:

I think the real difficulty I have with your argument, Mr Harley, and I'll mention this because you may be able to allay, is that an investigation under capital A surely
15 necessarily includes a power to request information without also going down the (B) route. (B) route is confined to request for information but the A route surely must include the ability to request information otherwise it's a funny sort of investigation.

20 **MR HARLEY:**

Your Honour my answer to the question is that (A) and (B) are directed to different people. (A) is directed to third persons, including the Commissioner himself. (B) is directed to the registered person.

25 **ELIAS CJ:**

Sorry which As and Bs are we talking about?

TIPPING J:

Capital A.

30

ELIAS CJ:

The capital A.

TIPPING J:

35 Why is that so? Can you explain that to me Mr Harley?

MR HARLEY:

Yes –

TIPPING J:

5 It doesn't appear on the face of it to be such.

MR HARLEY:

Well if it does. If Your Honour will bear with me. If we can go to capital B, you'll see the Commissioner then has the review of the information requested in accordance
10 with subsection (2).

TIPPING J:

Yes.

15 **MR HARLEY:**

Then go to subsection (2) where subsection (2) deals with what I've referred to as Option A and Option B refers to request the registered person to provide further information concerning the return.

20 **TIPPING J:**

But why is A limited to third party? I agree B is clearly limited to the registered person but your proposition is by implication it seems that A is limited to third parties.

25 **MR HARLEY:**

That is the contention, yes.

TIPPING J:

Well it can't be right Mr Harley.
30

MR HARLEY:

Well –

TIPPING J:

35 I mean I don't see how you can read that in. It's just not there.

MR HARLEY:

Well I can read it in like this. As a matter of interpretation there is a statutory purpose to section 46(4) in terms of requisitions made of registered persons and giving the Commissioner power to delay the refund until he's satisfied, on review of that
5 information, that he should make the refund.

TIPPING J:

So under A he can't ask the registered person anything?

10 **MR HARLEY:**

Just let me finish please.

TIPPING J:

Well no Mr Harley. No you have no absolute right.
15

MR HARLEY:

I didn't claim one.

TIPPING J:

20 No. Is it correct that under A, on your client's premise, that the Commissioner can't ask the registered person anything?

MR HARLEY:

If he invokes solely Option A, yes is the answer to that question. That is the
25 contention.

TIPPING J:

Right, thank you. That's all I wanted to clarify in my mind. If you want to elaborate,
fine.
30

MR HARLEY:

And if he wants both he exercises both –

TIPPING J:

35 He ticks both boxes?

MR HARLEY:

Yes.

ELIAS CJ:

- 5 How does this – I may have misunderstood your argument, but I had thought that you were saying that section 46 did not confer powers, it simply imposed time limits?

MR HARLEY:

Correct.

10

ELIAS CJ:

Well you're building an awful lot on the terms in which the powers of the Commissioner are circumscribed, you say, by section 46? That he may request only of the taxpayer and so on. Aren't these – I don't quite understand how your
15 argument fits in with the submission that you made that this doesn't confer powers?

MR HARLEY:

The starting place, Ma'am, is that the Commissioner's powers to enquire, to put it neutrally –

20

ELIAS CJ:

Yes, yes.

MR HARLEY:

- 25 Are conferred by section 16 through 19 of the Tax Administration Act.

ELIAS CJ:

Yes.

- 30 **MR HARLEY:**

And this section does not, in any way, affect the scope of those powers.

ELIAS CJ:

No.

35

MR HARLEY:

He can exercise them at any time within the statutory time bar, even if he's made an assessment he can alter it if he decides that it was wrong. All the section does –

5 **ELIAS CJ:**

Is trigger the obligation to pay?

MR HARLEY:

10 It says you must make a decision within 15 days as to what you want and get on with it.

YOUNG J:

It doesn't say that where there's an investigation though does it?

15 **MR HARLEY:**

Yes it does.

YOUNG J:

20 Where?

MR HARLEY:

Once. 15 days?

YOUNG J:

25 Yes, once the investigation –

MR HARLEY:

30 And thereafter you take as long as you like reasonably, within administrative law concepts, which is the *Almond Properties Ltd v CIR* (2003) 21 NZTC 18,293 (CA) decision –

ELIAS CJ:

35 But there has to be a determination then. There has to be an outcome of the investigation.

BLANCHARD J:

It might lead to a very long investigation because the Commissioner can't without, on your argument, triggering the obligation to make the refund, ask a question of the taxpayer, so he's got to take a lot of time doing his investigation by other means.

5

MR HARLEY:

Or he might take no time at all. He might decide that he won't take any time further, and issue an assessment and say to the taxpayer, "You show me, the onus of proof is on you."

10

TIPPING J:

That would be rather perverse incentive though.

YOUNG J:

15 I've rather had rammed down my throat over the last few years that the view that the Commissioner can only issue an assessment that represents a bona fide view of the tax position. That assessment shouldn't be issued for, as it were, tactical or holding reasons.

20 **MR HARLEY:**

Your Honour there's nothing tactical or holding or not reasoned, about the Commissioner saying on the face of the return that he's received, "I am not satisfied with this return."

25 **YOUNG J:**

That's not – it's one thing to say , "I'm not satisfied," it's another thing to say, "I'm satisfied that this is the correct tax position."

MR HARLEY:

30 If you just bear with me for a minute. "I am not satisfied with this return. I regard it as non-compliant. I can and I will lawfully issue an assessment now that disallows the refund claim because I'm not satisfied that it meets the taxpayer's burdens in terms of proof to me." That is squarely within the Commissioner's powers, as established by *Canterbury Frozen Meat*, there is nothing protective or unreasoned or arbitrary
35 about him doing that. He can and he does.

TIPPING J:

For a simple mind like mine, Mr Harley, does this point in this case, turn on the fact that the Commissioner didn't tick both the capital A and the capital B boxes?

5 **MR HARLEY:**

Yes. Exactly.

YOUNG J:

Well it's worse than that though, because having not ticked the – had the
10 Commissioner ticked the capital B box you would've said that again the process was
derailed as soon as a question was asked outside the 15 day time limit and the
refreshment 15 day time limit.

MR HARLEY:

15 I'm sorry, I lost the last –

YOUNG J:

Well say the Commissioner had issued a notice that invoked both investigation and
review and presumably – sorry, information – sorry, investigation and the review of
20 requested information, then as soon as a further request for information was made
outside the refreshment period, you say that would have derailed the whole process
and there would have been, as it were, an automatic requirement to refund the
amount claimed?

25 **MR HARLEY:**

Yes. Because he would've been in breach of his refreshment time limit. And that's
its purpose. Just to elaborate, the expression used by my friend, in the
Court of Appeal I think, was a rolling grid of time, so that the Commissioner issues
his request for information to the registered person within time. The taxpayer takes
30 whatever period is necessary to comply, does comply. The Commissioner then has
the 15 working day period next, in order to decide what to do, and issues the further
request for supplementary information. So long as he's making those decisions
within that 15 working day grid, we call refreshment, then he is well able to conduct
his review and satisfy himself when he gets to the end of it. If he doesn't, then
35 outside of the 15 day limit of refreshment, then he's triggered the obligation to pay
the refund unless he exercises his power of assessment. But he has both barrels in

his hand and there's nothing to stop him at any time exercising his powers of assessment.

YOUNG J:

5 I hear what you say.

MR HARLEY:

I wanted to deal briefly with section 174A which is just simply to draw attention to it, it's on page 4 of the note, 174A subsection (2), overrides the refund obligation the
10 Commissioner must not pay a refund if he considers that there's a risk to the revenue and then there are the compliance obligations.

TIPPING J:

Risk to the revenue for the uninitiated is the concept of not getting it back?
15

MR HARLEY:

Yes. And as the section makes clear Your Honour, it's not only get it back, but getting other unsatisfied obligations paid as well. So on that sense it's a no good money after bad, provision.
20

YOUNG J:

If a refund is within section 174A(2), it wouldn't be open to the Commissioner under section 46(1)(b) to determine that it was refundable would it?

25 **MR HARLEY:**

174A(2).

YOUNG J:

174A(2), "The Commissioner must not refund overpaid GST." So that provides in
30 certain circumstances a refund must not be made?

MR HARLEY:

Correct.

35 **YOUNG J:**

Okay, if those circumstances apply, then it wouldn't open to the Commissioner's knowledge, then it wouldn't be open to the Commissioner to determine that the

amount was refundable to section 46(1)(b), is that right? An amount that is not to be refunded is not easily regarded as refundable.

MR HARLEY:

5 I'm not trying to be obtuse here, but I don't understand that.

TIPPING J:

I think my brother means, otherwise refund.

10 **YOUNG J:**

If the money is refundable in all respects other than because of section 174A(2).

MR HARLEY:

Oh, I see what you mean. The answer to your question is yes, by which I mean
15 subsection (2) is saying to the Commissioner, "If you've got a good refund over here, you must not pay it in circumstances where anyone of these conditions is not met."

YOUNG J:

Yes I understand that. But say those are circumstances that are applying in relation
20 to an issue that arises under section 46 if the refund is within section 174(1)(2), that is a refund which the Commissioner must not make, presumably the Commissioner would not determine that it was refundable for the purposes of section 46(1)(b) little (i).

25 **MR HARLEY:**

I accept that that is the consequence of the decision making that he would follow in terms of subsection (2), yes.

TIPPING J:

30 But an investigation under 46, if I can put it, must therefore encompass inquiries into matters that could arise under 174A.

MR HARLEY:

That may well be, yes. And –

TIPPING J:

I'm not sure that that directly affects the primary issue but it certainly is a factor to be borne in mind.

5 **MR HARLEY:**

Well, the only reason I've referred to 174A here, is for completeness. There's no suggestion on these facts that that was what the Commissioner was on about.

TIPPING J:

10 No, no of course not.

MR HARLEY:

Not at all.

15 **TIPPING J:**

In construing the two sections together, as they must work together.

MR HARLEY:

I agree with that, and that's why I've referred to it in this way.

20

McGRATH J:

So you accept that 174A is caught by the words, "The circumstances of the return" in section 46(1)(b)(A)?

25 **MR HARLEY:**

Can I just follow that through with you Sir? The circumstances of the return in 46(1)(b)(A) –

McGRATH J:

30 That's what he investigates, isn't it, the circumstances of return?

MR HARLEY:

And I say in respect of third parties including himself.

35 **McGRATH J:**

Yes.

MR HARLEY:

That's my submission.

McGRATH J:

- 5 Yes but you say that what he may investigate being the circumstances of return encompasses the factors covered by section 174A, you accept that?

BLANCHARD J:

- 10 I would have thought they're separate matters because 174A(2)(a) would cover things that have got nothing whatsoever to do with the return –

McGRATH J:

Yes that's what –

- 15 **BLANCHARD J:**

– such as the looming insolvency of the taxpayer which might have been brought about by an event subsequent to the return.

MR HARLEY:

- 20 Or alternatively the non-payment of PAYE.

BLANCHARD J:

- Well at least that's a tax matter but I was thinking there might have been some natural disaster which has –
25

MR HARLEY:

Any one of the –

BLANCHARD J:

- 30 Uninsured risk is suddenly materialised.

MR HARLEY:

And –

- 35 **TIPPING J:**

But that means that it's refundable under 46 but mustn't be refunded under 174A.

BLANCHARD J:

Yes.

ELIAS CJ:

5 Which is the way –

BLANCHARD J:

In other words they operate separately –

10 **TIPPING J:**

But the effect is the same.

ELIAS CJ:

15 Which is the way you first put it, that section 174A comes in over the top because it's a prohibition.

BLANCHARD J:

Which made me wonder why we're being referred to it.

20 **ELIAS CJ:**

Yes.

MR HARLEY:

25 Well I was only referring to it for completeness in respect of looking at section 46 as a whole because 174A deals specifically with control over the payment of refunds for the purposes of section 46. I wasn't making anything more of it.

ELIAS CJ:

30 Well for all purposes.

TIPPING J:

Why is 174A headed partial refunds because subsection (2) seems to me that you can't make any refund if there's a risk to the revenue.

35 **MR HARLEY:**

I don't know the answer to that but I'm happy to blame the draftsman because it wasn't me.

TIPPING J:

Well it's probably of no moment whatever but for an untutored mind in this field, Mr Harley, it looks a bit odd.

5

MR HARLEY:

Well 174A is not without its own difficulties Your Honour.

TIPPING J:

10 I don't want to provoke you into that.

MR HARLEY:

Well you won't but you'll notice it uses refund of overpaid GST and that's not a defined term anywhere and you have to go through a gleaning process to work out that what it means is just refund.

15

TIPPING J:

Well I'd rather stick with whether – if you don't tick both boxes you can do what the chap did here.

20

MR HARLEY:

And I'm sticking to that Your Honour because the contention here is simply –

TIPPING J:

25 No, no, there's no need to go through it all again. I'm just saying, for my money, that's where the real focus of this case lies, not in section 174A.

MR HARLEY:

And I'm with you for my money too. All I was going to say to complete that part of the submission is that if you do not accept the submission that in fact what happened here was the Commissioner was using both options and did not comply with 46(4), including refreshment under 46(4), then the submission is there's no point to having 46(4) at all. It renders it redundant for the reasons that Duffy J gave in her judgment and my submission is she was right.

35

ELIAS CJ:

Can you remind me how do you say that you tick the capital A or B boxes? Is it simply in the form of the letter you send?

MR HARLEY:

5 Yes.

ELIAS CJ:

You have to invoke it?

10 **MR HARLEY:**

Yes. By writing a letter.

TIPPING J:

By the notice provisions of subsection (5) and (4) and (5), is it, or wherever they are.

15

MR HARLEY:

In *Sea Hunter*.

TIPPING J:

20 In *Sea Hunter*?

MR HARLEY:

Yes, that's right and it's a mechanistic postal rule, for want of a better term.

25 **ELIAS CJ:**

But (5) doesn't – oh I see, that's the indication of investigation.

TIPPING J:

30 This is so that the taxpayer, presumably, knows what's going on and is informed that the Commissioner is withholding the refund on one or other or both bases.

MR HARLEY:

35 Yes, yes and yes and the submission that's in the written material before you is that it is exciting the registered person because it's the person who has got the economic incentive –

TIPPING J:

Exciting may not be quite the right word on the receipt of one of these notices but I suppose it is in one sense, but nevertheless, I'm sorry Mr Harley, I'm not being straight enough faced.

5

MR HARLEY:

I'm happy with the smile Your Honour. The point simply is that the economic imperative is with the registered person.

10 **TIPPING J:**

Yes, to get –

MR HARLEY:

In order to get the refund.

15

TIPPING J:

Quite.

MR HARLEY:

20 And the registered person has statutory obligations to the Commissioner both in the formal sense to file correct returns and to co-operate with the Commissioner and where the economic incentive is, if you want the money then you meet my requirements then it's all one-way traffic in that sense and that is why those provisions are there and my submission is that that policy is properly reflected in the
25 Court of Appeal's decision in *Sea Hunter*.

That then gets me to really responding directly to the Commissioner's written submission and I wanted to take Your Honours firstly to paragraph 34 of that submission. If I could just ask you to look at it? The proposition that's articulated
30 there is that section 20(2) contemplates that the registered person is filing this information with the Commissioner or with the return. That's not what happens at all and it's not what section 20(2) requires. It's misleading as it's contended. Subsection (2) imposes the obligation on the registered person to hold the information before it makes the claim and it specifies the information that's required
35 to be held before there is a valid claim. If the person doesn't hold that information at the time they make the claim they risk prosecution.

TIPPING J:

I'm sorry, where do we find this subsection?

MR HARLEY:

5 Subsection (2) is in tab 4 of the Commissioner's bundle and is at page –

TIPPING J:

I've got it, thank you.

10 **YOUNG J:**

Well section – para 34 should read, in the second to last line, "To be held when claiming an input tax deduction."

MR HARLEY:

15 Correct. But the information that's specified in there is not supplied to the Commissioner by the person making the return.

TIPPING J:

But the Commissioner can always ask for it?

20

MR HARLEY:

Yes he can –

TIPPING J:

25 That's the point of this submission, isn't it?

MR HARLEY:

And he may ask for it but that's not all that he can ask for and nor is it what he would normally be concerned with. In my note I refer to a number of different types of
 30 information that the Commissioner may ask for. It's got nothing to do with the invoice debit note or credit note issues, for example, whether the persons carrying on the taxable activity, that there is a taxable supply in the course of the taxable activity, what the consideration is, whether the taxable supply is properly subject to GST or is zero rated or is exempt or whether it's been made by an associated person. Now,
 35 section 46, Option B gives the Commissioner the ability within that 15 day period, to request that information under 46(4) within the 15 day limit.

ELIAS CJ:

But doesn't it demonstrate why section 46(4) is not redundant? That it operates, that it attaches on the request under capital B.

5 **MR HARLEY:**

But we don't need any of that Ma'am if you just use Option A, just conduct an investigation and get all this as well.

ELIAS CJ:

10 But you might not be conducting – well we've been over this – but you might not be conducting an investigation you might just simply want to have it demonstrated and the taxpayer has to hold this material and you simply might want to view it.

MR HARLEY:

15 And my contention, that is conducting an investigation in orthodox terms and that's exactly what sections 16 and 17 provide for.

TIPPING J:

Well if that's included in investigation, then the drafter of this provision must have had
20 a – it was a bit belt and braces, but it's not uncommon to have belt and braces provisions in these sort of – is it?

ELIAS CJ:

Well it's capital B that would be redundant then, because any query would be an
25 investigation.

TIPPING J:

That's the point. But obviously whoever drafted this thought there was a difference
30 between investigation and just seeking information. I mean that's self-evident.

MR HARLEY:

Well Your Honour, it may be self evident to you, but to me, I'm flying blind. There is literally no legislative history or explanation –

35

TIPPING J:

Well never mind that, but if you have a provision that says it can either investigate or request information effectively, then the mind of that person must have seen the difference.

5

MR HARLEY:

And the mind of that person has bifurcated between the registered person and investigations into the circumstances of the return. Now I offer in the written submission the explanation as to why that be, being that the draftsman had in mind that where the focus is on requests for information to the registered person, the registered person has got his/her or its destiny in its own hands in terms of meeting the Commissioner's needs. Hence the refreshment process against the registered person as an ongoing, as my friend puts it, rolling grid. That is not the case in respect of third parties, including the Commissioner himself. The registered person has no ability to control or influence what that third person might or might not do or when in the same sense that they do for themselves. And so I offer the explanation in the written submission that that is what the draftsman was trying to reflect in terms of the different focus between Option A and Option B.

20 **TIPPING J:**

And this is what led Duffy J to say that an expansive interpretation of A renders B redundant.

MR HARLEY:

25 Yes.

TIPPING J:

But it does seem odd that an investigation into the circumstances of the return may not include any approach to the registered person.

30

MR HARLEY:

You mean, because they're not allowed, or because –

TIPPING J:

35 They're not comprehended within A.

MR HARLEY:

Well Your Honour it may well be that an investigation into the circumstances of the return has got nothing to do with A itself. It may have everything to do with who is the vendor and the circumstances of the vendor and that person's right or title in
5 respect of dealing with the property, that's the subject of the input claim at all.

TIPPING J:

It might, certainly. But you're saying it can't look at the registered person.

10 **MR HARLEY:**

I'm saying Option A can't.

TIPPING J:

No.

15

MR HARLEY:

Option B can. And if you want both, exercise both options, yes.

TIPPING J:

20 Yes, right well perhaps I'm taking you around in the circle again Mr Harley, but –

McGRATH J:

Mr Harley can I ask you, is the concept of an investigation, is that a concept that's not used as such in the Tax Administration Legislation?

25

MR HARLEY:

It isn't now, it was at the time in section 16, it was used interchangeably. If you're going to the blue history volume.

30 **McGRATH J:**

If you just give me the answer first, then I'm happy to look at the blue history, but are you saying that the word investigation and the concept of an investigation, was in play at the time the GST Act was enacted?

35 **MR HARLEY:**

Yes.

McGRATH J:

Thank you and if you can show me the reference, that would be helpful.

MR HARLEY:

- 5 I set out a summary in footnote 5 of the written submission of the then section 16 which you'll find the correct text for at tab 8 of the blue folder. It's different from the form that's in the Commissioner's bundle because the section was changed in 2003.

ELIAS CJ:

- 10 Was there any definition that attaches to the interpretation of these provisions, of investigation? I'm just wondering whether these are defined terms.

MR HARLEY:

- 15 No, no I understand Your Honour, I'm just attempting to troll the legislative data base or case data base in my head.

ELIAS CJ:

That's all right if you're not able to answer that, that's fine.

- 20 **MR HARLEY:**

I pressed the search button and I can't think of a definitive case decision that makes any distinguished difference, principled difference between power of investigation, power of requisition information. There are several, lots of cases on the use of the powers to obtain –

25

ELIAS CJ:

Yes.

McGRATH J:

- 30 Coming back to my point I think you're going to refer to 16(2) in this now repealed version.

MR HARLEY:

I think that's the one that says investigation, yes.

35

McGRATH J:

Yes. And so what you're really saying is that the legislative history indicates that the term investigation has been applied to these general information requirement provisions.

5

MR HARLEY:

Yes, yes and –

McGRATH J:

10 I can see that.

MR HARLEY:

Curiously Your Honour if you go 17.

15 **McGRATH J:**

In the same section? This is in here.

MR HARLEY:

Yes, yes I think it is. Yes, it is.

20

McGRATH J:

It is here, yes.

MR HARLEY:

25 17(1) refers to producing information, inspection of books and documents.

McGRATH J:

Yes.

30 **MR HARLEY:**

And then, I just need to be careful here with the statutory context. I didn't put in the materials what is section 17A which a Court enforcement powers directed at a person who fails to provide information, but it doesn't deal specifically with an investigation. An inquiry before a District Court Judge in section 18, is an inquiry for
35 the purpose of obtaining any information with respect to the liability of any person and section 19 is the Commissioner's own inquiry power to obtain information by examination. So –

McGRATH J:

It's just 17, just section 17 then.

5 **MR HARLEY:**

It's in the material, but I've just referred to 18 and 19 because they're the same in terms of the focus on information gathering and the –

McGRATH J:

10 But anyway your point is that in section 46(1) investigators, there's a reference back to those information gathering provisions in the legislation, Tax Administration Act section 16, 17, 18 etc –

MR HARLEY:

15 Yes.

McGRATH J:

In whatever form they were.

20 **MR HARLEY:**

Yes.

McGRATH J:

Sometimes using the word "investigator" or "investigation", sometimes not.

25

MR HARLEY:

Yes, and that's been common ground with my friend throughout.

McGRATH J:

30 I'm not questioning it, I was just – couldn't find the word earlier myself and was wondering what its status was.

MR HARLEY:

And now it's non-existent.

35

McGRATH J:

Yes.

ELIAS CJ:

Where were you wanting to take us to now Mr Harley?

5 **MR HARLEY:**

I'd like now to deal with the legislative history in terms of section 46 which is at page 6 of the note. The essential points in respect of the legislative history is that in 1996 section 46 was recast into its present form. For the reasons that are set out in the written submission the 1990 version had Option B, as I've referred to it, expressly
10 subject to Option A. That was removed. Again there is no legislative history explanation for why that was.

YOUNG J:

So where do we see that in the blue folder? Tab 5 is it?

15

MR HARLEY:

It's convenient to use tab 5 Sir because it's the consolidation for CCH purposes and you'll see in that, on the page 100 302 top left-hand corner, 46(1A) and then 46(1B) and the words I'm drawing particular attention to are 46(1B) are notwithstanding
20 anything in subsection (1) of this section and then the key words are, "But subject to subsections (1A) and (5) where the Commissioner is not satisfied," blah blah blah. And then if you go to the 1996 and now current version, which is at tab 6, you'll see the words "but subject to" are not there and so it becomes common ground with my friend, at least to the extent we get to, that Option A and Option B can operate
25 independently but under the 1990 version if the Commissioner had exercised his power under Option B it was always subject to (1A). And I say those amendments are statutorily significant. In fact I go further and say they compel, in my submission, the proposition that I have argued for, that if the Commissioner wishes to use both options he must exercise both and that he cannot use Option A and then actually
30 exercise what is within Option B.

Now the Commissioner does not join me in terms of drawing that inference from the statutory history and the changes between 1990, in 1996 but he has no explanation, in my submission, that's satisfactory as to why that change has obviously been
35 made.

That then gets me to the High Court decision in *Riccarton Construction Ltd v CIR* [2010] CIV-2009-485-001930) and which I have asked this Court to overrule. To understand that it's helpful briefly to go to the facts, which is in the green volume at tab 34. And we're only dealing with the first set of contracts in this case, which is

5 called the Academy Motor Lodge. Just working from the head note, as the head note records on the first page, there were 11 month sale and purchase agreements that were unconditional, calling for the deposits to be paid immediately or within three months. There's a mismatch between the cash basis of the vendor and the purchaser and the Commissioner was concerned that the GST refund paid out might

10 never be recovered and he was also the investigating officer was concerned over whether there were market prices. And then dealing specifically with the facts on the –

ELIAS CJ:

15 I'm sorry this is the case that the Commissioner, the counsel for the Commissioner says is the subject of appeal.

MR HARLEY:

Yes, it is subject to appeal. And I'm inviting the Court to overrule it.

20

ELIAS CJ:

Pre-empt the appeal?

MR HARLEY:

25 Yes, and you would do so on the basis that you were satisfied that the construction of the section that I have argued is correct and that the trial Judge in *Riccarton* was incorrect as a matter of statutory interpretation. If you don't reach that point then the submission can't be maintained.

30 **TIPPING J:**

If we hold that your proposed construction is correct, is that inevitably a necessary holding from your client's point of view. Inevitably dictates the outcome of *Riccarton* does it?

35 **MR HARLEY:**

Yes. Yes it does. And what I was going –

ELIAS CJ:

Is that common ground? I can't remember now from the – that it is inevitable, because if not -

5 **MR HARLEY:**

I'm always hesitant – I'm always hesitant Ma'am to say that is common ground with the Commissioner where we actually haven't agreed that it is, but he uses the expression in his written submission that the argument presented in *Riccarton* for the taxpayer was the mirror image of the argument that is in this case, that is an
 10 expression that I accept. It is the mirror image. And for that reason I am submitting that the Judge in *Riccarton* just so long as you accept the submission that I've made as to how Options A, Option B and both options work in the statutory context, then the Judge can't be right. Because –

15 **TIPPING J:**

Well if it's an inevitable consequence of your argument being accepted if it is, then there's nothing that can be done about it, vis a vis the parties in *Riccarton*, if it isn't, then we have to be very careful.

20 **BLANCHARD J:**

In *Riccarton* the Commissioner went the request route and then outside the 15 days when he tried to the investigation route, is that correct?

MR HARLEY:

25 Correct.

BLANCHARD J:

It's the exact opposite isn't it?

30 **MR HARLEY:**

Yes. I think my friend's right in terms of the expression "mirror image", and I accept the principled approach that Your Honour Justice Tipping has put to me in terms of if it is the inevitable consequence of the construction of the statute, that you accept first though I'm right, in terms of the contention I have made and second it is the mirror
 35 image in respect of *Riccarton*, then you should overrule it.

ELIAS CJ:

Well you're going to show us why it is inevitable, is that why you're taking us to the case. Or were you not going to enlarge on this anymore?

5 **MR HARLEY:**

Well yes I was going to enlarge on it Ma'am, but –

TIPPING J:

10 Is there anything in here which helps your argument conversely? I know the Judge didn't agree with your present argument, but is there anything in here which goes beyond what you've already said about your argument, that helps you, I mean? Unlikely as that might seem if the Judge was against you.

MR HARLEY:

15 Your Honour there's not a word in this judgment that helps me. Every word is against me.

TIPPING J:

20 Well why don't you just leave it, that this case will be incidentally overruled if we accept your argument.

MR HARLEY:

25 Well Your Honour incidentally isn't as good as explicit and I'm asking for explicit because if you accept the submissions that I have made then I don't need to argue this on appeal.

TIPPING J:

Oh I see, you've earned this one too?

30 **MR HARLEY:**

Yes.

TIPPING J:

Oh I see, I didn't realise that.

35

McGRATH J:

Mr Harley, is it the case that you did not accept that *Riccarton* was the mirror image of Contract Pacific in arguing *Riccarton*? I'm just looking at paragraph 32 of the *Riccarton* judgment and the passage here, "Riccarton Construction argued the
5 reverse is not true."

MR HARLEY:

The direct answer to your question is yes. If I could explain why?

10 **McGRATH J:**

But forget about – well yes you may tell me just to forget about it which would be enough, but if you want to explain why, please do.

MR HARLEY:

15 I don't want you to forget about it, I just want you to understand why I took the position that I did.

ELIAS CJ:

Well we don't really need to know why, you are trying to win an argument, but what
20 we need to know is whether you still maintain that view, and you're telling us you don't.

MR HARLEY:

No I'm not telling you that Ma'am. For obvious reasons I couldn't argue in *Riccarton*
25 that Contract Pacific in the Court of Appeal was wrong and so I sought to distinguish it, yes. And the distinction that I argued for was that on the supposition that Contract Pacific in the Court of Appeal was right and was binding on the Judge, then it could not be right that the issue of a section 46(4) information requisition, could suspend what the Court of Appeal said was the wider power in 46(2)(a). Either one's
30 wider than the other, but they can't both be wider, depending on which way you look through the telescope, was the proposition that I put to him. And –

YOUNG J:

Did the Judge in effect hold, that once the section 46(1)(b) process is embarked on,
35 there is no refund payable until the Commissioner has determined that it is refundable?

MR HARLEY:

That's exactly what he held. And the submission that was put to him was it was contrary to *Sea Hunter* which was binding on him.

5 **BLANCHARD J:**

Why is it contrary to *Sea Hunter*?

MR HARLEY:

Because if the Commissioner does not issue the 15 working day notice within time,
10 then under *Sea Hunter* the refund is a statutory debt automatically.

BLANCHARD J:

Yes, but *Sea Hunter* was a case where the Commissioner didn't issue a notice under
either – it defers the step to say that the Commissioner has to choose his route –
15

ELIAS CJ:

And stick to it.

BLANCHARD J:

20 And then has to stick to it, and if he doesn't stick to it then he's outside the time and
he has to make the refund.

MR HARLEY:

I agree with that and that was the submission –
25

BLANCHARD J:

I mean, why – assume the Commissioner goes the request route, why can't he,
having effectively stopped time running against him, then say, "Hmm as a result of
what I'm now finding, I'll have to have an investigation. I'm going to, for example,
30 need to talk to a third party about this." Why should that suddenly mean there's got
to be a refund payable?

MR HARLEY:

Or, an amended assessment.
35

BLANCHARD J:

Well he might not be in a position to make the amended assessment at that stage, conscientiously.

5 **MR HARLEY:**

He may not make an amended assessment that he is certain is correct, but he doesn't have to. He can make an amended assessment on the basis that he rejects the claim and leave it to the taxpayer to establish its validity.

10 **BLANCHARD J:**

And if he makes this amended assessment, despite not having full information, he doesn't have to make the refund and the matter then simply goes through the assessment objection process and he's free to carry out further investigation during that process?

15

MR HARLEY:

Yes, to all those questions.

BLANCHARD J:

20 Mmmm.

MR HARLEY:

And that is what *Sea Hunter* held, and in fact that's what *Sea Hunter* did.

25 **BLANCHARD J:**

Well, yes but –

ELIAS CJ:

There was no notice.

30

BLANCHARD J:

There was no notice in *Sea Hunter* –

MR HARLEY:

35 No, no, I accept that, but the principle that I've articulated in terms of the powers of the Commissioner to issue an assessment, to continue his investigation and not to make the refund, are recognised in *Sea Hunter*.

ELIAS CJ:

It's consistent with *Sea Hunter*.

5 **MR HARLEY:**

Yes, yes.

COURT ADJOURNS: 11.35 AM

COURT RESUMES: 11.54 AM

10 **MR HARLEY:**

I think that I've said all that needs to be said in terms of *Riccarton*, which really brings me to the summary of the contentions and the best place for me to start is with the judgment of Duffy J at paragraphs 125 through 132 of her judgment, you will find that in the case starting at page 44, but it's particularly paragraph 128 through 132 that I
15 wanted to emphasise and draw attention to. My submission is that she got it exactly right in respect of those paragraphs for every reason and every sentence that she gave. I can't improve on a word of it and I'm not going to try. I'd invite you to read it and the submission is she's right.

20 **TIPPING J:**

And precisely again, I'm sorry I missed it. 128 to 132?

MR HARLEY:

Yes.

25

TIPPING J:

Thank you.

MR HARLEY:

30 At 45 through 46 is the case.

BLANCHARD J:

What's the significance of the colour scheming?

35

ELIAS CJ:

Quite attractive.

BLANCHARD J:

5 The judgment starts out in the normal colour and then suddenly migrates into violet.

ELIAS CJ:

It's highlighted.

10

MR HARLEY:

As you will see from the index Your Honour, the index on page 4, sets out the reason for the highlighting. It was to provide an editing of what you would consider relevant for the purposes of this appeal. There's an entire section that is not highlighted, which dealt with a separate issue and which consumed most of the trial, and we agreed that it was in your interests as well as ours, to excise that material, if I can put it that way.

15

BLANCHARD J:

20 I see.

MR HARLEY:

You don't need to consider it because it's simply not in contention.

25

BLANCHARD J:

The colour drove me to the reported version of the case, which is what should be in here anyway.

MR HARLEY:

30 The reported version is in the casebook Sir.

BLANCHARD J:

Yes. I used that instead of the cover. Never mind.

35

MR HARLEY:

It was an attempt to help you. Then from those passages in the High Court judgment if I could direct first Your Honours to footnote 5 of the written submission for Contract

Pacific where I've set out what was the question that the Court was being asked to address should have said, and I simply draw attention to it, because that's the way the issue has been argued for Contract Pacific, not for any further purpose and then in the written submission as you will have seen in respect of paragraphs 5.46 through 5.49, I've summarised the use of the options with reference to the judgment of Duffy J and why she was right, and in conclusion, if I could take you to the summary of contentions, which is set out on page 2 to 3 of the written submission –

YOUNG J:

10 Sorry, what pages sorry?

MR HARLEY:

Pages 2 to 3 of the written submission. And there's no point in me repeating what I've already gone over. In high level summary I've simply set out there that section 46 offers Option A, separately Option B, thirdly both options, outside of section 46 the Commissioner's power of assessment stands alone and why the Judge was right to come to the conclusion, but any other approach to interpretation would render 46(4) that is Option B, redundant. I have no further submissions unless Your Honours have any questions. That then gets us to the savings provision, if we get there.

20

ELIAS CJ:

Yes, thank you Mr Harley. Mr Harley, Mr Stewart, we'd like to hear from the Crown on the section 46 argument first, and then we'll consider how we'll progress matters after that.

25

MR STEWART QC:

I understand that Your Honour.

ELIAS CJ:

30 Mr Palmer you've heard the discussion. We have of course read your written submissions, you might wish to speak to the points that have been raised.

MR PALMER:

Yes Your Honour, thank you. Your Honour I'd like to do two things briefly and then turn over to my colleague Ms Deligiannis to answer questions in relation to section 46 that the Bench may have. The first thing I'd like to do with the Court's agreement is hand up a two-page summary of the Crown's, an outline of the Crown's submissions.

35

Your Honours I don't propose to read this or to spend a lot of time on it. The Crown submissions in relation to the section 46 issue are similar to the sorts of questions which my friend dealt with, although in the Crown's view unsatisfactorily from the Bench and the key point Your Honours is that it cannot be that when the

5 Commissioner chooses to investigate a return, he is also required to comply with the notice requirements in relation to requesting information. The Commissioner's position is that the sorts of requests that he makes in the course of an investigation is a necessary part of what an investigation is and that to accept the submission of my learned friend would artificially constrain the nature of the Commissioner's

10 investigation process.

TIPPING J:

Is that effectively a submission that the concept of investigation shouldn't be read down from its ordinary connotations?

15

MR PALMER:

Yes Your Honour. My friend Ms Deligiannis will be able to deal with further questions in relation to section 46, but the second thing that I wish to do with the Court's permission is just to canvas very briefly two points in relation to the facts of this case.

20

The two points are these. Firstly that investigation has occurred here, can be involved, it can lead the Commissioner through a variety of different avenues, it can involve requests for information to the registered person, or requests to others and it is not clear to the Commissioner at the outset how the investigation will proceed.

25 Your Honours, this is not only always clear to the Commissioner, it was also clear to the appellants in this case. The Commissioner has agreed on a very slim line case on appeal and I'm aware that there are few facts before the Court. There is one document which might assist the Court to understand the reality of how this process started, and I wondered whether the Court would wish to receive, and that is a copy

30 of the initial return by Contract Pacific and its cover letter over that return. The reason for this is that it demonstrates quite clearly that Contract Pacific and its representatives were clearly expecting the Commissioner to undertake an investigation –

BLANCHARD J:

But how does that bear on the interpretation of the section? We've got to look at the matter as it would apply in other cases. You can put what happened, what you say

happened here to us as a hypothetical, but I don't think we need to actually receive the material.

MR PALMER:

- 5 I'd certainly be guided by the Court Your Honour. It's simply the fact that this particular material demonstrates what the expectations of these taxpayers were which was that there would be an investigation –

BLANCHARD J:

- 10 Well never mind what they're expectations were.

MR PALMER:

Which would require them to provide material.

- 15 **BLANCHARD J:**

We don't want it to give an interpretation which depends upon the expectations of particular taxpayers.

MR PALMER:

- 20 No Your Honour and I'm certainly not advocating that. So if the Bench would rather not have that material, that's –

ELIAS CJ:

It's really just a straight matter of statutory interpretation Mr Palmer.

25

MR PALMER:

- Yes Your Honour, it is. The second point that I wanted to make in relation to the facts were that a lot of the requests for information that occur here are relatively informal, they come up in the context of meetings. In some cases information is offered by the taxpayer and it is that informality in the relationships between the taxpayer and the Commissioner, consistent with the taxpayer's obligation of voluntary compliance, that the Commissioner says is important to the nature of an investigation. An investigation has to encourage the flow of information in order for the purposes of the investigation to be fulfilled.

35

ELIAS CJ:

Is it not a technical term in the legislation at all?

MR PALMER:

The Commissioner's not aware that the term is defined Your Honour.

5 **TIPPING J:**

Your point here being that you could inadvertently fall foul of Mr Harley's submission.

MR PALMER:

10 Yes Your Honour. At one point the Commissioner in this case, asked whether there were any submissions that the taxpayer's representatives may wish to make and that seems to qualify as a request for information that should be subject to this rolling grid of 15 day time limits according to my learned friend.

BLANCHARD J:

15 Well worse. They tendered some information and the Commissioner inadvertently says, "What do you mean by that?"

MR PALMER:

20 Exactly Your Honour. Exactly. And in some cases I think it's clear that the taxpayer was offering information, it's not clear therefore if the Commissioner would be prohibited from accepting it.

TIPPING J:

25 You'd then have an argument that there was an implied request.

MR PALMER:

Yes Your Honour.

TIPPING J:

30 And things could get very murky.

MR PALMER:

35 Very murky indeed. So those were really the two relatively minor points that the Commissioner wished to make on the facts. That investigations are involved and that they may inherently involve requests in the give and take of establishing what actually occurred. If Your Honours please, I'd like to hand over to my colleague Ms Deligiannis to make a couple of points in relation to the section 46 issue.

ELIAS CJ:

Yes indeed. Thank you.

5 **MS DELIGIANNIS:**

Your Honours I just wanted to touch upon a couple of points that I thought were relevant following your discussion with my learned friend Mr Harley, and the point that troubled the trial Judge Duffy J and which my friend continually raises is the issue of 46(2)(b) becoming redundant if the interpretation that the Commissioner is progressing and the Court of Appeal has agreed with is adopted by this Court. As was submitted to Her Honour and to the Court of Appeal as I'm going to submit to you today, section 46(2)(b) is far from being redundant. In practice a section 46(2)(b) all the information request is often used by the Commissioner on receipt of the GST return, that is claiming a refund. The facts of *Riccarton* confirm this. The facts of 15 *Sea Hunter* also confirm this and the facts of *Almond Properties* also were information requests. The Commissioner uses section 46(2)(b) whenever he wishes to request further information to check the correctness of a claim and when he does not perceive that there is a need to investigate the claim, as Your Honour pointed out. And I refer again to section 20(2) which provides for certain documentation to be 20 held by a registered person when claiming an import tax deduction. The Commissioner cannot decide to investigate the claim in every case. Quite apart from the fact that not every claim will require an investigation. He also –

YOUNG J:

25 Well what's the difference between asking for information about something and investigating it?

MS DELIGIANNIS:

An investigation is quite an involved process as far as the Commissioner is 30 concerned. It actually involves allocating and opening up an investigation file, allocating appropriate resources, following certain standard practices that the Commissioner has in place for investigations. It's intensive in terms of resources.

YOUNG J:

35 Where do you get that from? Why isn't ringing up the taxpayer an investigation? I just want to check this little thing, it's just you know, something I want to sort out in my own mind, but isn't that an investigation, a looking into the accuracy of the return?

Or are you saying investigation is a term of art that refers perhaps to the indication of statutory powers under the Tax Administration Act?

MS DELIGIANNIS:

5 It does include those Sir. And also in terms of how the Commissioner views investigation, he uses it in a specific technical way and a check on the Commissioner's website for examples under "Investigation" will bring up standard practice statements in regards to what a Commissioner does, the processes he follows when he sets up an investigation and I can -

10

ELIAS CJ:

Is that simply administrative however?

MS DELIGIANNIS:

15 Yes.

ELIAS CJ:

I think that's the question that's being put. It doesn't have a statutory basis –

20 **MS DELIGIANNIS:**

No, that's right Ma'am.

ELIAS CJ:

This distinction.

25

MS DELIGIANNIS:

That's right. But in terms of how the Commissioner – the Commissioner just doesn't say, "Right I'm going to investigate everything." He – for him that actually means something and it means something substantial and I do have –

30

ELIAS CJ:

It's just – I suppose the question is whether how the Commissioner goes about it, is actually relevant to the statutory interpretation which is the prior question.

35 **MS DELIGIANNIS:**

Yes, that's right. And if the Commissioner decides he's going to investigate a claim, as he did in this case, because this was – he in fact sets up a national inquiry into all inbound tour operator claims in this particular instance.

5 **McGRATH J:**

Could you just phrase that in terms of a submission as to what the word "investigated" means, in paragraph, subparagraph A, what does the term mean?

MS DELIGIANNIS:

10 Well the dictionary definition of what it means, it is – so what – you mean Sir, what it means in terms of when the Commissioner uses –

McGRATH J:

I think what the Chief Justice is putting to you is that we're not really helped by what
15 tax investigation means in a colloquial sense in the Inland Revenue Department, we need to know what investigation means when those terms are used in this Act, so can you tell us, as a matter of law, as a matter of legal submission, what meaning you say we should give to that term? The dictionary definition may be a reference you want to make, but we need to have a meaning to a word in a statute if we're
20 going to take your argument any further.

MS DELIGIANNIS:

Sir he needs to be able to – when the Commissioner is investigating in a sense that I'm submitting is required in the section, he is looking, not only at specific information,
25 but he's looking at how the claim came about, the circumstances of the vendor, it could be, the market value rate of a property, if that's what's in contention, he's looking at – he's investigating the total circumstances of the return, so he's looking into, he's making a factual inquiry of the total circumstances of that return.

30 **McGRATH J:**

So the idea of investigation in law means the administrative processes by which the Commissioner verifies what the taxpayer returns, and verifies it as a correct statement of what tax is owing and the facts on which it's based.

35 **MS DELIGIANNIS:**

Sorry, if he's investigating?

McGRATH J:

Is that what an investigation is?

MS DELIGIANNIS:

- 5 Well an investigation may involve asking questions. It may involve examining documents, analysing facts, asking for submissions. It's a wide concept, it's a wide –

YOUNG J:

Why isn't a request for information an investigation?

10

MS DELIGIANNIS:

A request for information can be part of an investigation.

YOUNG J:

- 15 Yes. So in that case requesting information of a taxpayer may just be a subset or what appeared to be a subset of a broad concept of investigation.

MS DELIGIANNIS:

- 20 Without necessarily involving a full-scale investigation, or an investigation. It could be just that the Commissioner has noticed that something is missing from the return.

YOUNG J:

- 25 Well there are two possible other meanings investigation might have, it might carry a connotation of systematic and sustained inquiry, or secondly, it might be a coded reference to an investigation invoking statutory powers.

MS DELIGIANNIS:

- 30 Yes. And as my learned friend said it is common ground that the Commissioner's investigation powers do come from sections 16, 17, 18 onwards in the Tax Administration Act. However, I will add that the Commissioner doesn't always have to formally invoke the section 16 or section 17 powers, he simply relies –

McGRATH J:

- 35 So are you saying there may be powers which can be invoked in the course of an investigation, but they're not the investigation itself?

MS DELIGIANNIS:

They're the source of the investigation powers, but the Commissioner doesn't have to say, "I'm asking you for this information pursuant to section 16" in all cases, because he operates on a voluntary compliance basis, so it's to the taxpayer's advantage to cooperate with the Commissioner in order to speed things up, to get a resolution.

5

TIPPING J:

Is there anything in the thought that he will investigate when you at least have a suspicion that something might be amiss, whereas you request further information if, as you put it a moment ago, something is missing and you just want to, as it were, validate the missing element.

10

MS DELIGIANNIS:

That is the submission Sir.

15

TIPPING J:

Oh I see.

MS DELIGIANNIS:

Sorry, no I'm agreeing with you.

20

ELIAS CJ:

I wonder however, whether this emphasis on the terms investigate and request, are slightly misconceived because the two occasions for the – looked at by section 46 are investigating the circumstances of the return and requesting further information, concerning the return. That's really why I've been asking whether investigate is something that's defined in the legislation. If it's not why would one not look at these as ordinary words, and apply them in their compendious context so that the two things that are envisaged, are that the Commissioner will look into the circumstances of the return or seek to obtain specific information.

25

30

MS DELIGIANNIS:

Yes, I agree with that Ma'am.

TIPPING J:

35

One is much broader than the other.

ELIAS CJ:

Yes.

TIPPING J:

- 5 I think if your asked to provide further information there must be something fairly specific about it. You can't sort of say, "Please give us further information," in the abstract. You have to refer to it. Whereas as the Chief Justice is saying, the circumstances of the return are apt to bring in a much wider scope.

10 **MS DELIGIANNIS:**

And usually Sir the request for information letters that are issued by the Commissioner set out exactly what it is that they're asking for, and the example could be the *Riccarton* – if you wanted to look at one it's the facts of *Riccarton*, where the Judge sets out in that case exactly what the Commissioner asked for.

15

TIPPING J:

And you will usually, not inevitably, but usually go down the investigation route if you smell a rat, and go down the other route if you're just wanting to clarify something or without necessarily smelling a rat.

20

MS DELIGIANNIS:

Yes Sir, and using the *Riccarton* example again, in *Riccarton* one of the things the Commissioner requested was a market valuation and the taxpayer said, "I don't have one," and that triggered off, well we've got to investigate now, because we're not, we
25 smell a rat. We don't think that the market valuation – we don't think that the price you've entered into in terms of this contract is a market rate one. So it necessitated – not getting information –

TIPPING J:

- 30 But if you're going to make a request for information and then following what you receive, pursuant to that request, decide to investigate, your time limits are pretty awkward, aren't they, because don't you have to do the investigation within 15 days or have I overlooked something?

MS DELIGIANNIS:

You have to if you decide to investigate, then –

TIPPING J:

No. What I want you to answer me is, if you decide to request further information, and then you want to broaden it to an investigation, can you do that?

MS DELIGIANNIS:

5 In my submission you can.

TIPPING J:

How do you –

BLANCHARD J:

But that's what *Riccarton* says.

10 **TIPPING J:**

Is it?

MS DELIGIANNIS:

Yes.

TIPPING J:

15 That's what *Riccarton* says. How do they get round - within the period for 15 working days?

MS DELIGIANNIS:

Because the Commission has complied with section 46 in terms of he's got out his notice of –

20 **TIPPING J:**

So the 15 days down the other track is suspended as it were?

UNKNOWN MALE SPEAKER:

Yes.

MS DELIGIANNIS:

25 Oh, the Commissioner doesn't – that's what the Judge said. It's not so much that the timeframes are suspended, it's that another – the section 46 obligations and

timeframes are satisfied, therefore the Commissioner moves on to a new process, which is to investigate, and that's a different process. It's not a section 46 process.

TIPPING J:

Not under section 46?

5 **MS DELIGIANNIS:**

No.

TIPPING J:

I follow, thank you, I follow. So you go outside 46 then?

TIPPING J:

10 Yes Sir.

TIPPING J:

Well that's a complete answer to my question.

MS DELIGIANNIS:

15 And if I can say, the Commissioner can't pretend, which is the suggestion that my learned friend has made, he can't pretend that a claim needs investigating when it doesn't. If he did that then he leaves himself open for the *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997 type judicial review. "A power granted for one purpose must be used for that purpose and not for some unauthorised or collateral purpose and that statutory power must be exercised in good faith."

20

When the Commissioner decides to investigate then it must be a genuine investigation in my submission. He cannot, as the appellant contends, disguise what he actually seeks to do in order to sidestep the section 46 for time limits and I will mention here, section 6 and 6A –

25 **ELIAS CJ:**

And the reason you say you go outside section 46 is that section 46 procedure has not been concluded in a way that makes the refund payable because the Commission, after reviewing the information, hasn't determined that it's refundable.

MS DELIGIANNIS:

Yes Ma'am.

ELIAS CJ:

Yes.

5 **TIPPING J:**

Exactly.

MS DELIGIANNIS:

10 And the flip side is appropriate for this particular case. The Commissioner has investigated, and he's not satisfied, and as part of that investigation he asked the taxpayer for information, or the registered person for information. That's part of his investigation. He did not request the further information pursuant to section 46. He requested that further information pursuant to his investigation.

ELIAS CJ:

15 Does that really mean that the section 46 time limit operates once only and then is spent, and then you're either into a determination that it's payable, or you're having to use some of your other statutory powers to disallow?

MS DELIGIANNIS:

Yes Ma'am, unless all you're doing is requesting information and reviewing that information, and then you're in the refresher or the rolling grid time periods.

20 **YOUNG J:**

Why do you need a refresh power because presumably the Commissioner wouldn't ask for more information unless not presently satisfied that the refund is payable?

MS DELIGIANNIS:

25 Yes, I could envisage a situation where perhaps the Commissioner has requested certain information or, when he initially had a look at the return he thought, "Right, I need to request an invoice," say, and when he received that invoice he then thought, "No, no, that's not what I wanted, I actually wanted something else." So then he would still be requesting information.

YOUNG J:

Well why do you need another time for that because presumably the Commissioner is still uncertain as to whether the refund is payable and therefore the section 46(1)(b) process hasn't come to an end?

5 **MS DELIGIANNIS:**

Well the reason I say that he has to do that, if all he's doing is reviewing information, is because of what the words of the section say in section 46.

YOUNG J:

10 Yes. Well we know that the Commissioner has to do it because that's what the section says but it's not quite so clear to me why the section puts this constraint on which the Commissioner, on the basis of *Riccarton*, can presumably say, "Well I'm not going to ask for more information. I'm going to investigate." It just so happens that involves asking for more information.

MS DELIGIANNIS:

15 My guess Sir, would be that, where the Commissioner – where all that's missing or required in order to satisfy the Commissioner is missing information, then those refresher provisions are there to ensure that the Commissioner just doesn't sit on information, and doesn't do anything about it.

ELIAS CJ:

20 I'm just really wondering whether that's right. On the interpretation point that we're now discussing, am I right in thinking that Justice Simon France would, perhaps, not be accurate in the way he characterised this legislation. As I understand, from what you've said, he said that the investigation power is suspended or, conversely, the request for information power is suspended while you go through the other process.

25 **MS DELIGIANNIS:**

I understand that that's not what the Commissioner argued –

ELIAS CJ:

No.

MS DELIGIANNIS:

30 – before His Honour. I don't – I wasn't the counsellor.

ELIAS CJ:

So you're not supporting the reasoning in *Riccarton*?

MS DELIGIANNIS:

5 No and the Commissioner has crossed, has - is supporting his decision on other grounds, not on the suspension grounds.

TIPPING J:

It's very hard to see a suspension out of this scheme.

MS DELIGIANNIS:

Yes Sir.

10 **TIPPING J:**

It's quite easy to see an ability to move outside the scheme.

MS DELIGIANNIS:

Yes Sir, and that would be the argument.

TIPPING J:

15 What does the scheme seem to suggest here – you've got to do something within the 15 days.

MS DELIGIANNIS:

Yes.

TIPPING J:

20 Once you've done something it's all on.

MS DELIGIANNIS:

That's right.

TIPPING J:

25 Colloquially. That won't be music to Mr Harley's ears at all. He wants a much more restricted view of the parameters of this section, but that's essentially your argument isn't it? Once you're in the door, within the 15 days, and then you can move around inside the room quite flexibly.

MS DELIGIANNIS:

Quite freely, yes Sir, and there really is no concern – there is no room for concern because the Commissioner's statistics show that 97 to 98 percent of all refunds are processed within the 15 working days. So the system is actually working well if I can
5 say.

ELIAS CJ:

I'm not sure that that's really relevant to what we have to decide but it's comforting I suppose.

MS DELIGIANNIS:

10 Well it's a direct response to my friend's concern that the Commissioner will just investigate everything and refunds will be held up when the scheme of the GST Act is that people will get their refunds if they're entitled to them, but I think the key point there is, if they are entitled to them and –

ELIAS CJ:

15 So the Commissioner really has to get out of the blocks fast.

MS DELIGIANNIS:

Yes.

ELIAS CJ:

But once out of the blocks all hell is unleashed by that other Act that I keep forgetting
20 the name of.

MS DELIGIANNIS:

Tax Administration Act.

ELIAS CJ:

Yes, yes, yes.

25 **MS DELIGIANNIS:**

Yes Ma'am, that's right.

BLANCHARD J:

Can the Commissioner issue a request for information within 15 days and then at the end of that time, after maybe more than another 15 days have gone by, say, "Right, well, I've now decided that there should be an investigation."

5 **MS DELIGIANNIS:**

Yes. In my submission, yes, he can.

BLANCHARD J:

Yet if he's only interested in making a request for further information he has a 15 day time limit for that request for the further information.

10 **MS DELIGIANNIS:**

Yes that appears to be the statutory scheme.

ELIAS CJ:

Why?

TIPPING J:

15 Subject to the refreshment period.

ELIAS CJ:

Oh.

BLANCHARD J:

I'm talking about the refreshment period.

20 **TIPPING J:**

I'm sorry.

ELIAS CJ:

Yes, but I'm still back, perhaps it's been answered to Justice Young's satisfaction but I'm still back wondering about whether there is a refreshment period – subsection (4).

25 **MS DELIGIANNIS:**

If Your Honour wishes to re-look at that, that is –

ELIAS CJ:

Well I'm just having another look at it in the light of what we've been discussing.

TIPPING J:

That has the concept of a subsequent request for information which you have to
5 make within a further period of 15 days.

ELIAS CJ:

Yes, yes I'd forgotten.

MS DELIGIANNIS:

Yes so it could be that the information you receive triggers a new wave of information
10 requests.

TIPPING J:

And if at the end of that 30 days, the Commissioner is not of view that the thing is
refundable, then the fundamental premise upon which subsection (2) is it, no (1) –

MS DELIGIANNIS:

15 (1).

TIPPING J:

– is based, it suggests that the matter's still at large?

MS DELIGIANNIS:

20 Yes and then we get into the disputes process, in the sense that the commissioner
isn't satisfied following the review of the information. He can either decide to
investigate the matter fully or he can decide to dispute the claim by issuing a notice
of proposed adjustment –

TIPPING J:

25 I have to say this section could have been arranged in a more user friendly manner,
you have to dive all over the place, backwards and forwards and –

MS DELIGIANNIS:

Yes Sir I agree.

ELIAS CJ:

- But it does make sense doesn't it, this division between investigation into the circumstances of the return and inquiry as to information that you want – in that context having a follow up, makes good sense because you're trying to clarify matters and decide whether there is something to be investigated using the powers under the other legislation.

MS DELIGIANNIS:

Yes.

TIPPING J:

- 10 The very fact that you have an extension period for request for information and not for the other one –

ELIAS CJ:

Yes, yes is significant.

TIPPING J:

- 15 – is significant.

MS DELIGIANNIS:

Yes indeed. And there are no further – once you've notified the intention to investigate within the 15 working days, there is no other time limits on an investigation apart from the four year section 108 time bar.

20 **TIPPING J:**

Suggesting that the B is a sort of short and sharp exercise whereas A might be a long and blunt exercise.

MS DELIGIANNIS:

- 25 Yes and it's not accepted that it's not used. It is used and there is no danger of that limb becoming redundant. It is used, we have examples of it being used in this Court and to make the commissioner investigate everything is a poor use of his resources and taxpayer resources – when he may simply just need some information.

TIPPING J:

Well equally awkward from your point of view if the submission is successful is that the powers to investigate under A are significantly curtailed from what one would imagine, at least prima facie, the concept of investigation envisaged?

5 MS DELIGIANNIS:

Yes and interestingly if my friend's submission is accepted, then the commissioner could arguably seize information from a taxpayer, the registered person, under section 16, but he can't ask for it. So he can actually go into somebody – the taxpayer's premises using a section 16 warrant and take what he requires from the registered person and that wouldn't engage section 46(1)(b) because he hasn't requested anything, he's just seized it and it just doesn't make any sense. It's an artificial distinction and it's an unnecessary one in my submission.

ELIAS CJ:

So really, the scheme of section 46 is in that the B far from being redundant, subsection (4) indicates what it's principally directed at and if you are into – if you are not satisfied after obtaining that sort of clarification then you're not at the stage where the refund has to be provided but you're into a full scale dispute or further investigation?

MS DELIGIANNIS:

Or further investigation. Yes before you decide to enter into the disputes process and get –

ELIAS CJ:

And it's necessarily outside section 46, which indeed as Mr Harley submitted, is principally concerned with the timing elements –

25 MS DELIGIANNIS:

Yes.

ELIAS CJ:

– the getting out of the blocks point?

MS DELIGIANNIS:

Yes, it's to let the taxpayer – the registered person know what is happening with their refund. Are they going to get it or do they have to wait?

ELIAS CJ:

5 Yes, thank you.

BLANCHARD J:

In a case like *Riccanton*, if no refresher request is made within 15 working days and there hasn't, within the original period, been a request, been a commencement of an investigation, is it not arguable that you have a then, a *Sea Hunter* situation, that –

10 **MS DELIGIANNIS:**

But you have had a notice requesting information within the 15 days?

BLANCHARD J:

Yes.

MS DELIGIANNIS:

15 Then I'd –

BLANCHARD J:

It's just this incredibly clumsily worded subsection (4) may open up that argument.

YOUNG J:

20 This is really why Justice Simon France says, effectively the meter stops, the clock stops once you give A, notice of either investigation or request of documents and that time doesn't start again until the commissioner has made a positive determination that the money's refundable and that's the literal approach to the section.

BLANCHARD J:

Yes, the argument doesn't help here because –

25 **YOUNG J:**

No, it's the other way round.

BLANCHARD J:

– we’ve got the converse situation.

MS DELIGIANNIS:

And in *Riccarton* there was no subsequent request for information either, so arguably
 5 you're still, well you're still within section, 46(4) is still ticking on, is still validly being
 exercised and the commissioner isn't satisfied that the refund is refundable therefore
 he's entitled to hold on to it. Because he hasn't – he's given his notice within the 15
 working days, he hasn't requested any further information so he hasn't breached the
 refresher provisions, so he hasn't determined that it's refundable.

10 **TIPPING J:**

What is curious is that the way B is framed seems to suggest that once you get, sorry
 little b, once you're in 41(1)(b), in any shape or form, the refund is not payable unless
 the Commissioner determines that it's refundable because it then becomes payable
 on the day after the working day on which the Commissioner determines the amount
 15 is refundable. I think this was my brother –

ELIAS CJ:

I wonder whether we're much too tough on a Parliamentary draughtsman because it
 is significant that capital B is reviewed the information, so really the fact is that the
 section, the effect of the section may be better seen as being spent once you've
 20 indicated that you're, once the Commissioner has indicated that he is investigating
 the matter. If he simply asks for information, then he has an opportunity to review it
 unless he invokes the refresher provision and unless following that, he takes some
 positive step. So he can't let matters drift on if he's simply saying you didn't tick this
 form or you didn't complete, you didn't supply some required information, but in terms
 25 of investigation it seems to me, well arguable that the section's effect is spent as
 soon as the investigation is undertaken until there is a determination.

MS DELIGIANNIS:

Yes until he determines that the amount is refundable, then he must refund it the
 working day after he determines that.

30 **ELIAS CJ:**

Mmmm.

MS DELIGIANNIS:

Yes I, yes Ma'am I think that is the statutory scheme of section 46. It's not to control how the Commissioner investigates or when he investigates or who he requests information from as part of his investigation, it's to ensure that the Commissioner

5 does do something as soon as he receives a refund, whether it be he decides he has to investigate, whether he decides to refund the money or whether he decides he simply needs to review some information that's missing, just to make sure that it is correct, that's all that section 46 is about, in my submission. And once he decides to investigate, it – there's nothing in the section to indicate that an investigation was

10 curtailed in any way and it's just nonsense, with respect, to suggest that if you enter into an investigation of the circumstances of a return you cannot engage the registered person by asking them questions or requesting submissions from them. An investigation will take the four years if that's the case.

15 Unless there are any other points that are troubling Your Honours I don't propose to meet the submissions - the Commissioner's submissions address all of my friend's arguments and unless there's anything specific you could like me to go over?

ELIAS CJ:

20 No thank you Ms Deligiannis. Yes Mr Harley. Do you want to be heard in reply?

MR HARLEY:

Yes I do. The first point I wanted to address is the exchange between Justices Tipping and Blanchard with my friends in terms of the inadvertent falling foul of

25 section 46 time limits. Justice Blanchard, for instance, posed the question from the Commissioner to the taxpayer, "Well what do you mean by that." And Justice Tipping made the observation about the very murky nature of implied requests. I would agree with you Sir, that would be a very murky position in terms of implication but if you look at section 46 it contemplates formality. It contemplates notice. Now

30 section 46(5) specifically requires a notice. Section 46(4) doesn't use the word notify but my submission is that they are to the same effect. There's nothing informal about the Commissioner using his statutory powers. They have legal solemnity and purpose and he is required to observe the terms of section 46 so that the taxpayer knows what – the registered person knows what it needs to confront.

35

The second point that I wanted to address in respect of the questions and answers was to Justice McGrath, what is meant by the term "investigation" and adopting, as I

do, the Chief Justice's formulation that the word is used in the context of investigate the circumstances of the return. My submission is that it's just an ordinary English word to be construed in the compendium, as the Chief Justice put it. It's to enquire for a statutory purpose, to seek out information, to obtain explanations in relation to that information. Where the Commissioner's purpose is to verify the return and the facts upon which it is based in terms of its claim and its legitimacy –

McGRATH J:

So it's anything that the Commissioner does to verify the accuracy of a return?

MR HARLEY:

Yes and to Justice Young I would respond in terms of the observations you made Sir in that exchange. Yes, it can involve the systematic and ongoing enquiry or questioning where the Commissioner is relying on the use of a statutory powers in section 16 and 17 and the obligations on taxpayers that are imposed in the Tax Administration Act for taxpayers to make correct returns and to co-operate with the Commissioner as he goes through the process of ensuring that he is satisfied that they are. So my submission is there is no legal magic within the Tax Administration Act as to some art form meaning of investigation. It simply is the ordinary English word having the meaning that I have submitted.

Briefly to deal with Justice France and "suspend", while it is the Commissioner's position in terms of what he now says on appeal it certainly was his argument for the Judge that the investigation of the circumstances of the return was suspended because he had issued a section 46(4) notice. The 46(4) notice required the information that's specified in paragraph 9 of the judgment and it is quite wide-ranging. It's a lot more than invoices. It was a high, wide and handsome requisition for a great deal of information, some of which didn't actually exist, but to Justice Tipping my response to you Sir, in terms of the observation well once you've done something, Commissioner, under section 46, it's all on, open slather, you can do what you like. No, it isn't correct Sir. It's certainly not correct in terms of section 46(4)(b) with the refreshment process as we've discussed but it is correct as an observation in terms of the Court of Appeal's decision in *Almond Properties* where the Commissioner invokes only Option A. *Almond Properties* is authority for the proposition that where the Commissioner invokes Option A, investigation of the circumstances of the return, he is not under any further limit in terms of section 46 as to the time that is taken to complete the investigation. The Chief Justice is right, he

can't sit on his hands and just do nothing and take forever, but subject to the standard administrative law principles as to reasonable conduct, he can take as long as is reasonably necessary to satisfy himself –

5 **TIPPING J:**

But he has to make the refund in the meantime if he has the misfortune to put his foot into the B box?

MR HARLEY:

10 Yes. Correct. Or issue an assessment and that's common ground now too, that he has the power to issue –

TIPPING J:

Oh yes.

15

MR HARLEY:

– the assessment. That's an advance Your Honour. I suspect that Justice Blanchard's questions in terms of *Riccarton* may have been designed to tease me but if I've got that wrong I'll respond anyway.

20

BLANCHARD J:

Not at all. No.

MR HARLEY:

25 Not to tease me?

BLANCHARD J:

No. I wouldn't dare.

30 **MR HARLEY:**

And I wouldn't dare not respond Sir and so just for my own safety I will respond briefly. The question that you put in the hypothetical was where the information requisition was given within the 15 days to the registered person, then more than the 15 days goes by and the Commissioner decides he needs to investigate, those were
35 the actual facts in *Riccarton* –

BLANCHARD J:

Yes, I understand that.

MR HARLEY:

- 5 Then your question was whether in those circumstances, whether it was arguably the proposition that emerges from the principle in *Sea Hunter* and for the reasons I submitted to you this morning, my submission is yes it is and further in response to the exchange that you had with my friend about that my submission further is that the section works both ways in respect of both section 46(4), which is the requisition to
- 10 the registered person, and for 46(5) in respect of the notice of investigation of the circumstances of the return. The one does not suspend the other, by the way, is the submission I'm making and that is why my contention is that Justice France, on any view of the construction of the section, can't be right.
- 15 The last point I wanted to deal with is the exchange between Her Honour the Chief Justice as to whether the issue of the investigation notice, once made within the 15 day period, makes section 46 spent, was the way you put it, and returning to *Almond Properties* the proposition is, yes it does in respect of the exercise of Option A but no it doesn't in respect of Option B and that's obvious in my submission
- 20 because of 46(4)(b) in respect of refreshment and so as I said in the written submission and in the oral address this morning, the essential contention that's being made here is that the Commissioner can't use Option A in order to carry out what is the exercise of Option B. He must make the decision to exercise both and where he does that in respect of information requisitions to the registered person, he must
- 25 comply with 46(4) including 46(4)(b). That's it.

TIPPING J:

- I wonder if I could trouble you with one thing Mr Harley that probably has nothing to do with this case but just in case it does. My mind has been drawn to subsection (3)
- 30 of section 46 because of the reference in 46(5) to the requirement to notify the registered person of the Commissioner's intention to withhold payment under subsection (3), that's what drew me to subsection (3). Subsection (3) talks about where people fail to provide a return for any taxable period but the Commissioner has got to give notice of the intention to withhold payment under subsection (3) within 15
- 35 working days following the day on which the return is not received.

MR HARLEY:

No Your Honour, I think we're talking about different returns here.

TIPPING J:

5 Are we? Because otherwise it's just a nonsense.

MR HARLEY:

I think that that's right, it would be nonsense, but I think what the section means is, where the person files the GST return and the Commissioner says, okay I've got that,
10 but you are not in compliance with your obligations in respect of prior periods. Or it may be he says, I've got your return in respect of this period and for the next period you are not in compliance and I require that to. So as I understand the regime it is –

TIPPING J:

15 Well never mind Mr Harley. I would suggest that the Crown looks at that section extremely carefully because on the face of it, it seems to make no sense at all.

MR HARLEY:

Well I can say –

20

TIPPING J:

And it doesn't affect this case, I wouldn't think.

MR HARLEY:

25 No it doesn't but I can say to Your Honour that the explanation that I have given to you is how it has worked.

TIPPING J:

I see.

30

MR HARLEY:

As in applied.

BLANCHARD J:

35 Perhaps they can do it as part of the general rewrite of the Goods and Services Tax Act, which it desperately needs.

TIPPING J:

It would be very, very nice if section 46 started off with something other than 46(1), which is the sort of –

5 **MR HARLEY:**

Well Sir, Ivor Richardon's now finished with the Income Tax Act –

BLANCHARD J:

Well I did suggest to him that he should do the GST Act at a conference a few years
10 ago –

MR HARLEY:

I recall it.

15 **BLANCHARD J:**

– but he didn't seem terribly enthusiastic. It's an impossible Act to read.

MR HARLEY:

It is a very difficult Act and the reason –
20

BLANCHARD J:

And it must be costing the Department so much time and trouble because they have trouble reading it too.

25 **TIPPING J:**

And taxpayers.

MR HARLEY:

I'd like to finish on that note.
30

ELIAS CJ:

It's a happy note for you Mr Harley, yes.

MR HARLEY:

35 Those are the submissions in reply. I'm happy to answer any further questions if that will help.

ELIAS CJ:

Thank you. I think we have no questions. Now counsel what we propose to do is to reserve our decision on this point and if it is necessary – because on the Commissioner's viewpoint it would be dispositive of the appeal –

5

MR HARLEY:

Correct.

ELIAS CJ:

10 If it is necessary we will hear you further on the secondary point but we think it's sensible to resolve this point first.

MR HARLEY:

As Your Honours please.

15

ELIAS CJ:

We've finished for the day Mr Stewart. I'm sorry that you didn't get a trot. Thank you counsel for the submissions. It's been very helpful.

20 **COURT ADJOURNS:12.54 PM**