

IN THE MATTER of a Civil Appeal

BETWEEN **DONALD EUGENE ALLEN**

Appellant

AND **THE COMMISSIONER OF  
INLAND REVENUE**

Respondent

Hearing 28 February 2006

Coram Elias CJ  
Blanchard J  
Tipping J  
McGrath J  
Anderson J

Counsel CT Gudsell for Appellant  
R Ellis and K Whitiskie for Respondent

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**CIVIL APPEAL**

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10.05 am

Elias CJ Thank you.

Gudsell Yes may I please Your Honours counsel's name is Gudsell and I appear for the appellant.

Elias CJ Thank you Mr Gudsell.

Ellis May it please the Court I am Miss Ellis for the respondent Commissioner and I have with me my learned junior Miss Whitiskie.

Elias CJ Thank you Miss Ellis and Miss Whitiskie. Right Mr Gudsell.

Gudsell Your Honours you have before you the substantive submissions on appeal, you also have before you an application to adduce further evidence which when granting leave for this appeal deferred that matter until this hearing and I'm comfortable with Your Honours to deal with the adducing of further evidence first if that would suit.

Elias CJ Well Mr Gudsell now that we have had an opportunity to consider the submissions on the substantive appeal unless you want to enlarge upon your submissions for admission of the further evidence we think that the point upon which leave has been given is clearly one of statutory interpretation and as the submissions indicate really can be dealt with on that basis. It's very late deputed evidence which seems to be directed almost at a legitimate expectation point rather than the point of interpretation in issue, so unless you want to press the point and want to be heard further we're minded to decline the application for admission of further evidence.

Gudsell I don't wish to push the point hard at all other than to say that in respect of the full position associated with the interpretation issues that will arise, you have before you the affidavit evidence of Mr Bruce on behalf of the department included in the case on appeal. You also have affidavit evidence for a Mr Allen, two affidavits in that respect, and a notices of claim and indeed the statement of claim that was filed on the 8 April. They refer collectively to correspondence and documentation exchange between the department and Mr Allen's advisers and really it's a matter of completeness more than anything that you have that full picture because you have a picture in part if you like.

Elias CJ Well I can understand that you'd want to complete the picture but really none of it, it seems to me, is relevant to the point that we have to determine which looks as though it is simply one to be dealt with in terms of the Statute.

Gudsell Very well Your Honour I won't pursue that further.

Elias CJ Thank you.

Gudsell The essential position as Counsel perceives it between those submissions filed for and on behalf of the appellant and those filed for and on behalf of the respondent is that they start at different positions. The submissions for the appellant commence with a critical examination of s.89D(2) of the Tax Administration Act, whereas the submissions advanced on behalf of the respondent hereto the Counsel's submission to commence for the consideration of s.138D which is a challenge proceeding process and the appellant's position is that the Court should commence at the beginning of the process to determine in light of the ground of appeal that was approved to examine the procedure followed by this appellant to establish whether or not that

would allow the appellant to ultimately challenge any determinations subsequently made by way of an assessment by the Commissioner. The reason for commencing in my submission at the start of the process is because it is critical to determine what s.89D(2) in particular means in the statutory framework that is before the Court. There is no point in my submission in examining critically s.138B or 138H at the commencement of this hearing if fundamentally s.89D2 is to be interpreted in the way the appellant advances.

Tipping J      You accept that the proper construction of 89D(2) may well engage attention to those other sections?

Gudsell        In order for the legislature to be seen as complete the dispute and challenge proceeding must be linked and I don't dispute that Your Honour that that must be so but to advance the matters as the respondent has done by way of implication or in the first instance to say that there must be additional words must be read into s.89D is to commence with a flawed approach. There is ample authority in the tax area to support the proposition that the clear words of the Act need to be read and to be given meaning to and if they lack meaning it is not for any Court to replace or to act in the place of the legislature in altering that position, and when one looks at s.89D(2) in the way in which it came into existence by way of the legislative history that is set out in the submissions it is my submission that it is apparent that there is a legislative gap that is now sought to be filled by reading in to s.89D that a taxpayer who defaults in filing an assessment must file a NOPA and a return. If the legislature had intended to be as clear as that it could easily have done just that and there is a case, I apologise for not including this in the volume of cases that came before you, that may be of interest to the Court. I suggest that it will be and it's a case of **C&J Clark Ltd** and the **Inland Revenue Commissioner**, a decision of the Court of Appeal sited in [1975] 1 All ER, and if I may through your Registrar hand a copy of that decision up, I will refer you to a particular passage. Thank you.

Elias            So is your submission that s.89D(2) has to be read in isolation because it's a rather novel approach to modern statutory interpretation.

Gudsell        Section 89D(2) is to be read in the context of the part with which it is in and also within the scheme of the Act, including part 8A, so I don't endeavour Your Honour to adopt any novel interpretation to the way in which the section is to be read but I do say that in the interests of determining what the legislature intended by that meaning if the Court of Appeal remarks regarding this particular provision and indeed the provisions as a whole where it remarked at page 39 of volume 1 of the case on appeal 'that the statutory provisions in issue in this case are nowhere as clear as they ought to be and that lack of clarity has led to the present difficulties'. Now that is not uncommon with statutory interpretation when the Court is put into a position of interpreting what may be complex or difficult legislation. But given that it has taken that

view, and I suggest a view open to this Court that in this complex area and given these reforms that took place in 1996, it is appropriate to look not in isolation but to the provision as it was enacted, as it was amended, as it was if you like interpreted by the department in its own publications immediately following the enactment. Now if those commentaries that I have provided to the Court by way of the introduction of the Bill, the amendment processes and the department's actions post the legislation being enacted are determined by this Court to be irrelevant then that would be of concern because it submitted that a citizen in terms of establishing their rights, and this is all this taxpayer is doing, their rights to engage in a process of dispute, not seeking to win some advantage by a technical point, then those words that that history should be given some meaning, so I don't seek to isolate it but the remarks that I refer you to in the decision **Clark** that I have provided to the Court with Justice Stamp at page 805 and in this case the Court was dealing with some complex provisions in the Act ss. 77 and 78 regarding surtax and interestingly enough by reference and cross reference of s.89D! the words 'subject to' which appear in our Act but at page 805 reference (B) I just re-emphasise the point I've made earlier and I appreciate that it's a point of general application that the Court is not at liberty to force a construction of clear language to correct even a clearer anomaly, and I say that because of the difficulty in the remarks of the Court of Appeal, also in respect of the remarks made by the Commissioner concerning the language of this legislation being opaque. For a Government Agency to introduce and to administer legislation which is incomprehensible to many, and certainly those who may accidentally default in filing a return as to knowing what their position is, is not a happy position to be in.

Tipping J I wondered if perhaps a little lower down that page Mr Gudsell that whether some assistance can be gained six lines down from letter (c) "of course in construing a particular section etc".

Gudsell Yes

Tipping J And then reference to Lord Reid and **Stenhouse Holdings** defeating the intention of the legislature as shown by reading about the provisions of the Act and so forth. This is all fairly familiar stuff isn't it?

Gudsell Yes it is. On of the aspects of this going over to page 806. Your Honours have read that first passage. I just refer you to the question of the choice of interpretation and particularly in the area of Tax Legislation and the assessment of people's liability to meet a tax at which there is no presumption.

Tipping J Well I think I would respond to that, that I think you're facing a situation here where one interpretation is consistent with the Act and the other isn't. It's not a choice of unpalatable alternatives, it's a

choice between consistency with the fraud thrust of the Act and the opposite.

Gudsell Consistency in the sense that I take it Your Honour that a person who defaults in filing a return ought consistently with any other taxpayer file a NOPA to challenge that return and also file a return.

Tipping J Yes exactly. Historically I think I'm right aren't I that under the old or previous, and I only have a glimmer of a recollection, that whatever else happened on a default assessment you had to file a return so I would be inclined to read this as saying you have to file your return before if you like and I don't mean before in a chronological sense, but as a condition of challenge.

Gudsell You don't need to file a return to a default assessment, you could accept a default assessment.

Tipping J Of course, well then there's no problem. But if you don't accept it don't you have to file your return and then challenge it by the stipulated measures.

Gudsell You have to file your return to engage in the process and the question is how you engage in process and the conflicting aspect to this interpretation issue which uncluttered by the history of the legislation, uncluttered by the publications that the Department has put forward to explain the legislation to the public and to advisers, the Court may take the view that it is simply in line with the general thrust of interpreting this legislation that the taxpayer must do both.

Tipping J You see the word 'may' suggests you can do it only if you furnish a return. The word 'may' seems to me clearly to denote that it's signalling a pre-condition, not an exclusive method.

Gudsell Well the word 'may' in s.89D(1) and then the words 'which have to be given some meaning subject to subsection 2'. Now to see the legislation in its context one would go to s.89C Section 89C provides the exception where the Commissioner can issue an assessment instead of a NOPA, because the scheme of it is as Your Honours are no doubt well aware, that by the time you get to the assessment phase everything's on the table. You've gone through a process, there might be an extended time being engaged in early exchanges between the taxpayer and the Department, but in certain circumstances in 89C the Commissioner can speed up that process, and when one examines s.89C before going to 89D by express reference or by proper inference, the taxpayer has filed a return in all cases except 89C(h), so if you look and examine 89C(a) it refers to return, (B) refers to return, there is agreement in (C) and (D) and there is essential agreement in (D), (B) etc, and I have worked through those and subject to correction the only one by necessary express reference that is different is 89C(h) where the taxpayer has not provided a return. So if the legislature in its broad

structure has said Commissioner you must file a note before an assessment but you can file an assessment in these cases. Almost in all instances he is armed with the taxpayer's position or the taxpayer agrees with him. But what he doesn't have in 89C(h) is either the taxpayer taking a tax position or the taxpayer having provided him with any information at all.

Blanchard J Isn't that because there's nothing to adjust? There's been no return.

Gudsell In 89C(h), yes he hasn't got anything, he's armed with nothing. Well he may have assembled independent information of course which is what happened in this case.

Blanchard J But he's got nothing to adjust.

Gudsell No nothing to adjust, that's right.

Blanchard J So that's why there is that exception?

Gudsell Well nothing to assess, yes, so that's why the exception.

Blanchard J No, nothing to adjust.

Gudsell Yes.

Blanchard J He has to do an assessment. That becomes the first stage.

Gudsell Yes, he may do an assessment.

Blanchard J So he's not required to do a NOPA at that stage because he's not adjusting anything.

Gudsell No he can't do a NOPA because he doesn't have anything.

Blanchard J So where does that take you?

Gudsell Well it takes you from going from the 'may' in 89D2 that Justice Tipping raised was that you go then to 89D from that preceding provision so if the Commissioner has issued a Notice of Assessment and not issued a NOPA, so you know in what cases he will have done that, then if the taxpayer wants to dispute that assessment they file a NOPA, but by express reference in subsection 1 the taxpayer may, it's obviously their choice, they may accept the assessment and in most instances would, because some of the things in 89C suggest they've agreed to things, may subject to subsection 2.

Blanchard J So he's complying with subsection 2?

- Gudsell Certainly with complying with subsection 2 or in addition to subsection 2 or it's subject to, as you say, complying the subjects in 2 but what does subject to subsection 2 mean?
- Blanchard J It means doing what subsection 2 requires of you.
- Gudsell Right, well when you go back and say well what meaning is to be given to those words in 89D(1) and 89D(2) why create the exception in subsection 2 for a taxpayer who has simply defaulted and not filed a return.
- Blanchard J It's not an exception, it's an additional requirement.
- Gudsell If the Commission had issued an assessment to all taxpayers referred to in 89C, then that taxpayer would include a defaulting taxpayer and a defaulting taxpayer they would receive an assessment and the language of 89D(1) could have said 'all such taxpayers in order to dispute must file a notice of proposed adjustment'.
- Elias CJ Well they don't have to challenge it.
- Blanchard J The Commissioner wants a return as well as a NOPA.
- Gudsell Yes
- Blanchard J And the NOPA is a pre-requisite to resort to s.138B.
- Gudsell Yes.
- Blanchard J So when you read 89D in light of 138B the meaning of s.89D (1) and (2) becomes pretty clear I would have thought.
- Gudsell What has troubled the appellant without attempting to avoid in any way your question Your Honour, is that when one looks at the passage of the legislation, the position in my respectful submission is that it is far from clear and indeed it is apparent from that legislative history and the material and the material that accompanied it by way of the introduction of the Bill, the reports, the reporting back and such like, that initially all taxpayers who had an assessment before a NOPA was issued were required to file a NOPA to dispute very, very clear; flowcharts, explanations, reports. Then the legislature commenced its movement and changes are reflected in the submissions that have been advanced before you and what came out the other end was a very clear indication that you do not file a NOPA to dispute a default assessment.
- Elias CJ When you say a very clear indication you mean s.89D(2)?
- Gudsell Emerged. It emerged from the legislative history of the provision.

- Elias CJ Yes but what is being put to you is that s.89D(2) doesn't bear that clear meaning if read in the context of s.89D.
- Gudsell Well in my submission it is capable of that interpretation.
- McGrath J We really aren't we now focusing on the contextual argument your running. We've got the legislative history coming up and I would like to see you complete that and that's to indicate where you see subsection 5 of s.89D as coming into assist in the context. I wonder whether for example subsection 5 doesn't indicate that s.89D(1) was the predominant provision and subsection 2 really an incidental provision.
- Gudsell Well the position with respect to the applicable response period Your Honour, I take it that is the.
- McGrath J What I'm really getting at is that subsection 5 rather indicates that s.89D is all about the process of issuing the NOPA and that may contextually, if that is right, and I'm suggesting subsection 5 would lend something on the face of it, to my mind would give some support to that. Perhaps subsection 2 should be read as an incidental provision rather than one which sets up another method of challenge, of starting off the challenge mechanism than the NOPA.
- Gudsell Yes, because the clear languages I've set out in the submission in respect of 89D(2) is the only means by which you can dispute a default assessment is to file a return.
- Tipping J Why do you say that when you read subsection 2 sequentially on subsection 1, because subsection 1 clearly is dealing with all types of assessment? If it wasn't dealing with a default assessment and the regime for default assessments was exclusively subsection 2 then it wouldn't seem to me to flow in the way intended. And it talks of a notice of assessment. You're wanting to carve out of that aren't you the default assessment?
- Gudsell I am wanting to carve out of that default assessment and the reason I'm wanting to carve out of that default assessment is that you've got a position where a taxpayer has not taken a tax position. The whole nature and philosophy of the compulsory assessment that applies in this area is to ensure that the Department captures a return, given that the obligation on the Commissioner is to ensure that the correct is assessed and there is ample authority in that regard. The default assessment process is not designed to achieve a correct assessment of tax, it is designed to penalise people who do not file correctly.
- Tipping J If 1 and 2 were supposed to be completely separate regimes, which is your position, it would be very awkward to find in subsection 1 that it was made subject to subsection 2. I know you said that reinforces the separateness of subsection 2 but surely conceptually as this is



proceeding it demonstrates that in addition to a NOPA, if you have a subsection 2 situation you must comply with, a fault assessment, you must comply also with what's there.

Gudsell The anomaly in my response to that Your Honour is that if you Noparing something, you are Noparing an assessment that's been made and your also filing a return so that you've got not an instance like this appellant's background but you've got a situation where someone simply errs in missing the date for filing a return. What are they then to do?

Tipping J If you were right instead of saying subject to subsection 2 they would have said that if the Commissioner issues a notice of assessment, other than a default assessment, because that would have been the way to signal that you were having one regime for non-ordinary assessments and another regime for default assessments.

Gudsell Well as Justice Blanchard remarked subject to complying with subsection 2 would have been a simple way of linking the two, it doesn't say that, and the Court of Appeal.

Blanchard J But the two are linked.

Gudsell Well the two are linked. They are part of the same section.

Elias CJ But they're linked by the words 'subject to' which doesn't set up an exception.

Gudsell I had difficulty in finding any commentary on subject 2 but I did find that in the Chancery Division of **Clark and Inland Revenue** and it probably is a matter of one would say at the end common-sense as to what subject 2 means but it was judicially considered in that case that the subject subsection was subject to the master subsection. If the subject subsection is s.89D(1), because that's the provision that has it in, is it subject to s.89D(2), because the philosophy behind this, and I'll provide that decision to Your Honours.

Tipping J Is this just coincidentally another **Clark**?

Gudsell Beg your pardon Sir.

Tipping J It's not the same case as the first **Clark**?

Gudsell Oh yes it's the Chancery Division.

Tipping J Oh it's the first instance, right.

Gudsell Yes it is Sir, if I may.

Tipping J But is this going to help, because it's notorious that phrases like 'subject to', it's like provided, are slippery in meaning, they have to be read in their context.

Gudsell They are slippery in their meaning and that is why it was appropriate that I refer really to the remarks made by Sir Eric Sachs in the Court of Appeal decision at page 807. It may bring somewhat of a lighter moment to this but nevertheless a remark that he made that upon "upwards of a dozen times in the course of the hearing I read and re-read the provisions of the first four subsection of s.78 of the Finance Act, having due regard to the provisions of s.77 as well as others called to our attention". I needn't perhaps continue reading as Your Honours are reading it. And at the foot of the page just after (g) the learned Judge commented that "in making this initial approach to the issue before us in what may be an unorthodox way he's deliberately refrained from an intricate examination of all the various possible conflicting meanings it could attach to the individual words and phrases in a complex piece of fiscal legislation when two completely contrasting views on the relevant effect of these four subsections have been adopted respectively by the experienced Commissioners and by the learned Judge, it seems appropriate to get back to the simple question "what impression do they convey to those who have to use them as a guide to action", and commented and I have his decision but Your Honours would be familiar with it of the **Cape Brandy Syndicate** case. At the foot of that page "a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no room for equity about tax law.

Blanchard J Yes but that's all about substantive tax. We're concerned here with procedural provision.

Gudsell Well in terms of the procedural provisions Your Honour I suggest that where substantive rights to procedural entitlements are an issue to allow a taxpayer, not in particular in Mr Allen's position, but any taxpayer who defaults in this regard, if the position is by reference to legislative history is unclear, if in context as Justice Tipping remarked provided and subject to slippery provisions, then ought a taxpayer where the matter as the **Clark** decision makes clear make it abundantly clear by very simple language ensuring that the taxpayer has a right to engage in challenge.

Tipping J I'm not wanting you to think that I think the subject in this instance is slippery. My remark was general, but if you just read subsection 1 without reference initially to the subject of subsection 2 wouldn't you say that in this situation that we're here present with your client has had a notice of assessment issued to him, (B) applies, so if you want to challenge it you can issue out your NOPA?

Gudsell I accept that.

Tipping J But the question then becomes, sorry you accept that? Sorry, you do accept that, I was a bit too quick.

Gudsell What I was going to say to you was if you look at page 25 of the appellants bundle of documents you will see the original form of s.89D and that it precisely falls into the category that Your Honour has just commented on precisely so why mix it up, trouble the legislature, create the distinctions, put in subject 2 in that instance if the legislature because Your Honour without stopping that line if you look at that provision 'the taxpayer may issue a NOPA' that catches a default assessment, because H above that on that same page 25 is a taxpayer who has not provided a tax return, nothing simpler. Why not leave it there. But they didn't, and what they've done over the years is stated as I put in the publications in my submissions they ought not to be put to one side by this Court. They say the whole area of default assessment has obviously caused confusion. Neither the legislature nor the administrators have been able to clarify it so what do they do in respect of 89D, they put in one of those provisions at page 32, in the centre of the page, it's the first amendment to s.89D(1) and they simply add after the words on page 25 that I've read to you 'the taxpayer may issue a notice of proposed adjustment provided that where a taxpayer has not furnished a return in respect of assessment and wishes to then the taxpayer must do so by furnishing a return', so they started tinkering with what to, from Your Honour's words they started tinkering with what Your Honour would have said respectfully was clear language. Everyone who's under 89C gets an assessment before a NOPA, no matter where you're from, what you've done, you need to file a NOPA to engage in disputes. So they start tinkering with it and they further tinker with it as it goes through the passage of its legislation and what they say quite clearly by way of guidance to not only to this Court, and they make that clear in the speeches, but also in guidance to the tax advisors is that they will provide a publication at the end of all this in the form of a tax information bulletin that will describe precisely to you, the taxpayer, the adviser and everybody else, what you need to do. They never say until April 2005 that you need to file a NOPA and a return.

Tipping J Where do you get from your second reference on page 32 to what we actually have construed? That's a further amendment isn't it?

Gudsell Yes, yes it is Your Honour and if you go to page 40 of the same bundle.

McGrath I think it's page 42 Mr Gudsell.

Gudsell Yes, I was really starting at page 40 but page 42 Your Honour, that's correct, that's where 1(a) comes in and the next page is the bottom of page 43 and over to page 44 and that's where it brings in those references clause 12, the footer page 44 brings in the references subject as 1A and then that became subject to subsection 2.

Tipping J Where in the sequence is the version at the bottom of page 42? Is that the third shot at it and there was a fourth shot at it later.

Gudsell The only shot there Your Honour was in changing the reference subject to 1A, changing that to 2 and then changing 1A that followed to 2.

Tipping J But this one here at the bottom of page 42 is the third version and the fourth version is just that small change that you've just mentioned.

Gudsell Well if you go to page 55 you'll see some even more change. The history provision at page 55 sets out what applies from 2002/2003 initially there Your Honour, which of course is not relevant to the tax returns of this taxpayer and that's one of the difficulties of the drafting of these things is to follow through what's relevant to your particular years.

Tipping J But where is the version that's relevant to your client there?

Gudsell The 2000 and 2001 reference Sir is that immediately set out under history. It says in the second line there it says 'the former s.89D(2) is listed below', that is the one that was relevant in 2000 and 2001, and if I may apologise to the Court in this analysis, I believe I sent out to the Court the one that is further down that was in the Bill. It's in the next reference down.

McGrath J So that's 89D(2) replaced is it?

Gudsell I'm sorry I cut across you Sir.

McGrath J I didn't quite get your point there are you referring now to the reference below subsection 2 in square brackets in the second paragraph and moving on to the third paragraph.

Gudsell Yes, the one that was relevant in 2000 and 2001 is the first subsection 2 appearing under history and the second one was the former one.

McGrath J Was the?

Gudsell Former, and that was after 1999.

McGrath J Mr Gudsell if we come back to the version at page 42, which is 1(A), that's a change obviously in the sense that what was a proviso has moved to be a statement that's incorporated in its own section. Now forgetting for the moment about whatever was being said later in IRD Bulletins, what is it that you invite us to draw from that change in the course of the legislative history except it's no longer a proviso?

Gudsell Well, not only that it's no longer a proviso but the specific distinction that I was just discussing with Justice Tipping of the original s.89D set

out on page 25, with respect it would have been very clear had that section remained and a defaulting taxpayer would have been required quite clearly to file a notice of proposed adjustment to the assessment that the Commissioner had made.

McGrath J So was that at page?

Gudsell 25.

McGrath J 25 was it, not 32?

Gudsell 25 was the start of the discussion.

McGrath J So what you're saying is that it ceased to be a proviso and at that stage became a new method of challenge, because it ceased to be a proviso to subsection 1.

Gudsell I'm sorry Sir I'll go back and retrace. There was never any proviso initially.

McGrath J Yes.

Gudsell Then there was a proviso.

McGrath J Yes.

Gudsell And then there was a subject to provision. That's the history of it Sir.

McGrath J Yes, now what I'm wanting to do is to get to what significance you attribute to the change between the proviso and the subject 2.

Gudsell I'm not sure that there's any distinction between the proviso and the subject 2. There is a distinction however between the initial provision as drafted which just captured everyone under s.89C and the subsequent position.

McGrath J So your focus is on the original and the first change, not on the difference between the first and second?

Gudsell Correct.

McGrath J Thank you.

Gudsell So.

Tipping J Is it possible that when they made the change from the first version to the second, the first change, someone tumbled to the fact that under the original first version there was no requirement to file a return and although it's been done in a rather hand fitted way the purpose of the change, never mind the semantic and other variations that came later

but that the primary change on which you're relying was to make it clear that you couldn't go forward with your challenge until you had filed your return, remedied your statutory default in other words.

Gudsell One of the difficulties Your Honour with that approach it perhaps throws up another anomaly without warning is that s.106 of the Act expressly refers to the defaulting taxpayer. I have included that provision and the documents at page 78 of the volume you have before you, it's a bundle of documents.

Elias CJ Sorry, what page?

Gudsell Page 78 Your Honour. So to address Your Honour's point about the only way you could engage in the process the curious language of 2.106, and I know this provision has been before the Court before in relation to an earlier incident by Mr Allen. I was not counsel on that occasion the decision of the Court of Appeal that Justice Young delivered addressed s.106 and s.92, and that's actually a decision that in the respondent's bundle of documents so I do intend to refer you to that because it does address both of these provisions, but to answer your point Justice Tipping, the only way that you can engage and challenge the process is by establishing on objection or in challenge the assessment. Now with the new regime.

Tipping J This was in the old Act was it?

Gudsell No this is in the Act which is still relevant.

Tipping J Still relevant.

Gudsell Relevant in 2001 and still relevant. So that you've got the reforms bringing in a dispute procedure and a challenge procedure that launches off that, yet the provision that says you're liable for the default assessment figure and your liable to pay it, say insofar or say so far as a person establishes on objection or in proceedings challenging the assessment, so that as forerunner Your Honour to your query regarding someone twigging to the fact that hey, we'd better file a return must force these people to take a tax position. That doesn't sit comfortably with s.106, which is the relevant provision which talks erroneously in my view an objection process.

Tipping J Is this because 106 does not in terms require the filing of a return before you can take objection or.

Gudsell No it doesn't.

Tipping J Is that the point?

Gudsell Well it is the point because Your Honour was saying.

- Tipping J I just wanted to make sure I understood what you were deriving from 106.
- Gudsell Yes Your Honour was saying has someone twigged that we must get these people to file a return before they can engage in the challenge proceedings, well if they had twigged to that they didn't twig to 106.
- Blanchard J But when you go to 106 you'd say to yourself alright well there has to be an objection or proceedings challenging the assessment. Where would you go to look for the word 'objection' to see what that requires of you? We know where you go with proceedings challenging the assessment I think but where do you go to establish an objection.
- Gudsell Part 8 Your Honour, and in Part 8 there is no application with the new dispute regime.
- Blanchard J Well when does it apply?
- Gudsell It applied in respect of the cases stated in and my friend will correct me if I'm wrong on this but I don't have immediately the full part available but the objection process was the one that existed prior to the dispute process coming in.
- Blanchard J So somewhere in the Act you'll be told there's no longer an objection procedure, effectively you're being told that words in the Act are to deal with historical matters.
- Gudsell Yes, yes that's correct.
- Blanchard J So therefore as far as a taxpayer at the present day or in the year 2001 is concerned you're looking at proceedings challenging the assessment and doesn't that just take you around in a circle again back to where were?
- Gudsell Yes, and then you get a situation where to start the dispute process, and this is where it gets a little contorted, to start the dispute process under 89D(2) for a defaulter. The only way in which to dispute is to file a return.
- Tipping J Well that's begging the question. You're suggesting that 106 somehow or another reinforces that construction but at the moment I'm having difficulty understanding why it reinforces your construction of subsection 2.
- Blanchard J It seems to me it's entirely mutual.
- Tipping J Yes.
- Elias CJ Mr Gudsell was s.106(1)B not in the legislation at the relevant time?

Gudsell S.106.

Elias CJ Because that language at face value seems to be inconsistent with your argument since it refers both to disputing the assessment and complying with the requirements of s.89D.

Gudsell Yes, that is the section Your Honour that has been subject to the Court of Appeal's consideration, and indeed Justice O'Regan in an earlier decision than the one that's been provided to you, addressed that and took the view it referred to I think subsection 1 above that he probably interpreted it as that being an error, it should have been 1A, but s.106(1)B applies only respective income statements set out in 1A, so it doesn't apply to default assessments.

Elias CJ Oh I see, it's 1A not 1.

Gudsell No, and it's a little surprising really Your Honour that the process isn't held up when one disputes it under 89D(2).

Anderson J Mr Gudsell do you think there might be any significance in the fact that s.89D talks about disputing the assessment and s.139 talks about challenging the assessment and my proposition I put to you for discussion is this what s.89D(2) is attempting to do is to show that you cannot engage the dispute process, not the challenge process but the dispute process, until you file a return. The dispute process is the process that involves NOPAS and laws. So it's saying you can't become a disputant, notwithstanding the definitions in s.3 until you file your return. Once you've filed a return you become a disputant and you can engage the dispute process and if you don't get satisfaction from that you then challenge.

Gudsell Yes, I accept that you need to trigger the whole mechanism before you can go into part 8A and it was a point that the Chief Justice made at the commencement of the hearing of seeing it in context and I accept that, you've got to trigger the mechanism. If you want to engage in disputing what the Commissioner says is the excess liability for tax, you do it in accordance with the dispute process mechanism set out in part 4A, if you don't do those you don't get to the next base.

Anderson J So if you file a return you are now entitled to dispute so you can issue a NOPA.

Gudsell The only troubling feature of the analysis that I'm endeavouring to put before the Court is this, that you have, and perhaps I'm harping on it, if you have a legislative history and you have a body that's intimately involved in the administration in the promoting the legislation and then administering it that has never at all said that this is a conjunctive process that the taxpayer needs to comply with and when you double that up with the pronouncements even as recently as February 2005 that I have attached in the summary of documents before you, is they



talk about the default assessment being cancelled. Now if an assessment, and I know that the questions of assessment, re-assessment and amended assessment have been dealt with by Your Honour in previous Court of Appeal decisions, there is no obligation to do so, but if a default assessment is cancelled and the taxpayer has filed a return and taken a tax position that the Commissioner can assess, it then allows the taxpayer to engage in the process and the point that I made in the Court of Appeal and as I understand it the Crown accepted that in this instance if the return were accepted as triggering the process when it was filed in this instance, then the Commissioner could still today issue a NOPA. Now the reason he could is because in this particular instance, s.108 of the Act, allows that Commissioner to come back at any time, particularly where there are issues of fraud or other, to reopen and investigate. Now because the Department is throwing out messages there's no legislative animal or beast called a default assessment, not to be found by way of definition, but is referring to people being assessed because of defaulting and filing return. If what has happened in this instance is that this taxpayer has taken a tax position the default assessment is cancelled, clearly clear words from the Department even last year, then what does the Commissioner have. They have a stated tax position from which an assessment can be remade and a NOPA can be issued. What is the point for the average taxpayer to file his return two months late uncluttered by any issues of fraud or otherwise having to file a NOPA to set out the structure of an 89F detailed documents, propositions of law and all of those other complications for their Commissioner to say the default assessment is set aside.

Tipping J        Sorry, could you just pause there? Are you saying that the filing of a return in a default situation automatically causes the default assessment to be set aside.

Gudsell         I am Sir.

Tipping J        You are. Because that could be of some moment.

Gudsell         Well the publication.

Tipping J        Well never mind the publication.

Blanchard J     The Act.

Tipping J        The Act. Let's just confine ourselves to the Act shall we because obviously these people don't know their own Act very well.

Gudsell         I would like to think that they know their Act very well and that they launch their publications off the back of it.

- Blanchard J Where does the Act say that the filing of a return by the defaulting taxpayer automatically sets aside a Commissioner's default assessment?
- Gudsell It doesn't Sir.
- Blanchard J Well that's the end of that.
- Gudsell Well.
- Tipping J I think in this very uncharted seas with people putting out blurb and all the rest of it that it doesn't seem to be consistent and all we can safely do is go on the legislation. That's our duty. We're not here to construe random publications by the Department.
- Gudsell Well that's why I come back to what should you make of the passage of the legislation their invitation for this Court to have regard to commentary in Hansard, their invitation to this Court to have regard to appendices and guides if that is to mean nothing.
- Anderson J That's one members view isn't it, in a speech?
- Gudsell One member of Parliament Sir.
- Anderson J Yes.
- Elias CJ But the normal approach Mr Gudsell is to start with the text of the Statute to try and ascertain its meaning from the language and from the context of the legislation and it's really only if you run into difficulties that you're driven to the sort of material you're taking us to.
- Gudsell I accept that and what I say in respect of that is that you have the Court of Appeal expressing a clear view that, I don't mean that in any pun, the statutory provisions in issue, the very same ones that this Court is considering are nowhere as clear as they ought to be and the lack of clarity has led to the present difficulties. Now if we have a starting position where the Commissioner equally says these provisions are opaque. It says in its submissions that for leave before this Court that you need to read in additional requirements. Now for an appellant, for a citizen to say in order for me to understand what are complicated, unclear, opaque words that some guidance ought not to be received from what Parliament intended and equally from those who promoted the legislation and significant reforms should not be given weight, is in my submission not a line that should be followed. I agree with the Court of Appeal, I agree with my friend in terms of the lack of clarity of this legislation so that I say Your Honour in response that we are in that situation, that the Court ought to be inclined to give due weight to the passage of this legislation and to things that flowed out of it.

- Blanchard J Don't you think Mr Gudsell that before this unhappy taxpayer in his confused state or her confused state goes back to Hansard they would naturally read the rest of the legislation which would bring them eventually to s.138B which you haven't so far addressed and which very clearly requires that there has been an adjustment proposed which has to be a reference to a NOPA.
- Gudsell Yes, and the reason that I haven't come to that, although I have addressed that in my written submissions as an alternative argument, I don't put it at the forefront of the submission I advance and the reason I have done that Your Honour is because to take Justice Anderson's position, in order for you to go to that you need to formulate and assess and determine what the trigger mechanisms are and if the trigger mechanisms are different and indeed what ought to happen here is that once this taxpayer filed his return and the default assessment became effectively a nullity.
- Blanchard J Now wait a minute, you're reading the Act. This taxpayer's reading the Act, where's he going to find that in it?
- Gudsell I'm suggesting that as Sir Eric Sachs said and others that often as an indeed Parliament has said, and I'll take you to the passage Your Honour. It's page 22 of the Appellant's bundle of documents. This has the part that I'm referring to in the introduction of this Bill and to the House commences at page 18, page 20 it starts the Honourable Wyatt Creech, Minister of Revenue, page 20 commences discussion in the Tax Dispute Resolution Procedures.
- McGrath J So are we now looking at you said page 22, you're also talking about Mr Creech, you're now talking about page 26.
- Gudsell This passage Your Honour is a document that was spoken to by a Mr Creech or produced through the Honourable Wyatt Creech through his Department commencing, I was just putting it in context, page 18.
- McGrath J Is this, alright, page 18 is where it starts. I'm sorry so we didn't go to page 22 right.
- Gudsell At the foot of the page after enactment and coming back to your point Justice Blanchard about where the tax advisor would roam in terms of determining the position, this is suggesting this detailed policy statement will be published before the new procedures come into effect and will provide taxpayers and tax professionals comprehensive guide to the new procedures, both legislated and administrative and it concentrates on the areas of procedures which have not be legislated.
- Tipping J Is there anything in this introductory speech which actually trenches on the precise issue that's before us other than saying that a lot of other material is going to be later published?

- Gudsell Well If I may address both those points.
- Tipping J Well I'd be much more interested in the direct one.
- Gudsell At the latter, 24, 24, at the foot of page 24.
- Tipping J Well the penultimate bullet point read with the last provision suggests exactly what they did of course but then you point out they tinkered with it.
- Gudsell Correct, and what you'll find is, that's exactly right Your Honour, it came back to that passage on page 25 that we discussed earlier and what you'll find is that when you come to the second point, and that is the.
- Tipping J But what I have difficulty with Mr Gudsell is that that was clearly their primary thrust that faced with a default assessment you had to file a NOPA. You're asking us to take the view that they completely abandoned that approach and decided that the NOPA would no longer be required and all that had to be done was the filing of a return. I can fully understand the addition of the return but what I cannot understand in policy terms or in any other terms as to why they would suddenly do a U-turn on their original stance that we must have a NOPA from this defaulting taxpayer. Is there anything there that will help us? Give your own submission but I'd be very happy to see something on paper.
- Gudsell They haven't enunciated that in clear language other than by reference to their discussion documents and the reports that flowed but the core issue in any tax regime by way of self-assessment arising out of the reforms was to elicit returns, to obtain returns by way of self-assessment. Now the original sections 33 and 92 that relate to the area of filing of returns did not refer to assessment but the whole process is built on the return, so they're saying to the defaulting taxpayer to dispute it you must file a return. You know if the taxpayer does that and there are administrative procedures to give the taxpayer time to do that, it didn't occur in this case as Your Honours' know from reading the papers that the first this taxpayer knew about it was when proceedings were issued on the 10 April, after an assessment on the 8<sup>th</sup>.
- Tipping J I'm sorry to interrupt you but you're not really addressing my point. Can you either point to in the papers or suggest a logical policy reason why they would dispense with NOPA's from a defaulting taxpayer in favour of the far less precision of a return simplicitor?
- Gudsell My response to that is they are not dispensing with the NOPA process, they are getting a return from which the NOPA process can then commence. Once the return is filed, and I know that Justice Blanchard will reluctantly hear what I'm going to say and that is if what occurs is that the default assessment is put to one side. They've got the return,

they reassess, this is in practice, that reassessment is capable of being NOPA'd

Tipping J I understand all that but that presupposes either that there's an automatic cancellation which we can't find or that it's dependent on a discretionary decision by the Commissioner to cancel the default assessment which I don't think we're bound by that.

Gudsell I'll see if I can assist Your Honour with any commentary other than a publication on the.

Tipping J If I could see a logical reason why they were substituting the return for the NOPA I would be helped, but at the moment I can see none. I can see a logical reason for adding the return to the NOPA.

Gudsell What's then NOPA'd, if you follow that reasoning through is the default assessment and there may be numerous issues associated with that because it's inherently inaccurate, it just builds 10% on the last year or whatever other information they've got. It's not a correct assessment, it's a trigger assessment to get a reaction from the taxpayer, they'll be sued, their liable for the debt so that in the default assessment regime the taxpayer is down and out the loser until they can engage in a process, so if they NOPA the default assessment that will compel in terms of process the Department to NOR on the default assessment.

Tipping J To put a what?

Elias NOR.

Gudsell Sorry, put a notice of response.

Tipping J Oh, I thought it was gnaw.

Tipping J Oh, I thought it was g. n. a. w, I'm sorry.

Elias CJ Even the Commissioner would find this indigestible.

Tipping J The thought of gnawing and indigestibility leads to morning tea in my books.

Elias CJ Yes.

Tipping J Sorry Mr Gudsell I shouldn't be facetious and I know it's difficult for you.

Gudsell So the position is that you're in a situation if that were to occur.

Tipping J So you're saying that a NOPA against a default assessment is an entirely artificial exercise in a sense?

Gudsell It is, especially if the taxpayer's filed a return, what's the point.

Anderson J Well it allows the Commissioner to look at something other than the default assessment to determine whether there's going to be a NOR or not.

Gudsell Or a re-assessment, because if you've got.

Anderson J In the light of the additional information.

Gudsell Yes, if you've got a situation why would you engage in a dispute process that might lead to challenge if you're NOPAing and I'll use the use the words 'notice of responding' a.

Anderson J Why should you get one foot up the ladder by defaulting?

Gudsell I'm not sure that you do get one foot up the ladder because the ladder would start to break on you if you're in Court like this taxpayer is two days after an assessment.

Anderson J He had a year to file, in fact up to two years, to file his return. He had to think about the period of default beforehand.

Gudsell Oh indeed. My submission really is a broader one in terms of the accidental defaulting taxpayer. The accidental defaulting taxpayer is required then to engage, by looking at s.89F.

Anderson J It's the taxpayer who observes a taxpayers obligation, files a return, gets an assessment and then files a NOPA. The defaulting taxpayer, like Mr Allen, you say doesn't have to file a NOPA at all so he can jump up on to the first run without meeting obligations.

Gudsell No, I'm suggesting Your Honour that this defaulting taxpayer is seeking to engage in process by having filed the return. The Commissioner then assesses that return and if there is to be a dispute in respect of that assessment that Mr Allen has to file a NOPA to which the Commissioner can file a notice of response and that can then lead to the challenge procedure.

Anderson J Why can't Mr Allen file a return in the NOPA saying in effect in the NOPA that on the basis of the return the fault assessment is wrong. The Commissioner will then examine the merits of the NOPA in the light of the merits of the return and may decide 'well I'm not happy with this return, I'll issue a NOR'.

Gudsell Yes he could issue a NOR and is he issuing a NOR to a reassessment or is he issuing a NOR to the default assessment?

Anderson J He's issuing a NOR to the NOPA.

Gudsell Which relates to the default assessment.

Blanchard J Yes.

Gudsell It doesn't relate to the actual tax liability issues or the assessment of correct tax that the Commissioner has made at all, it's issuing a NOPA to what is really a best guess position.

Tipping J Is it still the law that you've got the onus the taxpayer to show that the default assessment is wrong.

Gudsell Yes, I don't understand the position to be any different to the normal onuses and this is one reason in terms of engaging in process that in terms of the defaulting taxpayer getting leapfrogging up the ladder in my submission he doesn't and in all likelihood he would need to respond to likely proceedings for having failed to pay and the Commissioner issuing proceedings on it.

Tipping J I can understand your point about how everyone might have been misled and so on Mr Gudsell and maybe there is some sympathy there, although I'm speaking in general terms, but what is the problem in filing a NOPA as well as your return? What sort of great burden would we be laying on taxpayers by adopting the.

Gudsell Quite a significant one Your Honour.

Tipping J Really?

Gudsell Yes. Section 89F of the Tax Administration Act sets out the procedure. It was a little simpler in Mr Allen's day if you like, time has moved on.

Tipping J 89F?

Gudsell Yes. We found at page 56 of the bundle of documents that is before you.

Tipping J Yes, thank you.

Gudsell And just by way of an example this is the form that was filed by Mr Allen, it's at page 131 of the case on appeal at volume 2.

Elias CJ I'm sorry, I didn't hear the.

Gudsell Page 131, volume 2, sorry Your Honour, of the case on appeal.

Tipping J Does it have the effect of putting a greater onus of detail and supporting documents on the taxpayer than just simply filing a return? A return in my experience, and my careers are not as complicated as Mr Allen's obviously, it's a pretty simple sort of thing, but with a NOPA you really have to get down to chapter and verse do you.

Gudsell Yes, just by way of an example to answer that Your Honour the return for 2001 or 2000 that was filed can be found at page 101 of that same volume.

Tipping J This is when he finally got around to filing it?

Gudsell That's correct. On the 31 July 2002, given that the proceedings and assessment were filed in April and the reasons for his delay.

Tipping J Well that's got nothing really to do with it, I just wanted to make sure I looking at the return for the right year.

Gudsell Yes, that's the return. Now what this taxpayer did because of this exchange of correspondence that you've seen between the Department and the taxpayer, is they not only filed a return but they also filed the document to be found at page 107 of volume 2 of the case on appeal. Those notes accompanied the return.

Tipping J Yes but they wouldn't have to would they?

Gudsell No that's correct Your Honour but we're talking in terms of what would satisfy what obligation a taxpayer has who defaults. Now it's not simply a matter of putting in a page like 107 and saying hey, here's our view on your default assessment, they need to go a lot further and file the document that I've shown you at page 131, so the legislative requirements.

Tipping J I'm sorry you're saying they don't have to do this in order to be entitled to.

Gudsell They need to file the document at 131. They can't get away with filing the document that was at 107.

Tipping J I'm sorry but I've obviously dropped a stitch here. Are you saying that although you don't have to file a NOPA for the purposes of 89D(2) you do have to file a NOPA in due course?

Gudsell Correct.

Blanchard J Why shouldn't you have to file it for 89D(2) then?

Gudsell Well because of the return that a defaulting taxpayer may file, I was just leading off Justice Tipping's discussion about what additional



burden would the taxpayer need to meet if they were to have to file a NOPA.

Tipping J I've been looking at this hitherto Mr Gudsell on the premise that you don't have to file a NOPA at all. It's come as a slight revelation to me, and no doubt this is my fault, that you do have to file a NOPA but not yet.

Gudsell Well in the normal course the taxpayer is going to file a return. If the Commissioner doesn't like it they will put a NOPA on it indicating their proposed adjustments. If the taxpayer says after consideration, I accept those proposed adjustments, that's the end of the matter. If they don't they have to file a NOR, so what I'm saying in the instance of a default assessed taxpayer is that once having taken a tax position that the Department doesn't accept the Department is in a position to put a NOPA on it and to start the whole process. He's not advantaging himself at all because if.

Tipping J But wait a minute, aren't we back into this implicit removal from the scene of the default assessment by hook or by crook?

Gudsell We the Commissioner under s.113 is entitled to amend an assessment at any time, to reassess at any time.

Tipping J But look isn't the argument in this case whether you have to file just a return or a return plus a NOPA to challenge the default assessment?

Gudsell Yes it is.

Tipping J Thank you.

Gudsell And what Your Honour asked me was what sort of burden or obligation falls to the taxpayer who's defaulted in filing a return and a NOPA, what are they required to do if they file a return and a NOPA.

Tipping J Yes, I'm sure it's my fault because I understand now exactly where we're at.

Gudsell Well in that instance this is not an inconsiderable burden to put on what may be an accidental defaulting taxpayer.

Blanchard J Well that's one of the problems you get into if you default in filing your return.

Gudsell And if the interpretation that I have put before you were to be accepted and the taxpayer files their return taking a tax position and the Commissioner accepts it what is the point of filing a NOPA with it? It's a complex document that requires time and effort, cost on the part of the taxpayer, for someone who's merely defaulted when they are saying to the Commissioner you wanted me to take a tax position, it's a

voluntary system, I'm now taking it I'm sorry I'm late. No I won't accept your return, you must file a NOPA with it. Now that is a serious and heavy onus to put on a taxpayer who may have defaulted by being out of the country, being let down by a tax agent or any other thing.

Tipping J But the detail of the NOPA presumably will be in proportion if you like to the complexity of the difference between what the taxpayer is asserting and the Commissioner is asserting and then your ordinary case. If you've just had the statutory or de facto uplift of 10% and so on and otherwise things are pretty straightforward, it's not going to be difficult at all.

Gudsell I accept that that position could arise and so could others.

Blanchard J Your man's case was at the extreme though wasn't it?

Gudsell Certainly not corporate but certainly at a higher level because of the jurisdictional issues, US citizen etc but certainly I accept that.

Blanchard J And the somewhat unusual fact.

Gudsell I accept that Your Honour.

Tipping J But the moral of the story is don't default but if you're an ordinary sort of taxpayer your NOPA obligation is going to be fairly light. If you're a more complicated taxpayer you might have a slightly heavier burden, but frankly that doesn't soften my heart much.

Gudsell I suppose at the end of that assessment of position if you have some legislation that is unclear and you have guidelines that endorse an unclear interpretation then you are placing the citizen at risk of being unable to challenge because they haven't dotted every 'i' or got through the contorted and difficult analysis of linking, of adding in by way of additional.

Blanchard J But the Commissioner is obliged in the end to apply the law as he believes it to be. If he's been getting it wrong he has to correct himself and that applies both substantively and procedurally and if people have been disadvantaged because the Commissioner has misguidedly taken the wrong position on procedure for example, there are escape clause, there's an ability for the Commissioner to say well you have been misled, it's an exceptional circumstance, you can have extra time to do things properly, and if the Commissioner were to refuse the opportunity of further time in those circumstances, the Commissioner would no doubt get reviewed and the decision overturned, so in the end there isn't great hardship. Your client chose not to avail himself of that opportunity as I understand it but we're not here to debate that anyway.

- Gudsell Yes we aren't here to debate that Sir that the record with regard to his position is set out in the papers and I don't think it helps the case for me to go through that.
- Blanchard J It doesn't help your case, no.
- Gudsell No.
- Elias CJ It doesn't help either case.
- Gudsell There are matters I could respond on to that with regard to this taxpayer's position and his difficulties but I don't know it advances my argument at all to take that position.
- Tipping J I think this applies quite irrespective of the particular circumstances of this taxpayer. This is an argument of principle.
- Gudsell Well it's certainly an argument of principle, and what I have endeavoured to do, and I appreciate that we have been engaging for a while, what I've been endeavouring to do is to say if we're talking principle ought not we get some assistance from those who gave us this legislation to interpret the principles they wanted?
- McGrath J Part of the principle Mr Gudsell surely is a duty on the Commissioner to continue to appraise the advice he's been giving as to whether it's an accurate statement of the law. I mean the Commissioner is really under a continuing is he not actually to query his positions and to move to change them and in this particular case it was apparent from the time the Commissioner and your client came into contact with each other that the Commissioner was taking a different position than the historical one.
- Gudsell Yes and not one Your Honour on that point, not one in 2000 and 2001 that was consistent even with their own publications. These engagements.
- Blanchard J But that happens not infrequently in tax law that the Commissioner takes a position publicly and then has to say 'I repent of that, I was getting it wrong and I must apply the law as it is, not as I thought it was'.
- Gudsell I was endeavouring to make perhaps a more refined distinction that that Sir with respect and that was that the Commissioner was saying in correspondence with this taxpayer one thing but in its own publications a different thing, and I can point you to those at the time.
- McGrath J But there will be a transitional period. I mean the point you're making is it was only with Justice Wild's judgment that the Department moved to change their advice but it takes a while to turn this ship onto another course doesn't it. You've got to expect some transition in that regard.

- Gudsell Well the transition, and I've set this out in my written submissions, is that between 1996 when detailed and serious reforms were introduced it takes till 2005 to state the correct position when in 2002 in correspondence with this taxpayer and its been put in my submissions that we've slightly isolated this taxpayer, Mareva injunctions and everything else went through, that they are saying something very different.
- McGrath J This isn't just Inland Revenue it's any other body who has statutory obligations of some complexity that it may take a while before the Body reaches a point of certainty enough to change its advice and it's not unreasonable to wait until it's got a judgment of the High Court that confirms that dreadful feeling it developed that it was wrong which may be in the end only confirmed in the Commissioner's mind by a judicial decision.
- Gudsell And what I've been endeavoring to do, and I accept that Your Honour that it took that nine year gap for there to be some interchange to create a factual circumstance that gave rise to a ruling, so I accept that but I do say that you need to precede that analysis by looking at the way in which the legislation developed and if that legislation is sufficiently clear in its passage and in its commentaries, did the tax information bulletin, and I was going to come back to this Justice Tipping or Justice Blanchard I'm sorry.
- McGrath J Can I just say, well obviously we'll be breaking for tea in a minute, but you've gone through that statement from the Department, is there anything in what was actually said in the House which throws some light on these changes?
- Elias I wonder whether before you answer that we might take the adjournment because you'll want to look up the material. Thank you Mr Gudsell.
- Gudsell I take Your Honours to page 31 of the appellant's bundle of documents if I may. This is an Official's report in responding to your point by Justice Tipping and in respect of Justice Blanchard. I doubt whether there was anything in these reports with regard to the default assessment position and I've endeavoured to find all I can from the documents I've placed before you but the passage there at the top of the page 'any changes to procedures will be also covered in subsequent bulletins, this way the legislation's not cluttered with administrative detail and taxpayers are still informed, fully informed about the process'. Now that's in respect of adjudication which is part of the process under the dispute regime but comes back to the point, particularly which Your Honour Justice Blanchard raised of whether there is anything in the legislation which says what happens to this default assessment, so that clearly Parliament intended that the legislation not be cluttered up with all amounts of detail and indeed if

in terms of the ability of the Commissioner at any time under s.113 of the Act to amend or reassess is putting out publications. The documents as can be seen at page 225 of the case on appeal, volume 2.

Blanchard J 225?

Gudsell Yes Sir, 225. Now this is a document that was put out in February 2005 and this is well after Justice Wild's decision of August 2004 and we're talking now about an actual assessment, so that what we have by way of reports indicating an intent with regard to the procedure, given that there will clearly be detailed procedure if it's left in the hands of the Department that is promoting the reform and legislation to administer it in accordance with its intent and that's envisaged at the outset. It creates this distinction with disputing the default assessment the only means of doing so by filing a return and the Department announcing with regard to the procedure is that we will replace the default assessment with the actual assessment worked out from your return. Now just to give you an example of what that actual assessment is, at page.

Elias CJ Sorry so you're going away from legislative history now and showing us how the Commissioner has gone about things are you.

Gudsell What I was invited to do Your Honour was to see whether there was anything in the reports or the speeches in the House or anything that was indicative of a change in policy with regard to the way in which default assessments were to be seen and I hope I've accurately reflected that that was the question asked of me. We need to see either something in the reports, Hansard, or in the legislation to give us some comfort if we are to interpret the provisions the way I'm asking, making submissions to you on. And so in response to that invitation I have gone back to the Official's report presented in Parliament which says 'we will not be putting everything in the legislation, we need to leave procedural matters to the Department because it will clutter up the legislation', so in terms of finding a provision in the Act that says by way of a policy shift, default assessments are seen differently, my submission to you is you will not see that it clutters the provisions of the Act but what the Act has done in s.113 is it allows the Commissioner to reassess or amend assessments and what I'm submitting to you Your Honour is that when you look at the procedure that ties in with the legislation 225 is indicative of this is the way we go about it, we're not cluttering it, we will replace it so that they are formally adopting a procedure allowed for by the legislation to reassess under 113, they replace it with your actual return and I was going to go on and refer you to an actual default assessment to show you the difficulty that would be associated with the taxpayer taking a position in respect of that assessment and an actual default assessment in this case is to be found at page 95 of volume 2 of the case on appeal. So that, and my friend can correct me in respect of that normal format. My understanding if I may say so from the bar is that the default

assessment would normally have 'default assessment' written on it, with just a computer generated numbers, but this is the default assessment in its more proper form for me to refer to this because this is the evidence at page 95. So that's all the taxpayer would get if he had failed to file a return or defaulted in filing a return. That document in itself is then the basis under the current legislation for enforcement proceedings to take you through to sell you house and do whatever you like based on this one document. It says nothing, it's tied to nothing, it's just some figures on a page. What you are then required to do under the legislation is that you're actually required if the NOPA and NOR process is to run as the Commissioner suggests within a very very tight timeframe of two months, that's the response period for getting everything transacted. There has been recent legislation that's extended that to four months but didn't apply at the time of these assessments which then concertinas a dispute process into an extremely tight timeframe from which challenge proceedings must be launched and they must be launched off this one document. Now why I've taken you through that process is that it just underlines the sense of things when you look at the commentary on page 31 that what the Commissioner acknowledges is this is a document that must be put aside once the return has filed and they say yes it must, then it's replaced with an actual assessment. That actual assessment will be based clearly on the return and the information received and then the dispute procedure can commence or not. The taxpayer having filed their complete return will have evidenced its position accurately because it's its assessment and the Commissioner has say yes or no to it, but in doing that, and the Department saying by way of its own procedure we will want to be accurate here, replace it, worked out from your return. Now if there is any indicia to suggest that this supports the view that there is a distinction for a person who is a defaulter, this is it.

Tipping J      If one looks Mr Gudsell at 89D one sees that in subsection 5 there is a time limit for the NOPA, that is to say the applicable response period which I'm sure is capable of extension but prima facie there's a time limit. If you look at subsection 2 as if it were a self-contained regime for default situations there is no time period. Is that of some significance in construing the purportant rationale if you like of subsection 2?

Gudsell        It is if we are to put to one side the argument I've just been advancing, because.

Tipping J      Well I think one has to assess the strength of the argument you've just been advancing, not put it to one side, one has to assess its strength in the light of the dimension that I've just asked you to consider.

Gudsell        The response to that Sir would be this and that the concern for the defaulting taxpayer must be haste on his/her part because if they don't get their act together they are subject to proceedings, shortfall penalties, all sorts of other regimes that then kick in over the top of

their default so in terms of a time requirement Your Honour it would be detrimental to the taxpayer who has defaulted to allow that time to run any longer than it was absolutely necessary. It certainly is a gap in the legislation to impose a time limit for the filing of such a return because otherwise, and I acknowledge this, the matter could run on, but it only runs on to their detriment and if you were to apply that in this instance of this case within two days of the assessment proceedings had been filed, so not only was shortfall penalties and the other penalty regimes running but fear of having a judgment against you which could be enforced against your assets.

Tipping J But if you read it as a pre-condition not a stand-alone regime it has its own self-defining time period because you must do it within the time allowed for under subsection 5, and that would be quite logical and tidy.

Gudsell If you were to file your return within the two-month period which would be required you then run into the NOPA and NOR timeframes which throw a further complication in it in terms of being able to get your challenge proceedings underway, because there is, and I may be corrected on this, a two month timeframe within which to file the NOPA and in the notice of response there is a further time limit as set out at page 126 of the case on appeal, if you intend to reject a notice of response you must do so in writing within a two-month time period starting from the date of issue of the notice of response. I haven't tracked Your Honour the implications for that in terms of activating the challenge proceedings but it does trigger a whole lot of other mechanisms and then when you face that against what I now say to you is the procedural obligation of the Department to replace the actual assessment, the default assessment with an actual assessment, then why would that timeframe kick in. In my submission.

Tipping J My point is a rather simpler one, that if you read the subsection 2 as being contrary to the way you're advancing it immediately ties in necessarily with the timeframe in subsection 5, but if you read it your client's preferred way you are open-ended as to time and that could hardly have been intended. Sorry if I haven't put that clearly. And it seems to me to be an indicator in this difficult situation here that the purpose was to read them cumulatively not singly. The subsection 2 requirement was cumulative on the subsection 5 requirement.

Gudsell And then would necessarily need to read in my respectful submission to subsection 5 that a notice of proposed adjustment which disputes an assessment or a return which is the only way of disputing an assessment, that's what it says must be filed within the response period, and it doesn't say that. It puts the defaulting taxpayer at risk, and that's the whole design of it.

Tipping J I'm not sure that I accept that but I understand the argument against it.

- McGrath J Is your argument that this was deliberate? I thought your argument was rather that the subsection 2 emerged in a rather ad hoc way and you go the legislative history and see the way that subsection was developed to indicate that, but nevertheless it has got to be applied in its terms.
- Gudsell It's created in my submission a distinction in subsection 2 and when you read over the top of that the ability of the Commissioner to reassess at any time under 113 and you recognise that there are procedures that are left to the Commissioner available to him and the Commissioner says in relation to default assessments they will be replaced, yet it is a distinct.
- McGrath J So the Commissioner has got the power anyway, he can invoke it and can put himself in exactly the same position?
- Gudsell He can invoke the ability to reassess. What he does say he will do is that upon the filing of a return he will replace the default assessment with an actual assessment. Now if he replaces something then it no longer exists, if it no longer exists then the actual assessment exists and the dispute regime takes place, and a NOPA would be required if the taxpayer was unhappy with the tax position and taken their return as a result of the Commissioner's assessment. I'm not sure I can add much more.
- McGrath J There's nothing in what was said in the House I take it? You've taken us now to the Official's report and I appreciate that went to the Select Committee. There's nothing in terms of Mr Creech's statement or Mr Bradford's statement that actually bears on this I take it. It's just that you don't want to have troll through them all unless there is something in there specific.
- Gudsell No, I endeavoured to highlight the passages I thought may be appropriate for the Court to be directed to. Certainly that's the Official's report.
- McGrath J I'm now talking about Ministers.
- Gudsell Yes I appreciate Sir and I'm going to endeavour to see whether there's any references. I have endeavoured albeit in a full manner to set out in my written submissions the extracts that I was referring because there is a lot of material before you and it was a matter of you then trolling through it, and I thought it more appropriate Your Honour to put those out so they will be in the written submissions.
- McGrath J I'm perfectly happy. We've read the written submissions and those matters but they're general comments and they relate in particular to the general theme of how the Ministers wanted to see this legislation interpreted I suppose but if those are the passages that's fine, I just



wanted to make sure there was nothing specific on the matters we've developed this morning.

Gudsell The only passage I can quickly come to Sir and I believe I put this in my written submissions at page 46, that's at the top of the page and it really builds on the comments that the Official's report referred to on the 13 February 1996 that I earlier referred you to. So they are inviting if there is an adoption by the House through Hansard of the passages in their report and appendices then as a guide, then they make express reference to the assistance that that might give to the Courts, and that does not in any way diminish the argument that I was just previously advancing only five minutes or so ago, in fact in my submission it supports that view. The only passing remark and one that may or may not find favour with the Court is at page 48 of the submissions in the fourth paragraph.

Blanchard J Page 48 of what?

Gudsell Of the bundle of documents Your Honour. And the passage that reads 'one thing I would like to say' and indeed that's not by the Minister in charge, the Right Honourable Doctor Michael Cullen. You asked Sir whether there were any references to speeches by Mr Max Bradford and at page 51 of that same volume it further underlines the way in which the House considered that it did not need to clutter the legislation with procedural matters of the kind I referred to in dealing with default assessment, where in the second paragraph it talks about the layer of responsibility that has now been put on officials. I refer to that passage as well Your Honour. Now Your Honour unless there are other questions I'm not sure that I can advance the matter any further thank you.

Elias CJ Thank you Mr Gudsell.

Gudsell Do Your Honours wish to have a copy of the Chancery Division? I did refer to it in my submissions to you of the **Clark** case.

Elias CJ Yes Miss Ellis. Miss Ellis I haven't had an opportunity to confer with my colleagues and it may be that they'll have specific questions for you but I wonder whether the issues that you might want to respond to in the light of the very full written submissions you put in might be particularly focused on the legislative scheme. I'm not sure whether my colleagues will want to ask you about the background material but perhaps the legislation is the place to start.

Ellis Yes I'm certainly happy to do that Your Honour, although I would begin by mentioning my learned friend hasn't actually addressed the s.138B issue in his oral submissions at all. As I had understood it that was what we were here today to discuss and if in fact he is conceding that the pre-requisites of s.138B have not been met and from my learned friend's written submissions I had understood him to get close

to that point, really the answer is that s.138H would require the challenge to be struck out which is of course what His Honour Justice Wild did and the Court of Appeal confirmed, and indeed the opacity to which my learned friend referred and which I accept to a certain extent in relation to s.89D is really not present in s.138B at all. I don't really want to say.

Tipping J        Could you just take me to what you say is for present purposes is the key part of 138B.

Ellis              138B. Does Your Honour have the.

Tipping J        I've got the text in front of me, yes.

Ellis              It's 138B(3) Sir that the parties as I understand it are agreed applied in these circumstances, which is the circumstances where there has been a default assessment and you will see Sir that in common with the other subsections of s.138B what is required firstly is an assessment, which we have here in the form of the default assessment, the assessment then needs to be followed by an adjustment proposed by the disputant which is rejected by the Commissioner within the applicable response period and in the Commissioner's submission the requirement for an adjustment proposed by the disputant is a reference to a NOPA and that's what we don't have.

Elias CJ         I think you're right Miss Ellis that the argument that we've heard addressed to us today is directed at 138B not yet being engaged and that does raise the alternative point in written submissions that if that is so the challenge should be struck out for other reasons than were referred to in the High Court.

Ellis              I think Your Honour may be confusing the position with respect that it's my learned friend that's making the alternative submission not the Commissioner. His 89D submission as I understand it is an alternative to what was advanced in the High Court whereas 138B and the obligation to strike out for non-compliance with 138B that arises under s.138H has always been the Commissioner's position.

Elias CJ         Yes But not the subject of the determination in the lower Courts.

Ellis              No it was Ma'am, it was.

Elias CJ         I'm sorry I'm getting confused then.

Ellis              What happened just briefly is the Taxation Review Authority declined to exercise his 138H power. We reviewed that and Justice Wild said that the authorities should have exercised, well it's not actually discretion, 138H is mandatory in its terms and the authority didn't have a discretion if there was non-compliance with s.138B.

- Tipping J You're saying in effect as I understand it that this case fits none of the provisions of 138B and there is no capacity to circumvent 138B via 89D(2). That's it in a nutshell isn't it?
- Ellis That's correct Sir. It doesn't matter what 89D says in that respect.
- Tipping J Well it's neither designed for nor does it have the effect of circumventing the requirements of 138B. It is simply an additional step that you have to take if you are in the default situation.
- Ellis Sorry, just going back a step Sir, 138B must be complied with by any taxpayer who wants to bring a challenge.
- Tipping J Exactly. But if you are in a default situation you have to put in the return before you can go anywhere.
- Ellis Yes, that's right, because that is the fundamental obligation of all taxpayers under the Statute.
- Tipping J And that really is the, without being in any way dismissive, that is the essence of your position isn't it? That it's additional not substitutional?
- Ellis That's exactly right Sir. So having said that about 138B(3) and my submission in that respect being that His Honour Justice Wild and the Court of Appeal were correct in saying that the authority erred in declining to strike out the challenge I am happy to go on and talk about and address to Your Honours the s.89D(2) issue, bearing in mind the submission that I just made that it really makes no difference here, because certainly it is s.89(D) that is a little more opaque in the words that I used.
- Elias CJ Although the meaning of 89(D) does bear on the interpretation you contend for of s.138B(3) because it's not a procedure for challenging.
- Ellis No it's not, it's a procedure for disputing, as I think His Honour Justice Anderson said earlier, that's the distinction there and they inform each other. The interpretation that the Commissioner contends for involves a reading of 89D consistently with 138B. It all makes in my submission perfect sense when you read them in the way that is contended for by the respondent. As far as s.89D is concerned as I said although I accept to some extent that it is a little opaque in its terms, nonetheless in my submission it is in fact fairly unambiguous when you read it in the wider context as Your Honours have been teasing out.
- McGrath J But when you say opaque do you mean that just read purely literally without regard to context you can see that two meanings are possible, but they're resolved by looking at the context?
- Ellis I don't think it does emit two meanings and that's one of the problems that I think my learned friend has. I would submit it is unclear but in

terms of coming up with an alternative meaning to the one that the Commissioner contends, as Your Honour Would have noticed this morning, it's filled with fish hooks because in order for example from my learned friend's argument to succeed in s.89D he has to argue that somehow the filing of a return results in the disappearance of the default assessment.

McGrath J What I'm trying to get at Miss Ellis is what do you mean when you acknowledge some opaqueness in 89D?

Ellis All I really mean Sir is that the words in s.89D(2) are where I think the word is 'only by' filing a return, that is unclear when you read that.

McGrath J In itself it's unclear but not once you go to the context.

Ellis Yes, exactly Sir.

Tipping J Well 'only by' really means 'only if you have'.

Ellis Exactly Sir.

Tipping J And then you go on and do all the other things you have got to do.

Ellis Yes Sir that's right, and in that respect Sir my submission is that the Commission's position is entirely consistent in fact with the legislative history that was referred to by my learned friend because all that really shows is as far as I can make out from it it's not actually especially clear either in my submission but what it shows is there was the creation of a provision that was supposed to provide for what a taxpayer must do in order to dispute an assessment that hasn't been preceded by a NOPA, and then as I think Your Honour Justice Tipping said it appears to have dawned on them that in fact in the case of the default assessment there was an additional requirement that was always there that needed to be made clear for want of a better phrase by that subsection 2 requirement, that in addition to the NOPA a return must be filed and the taxpayer must comply with his fundamental obligations which is to file a return, and in my submission the legislative history doesn't show any more than that and certainly agree with my learned friend that the change from the proviso to the extra subsection is really neither here nor there. The legislative history in my submission is as clear or are clear as the resulting provision and in that sense is of no real assistance.

Tipping J A nice way of putting it.

Ellis So in effect I'm not sure that I can really add very much to some of the matters that have been raised by Your Honours this morning in relation to s.89D(2) but it really would make no sense for somehow a defaulting taxpayer to be firstly in a different position from any other taxpayer when it comes to disputing an assessment that hasn't been

preceded by a NOPA and it certainly doesn't make any sense in my submission for him effectively to be in a better position because somehow he's not bound by the time limits that apply in every other case.

Tipping J And also you'd be in a better position because he wouldn't have to go to the trouble and to satisfy the reasons for NOPA's. It may be that the NOPA will be relatively simple but the whole point of the NOPA as I understood it was that it would sharpen up the issues and lead to more immediate and ready understanding and hopefully resolution of those issues than just bunging in a return.

Ellis Yes, yes, and in that respect Sir I would have to respectfully disagree with my learned friend, the NOPA is not, well it may be burdensome in an individual case but really it is no more than the expression of the thinking underlying the return and in most cases that will be a relatively straightforward matter in my submissions, and here as my learned friend's chronology shows, in fact the taxpayer filed the NOPA and the return on the same day, suggesting that they were very much tandem processes in any event as one would expect.

Tipping J A return wouldn't have taken long to do because it consists largely of ticking the no box.

Ellis Yes, that's true Sir in this case but there do appear to have been some issues that were underlying the thinking in that respect. Of course in many cases a defaulting taxpayer will not file a NOPA because he assumes that the that the Commissioner wants in the first instance is for the return to be filed and might expect the Commissioner to process that in the usual way but in my submission if there's any prospect of a dispute about the correct tax position and that is plainly the case here where the Commissioner has assessed for \$1.5 million and as Your Honour just said, his filing return would be effectively nil, then a NOPA is absolutely required and for obvious reasons in my submissions.

Tipping J Is Your Point that the Commissioner can as a matter of discretion proceed in effect by cancelling the default assessment and going back to the beginning so to speak. But he doesn't have to.

Ellis No absolutely. He has a discretion under S113 and if as in this case he looks at the return and thinks why would I change my assessment, he's not required to do so. Really Your Honours unless I can help you any more with the provisions, that is the essence of what I have to say, the fundamental point being of course that in my submission the proceedings were rightly struck out by Justice Wild under 138(H) and as I said before s.89D really doesn't have any direct bearing on that and as far as s.89D itself is concerned my submission is that the assessment, the default assessment still stands, the taxpayer is out of time to issue an NOPA. Well in fact the taxpayer did issue a NOPA

but it was out of time and really in my submission that's the end of the matter so unless I can be of further assistance.

Elias No thank you Miss Ellis. Mr Gudsell do you want to be heard in reply?

Gudsell Other than to say Your Honour that the submissions I have made with regard to s.138B were presented in my written submissions. They were similar submissions as presented in the High Court and Your Honours have the benefit of those. So far as the last point that my learned friend made with regard to s.89D and one commented on by Justice Tipping was the discretion that the Commissioner may exercise under 113 to replace the default assessment with an actual assessment, the guide or instruction at page 225 that I took you to say that's what the Commissioner will do on receiving such a return and indeed if that is the administrative process that the Commissioner has been up until February 2005 following then it is difficult to reconcile the argument that has been placed before you at the moment that there is a requirement to NOPA the default assessment to allow you to engage in challenge proceedings.

Tipping J But you can't point to anything can you in the legislation that requires the Commissioner to replace the default assessment? I know I'm pressing you a little bit Mr Gudsell but I mean we can't change the law simply because he's put out a silly pamphlet?

Gudsell The only comfort you can find from the commentary that assists the legislation is the commentary that I have referred you to and 113 is clearly the basis for an amended assessment by the Commissioner at any time. Now if the legislature has said to the Court as it has through Hansard, that you can receive guidance and we won't clutter the legislation.

Blanchard J The legislature hasn't said that. The Minister may have.

Gudsell And I accept that Sir that there is a distinction between what the law pronounces and what members who are responsible for the legislation had commented on.

Tipping J The only possible argument and I'm not inviting you to expand on it is that in this situation there is a duty to exercise a power that I would have thought with respect that such an argument would be hopeless.

Gudsell I was just advancing it.

Tipping J That is jurisprudence at what you'd have to say that because of whatever there is a duty to exercise the power to cancel but you haven't said that and even putting that into your mouth I cannot see how you could sustain it.

Gudsell           The Court of Appeal has commented with regard to legitimate expectation and other issues in other cases in regard to the tax area. I'm not advancing that for the purposes of this appeal. It would be improper for me to do so. What I am saying to the Court is that the argument that's just been advanced with regard to the challenge process puts in clear conflict diametrically opposed if they are to say on the one hand you must file a return and a NOPA to a default assessment and they're saying once you file a return the default assessment is replaced because that way you start the procedure again, the citizen is entitled to take whatever steps the Commissioner takes in response to NOPAing the return is filed, and it's an unfortunate set of circumstances indeed that when you are dealing with an area where there is no presumption as to tax, you're dealing with citizens' rights to engage in procedure, that the hand that has directed the reforms has so misrepresented the position to the tax advisers and to the public at large that one thing is to be done and the other says the opposite. Those are my submissions.

Elias              Thank you Mr Gudsell. Thank you counsel for your submissions and we will take time to consider our decision in this matter.