IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA654/2017
[2018] NZCA 487

BETWEEN	GERARDUS PETER VAN UDEN Appellant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 18 and 19 July 2018

Court: Winkelmann, Brown and Clifford JJ

Counsel: M S Hinde for Appellant
S J Leslie and V T A Tuyay for Respondent

Judgment: 8 November 2018 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, Gerardus van Uden, is a ship's captain. For the last 40 years he has worked for an overseas shipping company, the China Navigation Company Ltd. On average, he is at sea for approximately eight months every year.

[2] The respondent, the Commissioner of Inland Revenue, assessed Mr van Uden for New Zealand income tax for the 2005 to 2009 tax years. She did so on the basis that Mr van Uden had a permanent place of abode in New Zealand in those years and was therefore liable to pay tax in New Zealand on his worldwide income. At the same time, the Commissioner imposed a 10 per cent penalty on the basis Mr van Uden had, in not returning his income on that basis, taken an unacceptable tax position.

[3] Mr van Uden has unsuccessfully challenged those determinations in the Taxation Review Authority[1] (the TRA) and the High Court.[2] He now appeals to this Court.

[4] The issues we must determine in this appeal are:

(a) Did Mr van Uden have a permanent place of abode in New Zealand in the 2005 to 2009 tax years?

(b) If he did:

(i) is he liable to pay tax on his interest in his employer's superannuation fund;

(ii) was the Commissioner's assessment for the 2005 to 2008 tax years time barred; and

(iii) was the Commissioner right to impose an unacceptable tax position penalty?

Background

[5] We first set out the general background to Mr van Uden's appeal. Whether or not Mr van Uden had a permanent place of abode in New Zealand in the 2005 to 2009

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1 *Van Uden v Commissioner of Inland Revenue* [2017] NZTRA 01, (2017) 28 NZTC ¶4–000 [Taxation Review Authority decision].

2 *Van Uden v Commissioner of Inland Revenue* [2017] NZHC 2554 (2017) 28 NZTC ¶23–037 [High Court decision].

tax years is an essentially factual determination. We will accordingly refer to the facts in more detail when considering that aspect of his appeal.

[6] Mr van Uden holds both a New Zealand passport and a Dutch one. He was born in New Zealand in 1957 to Dutch migrant parents. In early 1967 the family returned to Holland. Mr van Uden's mother had not settled in New Zealand. The move was not, however, a success. By August 1968 the family had returned to New Zealand. Thereafter, Mr van Uden lived with his family in the Papatoetoe area, and attended local schools.

[7] In January 1975 Mr van Uden signed on with China Navigation as a navigating cadet. He joined his first ship later that month. Mr van Uden has been employed by that company, or related entities, ever since. In July 1994 Mr van Uden was promoted to master, with the title of captain. Since then — as well as being a ship's captain — Mr van Uden has undertaken other jobs within China Navigation including, since October 2009, fleet commodore.

[8] Typically, Mr van Uden is posted to a ship for a period around four months. Again, typically and as noted, Mr van Uden is at sea for eight months every year.

[9] In January 1980 Mr van Uden married for the first time. He lived with his wife in the Philippines until late 1987. He adopted her two daughters from a previous relationship. Together they had a son, Peter, born in August 1983.

[10] In 1987, the family moved to New Zealand. Mr van Uden wanted his son to be educated here. The family purchased a house at Mangere Bridge where they lived until 1995, when Mr van Uden and his wife separated and then divorced.

[11] The following year, Mr van Uden purchased an apartment in St George Street, Papatoetoe. He did so to have a place he could stay in when he returned to New Zealand which was close to the secondary school it was then proposed his son would attend. Mr van Uden's evidence was that he visited and stayed in that apartment on some seven occasions between 1996 and 1998, using it as a lock up and leave apartment.

[12] Mr van Uden met Judith Berryman in early 1998. They were married in December 1998. Ms Berryman took the name Mrs van Uden. Mr and Mrs van Uden remain married to this day. Mr van Uden's children all now live overseas.

[13] When Mr and Mrs van Uden met, Mrs van Uden was living at 27 Evelyn Road. Mrs van Uden acquired 27 Evelyn Road in June 1996 as part of a matrimonial property settlement. In April 1997 Mrs van Uden transferred 27 Evelyn Road to a family trust (the Pink Dog Family Trust) (the Trust) she had established the previous year. Mr van Uden first lived with Mrs van Uden at 27 Evelyn Road when they returned from a holiday together in November 1998. They have, for the most part, lived at 27 Evelyn Road when they have returned to New Zealand thereafter. It is 27 Evelyn Road that the Commissioner says was Mr van Uden's permanent place of abode in New Zealand for the tax years 2005 to 2009.

[14] On the basis of Customs' arrival and departure records the TRA determined Mr van Uden was in New Zealand over those years for:[3]

(a) over six weeks in the 2005 year;

(b) two months during the 2006 year;

(c) five months during the 2007 year;

(d) four months during the 2008 year; and

(e) four months during the 2009 year.

[15] Neither Mr van Uden nor the Commissioner challenge those factual findings.

[16] Mr van Uden filed New Zealand income tax returns until and including the 2004 tax year, albeit he only returned approximately half of his salary in New Zealand. For the income years ended 31 March 2005 and 31 March 2006 Mr van Uden filed nil

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3 Taxation Review Authority decision, above n 1, at [44].

income tax returns. In the year ended 31 March 2007 Mr van Uden filed a non-resident tax return disclosing a small loss for the year. In the years ended 31 March 2008 and 31 March 2009 he filed non-resident tax returns.

[17] The Commissioner commenced an audit of Mr van Uden in 2009. She issued the challenged assessments in February 2014.

Was 27 Evelyn Road a permanent place of abode in New Zealand for Mr van Uden in the 2005 to 2009 tax years?

The law — permanent place of abode

[18] The tax years in dispute are covered by the Income Tax Act 1994, the Income Tax Act 2004 and the Income Tax Act 2007.

[19] Subsections (2) and (3) of s OE 1 of the Income Tax Act 1994 provide two bright line tests, based on aggregate days in New Zealand in any period of 12 months, by reference to which a person is deemed to be, or not be, a resident in New Zealand during that 12 month period. However, subs (1) is an overriding provision as to residence. Subsection (1) provides:

> Notwithstanding any other provision of this section, a person, other than a company, is resident in New Zealand within the meaning of this Act if that person has a permanent place of abode in New Zealand, whether or not that person also has a permanent place of abode outside New Zealand.

[20] The term "permanent place of abode" is not defined in the Income Tax Act 1994 or any of its successors.

[21] This Court comprehensively discussed the meaning of that term in *Commissioner of Inland Revenue v Diamond*.[4] It did so in the context of the Commissioner's assertion that a dwelling which the taxpayer had never lived in could be a permanent place of abode if it was available for that purpose. In rejecting that approach, and by way of overview, the Court noted:

> [48] First, we consider the plain meaning of the words "permanent place of abode in New Zealand". The word "permanent" is important, to state the

[4] *Commissioner of Inland Revenue v Diamond* [2015] NZCA 613, (2015) 27 NZTC ¶22-035.

> obvious, permanent is the opposite of temporary. Something is permanent when it is "continuing or designed to continue indefinitely without change".[5] Next, the word "abode" means "habitual residence, house or home or place in which the person stays, remains or dwells".[6] We consider this plain meaning, coupled with the statutory context we have reviewed above, demonstrates that the phrase means something more than mere availability of a place to stay and implies actual usage of the property by the taxpayer for residential purposes.
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> [49] … The scheme of the section allows these provisions [subs (2) and (3) — the bright-line tests] to be overridden by the application of subs (1) if it can be established that the taxpayer has a permanent place of abode in New Zealand, regardless of the taxpayer's presence or absence from New Zealand for particular periods of time.[7] We consider the structure supports the interpretation of permanent place of abode in New Zealand as a place where the taxpayer habitually resides from time to time even if the taxpayer spends periods of time overseas.

[22] The Court found the following observations of Fisher J in *Federal Commissioner of Taxation v Applegate* as to the meaning of the phrase "permanent place of abode" in a similar statutory context helpful:[8]

> To my mind the proper construction to place upon the phrase "permanent place of abode" is that it is the taxpayer's fixed and habitual place of abode. It is his home, but not his permanent home. It connotes a more enduring relationship with a particular place of abode than that of a person who is ordinarily resident there or who has there his usual place of abode. Material factors for consideration will be the continuity or otherwise of the taxpayer's presence, the duration of his presence and the durability of his association with the particular place.

[23] In rejecting the Commissioner's approach, the Court said it blurred the lines between connection with and enduring residence in a particular *dwelling*, and general cultural, personal, financial and other connections to New Zealand more broadly. It was the former that were relevant to imposing tax resident pursuant to s OE 1.[9]

[24] The Court then explained what it considered was the correct approach to s OE 1(1). In doing so, it emphasised that it involved a highly contextual question of fact:

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5 Graeme D Kennedy and Tony Deverson *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005) at 843.

6 At 3.

7 The opening words of s OE 1(1) make it clear that subs (1) applies "notwithstanding any other provision of this section …".

8 *Diamond*, above n 4, at [51], citing *Federal Commissioner of Taxation v Applegate* (1979) 27 ALR 114, (1979) 38 FLR 1.

9 At [55].

> [57] … Whether an individual has a permanent place of abode is a question of fact. What is required is an overall assessment as to whether the taxpayer has a permanent place of abode in New Zealand. This will be highly contextual and will naturally turn on the circumstances of each case.
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> [58] Specifically, we do not consider the determination can be separated into discrete questions. Rather, the approach calls for an integrated factual assessment, directed to determining the nature and quality of the use the taxpayer habitually makes of a particular place of abode. In this assessment, the mere availability to the taxpayer of a dwelling is not sufficient by itself. Nor as *Case Q55* demonstrates, will the mere unavailability of the dwelling necessarily result in loss of status as a resident taxpayer.
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> (footnotes omitted)

[25] The Court went on to find that the following non-exhaustive factors might inform that fact-specific inquiry:[10]

(a) the continuity or otherwise of the taxpayer's presence in New Zealand and in the dwelling;

(b) the duration of that presence;

(c) the durability of the taxpayer's association with the particular place;

(d) the closeness or otherwise of the taxpayer's connection with the dwelling — the situation before and after a period or periods of absence from New Zealand should be considered;

(e) the requirement for permanency is to distinguish merely transient or temporary places of abode. Permanency refers to the continuing availability of a place on an indefinite (but not necessarily everlasting) basis; and

(f) the existence of another permanent place of abode outside New Zealand does not preclude a finding that the taxpayer has a permanent place of abode in New Zealand.

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10 At [59].

[26] Whilst the focus of that factual inquiry is to be on the tax years in question, relevant circumstances before and after those years might be taken into account.[11] The issue was whether the taxpayer, and not members of the taxpayer's family, had a permanent place of abode in New Zealand.[12]

The High Court decision

[27] Agreeing with the TRA, Venning J concluded that for the relevant years Mr van Uden had habitually resided at 27 Evelyn Road when he was not at sea and in New Zealand.[13] It was more than just a place available to him. By 2004, and through to 2009, he had made it his home in New Zealand.[14] It was his base for his life in New Zealand.[15] Consideration of the factors identified by this Court in *Diamond* confirmed that position. The consistent pattern of Mr van Uden's life was that when he was not at sea, or holidaying or travelling, he would return to New Zealand and spend time in New Zealand.[16] That was the consistent pattern of events from 1998 through to 2010, when 27 Evelyn Road was sold and Mr and Mrs van Uden would instead stay in the property they had built next door, 29 Evelyn Road.[17] Thus, when he stayed in New Zealand in the tax years in dispute, he lived at 27 Evelyn Road.[18] 27 Evelyn Road had been Mrs van Uden's home since the end of her second marriage in 1996.[19] It became Mr van Uden's home as well when they began living together. 27 Evelyn Road was indefinitely available to Mr van Uden when he (and Mrs van Uden) returned to New Zealand.[20]

Submissions

[28] In presenting Mr van Uden's appeal, Ms Hinde summarised the position for Mr van Uden as being that he did not have any connections to 27 Evelyn Road that went beyond the connections any sojourner in New Zealand would have to a place

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11 At [60].
12 At [61].
13 High Court decision, above n 2, at [61].
14 At [46].
15 At [46].
16 At [47].
17 At [50].
18 At [47].
19 At [57].
20 At [59].

where they happened to stay habitually whilst in New Zealand. The TRA and the High Court had both focused, illegitimately in terms of the *Diamond* test, on the periods of time Mr van Uden had spent in New Zealand in the relevant years. Both had, moreover, mischaracterised the nature of the connection Mr van Uden had with 27 Evelyn Road. From around the beginning of the 2005 tax year, Mr and Mrs van Uden planned to spend an increasing proportion of the time Mr van Uden was not at sea outside New Zealand. They had it in mind to set up base somewhere in Europe. It was to Europe, and Holland in particular, that Mr van Uden felt attached.

[29] He only came to New Zealand to attend to family matters, and to the business interests he and Mrs van Uden had in the four properties they had together transferred to the Trust in early 2004, and to look after 27 Evelyn Road. In reality, Mr and Mrs van Uden had no permanent place of abode: their home was where they happened to be from time to time. 27 Evelyn Road was merely a convenient place to stay in New Zealand. It was not Mr van Uden's permanent place of abode here.

[30] For the Commissioner, and applying the non-exhaustive list of factors approved in *Diamond*, Ms Leslie submitted that both the TRA and the High Court had correctly made the integrated factual assessment called for by that case. Mr van Uden had a continuous presence in New Zealand and 27 Evelyn Road. The home there was indefinitely available to him when he returned to New Zealand. It did not matter that 27 Evelyn Road was held by a trust. Both Mr and Mrs van Uden were trustees of the Trust and beneficiaries. The Trust held their New Zealand properties. They lived at 27 Evelyn Road together when in New Zealand. 27 Evelyn Road was their New Zealand home.

[31] The records of their expenditure confirmed that. Mr van Uden maintained significant financial ties with 27 Evelyn Road. 27 Evelyn Road was the registered address for various motor vehicles. Mr and Mrs van Uden also used 27 Evelyn Road as the registered address for bills, bank statements, insurance policies, and investments. The High Court had correctly concluded that 27 Evelyn Road was Mr van Uden's permanent place of abode.

Analysis

[32] The *Diamond* test calls for "an integrated factual assessment, directed to determining the nature and quality of the use the taxpayer habitually makes of a particular place of abode".[21] As to the word abode itself, the Court adopted the dictionary definition of "habitual residence, house or home or place in which the person stays, remains or dwells".[22] The significance of a permanent place of abode having the characteristics of a person's home, although not the home in which they solely live, was emphasised. Subjective statements by a taxpayer were to be assessed as to whether they were sustainable in light of the objective factual circumstances.[23]

[33] Mr van Uden's characterisation of that nature and quality, at least from early 2004 onwards, was that he did not have the intention of using 27 Evelyn Road as a home. It, rather, became a convenient place to stay. His long-term connections were with Europe. Mrs van Uden gave similar evidence: she in fact said that she had not regarded 27 Evelyn Road as her home from the time she had transferred it to the Trust.

[34] In our view, the objective, integrated factual assessment does not support that characterisation. The property was transferred to Mrs van Uden as part of a matrimonial settlement. She in turn transferred it to a family trust of which she held the power of appointment of trustees, was herself a trustee and was a discretionary and final beneficiary along with her parents and a friend. Mr van Uden moved into 27 Evelyn Road with Mrs van Uden in November 1998, shortly before they were married. They lived there together when they returned to New Zealand in the years following that when Mr van Uden was on leave. IRD's investigation showed that Mr van Uden generally returned to New Zealand twice each year while on leave. During cross-examination he admitted that from November 1998 to June 2010 he almost always stayed at 27 Evelyn Road — in fact, the only other land address he stayed in when in Auckland was for a week. The pattern of expenditure associated with their times in New Zealand at 27 Evelyn Road reflects the normal pattern of domestic expenditure.

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21 *Diamond*, above n 4, at [58].
22 At [48].
23 At [53].

[35] Both of them emphasised that their stays at 27 Evelyn Road were principally attributable to their need to manage the Trust's properties, including that address, and to support elderly family members.

[36] By the time of the tax years in dispute, we think it can be fairly said that the Trust was Mr and Mrs van Uden's family trust. Mrs van Uden had appointed Mr van Uden to be a trustee, and the trustees had then added Mr van Uden and his son Peter as discretionary and final beneficiaries. That had occurred sometime in 1999, probably in September.

[37] The couple had built up a portfolio of four investment properties. Two of these had originally been Mr van Uden's property alone: they were transferred into a partnership the couple established in October 1999. The couple acquired two further properties together in October 1999 and January 2000. Each of those four properties was tenanted: each tenancy ran at a loss with Mr van Uden funding the partnership losses from his sea captain's salary. The partnership's accounts showed those losses being shared (albeit unequally) by Mr and Mrs van Uden.

[38] In early 2004, at the point when Mr and Mrs van Uden decided they wished to spend more time overseas, reflecting what they both described as their close associations with Europe, they transferred those four properties to the Trust. Thereafter Mr van Uden funded the Trust to the extent necessary. Whilst Mrs van Uden could have removed Mr van Uden as a trustee, we think that prospect — emphasised by Ms Hinde as an important indicator of the nature of Mr van Uden's connection with 27 Evelyn Road — was unrealistic. Certainly, in cross-examination Mr van Uden confirmed that he had no concerns at his wife's theoretical ability to do so.

[39] It is the case that both Mr and Mrs van Uden had elderly relatives and that, whilst living at 27 Evelyn Road, they looked after those relatives.

[40] Mr van Uden's mother died in May 2005. Mr and Mrs van Uden were living at 27 Evelyn Road in the period leading up to the death of Mr van Uden's mother. Similarly, Mr van Uden supported his father, who lived in Auckland and was still

alive, at least at the time Mr van Uden's appeal was heard in the High Court. Mrs van Uden's mother had died some years earlier. Her parents had separated, and her father lived with his second wife in Wanaka. He had a stroke in July 2005 and Mrs van Uden was able to stay at 27 Evelyn Road while she was in New Zealand supporting her father: during that time, she travelled up and down to Wanaka fairly regularly.

[41] But those family connections and responsibilities in our view serve to emphasise the ongoing family connection each of Mr and Mrs van Uden had with New Zealand (and with the property at 27 Evelyn Road), including in Mr van Uden's case the fact that two of his siblings continue to live here.

[42] Mr van Uden gave evidence that he had bought items associated with maintenance or gardening when in Auckland "as part of [the] hands-on attending to Trust [p]roperty matters". However, the credit card expenditure goes further than this. It evidences expenditure on a wide variety of matters — such as beauty therapy, optometry, dentistry, and picture framing. Other evidence also points away from the submission that Mr and Mrs van Uden were simply managing trust property while they stayed at 27 Evelyn Road. We place particular importance on two pieces of evidence. First, we note, as did the TRA and the High Court, that Mr van Uden paid for a SKY TV account from 4 April 2001 until 28 May 2010 (by which stage the SKY TV account was transferred to 29 Evelyn Road). Second, in loan documentation signed on Mr van Uden's behalf, 27 Evelyn Road was described as his "own home". This is particularly evident when the use of 27 Evelyn Road is compared to the Trust's other properties. 27 Evelyn Road was never formally let between 1987 and 2010. The one occasion it was let was short-term, below market rate, and at a time when both Mr and Mrs van Uden were overseas. By contrast, the other Trust properties were all formally let, for long periods of time, at market rate.

[43] In our view, it is unrealistic to allow the Trust structure to obscure the fact that Mr van Uden availed himself of 27 Evelyn Road while he was in New Zealand and made it his home. We are satisfied, like the TRA and High Court before us, that Mr van Uden had a permanent place of abode in New Zealand.

[44] The individual factors listed in *Diamond* support this conclusion. We propose to address them shortly.

Continuity or otherwise of the taxpayer's presence in New Zealand and in the dwelling

[45] As Ms Leslie submits, Mr van Uden has had a continuous presence in New Zealand since 1957, except for a short stint in the Netherlands and later the Philippines. In the relevant tax years, Mr van Uden spent approximately eight months a year at sea. However, when he was not on the ship or travelling, he would return to New Zealand. And when he did return to New Zealand in the relevant tax years, and was not visiting family, he lived at 27 Evelyn Road. This factor supports the conclusion of Mr van Uden having a permanent place of abode in New Zealand.

The duration of that presence

[46] 27 Evelyn Road has been available to, and used by, Mr van Uden for approximately 12 years — that is, from November 1998 to June 2010. Again, this factor points in favour of Mr van Uden having a permanent place of abode in New Zealand.

The durability of the taxpayer's association with the particular place

[47] The High Court found that Mr van Uden had maintained significant ties with 27 Evelyn Road, and that these were exhibited in both practical and financial ways. We agree. The key evidence is the appellant's credit card statements for the relevant years. These show that, in the years in dispute, Mr van Uden incurred regular household expenditure at a variety of stores near the property in question.

[48] The balance of the evidence supports this conclusion. As we noted above, Mr van Uden acknowledged that he paid for a SKY TV account at the property during the relevant tax years. The property is also the registered address for various motor vehicles belonging to Mr and Mrs van Uden. Similarly, Mr van Uden has used the 27 Evelyn Road address as the address for bills, bank statements, insurance policies, and investments. Again, this factor points in favour of Mr van Uden having a permanent place of abode in New Zealand.

The closeness or otherwise of the taxpayer's connection with the dwelling

[49] Ms Hinde points to Mr van Uden's limited legal standing as pointing away from 27 Evelyn Road being a permanent place of abode. It is clear that Mr van Uden does not own the property. However, as seen in *Case H97*, a taxpayer does not need to own a property in his or her own name to have a permanent place of abode there.[24] As we discussed above, it is reasonably evident that Mr van Uden had a close connection to 27 Evelyn Road. Whenever Mr van Uden returned to New Zealand, and was not staying on the ship, travelling or visiting relatives, he would stay at 27 Evelyn Road. Unlike the four rental properties owned by the Trust, 27 Evelyn Road was not formally let until 2010. In a loan application for funding to purchase the adjoining property at 29 Evelyn Road, signed by Mrs van Uden in her husband's absence, 27 Evelyn Road is referred to as their home. Mrs van Uden explained that a mortgage broker had filled out that form. Nevertheless, the mortgage broker's use of that term is indicative of his assessment of the character of the relationship Mr van Uden had with that address, and one Mrs van Uden endorsed by signing the application.

Permanent not temporary place of abode

[50] In our view, 27 Evelyn Road was a permanent place of abode, rather than a temporary place of abode. As this Court noted in *Diamond*, this factor refers to the continuing availability of a place on an indefinite but not necessarily lasting basis.[25] 27 Evelyn Road was always available to Mr van Uden when he returned to New Zealand. The only time it was let was informal and when Mr van Uden was not in the country.

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24 *Case H97* (1986) 8 NZTC 664 (TRA).
25 *Diamond*, above n 4, at [59(e)].

Other permanent places of abode

[51] Mr van Uden no longer maintains that he has a permanent place of abode outside of New Zealand.[26] This factor is accordingly of no weight.

Summary

[52] We therefore uphold the conclusion reached by the TRA and the High Court that, during the tax years in dispute, Mr van Uden had a permanent place of abode in New Zealand. We will now address the balance of the issues.

Mr van Uden's superannuation account: taxable foreign investment fund income

[53] As part of his remuneration arrangements, Mr van Uden has, since January 1980, been enrolled in his employer's non-contributory superannuation fund (the Provident Fund). By 2005 the balance of Mr van Uden's account in the Provident Fund stood at approximately $852,730. Mr van Uden also owned a relatively small parcel of units in a Hong Kong Unit Trust.

[54] Mr van Uden accepts that, on the face of things, his interest in the Provident Fund would constitute an interest in a foreign investment fund (FIF) for the purpose of s CG 15 of the Income Tax Act 1994 and, as such, be taxable on the basis of the accrual rules. His interests in the Unit Trust would also be taxable on the basis of aggregation.

[55] But, Mr van Uden says his interest in the Provident Fund is not to be treated as an investment in a foreign investment fund because of s CG 15(2)(d), which for the 2005 tax year provided that interests held by a person in a foreign entity shall not be treated as an interest in a FIF if:

> the person is a natural person, other than in that person's capacity as a trustee, and at no time during the income year at which the person is resident in

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[26] In cross-examination Mr van Uden accepted that the following statements he had made at various times to IRD were not correct:
(a) that he did not have access to accommodation in New Zealand;
(b) that he had not, as he said he had, claimed to have a permanent place of abode in Hong Kong;
(c) that all the properties owned by the Trust were rented; and
(d) that he and Mrs van Uden paid market rate rental to the Trust when they were living at 27 Evelyn Road.

> New Zealand does the aggregate cost or expenditure incurred by or on behalf of the person in acquiring all interests held at the time by the person in any foreign entities, being interests that but for this paragraph would be treated as interest in a foreign investment fund, exceed $50,000.

[56] The argument Ms Hinde makes for Mr van Uden is a simple one: because contributions to Mr van Uden's account in the Provident Fund are paid by his employer, and he is not required to make any contributions himself, then there is no "cost or expenditure incurred by or on behalf of Mr van Uden as regards the Provident Fund". His interests in the Provident Fund are therefore not to be treated as an interest in a FIF. Furthermore, his interests in the unit trusts do not exceed $50,000. So, they fall outside the FIF taxing net accordingly.

[57] The key submission here is that Mr van Uden did not incur a cost. Ms Hinde says Mr van Uden's employer was not his agent and did not incur any cost on his behalf. Whatever the employer did was on its own behalf. Mr van Uden's evidence was that he was not initially aware he had been enrolled by his employer in the Provident Fund. Later, however, he received reports as to the balance of his account in the Provident Fund. It was not enough that his employer may have been acting in Mr van Uden's interests when it made those contributions. Parliament chose not to legislate to create accrual income liability on that basis: rather, it left the prospective future receipt of a lump sum outside the FIF accrual rules.

[58] As Ms Leslie for the Commissioner submitted, we think that Mr van Uden's employer was clearly acting on his behalf when it made its contributions to the Provident Fund.

[59] Section CG 15 applies to the 2005 tax year and was enacted as such in 1993 (as part of the Income Tax Act 1976). The section had originally referred only to the aggregate cost or expenditure incurred by the person: the words "or on behalf of" were added several months later.[27] The explanatory note to the Taxation Reform Bill (No 7) of that year records:[28]

> … clause 64 amends the *de minimis* exception from the foreign investment fund regime in s 245RA(2) of the Act to ensure that expenditure incurred on

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27 Income Tax Amendment Act (No 3) 1993, s 65.

28 Taxation Reform Bill (No 7) 1993 (267-1) (explanatory note) at 15.

> behalf of the person (such as employer contributions to foreign superannuation schemes) will be taken in account in determining whether the $20,000 threshold has been reached, as well as expenditure directly incurred by the person.

[60] To the extent that the words "on behalf of" in this context require explanation, that explanatory note makes the point clear. Parliament clearly intended to include employer contributions to superannuation funds. As Venning J noted, it is the employee who benefits from those contributions — to that extent, the cost or expenditure is incurred by or on behalf of them.[29]

[61] In the 2004 and 2007 Income Tax Acts (which apply to the 2006 to 2009 years), s CQ 5(1)(d) (the equivalent of s CG 15(2)(d)) brings an interest within the FIF rules if the total cost of attributing interests in FIFs that the person holds is more than $50,000. There is, as Ms Leslie submitted, no requirement that any particular person incurred a cost, a comprehensive answer to Mr van Uden's challenge as regards those tax years.

The time bar

[62] The assessment for the 2005 to 2008 tax years became time barred from reassessment pursuant to s 108(1) of the Tax Administration Act 1994 (the TAA) on 31 March 2013. Notices of reassessment for those time barred years were subsequently issued on 24 February 2014.

[63] The issue is accordingly whether, before that, the Commissioner had exercised the power under s 108(2) to lift the time bar. Ms Hinde focuses on the process by which the reassessments were said to have taken place. She says that Mr Young — who, unlike the other officials, did have authority to make the reassessments — did not reassess Mr van Uden on the facts.

[64] Section 108 of the TAA provides:

> **108 Time bar for amendment of income tax assessment**
>
> (1) Except as specified in this section or in section 108B, if—

[29] High Court decision, above n 2, at [70].

(a) a taxpayer furnishes an income tax return and an assessment has been made; and

(b) 4 years have passed from the end of the tax year in which the taxpayer provides the tax return,—

the Commissioner may not amend the assessment so as to increase the amount assessed or decrease the amount of a net loss.

(1A) Unless subsection (2) or section 108B applies, the Commissioner must not issue an income statement under Part 3A if 4 years have passed since the end of the tax year that follows the tax year to which the income statement would apply.

…

(2) If the Commissioner is of the opinion that a tax return provided by a taxpayer—

(a) is fraudulent or wilfully misleading; or

(b) does not mention income which is of a particular nature or was derived from a particular source, and in respect of which a tax return is required to be provided,—

the Commissioner may amend the assessment at any time so as to increase its amount.

…

[65] We adopt the following description of subsequent events from Venning J's judgment:[30]

> [83] In an internal memorandum dated 7 May 2013 approval was sought to invoke the power under s 108(2) of the TAA to increase the assessments of the appellant's income tax returns for the years ended March 2005, 2006, 2007 and 2008.
>
> [84] The memorandum concluded with a recommendation that the Commissioner's discretion under s 108(2)(b) be exercised to approve the reopening of the assessments for the income tax returns for the years ended 31 March 2005, 31 March 2006, 31 March 2007 and 31 March 2008. Ms Lloyd, Manager, Investigations and Advice, purported to exercise a power delegated to her in the following way:
>
> > I, Tracey Lloyd, Investigations Manager, holding the delegated authority under section 108(2) of the Tax Administration Act 1994, approve the re-opening of assessments for [the appellant] for the 2005 - 2008 income tax years. I base my decision on the

[30] High Court decision, above n 2.

> information contained in this memorandum and any further comments outlined below:
>
> Dated 9/5/13.
>
> [85] Subsequently, after the failure to resolve matters at a facilitated conference the Commissioner issued a statement of position dated 12 July 2013. The appellant issued a statement of position in response dated 11 September 2013 and the matter was referred to the Disputes Unit. Mr Bruce Young, the Manager of the Dispute Review Unit, issued an adjudication report on 11 February 2014. In that decision Mr Young confirmed:
>
> > An exception to the time bar applies and the service delivery group is able to amend the taxpayer's assessments for the periods in dispute.
>
> [86] It is not in issue that Mr Young held the appropriate delegation to make an opinion on behalf of the Commissioner. Mr Young's opinion confirmed that the appellant was resident. He went on to make the following determination:
>
> > 6.22 As the Taxpayer's returns filed for [the relevant period] do not disclose, in or with the return, any mention of income sourced from the Company, or any income from FIFs, the exception in s 108(2)(b) will apply because the Taxpayer has omitted from their return all income of a particular "nature" or from a particular "source". On that basis, the time bar in section 108 does not apply and the Commissioner is able to amend the Taxpayer's assessments.
>
> [87] Notices of Reassessment for the time barred years were subsequently issued on 24 February 2014.

[66] As can be seen, after an investigation, Ms Lloyd purported to exercise a delegated power to assess Mr van Uden for the 2005 to 2009 years. The matters were then referred to the Disputes Unit, where Mr Young issued a report. He formed the view that "an exception to the time bar [applied] and [that the relevant part of Inland Revenue] [was] able to amend the taxpayer's assessments for the periods in dispute". Mr Young then gave his reasons for this — namely, that Mr van Uden was, despite his tax return suggesting otherwise, a resident and liable to pay tax on income sourced from China Navigation and the FIFs.

[67] Venning J reasoned that Mr Young had an authority to make an opinion under s 108(2) and he expressly stated he exercised his delegation under that section.[31] It

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[31] High Court decision, above n 2, at [93].

was, the Judge said, that opinion that was the necessary requirement for the purposes of s 108(2) rather than the language used to record it.[32]

[68] In our view, there can be no challenge to this aspect of the Judge's reasoning.

[69] There is a further issue, as Ms Leslie submitted. As this Court noted last year in *Great North Motor Company Ltd (in rec) v Commissioner of Inland Revenue*, when considering a tax challenge under pt 8A of the TAA, the TRA is obliged to review the ruling de novo.[33] That de novo process having been followed, and the TRA having confirmed those assessments, there is no room for any further challenge pursuant to s 108 of the TAA.

The unacceptable tax position penalty

[70] The final issue is one of penalties.

[71] The relevant section here is s 141B of the TAA. As relevant, it provides:

> **141B Unacceptable tax position**
>
> (1) A taxpayer takes an unacceptable tax position if, viewed objectively, the tax position fails to meet the standard of being about as likely as not to be correct.

[72] This was discussed by the Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, where the majority stated:[34]

> [184] On its terms, this standard does not require that the appellants' tax position had a 50 per cent prospect of success but, subject to that qualification, the merits of the arguments supporting the taxpayer's interpretation must be substantial. The stipulation of an objective test means that the taxpayer's belief that the position taken was correct, or not unacceptable, is irrelevant.
>
> [185] There is a helpful observation of Hill J concerning the statutory standard made in the context of a similar provision in Australian legislation:
>
> > The word "about" indicates the need for balancing the two arguments, with the consequence that there must be room for it

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32 At [93].

33 *Great North Motor Company Ltd (in rec) v Commissioner of Inland Revenue* [2017] NZCA 328, (2017) 28 NZTC ¶23–022 at [34].

34 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 (footnote omitted).

> to be argued which of the two positions is correct so that on balance the taxpayer's argument can objectively be said to be one that while wrong could be argued on rational grounds to be right.
>
> Whether a taxpayer's interpretation meets the standard in any case accordingly comes down to a judgment of the weight of the arguments that support the taxpayer's position in the application of the law to the relevant facts.

[73] As Venning J observed, Mr van Uden had raised the issue of his tax residence in 1995. In evidence, he said it was the only time he received advice about tax residence. The accountants advised that, from the information he had provided, it appeared Mr van Uden would be treated as having a permanent place of abode in New Zealand and, consequently, as a resident. Mr van Uden no longer has a copy of the letter in which he described those living arrangements to his accountants. But what is clear is that he was aware of the issue from that time. Mr van Uden's subsequent use of 27 Evelyn Road to live in whilst in New Zealand did not change markedly in the period immediately following his marriage in 1998, nor in the tax years in question. We acknowledge the change of ownership structure of the various properties in 2004, but that of itself is not a particular focus of the *Diamond* test. We emphasise the periods Mr van Uden spent in New Zealand from 1998 to 2010, and his admission in cross-examination that when in New Zealand and not on the ship or travelling he almost exclusively stayed at 27 Evelyn Road.

[74] The objective assessment of the evidence that we have already undertaken, supports the conclusion that Mr van Uden's contention that he was not tax resident in New Zealand in the relevant years was not "about as likely as not to be correct".

[75] We acknowledge Mr van Uden's evidence of reliance on his accountants as regards the filing of his tax returns over time. But, again, the test here is objective.

Result

[76] The appeal is dismissed.

[77] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
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