IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-000464
[2017] NZHC 2554

IN THE MATTER	of an appeal from a decision of the Taxation Review Authority dated 24 February 2017
BETWEEN	GERARDUS PETER VAN UDEN Appellant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 12-13 September 2017

Appearances: M Hinde for Appellant
S J Leslie and R Soni for Respondent

Judgment: 19 October 2017

JUDGMENT OF VENNING J

This judgment was delivered by me on 19 October 2017 at 11.45 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Solicitors: Vlatkovich & McGowan, Auckland
Crown Law, Wellington
Copy to: M Hinde, Auckland

Introduction

[1] Mr van Uden (the appellant) is a master mariner. He has spent over 40 years at sea working for an overseas shipping company. On average he is at sea for approximately eight months each year. Despite that the Commissioner assessed the appellant for income tax on his overseas income for the years ended 31 March 2005 to 31 March 2009 (inclusive) on the basis he was resident in New Zealand. The appellant unsuccessfully disputed that before the Taxation Review Authority (TRA). He appeals that decision.

[2] The principal issue on this appeal is whether the appellant had a permanent place of abode in New Zealand during the relevant financial years.

[3] Although that is the principal issue, the appellant also challenges the assessments and penalty imposed on a number of other grounds.

Background (chronology)

[4] The appellant was born in New Zealand in 1957 after his parents had emigrated from The Netherlands to New Zealand. The family maintained a strong link with The Netherlands. Dutch was the first language used in the home. The appellant and his family visited The Netherlands when he was a child and then, in 1967 when the appellant was nine, his parents took the family back to The Netherlands with the intention of returning there permanently. The family's relocation to The Netherlands was not successful and after approximately 18 months when the appellant was aged 10 his parents re-emigrated from The Netherlands to New Zealand again where they ultimately settled in Auckland. The appellant has held both New Zealand and Netherlands passports.

[5] In 1975, at 17 years of age, the appellant became a navigating cadet with China Navigation Co Ltd, a shipping company based in Hong Kong, following the nomination of the New Zealand Shipping Corporation. In December 1979, at 22, the appellant was enrolled in his employer's superannuation scheme.

[6] In 1980 the appellant married his first wife, who was Filipino. He adopted her two daughters. His son was born in the Philippines in 1983. In December 1987 the appellant brought his wife and children to New Zealand primarily for his son's education. They bought a home in Mangere Bridge, Auckland.

[7] In late 1988 the appellant sought clarification from the District Commissioner, Inland Revenue Department (IRD) regarding his taxation obligations. On the assumption he had a permanent place of abode in New Zealand he was advised he would be considered a resident and would be liable for New Zealand income tax on his worldwide income.

[8] In 1992 the appellant was promoted to the position of Fleet Safety Training Officer. The appellant's accountant at the time was Mr Paul Rogers of Seal & Co. He took advice from Mr Rogers, including advice about the purchase of a rental property. He subsequently bought a rental property in Auckland in October 1993. That was the first of four rental property investments.

[9] In 1994 the appellant was promoted to Master. By this time the appellant and his first wife had separated. They became involved in an acrimonious matrimonial dispute. He took advice concerning protection of his assets.

[10] In 1996 the appellant bought a lock-up and leave apartment which he stayed in while in New Zealand. He returned regularly to New Zealand primarily to visit his son.

[11] In the meantime the appellant's current wife, Judith van Uden, had separated from her second husband. She received a property at 27 Evelyn Road as part of the divorce settlement. In 1997 she transferred the property to herself and her solicitor as trustees of the Pink Dog Family Trust.

[12] The appellant and Judith met in April 1998 when he was 40. In November 1998 they holidayed together. On their return to New Zealand on 21 November the appellant stayed at 27 Evelyn Road. On 25 November the appellant gave notice to

the Department of Social Welfare that he had a new partner for child maintenance purposes. On 14 December 1998 he and Judith married.

[13] From 27 January 1999 until 7 March 1999 the appellant and Judith went on a coastal voyage around New Zealand on the appellant's ship. On 7 March the appellant departed New Zealand on the same ship. On his return to New Zealand the appellant stayed at 27 Evelyn Road with Judith. He stayed there on subsequent occasions when he returned to New Zealand.

[14] During 1999 the appellant was appointed as an additional trustee to the Pink Dog Family Trust and, on 3 September 1999, was included as a discretionary beneficiary of the Trust.

[15] In 1999 the appellant and Judith bought one week in a time share in Bali (adding three more weeks in 2000).

[16] By the end of 1999 Judith had decided to leave her career as a purser with Air New Zealand to join the appellant at sea. From early 2000 she began sailing fulltime with the appellant when he was aboard.

[17] In 2001 the appellant's son who was then 18 and his oldest adopted daughter left New Zealand separately for Australia. Neither returned to New Zealand.

[18] In early 2003 the appellant obtained company approval for Judith to accompany him fulltime for the next four years on his round-the-world tours of duty.

[19] In February 2004 the appellant took advice regarding the management of the rental properties and his tax residence status. The rental properties which the appellant had previously transferred to himself and Judith jointly in 1999 and 2000 were transferred to the Pink Dog Family Trust.

[20] In March 2004 the daughter of Judith's hairdresser took a tenancy of 27 Evelyn Road paying $70 a month. About the same time the appellant redirected his mail to his accountants.

[21] During early 2005 the appellant carried out deferred maintenance at 27 Evelyn Road. In August 2006 the trustees of the Pink Dog Family Trust bought the next-door property at 29 Evelyn Road. That property was subsequently tenanted.

[22] In August 2008 the appellant returned nil IR3 tax returns for the years ended 31 March 2005 and 2006 late, and on the wrong form. In February 2009 the IRD opened a file on the appellant. The IRD investigation continued through 2010 and 2011.

[23] In June 2009 the appellant and Judith commenced a new build project at 29 Evelyn Road, and in July terminated the tenancy. In 2010 the appellant and Judith let 27 Evelyn Road to tenants. The rebuild at 29 Evelyn Road included a swimming pool which was completed by early 2011.

[24] On 1 April 2013 the time bar for reopening years 2005, 2006, 2007 and 2008 took effect. The parties had in the meantime been exchanging Notices of Proposed Assessment (Commissioner) and Notices of Response (appellant). The parties then exchanged statements of position in July and September 2013 before Bruce Young, Manager, Disputes Review Unit, issued a decision on the appellant's liability for tax on 11 February 2014. Notices of Reassessment then followed on 24 February 2014.

TRA Decision

[25] The TRA referred to the Court of Appeal decision of *The Commissioner of Inland Revenue v Diamond*[1] and the non exclusive factors referred to in that case before concluding the appellant had maintained an ongoing and close association with the property at 27 Evelyn Road over many years. The TRA found that the appellant had regularly stayed at the property over a period of 12 years and, while the appellant was not a beneficial owner of the property, he was a trustee and discretionary beneficiary of the Trust and the property was available to him for use.

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

[26] The TRA concluded that the appellant had a permanent place of abode in New Zealand at 27 Evelyn Road in each of the income tax years in dispute so that he was resident in New Zealand for the purposes of the relevant Income Tax Acts.[2]

[27] The TRA also concluded that the appellant was liable to pay tax on his interest in his employer's superannuation fund (the Swire Pacific Ship Management Ltd Provident Fund) and on foreign investment unit trusts owned by him under the Foreign Investment Fund (FIF) rules.

[28] Next, the TRA accepted the Commissioner had power to amend the assessments that were otherwise time barred for the years 2005 to 2008 and that Mr Young had formed the necessary opinion. The reassessments were valid.

[29] Finally the TRA upheld the shortfall penalties proposed by the Commissioner.

[30] The appellant challenges all four findings of the TRA.

Issues

[31] The issues for this Court on appeal are:

(a) Did the appellant have a permanent place of abode in New Zealand in the income years ended 31 March 2005 to 31 March 2009 so that he was a New Zealand tax resident during those years?

(b) Did the appellant derive FIF income as a consequence of his employer's contributions to the Provident Fund on his behalf?

(c) Were the time barred years validly reassessed?

(d) Was the TRA correct to uphold the imposition of shortfall penalties on the basis the appellant took an unacceptable tax position in the years in dispute?

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[2] Income Tax Act 1994, Income Tax Act 2004 and Income Tax Act 2007.

Residence

[32] The relevant definition is in s OE 1(1) Income Tax Act 1994:

> **OE 1 Determination of residence of person other than company**
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> (1) 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.
>
> …

[33] In *The Commissioner of Inland Revenue v Diamond* the Court of Appeal considered the legislative history of the section.[3] The Court traced s 241(1) of the Income Tax Act 1976, which the Court in *Geothermal Energy New Zealand Ltd v Commissioner of Inland Revenue*[4] found required the taxpayer's home to be in New Zealand, through its subsequent amendments before concluding that the adoption of the test of a permanent place of abode in OE 1(1) seemed to have been intended to move away from the narrow focus established in *Geothermal*:[5]

> … It also supports a desire to retain the nuanced and contextual approach captured in the same phrase as used … in Australian cases such as *Federal Commissioner of Taxation v Applegate*. This includes the "concept" of home in its broader sense, namely a dwelling being the subject of enduring and clear ties on the part of the taxpayer.

[34] The Court of Appeal also rejected the two-step process which the Commissioner had argued for in reliance on previous decisions of the TRA. Under that approach the availability of a place of abode was the first step followed by a second which required consideration of all the facts and circumstances applicable to the particular taxpayer, indicating some salient connection to the property and/or New Zealand.

[35] The Court stated:[6]

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3 *The Commissioner of Inland Revenue v Diamond*, above n 1.

4 *Geothermal Energy New Zealand Ltd v Commissioner of Inland Revenue* [1979] 2 NZLR 324 (SC).

5 *The Commissioner of Inland Revenue v Diamond*, above n 1, at [41].

6 *The Commissioner of Inland Revenue v Diamond*, above n 1 (footnotes omitted).

> [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 obvious, permanent is the opposite of temporary. Something is permanent when it is “continuing or designed to continue indefinitely without change. Next, the word “abode” means “habitual residence, house or home or place in which the person stays, remains or dwells”. 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.
>
> [49] … The scheme of the section allows these provisions 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. 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.

[36] The Court also considered that, given the purpose of the section and the consequences of being tax resident in New Zealand, an interpretation beyond the ordinary and natural meaning of the term “permanent place of abode” ought not to be adopted unless plainly indicated by the statutory language or context.

[37] In the course of its decision the Court referred to the observations of Fisher J in *Federal Commissioner of Taxation v Applegate* that:[7]

> 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.

[38] Finally the Court set out what it considered to be the appropriate interpretation of s OE 1:[8]

> [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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7 *Federal Commissioner of Taxation v Applegate* [1979] FCA 66 (FCAFC) at 128.

8 *The Commissioner of Inland Revenue v Diamond*, above n 1 (footnote omitted).

> [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.

[39] The Court of Appeal then noted the following (non-exhaustive) factors may inform the inquiry:

> [59] The following (non-exhaustive) factors may inform the inquiry:
>
> (a) The continuity or otherwise of the taxpayer's presence in New Zealand and in the dwelling;
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> (b) The duration of that presence;
>
> (c) The durability of the taxpayer's association with the particular place;
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> (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.
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> (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.
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> (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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> [60] In assessing a particular case the factual inquiry will be on the tax years in question. However, we consider evidence of the relevant circumstances both before and after those tax years may be taken into account to the extent they bear upon the question whether the taxpayer had a permanent place of abode in New Zealand in the tax years in question.
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> [61] Importantly the focus is on whether the taxpayer, not members of the taxpayer's family, have a permanent place of abode in New Zealand. Accordingly the fact that a taxpayer may provide a home for his family in circumstances where the taxpayer lives elsewhere would not necessarily be sufficient to establish that the taxpayer had a permanent place of abode in New Zealand.

The appellant's submissions on residence

[40] In her comprehensive submissions Mrs Hinde submitted that prior to April 1998 when the appellant first met his second wife, Judith, he did not have a

permanent place of abode in Auckland and even if he had once had one, it had long ceased to exist. She referred to and relied on the following:

(a) From 1988 to 1994 the appellant's family was living in Auckland solely for the purpose of his son's education and to avoid the corruption then rife in the Philippines.

(b) The two daughters he had adopted left their mother's home once they were old enough.

(c) By July 1994 the appellant's first marriage was deteriorating.

(d) By 1995 the appellant was only visiting New Zealand to maintain a relationship with his young son against the background of a difficult divorce. The house he had owned jointly with his first wife was transferred to her and rapidly on-sold.

(e) The appellant bought a lock-up and leave at 2/77 St George Street in 1996 which he used for the purpose of visiting his son but that soon became used as a rental property.

[41] Mrs Hinde submitted that the appellant's shift from 2/77 St George Street to 27 Evelyn Road was a consequence of his desire to live with his new wife when ashore and was "not to assert dominion over the Trust owned property".

[42] Mrs Hinde submitted that the appellant's aim was to take his new wife, Judith, to sea fulltime and he succeeded in that goal after a year of marriage. He had no personal goal of settling in New Zealand, in Auckland or in the house and objectively exhibited no sign of ever settling in New Zealand. He had spent his entire working life at sea working for the same overseas shipping line. His roots were in Europe where he and Judith intend to retire. In this context Mrs Hinde emphasised that Judith had been educated overseas in Cyprus and Singapore before coming to New Zealand with her parents. Mrs Hinde noted that 27 Evelyn Road had been rented out for 10½ months during 2004.

[43] Mrs Hinde emphasised that the appellant's life was at sea, and that he had no connection with New Zealand. The home at 27 Evelyn Road was simply available to him and Judith as a convenience.

Decision – permanent place of abode

[44] As the Court of Appeal in *Diamond* made clear the mere availability of a dwelling is not sufficient by itself. The Court is required to determine the nature and quality of the use that the taxpayer habitually makes of a particular place of abode. In this context, as the Court noted, "permanent" meaning continuing or designed to continue indefinitely without change, and "abode" meaning the habitual residence, house or home or place in which the person stays, remains or dwells are important concepts.

[45] While Mrs Hinde argued the appellant's life was at sea, the definition confirms that a taxpayer can have a permanent place of abode in New Zealand even if they have another permanent place of abode outside New Zealand. Even though the appellant had made his life at sea, he can still have a permanent place of abode in New Zealand.

[46] For the relevant tax years the appellant habitually resided at 27 Evelyn Road when he was not at sea. 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. It was his base for his life in New Zealand. Consideration of the factors identified by the Court in *Diamond* confirms the position.

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

[47] As a seaman the appellant spent an average of at least eight months a year at sea. The reasons for returning to New Zealand and his connections with New Zealand may have changed over time but the consistent pattern when he was not on the ship and not holidaying or travelling was that he would return to New Zealand and spend time in New Zealand. When he did return to New Zealand over the relevant time period he lived at 27 Evelyn Road. As a seaman spending eight

months of the year at sea he was never going to be spending time continuously in New Zealand. What is important is that when not at sea and not otherwise holidaying or travelling he returned to New Zealand and based himself at 27 Evelyn Road.

[48] The appellant was born in New Zealand in 1957. Apart from the extended holiday with his family in The Netherlands followed by the period of approximately 18 months when his parents returned to The Netherlands and attempted to settle there and then later a period in the 1980's where he based himself in the Philippines and met his first wife, he has had a continuous presence in New Zealand.

The duration of that presence

[49] Between 2000 and 2009 the appellant spent the following periods of time in New Zealand (in the financial years):

> March 2004 – March 2005 – just over six weeks;
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> March 2005 – March 2006 – two months;
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> March 2006 – March 2007 – five months;
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> March 2007 – March 2008 – almost four months;
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> March 2008 – March 2009 – four months.

[50] 27 Evelyn Road has effectively been available and used by the appellant as his home in New Zealand for almost 10 years from November 1998 to June 2010. From June 2010 until June 2015 the next-door property at 29 Evelyn Road was available.

[51] The appellant and Judith only moved from 27 Evelyn Road to 29 Evelyn Road when the renovations to that property were completed, after the relevant tax years.

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

[52] I accept Ms Leslie's submission that the appellant has maintained significant ties with 27 Evelyn Road which are exhibited in both practical and financial ways. First, as noted 27 Evelyn Road was the address that he and Judith returned to when not at sea. They further committed to that address when they bought the neighbouring property door at 29 Evelyn Road and invested significantly in upgrading that neighbouring property (including installing a $100,000 swimming pool).

[53] The appellant's credit card statements for the relevant years show regular household related expenditure in the locality of 27 Evelyn Road at homeware stores, including at Bunnings, The Warehouse, Mitre 10, Spillers Hardware, Freedom Furniture, Early Settler, Bed Bath and Beyond, Lighting Direct, Briscoes, Yelland Interiors and Danske Mobler, and visits to the local shops and restaurants. In addition there are indicia of the use to which 27 Evelyn Road was put to as a home, such as a Sky television account. Mrs Hinde submitted it was cheaper to keep the Sky account active than to cancel it but the fact there was such an account in the first place suggests use of the house as a home. The account was also maintained for a number of years. There is strong evidence 27 Evelyn Road was used for residential purposes, albeit for the limited time the appellant was in New Zealand.

[54] It is relevant that 27 Evelyn Road was the given address for three motor vehicles that the appellant's wife and the Trust owned from time to time. The appellant's pay slips during the years in dispute were addressed to 27 Evelyn Road and the appellant's electoral address for electoral purposes for the 2008 and 2011 elections was 27 Evelyn Road.

[55] Ms Leslie also sought to rely on various insurance and investment interests held by the appellant in New Zealand (and for that matter reference could be made to the rental properties). While they disclose a connection with New Zealand they do not of themselves disclose a connection with the dwelling in issue of 27 Evelyn Road. As the Court of Appeal noted in *Diamond* for such connections to have relevance they must be focused on the permanent place of abode. To the extent that

the appellant gave his address for bills for bank statements, insurance policies and investments as 27 Evelyn Road then that does provide support for 27 Evelyn Road as his permanent place of abode.

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

[56] The situation before and after the period or periods of absence from New Zealand is to be considered. As Mrs Hinde correctly pointed out there were times when the appellant and Judith were in New Zealand, and they did not stay at 27 Evelyn Road. But on those occasions they were holidaying in New Zealand or visiting relatives. For example, they spent time in Wanaka when Judith's parents were unwell. However 27 Evelyn Road remained the property they left from and returned to. It was their base in New Zealand.

[57] It is also relevant that 27 Evelyn Road was Judith's home. The appellant committed to the relationship with Judith. Her home became his home as well (in practice if not in law).

[58] Mrs Hinde also pointed out that the appellant did not own 27 Evelyn Road, the Trust did. The appellant, although a trustee, was only a discretionary beneficiary in the Trust. Judith had the sole right to appoint and remove trustees. She could have removed the appellant at any time as trustee and then had him removed as a sole beneficiary. That issue was touched on in the cross-examination of the appellant before the TRA. It did not seem to be an issue of concern to the appellant. Further, the parties committed to each other at an early stage in their relationship. The appellant transferred his rental properties first to them both as a partnership and then from the partnership to the Trust.

The requirement for permanency to distinguish merely transient or temporary places of abode

[59] The Court of Appeal noted that permanency in this context refers to the continuing availability of a place on an indefinite but not necessarily a lasting basis. It is the place where the taxpayer habitually resides from time to time. In this context 27 Evelyn Road was indefinitely available to the appellant when he (and

Judith) returned to New Zealand. Although it was tenanted in 2004, it was at a very concessionary rate of $70 a month and was only for a period of 10 months. That was at a time that the appellant and Judith commenced living on board the boat. The property was not subsequently tenanted. A house sitter was from time to time arranged. When 27 Evelyn Road was not needed by the appellant and Judith it was available for use by friends and family. Importantly however the house sitter and the friends' or family's use was dependent on the appellant and Judith's need to live in the property.

The existence of another permanent place of abode outside New Zealand

[60] The Court noted that a permanent place outside New Zealand did not preclude a finding the taxpayer had a permanent place of abode in New Zealand. There is no suggestion the appellant has any other permanent place of abode outside New Zealand. The reality is that when not in New Zealand or holidaying the appellant was on board his ship which is where he based himself when not in New Zealand.

[61] Having regard to the above, I conclude that 27 Evelyn Road was the home habitually used by the appellant when in New Zealand during the relevant tax years. The TRA was correct to conclude that 27 Evelyn Road was the appellant's permanent place of abode during the relevant tax years. The appellant has a tax residence within New Zealand.

FIF

[62] The next issue is whether the appellant is liable to pay tax on his interest in his employer's superannuation fund (Provident Fund) and on foreign investment unit trusts owned by him (Unit Trusts). The parties are agreed on the quantum in issue. The plaintiff's income from his personal Unit Trusts is below the de minimis threshold provided in the relevant Income Tax Acts but Mrs Hinde accepts that if the appellant is liable to pay tax on his interest in the Provident Fund then his income from the Unit Trusts would be aggregated. The issue is whether the appellant is liable to pay tax on the income earned from his interest in the Provident Fund.

[63] Three tax statutes applied over the relevant income tax years.[9] In substance the relevant provisions of those statutes are the same.

[64] The section that applied to the first income tax year was s CG 15 of the Income Tax Act 1994:

> **CG 15 What constitutes an interest in a foreign investment fund**
>
> (1) Subject to this section, the following kinds of interest of a person in a foreign entity shall be treated for the purposes of this Act as an interest in a foreign investment fund:
>
> (a) Rights held by the person in relation to the foreign entity (not being interests of a kind referred to in paragraphs (b) and (c)) where, if the entity were a controlled foreign company, the rights of the person would be treated under section CG 5 as a direct income interest in the entity:
>
> (b) Any entitlement of the person to benefit, as a beneficiary or member, where the foreign entity is a foreign superannuation scheme:
>
> (c) Any entitlement of the person to benefit from a policy of life insurance upon human life of which the foreign entity is the insurer (not being a policy of life insurance offered or entered into in New Zealand in respect of which policy the foreign entity is subject to the provisions of sections CM 15 to CM 17, DK 3, II 1, and II 2).
>
> (2) An interest held by a person in a foreign entity at any time during an income year shall not be treated as an interest in a foreign investment fund—
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> …
>
> (c) If, at the time, the interest is an interest in an employment-related foreign superannuation scheme; or
>
> …
>
> (d) 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 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 interests in a foreign investment fund, exceed $50,000; or
>
> …

[9] Income Tax Act 1994, 2004, 2007.

[65] The appellant acknowledges that prima facie his Unit Trusts fall into s CG 15(1)(a) and his entitlement under the Provident Fund would fall under s CG 15(1)(b). The appellant however relies on the exemption in s CG 15(2)(d). The exception in s CG 15(2)(c) does not apply because of the definition in s OB 1 of the Act of an "interest in an employment related foreign superannuation scheme". The appellant concedes that if he is found to be resident in New Zealand then the exemption in s CG 15(2)(c) does not apply to him.

[66] Mrs Hinde argued that s CG 15(2)(d) applied to exempt the income from the Provident Fund because the appellant had not incurred any cost (or expenditure) in relation to his employer's contribution to the fund. She acknowledged that the contributions to the fund were made by the appellant's employer but submitted that they were not costs (or expenditure) incurred by or on behalf of the appellant.

[67] Mrs Hinde submitted the proper process was to deal with the matter sequentially by asking the following questions. Did the appellant acquire an entitlement to a FIF? The answer to this question is clearly no. Then: was the relevant outlay incurred directly by the appellant? She submitted the answer to that was no. Next: was the outlay incurred on behalf of the appellant? She submitted that the only way that could be the case would be if the employer had incurred the cost, or made the expenditure as the appellant's agent. There was no such agency relationship for that purpose in the present case. Mrs Hinde submitted that even though the outlay had effectively been incurred in the interest of the appellant, there was no statutory category to cover it. There was no amount to include in the aggregate cost.

[68] With respect I am unable to accept that submission and the reasoning that supports it. The issue is whether the employer's contributions were costs or expenditure incurred "by or on behalf of" the appellant. That is a matter of interpretation of the statutory language. While an agent may act on behalf of his or her principal, it is unnecessary to construct the existence of an agency relationship for s CG 15(2)(d) to apply. The statutory language does not require that.

[69] An employer can make payments to a superannuation scheme such as the Provident Fund in this case on behalf of an employee without the need for an agency relationship. In the present case the appellant's employer pays 20 per cent of his salary into the Provident Fund.

[70] A plain reading of s CG 15(2)(d) supports the conclusion that the cost or expense incurred by or on behalf of the person includes the employer's contributions to a superannuation fund. It is the employee as a member of the fund who benefits from the payments. To that extent the cost or expenditure is incurred by or on behalf of them. If Parliament had intended to limit the payments to payments made by an agent, it could have expressly said so.

[71] The history of the section confirms that interpretation. The words in issue, "on behalf of" were first inserted by the Income Tax Act Amendment Act (No 3) 1993. The amendment inserted the words "or on behalf of" after the words "expenditure incurred by" in s 245 RA(2)(d) of the Income Tax Act 1976.

[72] Importantly the explanatory note to the bill expressly records in respect of this amendment that:

> … clause 64 amends the de minimis exception from the foreign investment fund regime in section 245 RA(2) of the Act to ensure that expenditure incurred on behalf of the person (such as employer contributions to foreign superannuation scheme) will be taken into account in determining whether the $20,000 threshold has been reached, as well as expenditure directly incurred by the person. It provides an express indication of Parliament's intention.

[73] The intention of Parliament is clear from the explanatory note.

[74] Such an interpretation of the section also accords with the purpose of the FIF rules, namely to protect the domestic tax base by ensuring that income earned by a New Zealand resident from foreign retirement savings is taxed in the same way as income earned from New Zealand retirement savings. The alternative interpretation argued for by Mrs Hinde would enable a taxpayer in the appellant's position to accept a salary sacrifice in exchange for significant superannuation contributions by his or her employer and therefore avoid income tax.

[75] Mrs Hinde referred to the more recent amendments to the FIF but the amendments occurred well after the income tax years in issue in this case. They do not assist the interpretation of the section in the relevant years.

[76] Mrs Hinde also referred to the Court of Appeal decision in *Joint Action Funding Ltd v Eichelbaum* and the discussion of the phrase in that case of "costs incurred".[10] She submitted the Court was clear that costs were amounts that are factual, not deemed. She submitted that contrasted with the Authority's finding which effectively extended the meaning of costs incurred to employer contributions. On the appellant's evidence he did not initially know he had been joined up to the Provident Fund.

[77] I do not consider the case of *Joint Action Funding Ltd v Eichelbaum* is of any particular assistance to the appellant. It involved a completely different issue. The issue in that case was whether the Court of Appeal should revisit the earlier authority of *Brownie Wills v Shrimpton* where the Court had accepted that a lawyer acting for him or herself could be entitled to an award of costs in the proceeding.[11]

[78] Even accepting that the appellant may not have been aware as a young man that his employer had joined him to the Provident Fund (which seems odd given that it is effectively part of his overall salary package, based as it is on his gross salary) the appellant regularly received statements showing the contribution made to the Provident Fund on his behalf. It was clearly part of his salary package.

[79] Counsel accepted that the interpretation of the de minimis exception in s CQ 5(1)(d) of the Income Tax Act 2004 and 2007 was, for the purposes of the argument the same, as s CG15(2)(d).[12]

[80] I conclude the appellant was liable to pay tax on the income earned from the Provident Fund. As a result, his Unit Trust investments are also caught as the additional Unit Trust income is aggregated to the income from the Provident Fund.

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[10] *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249.
[11] *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA).
[12] See also Income Tax Act 2004, s YA 3; Income Tax Act 2007, s ZA 3.

Time bar issue

[81] The assessments for the tax years March 2005 to March 2008 became time barred from reassessment by s 108(1) Tax Administration Act 1994 (TAA) on 31 March 2013.

[82] 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—
>
> (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.
>
> …

[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 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.

[88] Mrs Hinde submitted that the Commissioner had missed the opportunity to reassess under s 108(2)(b) because the delegation to Ms Lloyd was invalid and Mr Young had failed to exercise the power delegated to him when he made his report of

11 February 2014. The power to reassess and the power to nullify the time bar under s 108(2) was statutory and had not been exercised lawfully in this case.

[89] Mrs Hinde submitted that Ms Lloyd lacked the appropriate delegated power to amend time bar assessments and did not in fact issue any assessments. While Mr Young had authority, he did not exercise a delegated power to amend the assessments but wrongly purported to delegate that non-delegable power to issue amended assessments to an investigator.

[90] Mrs Hinde submitted that there were no direct evidence that Mr Young exercised the s 108(2) power. She compared his report with the purported exercise of the power by Ms Lloyd. She noted that Mr Young had not been asked to, and in her submission, had not exercised the delegated power as the purpose of the review was to test the quality of the work done by investigators. She submitted there was no ability for the TRA to have "cured" matters by the de novo hearing.

[91] Although the Commissioner does not seek to rely on the opinion formed by Ms Lloyd, Mrs Hinde submitted it was still relevant to the weighing of evidence as to the steps taken by Mr Young.

[92] The appellant's submissions are based on the proposition that s 108(2) contemplates a single process of reaching an opinion on the time bar and making an amended assessment.

[93] Mr Young had authority to make an opinion under s 108(2) and he expressly stated he exercised his delegation under s 108(2). It is the opinion that is the necessary requirement for the purposes of s 108(2) rather than the language used to record that opinion.

[94] In *Wire Supplies Ltd v Commissioner of Inland Revenue* the Court of Appeal determined that once evidence of the opinion was provided the onus was on the taxpayer to persuade the Court that:[13]

[13] *Wire Supplies Ltd v Commissioner of Inland Revenue* [2007] NZCA 244, [2007] 3 NZLR 458 (CA) at [87].

(a) the Commissioner's officer did not honestly hold the opinion; and

(b) the Commissioner's officer misdirected himself or herself as to the legal basis upon which the opinion was formed; or

(c) the opinion was not reasonably open to the decision maker on the information available.

[95] I am satisfied that through Mr Young the Commissioner validly formed an opinion to open the time bar pursuant to s 108(2)(b). The opinion was the most recent opinion on the issue. It was reasonably held and correct. The assessments that followed were consistent with that opinion and were validly issued.

[96] The amended assessments are not made under s 108, rather they are made under other provisions in the TAA, such as s 106 and s 113.

[97] There is no significance in the form of wording used by Mr Young. All the Commissioner must do (through him) is form the opinion.[14]

[98] Mr Young went on to set out the table of adjustments which formed the basis for and were effectively repeated in the notice of assessments made. Further, s 114(b) of the TAA confirms that an assessment by the Commissioner is not invalidated because it was made wholly or partly in compliance with direction or recommendation made by an authorised officer on matters relating to the assessment.

[99] In any event the hearing before the TRA was a de novo hearing and the TRA confirmed the assessments. As the Court of Appeal recently confirmed in *Great North Motor Co Ltd (in rec) v Commissioner of Inland Revenue* the TRA's reconsideration of the Commissioner's time-bar ruling is not restricted to whether her opinion under s 108(2) was honestly held and reasonably available on the evidence.[15] The TRA was obliged to review the ruling de novo.

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[14] *Miller v Commissioner of Inland Revenue* (1993) 15 NZTC 10,187 (HC).

[15] *Great North Motor Co Ltd (in rec) v Commissioner of Inland Revenue* [2017] NZCA 328 at [33]–[34].

Shortfall penalties

[100] Shortfall penalties were imposed as the appellant failed to meet the standard of being "about as likely as not to be correct" in the position he took. The penalties were reduced by 50 per cent for previous behaviour.

[101] Mrs Hinde submitted the acceptability or unacceptability of the appellant's tax position was to be determined at the time he took the tax position. Mrs Hinde submitted that the Court was not authorised to take into account events occurring after the date the returns were lodged. The penalties were not automatic.

[102] She effectively repeated the submissions made to support the appellant's position that he was not resident in New Zealand during the relevant tax years.

[103] The test whether the position taken by the appellant was "about as likely as not to be correct" is objective.[16] The Supreme Court confirmed in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* that "the taxpayer's belief that the position taken was correct, or not unacceptable" was not relevant.[17]

[104] In the present case the appellant was aware of the importance of his residence. He had raised the issue some years before. At the time he had been advised that he was resident.

[105] The evidence supports the conclusion that the appellant's claim he did not have a permanent place of abode in New Zealand during the tax years in dispute did not have the prospect of being close to a 50 per cent chance of success. He therefore failed to meet the standard of being about as likely as not to be correct.

Result

[106] The appeal is dismissed.

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16 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [183].

17 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 15, at [184].

Costs

[107] Costs are to follow the event. The Commissioner is entitled to costs on a 2B basis.

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Venning J