IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-10882
[2014] NZHC 1935

UNDER	the Income Tax Act 2007 and the Tax Administration Act 1994
IN THE MATTER OF	an appeal from a decision of the Taxation Review Authority dated 5 December 2013
BETWEEN	MICHAEL WILLIAM DIAMOND Appellant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 9 July 2014

Counsel: J Coleman for appellant
D Lemmon and S Chapman for respondent

Judgment: 15 August 2014

JUDGMENT OF CLIFFORD J

Introduction

[1] The appellant, Michael William Diamond, is in dispute with the respondent, the Commissioner of Inland Revenue, as to the amount of income tax he is liable to pay for the tax years ending 31 March 2004 to 31 March 2007.

[2] Mr Diamond says he was not resident in New Zealand for tax purposes during those years. The Commissioner has assessed Mr Diamond on the basis that he was.

[3] The Commissioner accepts that in each of those tax years Mr Diamond was absent from New Zealand for a period or periods exceeding in aggregate 325 days.

On that basis Mr Diamond was, in terms of s OE 1(3) of the Income Tax Act 1994 and the Income Tax Act 2004, deemed not to be resident in New Zealand for tax purposes. But, the Commissioner says, throughout each of those tax years Mr Diamond had a permanent place of abode in New Zealand. Mr Diamond was therefore, in terms of the overriding effect of ss OE 1(1) of those Acts, resident in New Zealand for tax purposes in those years.

[4] The dispute between Mr Diamond and the Commissioner has been considered by Judge Sinclair in the Taxation Review Authority. In a judgment of 5 December 2013 the Authority upheld the Commissioner's approach.[1]

[5] Mr Diamond now appeals that decision.

[6] Mr Diamond has never lived at 24 Waikato Esplanade, the address the Commissioner says was his permanent place of abode in New Zealand. For that, and other reasons, Mr Diamond says 24 Waikato Esplanade was not and, as a matter of law could not have been, a permanent place of abode he had in New Zealand in the relevant tax years.

[7] The principal issue raised by this appeal is whether the Authority's approach to the meaning of a permanent place of abode in New Zealand is correct.

[8] The Authority also upheld the Commissioner's assertion that, by saying he was not resident in New Zealand for tax purposes during the relevant tax years, Mr Diamond adopted an unacceptable tax position. The second issue raised by this appeal is whether that decision is correct.

Facts

[9] Mr Diamond was born in New Zealand in 1960 and is a New Zealand citizen.

[10] From some time in 1978 until June 2003, Mr Diamond served, in New Zealand and overseas, with the New Zealand Army. Mr Diamond retired from the New Zealand army in June 2003. Following his retirement, Mr Diamond left

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1 *Diamond v Commissioner of Inland Revenue* [2013] NZTRA 10, 5 December 2013.

New Zealand. Thereafter, Mr Diamond worked in Papua New Guinea as a security consultant with AusAid. Between July and October 2004 Mr Diamond holidayed and worked in Queensland. From October 2004 until some time in 2012 Mr Diamond worked as a security guard in Iraq, employed by a United States corporation – DynCorp. More recently, Mr Diamond has lived in Australia, at Mt Isa.

[11] Mr Diamond, who the Authority assessed as a credible witness, said his intention in June 2003 was to leave New Zealand permanently, and that he had no intention of returning.

[12] Mr Diamond married his wife, Wendy Diamond, in 1981. Mrs Diamond was also in the army. For many years the Diamonds lived in army accommodation. Mr and Mrs Diamond separated in August 1994. At that point, Mrs Diamond moved with their three children (she was pregnant with their fourth at the time) to Ngaruawahia.

[13] Notwithstanding their separation, Mr and Mrs Diamond remained, and still remain, in what would appear to be reasonably close contact with each other. Mr Diamond has provided child support to Mrs Diamond, directly and indirectly. Mrs Diamond had direct access to Mr Diamond's United States bank account, into which his Iraq income was paid. Their children from time to time also had access to that account for living and holiday expenses. At the same time, Mrs Diamond managed Mr Diamond's financial affairs in New Zealand. She held an Enduring Power of Attorney in relation to his personal care and welfare. She was his trusted person of contact for the purposes of his employment as a security guard in Iraq. In the event of Mr Diamond's death in Iraq, it was to Mrs Diamond in New Zealand that his body would have been returned. In Mr Diamond's words, his body would have been sent "back home".

[14] More generally, Mrs Diamond's home address, 79 Waingaro Road, Ngaruawahia was Mr Diamond's contact address in New Zealand for many purposes, including passenger arrival and departure cards, pay slips from his employer in Iraq and other documentation.

[15] In 2006, Mr Diamond formed a relationship with a New Zealand woman whom he met at the Gallipoli commemorations that year. The relationship did not last, but a child was born. Mrs Diamond also arranged for maintenance payments to be made for that child from Mr Diamond's United States bank account.

[16] During the tax years in question, Mr Diamond visited New Zealand every five or six months. During those visits he would stay with Mrs Diamond for between two to five days to see his children. He would also visit his mother, other family and friends.

[17] Mr and Mrs Diamond were not legally separated, and their marriage was not dissolved and relationship property matters addressed, until March 2009. At that time, and reflecting an ongoing relationship, Mr Diamond executed a will appointing his former wife, Mrs Diamond, as his sole executor and trustee.

[18] The accepted factual position, as recorded by the Authority, was that all (or certainly by far the largest portion) of Mr Diamond's income during these years was spent in New Zealand, either to support his wife in providing for their children's living expenses, or to discharge mortgage obligations on the various properties he owned during this period.

[19] Mr Diamond's ownership of 24 Waikato Esplanade came about in the following manner:

(a) When Mrs Diamond moved to Ngaruawahia, she bought a house at 14 Kent Street. That house proved to be too small and, in 1996, she sold it and purchased 24 Waikato Esplanade. Mr Diamond's name was put on the title, as well as Mrs Diamond's, because the bank would not lend to her alone. Instead of paying child support, Mr Diamond paid half the mortgage. Mrs Diamond lived at 24 Waikato Esplanade with their four children. Mr Diamond did not.

(b) In 1998, Mrs Diamond moved to 79 Waingaro Road. Around that time, Mr Diamond would appear to have cashed up some army

> superannuation. Mrs Diamond contributed her share of that superannuation to purchase 79 Waingaro Road. To fund the balance, Mr Diamond bought her share in 24 Waikato Esplanade. From that time Mr Diamond has beneficially owned 24 Waikato Esplanade on his own, and met all mortgage and other expenses relating to that property. Mr Diamond rents out 24 Waikato Esplanade. For him, it is an investment property.

[20] Mr Diamond owns other real property in New Zealand, including: two blocks of inherited, communally owned, Māori land; two blocks of bare land; and one-half of a property at 2 Tidd Drive, Raglan (Mrs Diamond owns the other half).

[21] A number of these properties were at times registered in Mr and Mrs Diamond's joint names, notwithstanding clear acknowledgements as to beneficial ownership. In 2000 Mrs Diamond formed a partnership with Mr Diamond to own rental properties. In 2005 Mrs Diamond incorporated a company, Wee Gem Ltd, to own those properties. Wee Gem is the legal owner of 24 Waikato Esplanade and 2 Tidd Drive. Mr and Mrs Diamond are, however, clear as to beneficial ownership. That is, Mr Diamond beneficially owns 24 Waikato Esplanade, and a half of 2 Tidd Drive.

Nature of this appeal

[22] This is an appeal by way of rehearing. As the Supreme Court held in *Austin, Nichols*:[2]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

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2 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141 at [16].

The challenged decision

[23] Very much in reliance on the Authority case *Q55*,[3] Judge Sinclair approached the "permanent abode" question on the basis that two steps were involved in the analysis.

[24] Judge Sinclair first considered whether Mr Diamond had an available dwelling in New Zealand in the relevant tax years. Without difficulty, she concluded (that he had.[4] Although 24 Waikato Esplanade was rented out, as beneficial owner Mr Diamond controlled the disposition of that property. He could, the Authority concluded, have made it available to himself to live in.

[25] The Judge then assessed Mr Diamond's other connections with New Zealand. She did so without articulating the relationship between Mr Diamond having an available dwelling in New Zealand, and those connections, in terms of the "permanent place of abode in New Zealand" test. As Mr Lemmon submitted, in supporting her approach, the purpose of that assessment was tp determine whether, given those connections, it was sufficiently likely during those years that Mr Diamond would return to New Zealand and live in that house, so as to qualify it as a permanent place of abode.

[26] She noted:

(a) Mr Diamond's work had, over the relevant period, necessarily involved his absence from New Zealand: while he had no certainty of employment, his contracts were in fact rolled over from year to year during the relevant period.

(b) There was no contemporaneous documentation supporting his stated intention to leave New Zealand permanently in 2003. The length of time he had spent out of New Zealand supported that proposition, but was not determinative.

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3 Case *Q55* (1993) 15 NZTC, 5,313.

4 *Diamond v Commissioner of Inland Revenue*, above n 1, at [64].

(c) Mr Diamond had not been continuously out of New Zealand. He had returned from time to time, continued to pay child support and maintained a New Zealand relationship with Mrs Diamond. She was in effect his financial and business adviser.

[27] The Authority considered that Mr Diamond's ongoing relationship with his children, including his financial support of them, and his ongoing relationship with Mrs Diamond was "a significant factor in favour of finding that the disputed permanent place of abode remained in New Zealand in the relevant tax years".[5]

[28] Overall, the Authority concluded:

> [77] While there are some factors supporting the disputant's position I consider looking at the circumstances overall, that the disputant continued to have a strong and enduring relationship with New Zealand in the relevant tax years. He continued to have an available dwelling to return to and maintained close family and financial ties to this country. Taking into account all the matters discussed above I am of the view that the disputant had a permanent place of abode in New Zealand in the tax years ending 31 March 2004, 31 March 2005, 31 March 2006 and 31 March 2007.

[29] On the question of whether by saying he was not resident in New Zealand Mr Diamond had adopted an unacceptable tax position, the Authority acknowledged Mr Diamond's submission, that it required judgment and discernment to get the residency status issue correct. But, she concluded, the merits supporting Mr Diamond's arguments were not substantial. Neither could Mr Diamond rely on the Commissioner's public statements, that an absence of three years would generally be enough for a person to be non-resident. There was no evidence Mr Diamond knew of that statement or relied upon it.

Case on appeal

[30] The positions taken by Mr Diamond and the Commissioner in this appeal can be stated succinctly.

[31] Mr Coleman's principal submission was that for a dwelling in New Zealand to be a (otherwise non-tax resident) taxpayer's place of permanent abode, the

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5 At [72].

taxpayer in question had to have lived in that dwelling as a home before they had ceased to be otherwise resident here. It was simply not correct to approach the matter, as the Authority did, on the basis of whether or not there was a dwelling available to the taxpayer to live in New Zealand, and then assess – by reference to the taxpayer's connections to New Zealand – whether or not that available dwelling was to be characterised as a permanent place of abode. In terms of the *Q55* case, and the Authority's adoption of it, the Authority had misread what were essentially dicta of Judge Barber commenting on the possible significance of a taxpayer's connections to New Zealand when assessing residence in terms of s OE 1(1). Alternatively, if what Mr Coleman categorised as dicta of Judge Barber in *Q55* were part of his decision, then to that extent *Q55* was wrong.

[32] Mr Coleman's submission was that the two step approach had led the Authority astray: Judge Sinclair's inquiry was directed at whether or not it could be said that New Zealand was Mr Diamond's "home" when what she was required to determined was whether Mr Diamond had a permanent place of abode, a home, in New Zealand.

[33] In supporting the Authority's decision, Mr Lemmon for the Commissioner also relied very much on the approach set out in *Q55*. Mr Lemmon agreed that the Judge's observations were, given the facts of that case, dicta, but he argued the two-step approach was nevertheless the correct approach to take in circumstances such as those involving Mr Diamond. The Authority had correctly applied that two-step approach. 24 Waikato Esplanade was for Mr Diamond in the relevant tax year a permanent place of abode because:

(a) it was available to Mr Diamond to live in; and

(b) given the connection Mr Diamond has to that house, to its locality and to New Zealand more generally, it was sufficiently likely during those years that Mr Diamond would return to New Zealand and live in that house.

[34] Mr Lemmon acknowledged that the Authority had not explicitly undertaken the second stage of that analysis but said it was implicit in her decision. Mr Lemmon also acknowledged this was the first case in which the Commissioner had taken this approach to the meaning and application of s OE 1(1).

Analysis

Overview

[35] The approach taken by the Commissioner on this appeal is based on the proposition that the case of *Q55* is authority for the two-stage approach applied by the Authority, as further explained by Mr Lemmon. I first consider whether that is, as a matter of law, correct. I conclude that it is not.

[36] I then consider whether there is any other basis for the proposition that, during the relevant tax years, Mr Diamond had a permanent place of abode in New Zealand so as to make him resident for tax purposes by reason of that fact. I conclude that there is not.

[37] I therefore allow this appeal.

Q55

[38] *Q55* involved a university professor absent from New Zealand on sabbatical leave for 368 days (21 January 1990 to 25 January 1991). The professor had a home in New Zealand which he lived in immediately before and immediately after his absence on sabbatical leave. He rented his home to tenants for the fixed period of his absence from New Zealand. That absence was always intended to be, and was in fact, a temporary one. The professor at all times intended to return to New Zealand to resume permanent residence in his home after his period of sabbatical. The professor argued, however, that he was not tax resident in New Zealand during the year in question on the basis of the permanent place of abode test – as the Commissioner said he was – because his home was not available to him during his absence.

[39] Judge Barber found, in the circumstances, that the professor's rented property remained, for him, "a permanent place of abode" in New Zealand. The Judge considered the decision of Beattie J in *Geothermal Energy New Zealand Ltd v Commissioner of Inland Revenue*,[6] his own decisions in *H97* and *J98*,[7] and the decision of the Federal Court of Australia in *Federal Commissioner of Taxation v Applegate*.[8] The Judge referred to these observations of Fisher J in *Applegate*:[9]

> It follows that it is in my view proper to pay greater regard to the nature and quality of the use which a taxpayer makes of a particular place of abode for the purpose of determining whether it qualifies as his permanent place of abode. His intention with respect to the duration of his residence is just one of the factors which is relevant. …
>
> Material factors for the consideration will be the continuity or otherwise of the taxpayer's presence, the duration of his presence and the durability of his association with a particular place.

[40] It was, the Judge concluded, a question of fact as to whether or not a taxpayer had a permanent place of abode in New Zealand: of necessity, s 241(1) of the Income Tax Act 1976 (the then equivalent of s OE 1) was not referring to a taxpayer actually abiding or dwelling in an abode in New Zealand, but to a dwelling which was a permanent place of abode, notwithstanding the fact that the taxpayer was not living there at the relevant times. The Judge cited with approval the following factors as relevant in determining whether a taxpayer had a permanent place of abode in New Zealand:

(a) reasons for going overseas;

(b) whether the objector established a permanent place of abode out of New Zealand;

(c) arrangements made by the objector concerning his home in New Zealand;

(d) employment;

(e) financial ties with New Zealand;

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

7 Case *H97* (1986) 8 NZTC 644 (TRA); Case *J98* (1987) 9 NZTC 1,555 (TRA).

8 *Federal Commissioner of Taxation v Applegate* (1979) 27 ALR 114 (FCA).

9 At 128.

(f) other ties with New Zealand; and

(g) length of time out of New Zealand.

[41] The Judge concluded:[10]

> In this case the objector and his wife had their permanent place of abode at their home in the New Zealand city prior to the objector's sabbatical leave. Their letting of that home for the period of their absence overseas, and for an earlier period, did not abrogate from that home remaining their permanent place of abode in all the circumstances.

[42] It is in the context of that factual matrix that I think the observations of the Judge, on which the Authority and the Commissioner place particular reliance, are to be understood. The Judge said:[11]

> I consider that "has a permanent place of abode" does not require that a dwelling be always vacant and available for the taxpayer to live in; but that there is a dwelling in New Zealand which will be available to the taxpayer as a home when, and if, that taxpayer needs it, and that the taxpayer intends to retain that connection on a durable basis, with that locality.

[43] In my view, and as Mr Coleman for Mr Diamond submitted, in the context of the statutory wording of s OE 1(1), those observations proceed on the factual basis that in *Q55* the objector had a permanent place of abode in New Zealand from which he was temporarily absent. That permanent place of abode was not available to him at all times when he was overseas, given that it was rented on a short term fixed tenancy. But it remained his permanent place of abode because of all the facts applying, and in particular that the taxpayer had lived there prior to his temporary departure overseas on sabbatical leave, and intended to and did in fact return there immediately after that period of leave expired. Moreover, during that one year's absence, the taxpayer retained a wide range of connections with New Zealand.

[44] In my view, *Q55* is therefore properly authority for the proposition that a person's permanent place of abode in New Zealand will not cease to have that character merely because, whilst the person is outside New Zealand for a period greater than the statutory deeming period, that dwelling is rented out. The dwelling

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10 Case *Q55*, above n 3, at 5,320.
11 At 5,319.

can maintain its character as the person's permanent place of abode, dependent on the particular fact circumstances, notwithstanding that fact.

[45] I therefore find that *Q55* is not authority for the approach taken by the Commissioner in Mr Diamond's case.

[46] In many ways that finding is sufficient to dispose of this appeal. Mr Lemmon responsibly acknowledged that the Commissioner's case did depend upon her interpretation and application of *Q55*. In that context, moreover, I note that nowhere in *Q55* is it suggested that a permanent place of abode in New Zealand may be a house that the taxpayer has never lived in, and that the application of the test involves some assessment of the likelihood of the taxpayer returning to New Zealand and taking up residence in that house.

[47] For the sake of completeness, however, I will consider whether there is any other basis upon which 24 Waikato Esplanade might be considered to be a permanent place of abode in New Zealand which Mr Diamond had.

24 Waikato Esplanade – a permanent place of abode?

[48] Whether 24 Waikato Esplanade was, in the tax years in question, a permanent place of abode in New Zealand for Mr Diamond is to be determined by applying the facts on the basis of the correct interpretation of s OE 1(1).

[49] Section 5(1) of the Interpretation Act 1999 (the Interpretation Act) states:

> The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[50] In *Commerce Commission v Fonterra Co-Operative Group Ltd*, the Supreme Court stated:[12]

> … Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative

[12] *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnote omitted).

> context. Of relevance too may be the social, commercial or other objective of the enactment.

[51] In *Terminals (NZ) Ltd v Comptroller of Customs*, the Supreme Court confirmed that taxation statutes are to be construed purposively in the same manner as any other statute.[13]

[52] Sub-part E of the Income Tax Act 1994, and Sub-part OE of the Income Tax Act 2004, are each entitled "Source of Income and residence". Section OE 1 appears in identical form in each of them. It provides, as relevant here:

> **Determination of residence of person other than a company**
>
> (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.
>
> (2) Where a person other than a company is personally present in New Zealand for a period or periods exceeding in the aggregate 183 days in any period of 12 months, that person shall be deemed to be resident in New Zealand from the first day within that period of 12 months on which that person was personally present in New Zealand.
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> (3) Where a person other than a company is resident in New Zealand and is personally absent from New Zealand for a period or periods exceeding in aggregate 325 days in any period of 12 months, that person shall be deemed not to be resident in New Zealand from the first day within that period of 12 months on which that person was personally absent from New Zealand and, subject to this section, thereafter.
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> …

[53] In other words for tax purposes:

(a) a person is *deemed* to be resident (for any given 12 month period) if personally present for more than 183 days during that period (s OE 1(2));

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[13] *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [39].

(b) a person is *deemed* non-tax resident (for any given 12 month period) if personally absent for more than 325 days during that period (s OE 1(3));

(c) a person present 40 days or more (365-325), but only for 183 days or less, is not subject to any deeming as to their tax residence status; and

(d) a person is in all circumstances tax resident in New Zealand if they have a permanent place of abode in New Zealand. A person may have a permanent place of abode in New Zealand at the same time as having one outside New Zealand (s OE1(1)).

[54] To determine the correct interpretation of the phrase "a permanent place of abode in New Zealand" I first consider its ordinary meaning. I then assess the significance of legislative purpose, and broader context.

[55] Considering first the words used:

- *Permanent* – something is *permanent* where it is "continuing or designed to continue indefinitely without change". *Permanent* is the opposite of temporary.[14]

- *Abode* – as a noun *abode* is "a habitual residence; a house or home".[15] The verb *abode* is the past tense of the verb *abide*. *Abide* means, here, to stay or remain, to reside or dwell.[16]

- *Place* - the word *place* can itself mean a residence or a dwelling.[17] It can also mean a particular portion of space. That latter sense is to be preferred here, given the use of the indefinite article, *a* place.

- *In* - the word "*in*" can mean many things. Here it is used to express position, that is inclusion within limits of space, time or circumstance:

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14 *Shorter Oxford English Dictionary*: (5th ed, Oxford University Press, Oxford, 2002).
15 *Shorter Oxford English Dictionary*, above n 13.
16 As opposed to *accept* or in *accordance with*.
17 As in *our place.*

> in particular, inclusion within the geographical and political entity, the country, of New Zealand.

[56] On that basis, and considering the phrase as a whole, in my view the ordinary meaning of "to have a permanent place of abode in New Zealand" is "to have a home in New Zealand". The significance of an appropriate degree of permanence is emphasised by the meaning of the noun "abode" being itself that of an habitual residence, a house or home.

[57] Given that Mr Diamond had and has still not ever lived at 24 Waikato Esplanade, and for so long as he has owned that property himself has rented it out to others, including during the relevant tax years, 24 Waikato Esplanade is not, in the ordinary sense of the meaning of those words, a permanent place of abode Mr Diamond has in New Zealand. That is, for Mr Diamond, 24 Waikato Esplanade is not a dwelling, or a home, in New Zealand. On the basis of that interpretation I would also allow Mr Diamond's appeal.

[58] Notwithstanding, and in terms of *Commerce Commission v Fonterra Co-Operative Group Ltd*, I now need to cross-check that plain meaning against purpose, having regard to both the immediate and general legislative context, and possibly, the social, commercial or other objective of the Income Tax Act.[18]

[59] Up until 1 October 1980 s 241(1) of the Income Tax Act 1976, (the then equivalent of s OE(1)), simply provided:

> A person other than a company shall be deemed to be resident in New Zealand within the meaning of this part of the Act if his home is in New Zealand.

[60] Section 241(1) was considered by the High Court in *Geothermal Energy New Zealand Ltd v Commissioner of Inland Revenue*.[19] The case concerned whether New Zealand employees of Geothermal Energy, who were located overseas for periods of more than 15 months, continued to have their homes in New Zealand. The case was decided on a procedural point. The judgment also reflects difficulties Inland

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[18] *Commerce Commission v Fonterra*, above n 12.

[19] *Geothermal Energy New Zealand Ltd v Commissioner of Inland Revenue,* above n 6.

Revenue had in applying the residence test, and inconsistencies in the approach to that exercise it had taken. But Beattie J did nevertheless make the following declarations as to the meaning of the interpretation of s 241(1):[20]

> (a) Section 241 of the Income Tax Act 1976 is exhaustive in its definition whether applied to a person or a company.
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> (b) The essence of the "home" criterion as used in s 241(1) is the centre of gravity for the time being of the life of the person concerned. It will usually be where his wife and children reside. If he has no such family, or is separated, divorced or single, then the place where the normal course of his life occurs will apply – that is, the centre of his interests and affairs.
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> (c) Though "home" needs some degree of permanency, it does not connote "permanent home" in the sense making it similar to the concept of "domicile". The distinction should also be drawn between the place that has become the centre of gravity and that which is merely used for some ephemeral or transient purpose.
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> (d) "Home" under s 241 should not be regarded as synonymous with the ownership of any interest in a house or property. It should in my opinion be construed qualitatively.

[61] There is no support in my view in those declarations for the proposition that, in these circumstances, 24 Waikato Esplanade could be regarded as Mr Diamond's home.

[62] The Income Tax Amendment Act 1980 amended s 241(1) and replaced it with the following provision:

> (1) For the purposes of this section, the term 'continuous period' means an unbroken period of days and includes a continuous period which commenced before the 1st day of April 1980:
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> Provided that –
>
> (a) Two or more such periods are to be treated as a continuous period if there are not more than 28 intervening days between such periods and those intervening days do not exceed in the aggregate 56 days in the income year.
>
> (b) Where 2 or more such periods are treated as a continuous period pursuant to paragraph (a) of this proviso, any intervening days between those periods are to be treated as part of that continuous period.

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[20] At 346.

> (1A) Subject to this section, a person, other than a company, shall be deemed to be resident in New Zealand within the meaning of this Part of the Act if his permanent place of abode is in New Zealand.
>
> (1B) Where a person is personally present in New Zealand for a continuous period of not less than 365 days, he shall be deemed to be resident in New Zealand at all times during that continuous period:
>
> Provided that where, at the request of that person, the Commissioner determines that that person had a permanent place of abode outside New Zealand at all times during that continuous period, this subsection shall not apply to that person.
>
> (1C) Where a person is absent from New Zealand for a continuous period of not less than 365 days, he shall be deemed not to be resident in New Zealand at all times during that continuous period:
>
> Provided that where, at the request of that person, the Commissioner determines that that person had a permanent place of abode in New Zealand at all times during that period of absence, this subsection shall not apply to that person.

[63] As can be seen, a form of bright line test (reflected by the references in ss (1B) and (1C) to a continuous period of not less than 365 days) was introduced, and the "permanent place of abode in New Zealand test" replaced the reference to "home".

[64] Further amendments made to the Income Tax Act by the Income Tax Amendment Act 1988, in particular as regards the construction of the bright line tests and giving statutory priority to the "permanent place of abode test", brought the section largely into line with the current provision. The permanent place of abode test remains, however, in the form it was when introduced in 1980.

[65] The enactment of the new s 241(1) in 1980 is said to have been a reaction to a degree of uncertainty created by the declarations made in *Geothermal Energy.*

[66] Commenting, the Tax Planning Report[21] suggests that in 1980 the legislature intended to adopt the Australian permanent place of abode test as articulated in *Federal Commissioner of Taxation v Applegate*.[22]

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21 *New Zealand Tax Planning Report* (5 October 1980).

22 *Federal Commissioner of Taxation v Applegate* 79 ATC 4307, (1979) 38 FLR 1.

[67] Given those observations, and the fact that that test replaced the use of the word "home", attention needs to be paid to the extent to which that test may be seen as varying the ordinary meaning of the word "home" which I have identified as essentially the ordinary meaning of the words in that test.

[68] It is to be noted that, in Australia, the permanent place of abode test is a negative test: there, one is a tax resident of Australia if one's domicile is in Australia, unless one has a permanent place of abode outside Australia. The fact that by definition in Australia "a permanent place of abode" is something different to domicile requires a particular interpretation of the word "permanent". As Fisher J observed in *Applegate*:[23]

> The section is difficult to apply particularly if the emphasis is on subjective intention. It is made doubly difficult by the indiscriminate use of the differing concepts of domicile, residence, permanent place of abode and usual place of abode. Moreover, the concept of permanence is used in a context in which it does not, and could not, bear its primary meaning of "everlasting". It would amount to a contradiction in terms to suggest that an independent person could be domiciled in Australia but with his permanent residence outside Australia, if permanent bears its ordinary meaning.

[69] The Judge went on to conclude the meaning of permanent was far from intractable, and very much took its colour from its context.[24]

[70] On that basis, and more generally – particularly on the basis this case was argued before me – it is not clear to me how much I can, in fact, take from *Applegate*.

[71] However, I find the following observations of Fisher J helpful in the context of this case:[25]

> 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 denotes 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

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23 At 127.
24 At 127.
25 At 128.

> presence, the duration of his presence and the durability of his association with the particular place.

[72] To the extent, therefore, that the use of the phrase "a permanent place of abode in New Zealand" can be seen as altering the meaning of the phrase "a home in New Zealand", any alteration does not, in my view, support the approach taken by the Commissioner in this case.

[73] The statutory test has also been considered in a number of other decisions by the Tax Authority.[26] I do not think it necessary to go into those decisions in detail. By my assessment, none of them support the proposition that, on the facts of this case, 24 Waikato Esplanade can be regarded as a permanent place of abode Mr Diamond had in New Zealand in the relevant tax year.

[74] Here, and as Mr Coleman submitted, 24 Waikato Esplanade has never been Mr Diamond's home; it was not intended by him to be his home; it has never been lived in by him; the use he has made of the property has consistently been one of investment, and that use has continued for nearly 20 years.

[75] Mr Diamond did have other, and ongoing, personal connections with New Zealand. But in the absence of 24 Waikato Esplanade having any of the characteristics of a permanent place of abode for Mr Diamond, those connections do not alter the conclusion I have reached.

[76] It is not necessary for me to consider the "unacceptable position" question. Having said that, given Mr Lemmon's acknowledgement that this is the first time the Commissioner has approached the application of s OE1(1) in this way, and the inherent complexity of these issues, if that had been necessary I would have had little difficulty in concluding Mr Diamond had not taken an unacceptable position.

[77] Mr Diamond's appeal is allowed. The question of costs is reserved. I see no reason why costs should not follow the event in the ordinary case. If the parties are

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[26] Case *F139* (1984) 6 NZTC 60,245; Case *F138* (1984) 6 NZTC 60,273; Case *U17* (1999) 19 NZTC 9,174.

unable to agree, brief submissions may be filed no later than three weeks from the date of this judgment.

“Clifford J”

Solicitors:
Tompkins Wake, Hamilton for the appellant.
Crown Law, Wellington for the respondent.