IN THE COURT OF APPEAL OF NEW ZEALAND

CA830/2013
[2015] NZCA 253

BETWEEN	COMMISSIONER OF INLAND REVENUE Appellant
AND	TRUSTPOWER LIMITED Respondent

Hearing:	23, 24 and 25 March 2015
Court:	Ellen France P, White and Miller JJ
Counsel:	D H McLellan QC, M J Andrews and C M Kern for Appellant G J Harley, S A Armstrong, A F Y Church and V V Kumar for Respondent
Judgment:	19 June 2015 at 10.00 am

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The appellant's re-assessments disallowing the respondent's deductions claimed for the 2006, 2007 and 2008 tax years are confirmed.**

C **By consent the allocation of particular expenditure as capital rather than revenue after the dates the respondent committed to applying for the resource consents for the four projects is remitted to the High Court for determination.**

D **The respondent is to pay the costs of the appellant for a complex appeal on a band B basis. We certify for second counsel.**

E **The order for costs made against the appellant in the High Court is quashed and the respondent is ordered to pay the appellant's costs in that Court.**

REASONS OF THE COURT

(Given by White J)

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Introduction

[1] The issue on this appeal is whether certain expenditure totalling approximately $17.7 million incurred by the respondent, Trustpower Ltd (Trustpower), in the 2006, 2007 and 2008 tax years is deductible on revenue account

in the year in which it was incurred as the High Court held,[1] or whether the expenditure should be on capital account and depreciated later over time as the appellant, the Commissioner of Inland Revenue (the Commissioner), contends.

[2] Trustpower is a generator and retailer of electricity. It generates (by hydro or wind) about half of the electricity it sells and buys the rest on the electricity market from other generators. Trustpower's business income is derived from its retail sales.

[3] The disputed expenditure in the three tax years was incurred by Trustpower in taking preliminary steps and then applying for and obtaining various consents under the Resource Management Act 1991 (the RMA) in respect of four possible future new generation projects in the South Island: two hydro (Arnold and Wairau) and two wind farms (Kaiwera Downs and Mahinerangi).

[4] The resource consents were land use consents, water permits and discharge permits. Apart from some of the land use consents, which were for an unlimited duration, the consents were for fixed periods, commencing from 2008 to 2011 and being generally 10, 15 or 35 years.

[5] The four projects were part of Trustpower's development "pipeline" which contains approximately 200 projects at any time. The purpose of the pipeline is to provide Trustpower with information about the viability, feasibility and costs of building new generation capacity. There are always more projects in the pipeline than Trustpower has the finances or resource capability to construct or are needed for its business, but the information provides Trustpower with a suite of options when it comes to decide whether to build a new generation project or to buy electricity on the market (Trustpower's "build or buy" decision).

[6] Trustpower's case, which was accepted by Andrews J in the High Court,[2] is that the expenditure on the resource consents was incurred as part of its feasibility analysis of the four projects and before it had made its build or buy decision and committed to the construction of any of them. The resource consents were also not

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1 *Trustpower Ltd v Commissioner of Inland Revenue* [2013] NZHC 2970, [2014] 2 NZLR 502 (High Court judgment).

2 At [94], [102], [116], [133] and [140].

"stand-alone assets" separate from the projects to which they related.[3] On this basis Trustpower submitted and the High Court accepted the expenditure was "feasibility expenditure" and deductible on revenue account because it was incurred in the course of deriving income from the generation and sale of electricity.[4] Trustpower did not seek to apportion its expenditure between capital and revenue.[5] As Mr Harley said, it was "all or nothing".

[7] The Commissioner's case, which was rejected in the High Court but is pursued on appeal, is that the resource consents were themselves intangible capital assets so that from the time Trustpower was committed to applying for them the expenditure incurred in doing so was capital expenditure. The principal submissions for the Commissioner are:

(a) The resource consents (with the exception of land use consents of unlimited duration) were "depreciable intangible property" under the relevant provisions of sub-pt EE of the Income Tax Act 2004 (the ITA) so that the expenditure incurred by Trustpower in respect of those consents was on capital account.

(b) In any event the expenditure should be characterised as being of "a capital nature" and therefore subject to the "capital limitation" in s DA 2(1) of the ITA.

(c) The expenditure became expenditure on capital account when Trustpower decided to engage consultants to undertake the work required to produce assessments of environmental effects (AEEs) before applying for the resource consents.

[8] In addition to responding to these submissions, Trustpower has challenged the Commissioner's reliance on the provisions of the ITA relating to "depreciable intangible property". Trustpower submits that these provisions are inapplicable

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3 At [80]–[97].
4 At [97], [116] and [141].
5 Compare *Buckley & Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485 (CA) at 487–488.

when, as here, Trustpower relies on the "general permission" under s DA 1 of the ITA to deduct the expenditure on revenue account.

[9] Trustpower also objects to the Commissioner's characterisation of the expenditure as being of "a capital nature" on the ground it was contrary to the factual findings made by Andrews J based on her assessment of the unchallenged evidence from Trustpower's witnesses. Trustpower submits that when the reliability and credibility of witnesses is in issue this Court should pay deference to the findings of the High Court which had the advantage of seeing the witnesses give their evidence.[6]

[10] Similarly, Trustpower objects to the Commissioner's identification of the date when Trustpower "committed" to acquiring the resource consents on the ground that it was also contrary to Andrew J's factual findings. Trustpower's unchallenged evidence was that it did not "commit" to the resource consent applications until the time of Board approval.

[11] Finally, Trustpower supports the judgment of Andrews J on the further grounds that if, contrary to her judgment,[7] this Court finds the resource consents were "stand-alone assets" of Trustpower, they should still be found to be revenue assets on the basis of well-established authority.[8] Andrews J erred in deciding otherwise.[9]

[12] There is no dispute that the onus was on Trustpower as the taxpayer to establish that the Commissioner's assessments were wrong and by how much they were wrong.[10]

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[6] Reference was made to *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC) at 150; *Rae v International Insurance Brokers (Nelson Marlborough Ltd)* [1998] 3 NZLR 190 (CA) at 197; and *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21, [2014] 4 All ER 418 (PC).

[7] High Court judgment, above n 1, at [92]–[97].

[8] *BP Australia Ltd v Commissioner of Taxation for the Commonwealth of Australia* [1966] AC 224 (PC).

[9] High Court judgment, above n 1, at [109]–[110] and [124]–[125].

[10] Tax Administration Act 1994, s 149A; *Buckley & Young Ltd v Commissioner of Inland Revenue*, above n 5, at 498; and *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115; [2009] 2 NZLR 289 at [171].

[13] In addressing the issues raised by the competing contentions for the parties, we propose to summarise the relevant provisions of the ITA and deal first with the argument about the application of the provisions in sub-pt EE relating to "depreciable property". We then turn to the authorities relating to the distinction between expenditure on revenue and capital account, the characterisation and classification of the disputed expenditure in this case, and the submissions relating to the High Court factual findings. It is convenient to deal with the judgment under appeal and the submissions for the parties in the context of addressing the issues.

The Income Tax Act 2004

Deductions

[14] In a case such as this one relating to deductions, the starting point is s DA 1 which, under the heading "General Permission", provides:

> **DA 1 General Permission**
>
> *Nexus with income*
>
> (1) A person is allowed a deduction for an amount of expenditure or loss (including an amount of depreciation loss) to the extent to which the expenditure or loss is–
>
> (a) incurred by them in deriving–
>
> (i) their assessable income; or
>
> (ii) their excluded income; or
>
> (iii) a combination of their assessable income and excluded income; or
>
> (b) incurred by them in the course of carrying on a business for the purpose of deriving–
>
> (i) their assessable income; or
>
> (ii) their excluded income; or
>
> (iii) a combination of their assessable income and excluded income.
>
> *General permission*
>
> (2) Subsection (1) is called the general permission.

[15] For present purposes the following features of this provision are immediately noticeable:

(a) A deduction is "allowed" for an amount of expenditure to the extent to which the expenditure is "incurred" in "deriving … assessable income" or in "the course of carrying on a business for the purpose of deriving … assessable income". As the subheading "*Nexus with income*" confirms,[11] there must be an identifiable and real connection or sufficient relationship between the incurring of the expenditure and the deriving of income before a deduction is allowed.[12]

(b) A deduction may also be allowed for an amount of loss incurred in deriving income and "loss" is described parenthetically as "including an amount of depreciation loss". There is no express requirement in this provision that an amount of "depreciation loss" must be claimed as a deduction.

[16] The next principal provision is s DA 2 which, under the heading "General limitations", contains a series of further provisions denying deductions under s DA 1. For present purposes, the relevant provision is s DA 2(1) which provides:

> **DA 2 General limitations**
>
> *Capital limitation*
>
> (1) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is of a capital nature. This rule is called the capital limitation.

[17] The juxtaposition of ss DA 1(1) and DA 2(1) reflects in statutory form the fundamental legal distinction between revenue (income) and capital which underlies the ITA and which has been the subject over the years of much litigation between taxpayers and the Commissioner. Characterisation of expenditure or loss as being of a capital nature will prevent a deduction from being allowed under s DA 2(1), but may enable the amount involved to be characterised as "depreciable property" under s EE 6, with the "depreciation loss" involved quantified under sub-pt EE and then deducted over time if the provisions of pt D are met.[13]

[18] To assist in determining whether particular expenditure is deductible under the general permission or is of a capital nature and may be deducted as a

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11 Subheadings may aid statutory interpretation; see Interpretation Act 1999, s 5(2)–(3); *Tyler v Attorney-General* [2001] 1 NZLR 211 (CA) at [24]; and *R v Mist* [2006] 3 NZLR 145 (SC) at [60] and [84].

12 *Commissioner of Inland Revenue v Banks* [1978] 2 NZLR 472 (CA) at 476; *Buckley & Young Ltd v Commissioner of Inland Revenue*, above n 5, at 487.

13 Income Tax Act 2004, s EE 1(1)(a); and David McClay and Denham Martin *New Zealand Income Tax Law and Practice* (online looseleaf ed, CCH) at [247-600].

"depreciation loss" over time, the ITA contains a series of specific provisions governing particular types of property and expenditure. In this case we are concerned with expenditure leading to the acquisition of resource consents, which are intangible, and the possible application of the specific provisions relating to "depreciable intangible property".

[19] For completeness we note we are not dealing with expenditure incurred on research or development which may be deductible under s DB 26. If we had been, it would, by virtue of s DB 27, have been necessary to consider the definitions of those expressions in the Financial Reporting Standard No 13 1995 (Accounting for Research and Development Activities).

Depreciable intangible property

[20] The preliminary question here is whether the provisions of sub-pt EE of the ITA relating to "depreciable intangible property" are applicable. The starting point is to note that, under the definition of "property" in s OB 1, "property" in sub-pt EE includes consents granted under the RMA. As Andrews J pointed out,[14] this definition was introduced to include for depreciation purposes certain consents under the RMA.[15] It was necessary for this definition to be enacted to override for tax purposes s 122(1) of the RMA which provides that "a resource consent is neither real nor personal property". While, as Andrews J recognised,[16] the provisions of the RMA are relevant to the legal nature of resource consents, they do not determine the interpretation and application of the ITA.

[21] Next we note the definition of "depreciable intangible property" in s EE 53 which provides:

> **EE 53 Meaning of depreciable intangible property**
>
> *Meaning*
>
> (1) Depreciable intangible property means the property listed in schedule 17 (Depreciable intangible property).

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14 High Court judgment, above n 1, at [64].
15 Taxation (Miscellaneous Issues) Bill 1995 (No 109-1) (explanatory note) at xv.
16 High Court judgment, above n 1, at [73].

Criteria for listing in schedule 17

(2) For property listed in schedule 17 (Depreciable intangible property), the criteria are as follows:
(a) it must be intangible; and
(b) it must have a finite useful life that can be estimated with a reasonable degree of certainty on the date of its acquisition.

Schedule 17 prevails

(3) Property that is listed in schedule 17 (Depreciable intangible property) is depreciable intangible property even if the criteria are not met.

[22] The relevant property listed in schedule 17 appears in cl 9 which provides:

> a consent granted under the Resource Management Act 1991 to do something that otherwise would contravene sections 12 to 15 of that Act (other than a consent for a reclamation), being a consent granted in or after the 1996-97 tax year

[23] The parties accept that:

(a) clause 9 includes the resource consents Trustpower ultimately obtained in respect of its four projects other than the land use consents of unlimited duration;

(b) contrary to the suggestion in the High Court judgment,[17] these consents are significant; and

(c) in terms of s EE 53, they are "depreciable intangible property".

[24] The next question is whether, as an item of "depreciable intangible property", the cl 9 resource consents are "depreciable property". This depends on s EE 6 which relevantly provides:

[17] High Court judgment, above n 1, at [74].

Meaning of depreciable property

EE 6 What is depreciable property?

Description

(1) Depreciable property is property that, in normal circumstances, might reasonably be expected to decline in value while it is used or available for use–
(a) in deriving assessable income; or
(b) in carrying on a business for the purpose of deriving assessable income.
Subsections (2) to (4) expand on this subsection.

Property: tangible

(2) …

Property: intangible

(3) An item of intangible property is depreciable property if–
(a) it is within the definition of depreciable intangible property; and
(b) it is described by subsection (1); and
(c) it is not described by section EE 7.

…

[25] In the case of intangible property, this provision will apply if the three requirements of s EE 6(3) are met. As the cl 9 resource consents are "depreciable intangible property", the first requirement is met. The land use consents of unlimited duration are not within the definition of "depreciable intangible property" because without a fixed term they cannot be "expected to decline in value" over time.

[26] Mr Harley for Trustpower submitted, however, that the cl 9 resource consents did not meet the second requirement because they were not "used or available for use" in deriving income unless and until Trustpower decided to proceed with the particular project and to build the new hydro or wind generation plant. He pointed out that the resource consents, which had fixed terms under the RMA,[18] had to be used within ten years to comply with their terms,[19] but until they were used they had

[18] Resource Management Act 1991, s 123(c)–(d).
[19] Consents lapse on the date specified in the consent unless they are given effect to or an application is made to the consent authority for an extension; Resource Management Act 1991, s 125.

no fixed life (for their value to decline) and they were not "available" because their use depended on first obtaining land access.

[27] We do not accept Mr Harley's submissions on the second requirement of s EE 6(3) which were accepted by Andrews J in the High Court.[20] Clearly, once the resource consents were granted, they were "available for use" by Trustpower. The fact that they were not being used and would not be used unless and until Trustpower decided to use them and obtained land access did not mean that they were not "available" for use. The expression "available" simply means "capable of being used".[21] Once Trustpower decided to use them and obtained land access, they would be used. Prior to that they were available for that purpose.

[28] It is important to distinguish between the characterisation of property as depreciable under s EE 6 and the separate question of the timing of the depreciation under s EE 1(2) which provides:

> (2) A person has an amount of depreciation loss for an item for an income year if–
>
> (a) the person owns an item of property, as described in sections EE 2 to EE 5; and
>
> (b) the item is depreciable property, as described in sections EE 6 to EE 8; and
>
> (c) the item is used, or is available for use by the person in the income year; and
>
> (d) the amount of depreciation loss is calculated for the person, the item, and the income year under sections EE 9 to EE 11.

[29] As Mr Harley accepted, if property is correctly characterised as depreciable under s EE 6, then expenditure incurred in obtaining that property will be able to be carried forward and depreciated in terms of s EE 1(2) when the property is used or available for use. This means, as Mr Harley also accepted, the suggestion in the High Court judgment that sub-pt EE cannot apply because Trustpower had not acquired the resource consents in the three tax years is incorrect.[22] If the consents

20 High Court judgment, above n 1, at [74].
21 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 70, definition of "available".
22 High Court judgment, above n 1, at [74].

are correctly characterised as depreciable property under s EE 6, the expenditure incurred by Trustpower in obtaining them might be carried forward and depreciated when the consents were used or available for use.

[30] Of more difficulty for the Commissioner, however, is the third requirement of s EE 6(3) because s EE 7 relevantly provides:

> **EE 7 What is not depreciable property?**
>
> The following property is not depreciable property:
>
> …
>
> (j) property for whose cost a person is allowed a deduction under a provision of this Act outside this subpart … .

[31] As this provision makes clear, if a person is allowed a deduction "under a provision of this Act outside this subpart" then the property involved will not be "depreciable property". In other words, if Trustpower is allowed a deduction for the expenditure under s DA 1 (the general permission) because it was incurred on revenue account, sub-pt EE relating to "Depreciation" will not be applicable. In our view Mr Harley is therefore right to submit that the issue whether Trustpower's expenditure should be characterised as on revenue or capital account needs to be determined first because if it is on revenue account and deductible under the general permission the provisions of sub-pt EE will simply not apply.

[32] As Mr Harley submitted, this approach to the interpretation of the third requirement of s EE 6(3) and s EE 7(j) is reinforced by the purpose and scheme of the legislation:

(a) The purpose of the enactment in 1993 of the predecessor to sub-pt EE[23] was to extend the application of the general depreciation rules to intangible property.[24] Resource consents were added to the

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23 Income Tax Act 1976, ss 107A–108L, enacted by the Income Tax Amendment Act 1993 (No 1), s 2.

24 Tax Accounting Issues Consultative Committee Report (the Valabh Committee, February 1991). The effect of the original provisions as re-enacted in the Income Tax Act 1994, sub-pt EG is described in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland* Revenue, above n 10, at [41]–[42].

definition of depreciable intangible property in 1995.[25]

(b) Other relevant provisions indicating the scheme of the legislation include s DA 3(6), which prohibits the depreciation rules from overriding either the general permission or the capital limitation, and s DA 4, which confirms that if a taxpayer is eligible to claim an amount of depreciation loss for an item of property, the capital limitation is cancelled to allow a deduction to occur because that item will necessarily be of a capital nature.

[33] Mr Harley's submission is also consistent with the Commissioner's acknowledgement that expenditure on consents obtained by a building developer where the consents relate to real property intended for sale will be revenue expenditure because they are, for that developer, effectively stock in trade. As Mr Harley pointed out, this logic requires the revenue/capital distinction to be considered before the depreciation regime.

[34] In opposing this interpretation of these provisions, Mr McLellan QC for the Commissioner submitted:

(a) The inclusion of resource consents in the sch 17 list of items which are depreciable intangible property indicates they are not items of property for which immediate deduction will be allowed but rather are property the costs relating to which must be depreciated over time. This interpretation is reinforced by s EE 53(1) which provides that depreciable intangible property "means the property listed in schedule 17" and s EE 53(3) which provides that sch 17 prevails.

(b) The purpose of s EE 7(j) is to prevent double deduction in those circumstances where the ITA allows the immediate or accelerated deduction of costs obtaining tangible or intangible property that would otherwise be depreciable. Examples include s DO 4 dealing with the situation in which deductions for expenditure on term improvements

25 Income Tax Act 1994 Amendment Act (No 4) 1995, s 70(3).

will be allowed.[26] That section specifically overrides the capital limitation although the general permission must still be satisfied. In that situation the effect of s EE 7(j) is to make it clear that no depreciation loss deduction will be allowed.

(c) This interpretation is supported by s DB 13B and statements in explanatory materials relating to the introduction of that provision in 2004. The enactment of s DB 13B, which enables a taxpayer to claim deductions for failed or withdrawn consents, would not have been necessary if expenditure on the resource consents would not otherwise be caught by the capital limitation.

[35] At the same time, however, the Commissioner accepts that s EE 7(j) would prohibit a depreciation loss deduction for property held on revenue account, when those costs could immediately be deductible under the general permission because the costs are not subject to the capital limitation. Implicit in this is acceptance by the Commissioner that the general permission still applies even though the costs relate to an item of property included in sch 17 and so identified as "depreciable intangible property". This is the reason for the Commissioner's acknowledgment relied on by Mr Harley (see [33] above) in the case of a taxpayer who acquires resource consents of the type included in sch 17 for the purpose of resale. But, as the evidence for Trustpower made clear, that was not Trustpower's purpose in the present case, and so the Commissioner says s EE 7(j) cannot apply here.

[36] There are a number of difficulties with the submissions for the Commissioner on this aspect of the appeal.

[37] First, there is nothing in sub-pt EE or the legislative material relating to the enactment of that sub-pt in 1993 to suggest that it was intended to be mandatory and to override the general provisions relating to the income/capital distinction in the ITA.[27] Indeed s DA 3(6) provides otherwise.

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[26] Other specific provisions to similar effect include s DO 6 (improvements to aquacultural business) and s DP 3 (improvements to forestry land).

[27] Para (b)(v) of the definition of "depreciable property" in s 107A of the Income Tax Act 1976 as enacted by the Income Tax Amendment Act 1993 (No 1), s 2.

[38] Second, s EE 7(j) is not limited to "specific provisions". It refers to all types of property and must operate to exclude property for which a deduction is allowed under the general permission in s DA 1. Indeed, when the general permission was enacted in 1996 as s BD 2(1) of the Income Tax Act 1994, the definition of "depreciable property" was amended to provide that depreciable property did not include property the cost of which was allowed as a deduction under the general permission.[28]

[39] Third, taking the Commissioner's acknowledgement (at [33] above) to its logical conclusion, it must be possible for the evidence to show there is another basis on which it could be demonstrated that the general permission applies and the expenditure is not on capital account. If that is the situation, then s EE 7(j) could apply.

[40] The Commissioner's response to this possibility was that, given the specifics of sch 17 and the definition of depreciable intangible property, there would need to be something exceptional to take the taxpayer out of the depreciation regime and Trustpower's case did not meet that threshold. The notion that exceptional circumstances are required is not explicit in the legislation and would, in any event, mean that consideration of the general permission would be required.

[41] Finally, the Commissioner's interpretation is not supported by s DB 13B and its explanatory materials. Section DB 13B provides:

> **DB 13B Expenses of failed or withdrawn application for resource consent**
>
> *Deduction*
>
> (1) A person who applies for the grant of a resource consent under the Resource Management Act 1991 and is refused the grant or withdraws the application is allowed a deduction for expenditure—
>
> (a) that the person incurs in relation to the application; and
>
> (b) that would have been part of the cost of a resource consent that is depreciable property if the application had been granted; and

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28 Taxation (Core Provisions) Amendment Act 1996, s 5; and sch 1, definition of "depreciable property", para (b)(v).

(c) for which the person is not allowed a deduction under another provision.

Timing of deduction

(2) The deduction is allocated to the income year in which the grant is refused or the application is withdrawn.

Link with Sub-pt DA

(3) This section overrides the capital limitation. The general permission and other general limitations still apply.

[42] The explanatory note to the introduction of s DB 13B stated:[29]

> **Patent and resource management application costs**
>
> An amendment is proposed that allows costs associated with patent and resource management consent applications to be deducted, although the applications are not granted or are withdrawn. Costs for such applications cannot currently be claimed under the general deductibility rules as they are a capital expense. Nor can they be depreciated as there is no depreciable asset. Under the proposed change, the deductible expenditure consists of those costs that would have been depreciable if a patent or resource management consent had been granted.

[43] The Commentary on the Bill stated:[30]

> Patents and certain consents issued under the [RMA] are depreciable intangible property. To the extent expenditure incurred in applying for a patent or resource management consent results in an application being granted, the costs must be capitalised and depreciated. However, if an application is unsuccessful or is withdrawn, any costs incurred up to that point are not depreciable as there is no depreciable asset. Nor can this expenditure be expensed under the general deductibility rules because it is capital in nature.

[44] The purpose of the enactment of s DB 13B in 2004 was, as the explanatory materials indicate, to enable patent and resource management application costs to be deducted even although the applications were not granted or were withdrawn. In other words, as the Commissioner submitted, the purpose of s DB 13B was to prevent "black hole" expenditure by making what would otherwise be capital costs deductible.

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29 Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions) Bill 2004 (No 110-1) (explanatory note) at 5.

30 Policy Advice Division "Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions) Bill 2004, Commentary on the Bill" (Inland Revenue, Wellington, 2004) at 9.

[45] The 2005 statements in the explanatory note and the Commentary on the Bill do not address the enactment of sub-pt EE. They were no doubt the views of the Commissioner, who has responsibility for drafting the ITA, in 2005, but they could not retrospectively assist in the interpretation of the 1994 legislation if, as we have found, they were mistaken.[31]

[46] As Andrews J pointed out,[32] s DB 13B provides that resource consents *may* be capitalised; it does not provide that they *should* be.

[47] Mr McLennan acknowledged that this is not a case for reading words into s DB 13B, let alone sub-pt EE, to implement the statements in the legislative materials.[33] The Commissioner did not propose any wording to achieve that purpose. If that is the Commissioner's intention, it will be necessary for Parliament to amend the ITA in order to implement it.

[48] In the end Mr McLellan accepted that he could not take this argument any further.

[49] In our view the effect of s EE 7(j) is to exclude from the depreciation regime expenditure in respect of which a deduction is allowed under s DA 1. This means that the second principal issue relating to the characterisation of the expenditure in the context of the principles relating to the revenue/capital distinction needs to be considered first because if the expenditure is on revenue account it will be deductible under s DA 1.

[50] In reaching this conclusion, however, we recognise that the provisions of sub-pt EE relating to depreciable intangible property remain part of the relevant statutory background. The fact that Trustpower might have treated the expenditure on capital account and claimed depreciation is not irrelevant.

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31 *Tautau v Ministry of Transport* [1991] 2 NZLR 204 (HC) at 212.
32 High Court judgment, above n 1, at [76].
33 *Northern Milk Vendors Assoc Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 538; and Ross Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 220–221.

The income/capital distinction

General principles

[51] The correct approach to the distinction between income and capital is well-established by appellate authority in New Zealand, Australia and England. As the established approach was not challenged by the parties, we are able to summarise it relatively briefly. In issue here is the application of this approach to the facts of this case and the Commissioner's challenge to the ascertainment of those facts by the High Court.

[52] The starting point is invariably the classic 1946 judgment of Dixon J in *Hallstroms Pty Ltd v Federal Commissioner of Taxation* where he made two statements of general principle that have been followed ever since.[34] The first statement is:[35]

> … the contrast between the two forms of expenditure corresponds to the distinction between the acquisition of the means of production and the use of them; between establishing or extending a business organization and carrying on the business; between the implements employed in work and the regular performance of the work in which they are employed; between an enterprise itself and the sustained effort of those engaged in it.

[53] The second statement, which was referred to by Andrews J,[36] is:[37]

> What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process.

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34 *Hallstroms Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 (HCA).

35 At 647: followed in *Regent Oil Co Ltd v Strick (Inspector of Taxes)* [1966] AC 295 (HL) at 329; *Mount Isa Mines Ltd v Federal Commissioner of Taxation* (1992) 176 CLR 141 (HCA) at 147.

36 High Court judgment, above n 1, at [47] and [139].

37 At 648: followed in *BP Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia*, above n 8, at 264; *Regent Oil Co Ltd v Strick (Inspector of Taxes)*, above n 35, at 348; *Commissioners of Inland Revenue v Carron Company* (1968) 45 TC 18 (HL) at 70; *Federal Commissioner of Taxation v South Australian Battery Makers Pty Ltd* (1978) 140 CLR 645 (HCA) at 659; *Buckley & Young Ltd v Commissioner of Inland Revenue*, above n 5, at 488; *Federal Commissioner of Taxation v Foxwood (Tolga) Pty Ltd* (1981) 147 CLR 278 (HCA) at 293; *Commissioner of Inland Revenue v McKenzies (NZ) Ltd* [1988] 2 NZLR 736 (CA) at 740; *Commissioner of Inland Revenue v Wattie* [1999] 1 NZLR 529 (PC) at 536; *Birkdale Service Station Ltd v Commissioner of Inland Revenue* [2001] 1 NZLR 293 (CA) at [32]; *Commissioner of Taxation v Citylink Melbourne Limited* (2006) 228 ALR 301 (HCA) at [25].

[54] *Hallstroms* concerned expenditure incurred in successfully opposing a competitor's patent. Dixon J, dissenting with Starke J, concluded that the expenditure was of a capital rather than a revenue nature, essentially because it was:[38]

> … concerned with the reform of or the more effective establishment of the organization by which income will be produced (the profit-yielding subject) and not with the means whereby that organization will be used for that purpose.

While the majority (Latham CJ, McTiernan and Williams JJ) decided otherwise, it is Dixon J's judgment with its apposite articulation of the general principle that has had lasting influence.

[55] The crucial distinction Dixon J drew in his first statement has not only been followed but has also been adapted in other leading appellate decisions, particularly by Viscount Radcliffe delivering the advice of the Privy Council in *Commissioner of Taxes v Nchanga Consolidated Copper Mines* where he said:[39]

> Again courts have stressed the importance of observing a demarcation between the cost of creating, acquiring or enlarging the permanent (which does not mean perpetual) structure of which the income is to be the produce or fruit and the cost of earning that income itself or performing the income earning operations. Probably this is as illuminating a line of distinction as the law by itself is likely to achieve …

[56] *Nchanga* concerned a payment of compensation by two copper mining companies to a third copper mining company in return for the third company abandoning its production for a year following a steep fall in the world market price for copper. The Privy Council held that the compensation payment was an allowable deduction in determining the taxable income of one of the companies that made the payment because it was a cost incidental to the production and sale of the output of their mine; as such its true analogy was with an operating cost.

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38 *Hallstroms Pty Ltd v Federal Commission of Taxation*, above n 34, at 649.

39 *Commissioner of Taxes v Nchanga Consolidated Copper Mines* [1964] AC 948 at 960; followed in *Regent Oil Co Ltd v Strick (Inspector of Taxes)*, above n 35, at 317; *Commercial and General Acceptance Ltd v Federal Commissioner of Taxation* (1977) 16 ALR 267 (HCA) at 275; *Cliffs International Inc v Federal Commissioner of Taxation* (1979) 24 ALR 57 (HCA) at 73–74; *Commissioner of Inland Revenue v McKenzies (NZ) Ltd*, above n 37, at 746; *Wharf Properties Ltd v Commissioner of Inland Revenue* [1997] AC 505 (PC) at 510.

[57] Viscount Radcliffe's statement was relied on in *Federal Commissioner of Taxation v Foley Bros Pty Ltd* where Kitto, Taylor and Menzies JJ put the distinction this way:[40]

> The true contrast is between altering the framework within which income-producing activities are for the future to be carried on and taking a step as part of those activities within the framework.

[58] *Foley Bros* concerned the question whether an amount of damages paid by the taxpayer to a related company in settlement of a claim for breach of an agreement that the taxpayer would not close its Australian branches or reduce its trading activities of the business was on revenue account and an allowable deduction. The Court held the amount was an outgoing of a capital nature because it related to changes in the structure of the profit-making apparatus and was not merely a reorganisation of day-to-day business affairs.

The BP Australia *factors*

[59] The general principles stated by Dixon J in *Hallstroms* and Viscount Radcliffe in *Nchanga* were adopted by the Privy Council in *BP Australia Ltd v Commissioner of Taxation for the Commonwealth of Australia*.[41] The Privy Council also relied on specific matters identified by Dixon J as relevant in his earlier decision in *Sun Newspapers Ltd v Federal Commissioner of Taxation*.[42] Lord Pearce, delivering the advice of the Privy Council, said in another frequently cited passage:[43]

> A valuable guide to the traveller in these regions is to be found in the well-known judgment of Dixon J in *Sun Newspapers Ltd v Federal Commissioner of Taxation*, where he discussed the nature of certain sums spent in buying up the competition of a rival and concluded that they were capital. "There are, I think," he said,

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40 *Foley Bros Ltd v Federal Commissioner of Taxation* (1965) 13 ATD 562 at 563, (1965) 9 AITR 635 (HCA) at 645.

41 *BP Australia Ltd v Commissioner of Taxation for the Commonwealth of Australia*, above n 8, at 261, 264–265 and 271.

42 *Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337 (HCA).

43 *BP Australia Ltd v Commissioner of Taxation for the Commonwealth of Australia*, above n 8, at 261; cited in *Commissioner of Inland Revenue v Thomas Borthwick & Sons (Australasia) Ltd* (1992) 16 TRNZ 777 (CA) at 779; and *Commissioner of Inland Revenue v McKenzies (NZ) Ltd,* above n 37, at 740.

> “three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment.”

And he said:

> “the expenditure is to be considered of a revenue nature if its purpose brings it within the very wide class of things which in the aggregate form the constant demand which must be answered out of the returns of a trade or its circulating capital and that actual recurrence of the specific thing need not take place or be expected as likely.”

[60] At the same time, however, the Privy Council was careful to recognise that a rigid test was not appropriate. Lord Pearce, in yet another frequently cited passage, said:[44]

> The solution to the problem is not to be found by any rigid test or description. It has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction. It is a common sense appreciation of all the guiding features which must provide the ultimate answer. Although the categories of capital and income expenditure are distinct and easily ascertainable in obvious cases that lie far from the boundary, the line of distinction is often hard to draw in border line cases; and conflicting considerations may produce a situation where the answer turns on questions of emphasis and degree. That answer:
>
>> “depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process”
>
> As each new case comes to be argued felicitous phrases from earlier judgments are used in argument by one side and the other. But those phrases are not the deciding factor, nor are they of unlimited application. They merely crystallise particular factors which may incline the scale in a particular case after a balance of all the considerations has been taken.
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> (Citation for *Hallstroms* omitted)

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[44] *BP Australia Ltd v Commissioner of Taxation for the Commonwealth of Australia*, above n 8, at 264–265; cited in *Buckley & Young Ltd v Commissioner of Inland Revenue*, above n 5, at 488; *Birkdale Service Station Ltd v Commissioner of Inland* Revenue, above n 37, at [32]; *Commissioner of Taxation v Citylink Melbourne Limited*, above n 37, at [21].

[61] *BP Australia* involved payments by BP to petrol retailers to secure their trade. The payments were held to be on revenue account because the advantage BP sought by entering into the trade tie agreements was to obtain orders for petrol from retailers in accordance with the marketing methods of the day. That advantage was to meet a continuous demand in the trade of petrol, and therefore entry into trade ties was part of the ordinary process of selling and a revenue outgoing.[45]

[62] As Andrews J recognised,[46] the approach of the Privy Council in *BP Australia* was followed by this Court in *Commissioner of Inland Revenue v McKenzies (NZ) Ltd*.[47] After referring to Lord Pearce's warning about avoiding any rigid test, Richardson J, delivering the judgment of this Court, said:[48]

> Amongst the factors weighed by the Judicial Committee in *BP Australia* were: (a) the need or occasion which called for the expenditure; (b) whether the payments were made from fixed or circulating capital; (c) whether the payments were of a once and for all nature producing assets or advantages which were an enduring benefit; (d) how the payment would be treated on ordinary principles of commercial accounting; and (e) whether the payments were expended on the business structure of the taxpayer or whether they were part of the process by which income was earned.

[63] Richardson J then pointed out:[49]

> The broad approach of the Privy Council in *BP Australia* was recognised in this Court in *Commissioner of Inland Revenue v L D Nathan & Co Ltd* [1972] NZLR 209 and *Buckley & Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485. What is also significant is that in the *L D Nathan & Co Ltd* case, North P (p 214) considered the character of the payments to be clear enough not to require an application of the various tests enunciated by the Privy Council in *BP Australia*. And in *Buckley & Young* (p 489) it was not found necessary "to enter any twilight areas in this case for it is common ground that the alternatives clearly fall on opposite sides of the dividing line and far from the boundary".

[64] *McKenzies* involved a payment on the surrender of a lease which was held to be on capital account. The lease itself was a capital asset, being part of the profit-making structure of the business. Richardson J said the costs of disposal of a capital asset should have the same character as those spent on the acquisition of a

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45 *BP Australia Ltd v Commissioner of Taxation for the Commonwealth of Australia*, above n 8, at 265–266 and 273.
46 High Court judgment, above n 1, at [49].
47 *Commissioner of Inland Revenue v McKenzies (NZ) Ltd*, above n 37.
48 At 740.
49 At 741.

capital asset, unless there are complicating factors. There were no complicating factors in that case.[50]

[65] When the *BP Australia* factors are taken into account their individual significance will vary according to the circumstances of the particular case. In a number of cases the usefulness of some of the factors has also been questioned.

[66] The first *BP Australia* factor — the need or occasion which called for the expenditure — was found to be of considerable importance in *Birkdale Service Station Ltd v Commissioner of Inland Revenue*.[51] Blanchard J, delivering the principal judgment,[52] said:

> [33] In applying that approach the background to the present transactions is of considerable importance. …

[67] The utility of the second factor — whether the payments were made from fixed or circulating capital, with the former indicating capital and the latter revenue[53] — has been questioned in the High Court.[54] For reasons that emerge later in this judgment, we do not need to resolve this issue.

[68] The utility of the third factor — whether the expenditure was of a once and for all nature producing assets or advantages which were of an enduring benefit to the taxpayer[55] — has also been questioned. In *Sun Newspapers* Dixon J described the "once and for all" test as a "by no means successful" attempt to find a test.[56] He concluded that "recurrence is not a test, it is no more than a consideration the weight of which depends on the nature of the expenditure."[57]

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50 At 741–742.
51 *Birkdale Service Station Ltd v Commissioner of Inland Revenue*, above n 37, at [33].
52 The judgment of Richardson P, Gault, Blanchard and Keith JJ. Thomas J wrote a separate judgment largely agreeing with the majority judgment.
53 *John Smith & Son v Moore* [1921] 2 AC 16 (HL) at 19.
54 *Milburn New Zealand Ltd v Commissioner of Inland Revenue* (2001) 20 NZTC 17–017 (HC) at 17–025 and *Commissioner of Inland Revenue v Fullers Bay of Islands Ltd* [2005] NZLR 255 (HC) at [36] (upheld on other grounds: *Fullers Bay of Islands Ltd v Commissioner of Inland Revenue* (2006) 22 NZTC 19-716 (CA)).
55 *British Insulated and Helsby Cables Ltd v Atherton* [1926] AC 205 (HL) at 213–214.
56 *Sun Newspapers Ltd v Federal Commissioner of Taxation*, above n 42, at 361.
57 At 362.

[69] The meaning of "an enduring benefit" in this context is explained by Rowlatt J in *Anglo-Persian Oil Co Ltd v Dale (Inspector of Taxes)*:[58]

> … a benefit which endures in the way that fixed capital endures; not a benefit that endures in the sense that for a good number of years it relieves you of a revenue payment … . *It is not always an actual asset,* but it endures in the way that getting rid of a lease or getting rid of onerous capital assets … endures.
>
> (Emphasis added)

[70] A similar point was made by Dixon J in *Sun Newspapers Ltd v Federal Commissioner of Taxation* when he said:[59]

> … the courts have relied to some extent upon the difference between an outlay which is recurrent, repeated or continual and that which is final or made "once and for all", and to a still greater extent upon a distinction to be discovered in the nature of the asset or advantage obtained by that outlay. If what is commonly understood as a fixed capital asset is acquired the question answers itself. But the distinction goes further. The result or purpose of the expenditure may be to bring into existence or procure some asset or advantage of a lasting character which will enure for the benefit of the organization or system or "profit-earning subject." It will thus be distinguished from the expenditure which should be recouped by circulating capital or by working capital.

[71] The fourth factor — how the payment would be treated on ordinary principles of commercial accounting — is unlikely to be particularly significant or determinative. This is because in New Zealand the relevant provisions of the ITA prescribe what deductions are permissible for taxation purposes irrespective of financial accounting principles.[60]

[72] In *Milburn New Zealand Ltd v Commissioner of Inland Revenue* where Wild J was faced with two different accounting approaches he concluded:[61]

> But the overriding point is that what is correct accounting treatment of expenditure is not determinative of its correct treatment of tax purposes. And when two almost diametrically opposed accounting treatments are

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58 *Anglo-Persian Oil Co Ltd v Dale (Inspector of Taxes)* (1931) TC 253 at 262, affirmed on appeal: *Anglo-Persian Oil Co Ltd v Dale (Inspector of Taxes)* [1932] 1 KB 124 (CA).

59 *Sun Newspapers Ltd v Federal Commissioner of Taxation*, above n 42, at 361.

60 Compare *Commissioner of Inland Revenue v Mitsubishi Motors New Zealand Ltd* [1995] 3 NZLR 513 (PC) at 516, *Milburn New Zealand Ltd v Commissioner of Inland Revenue*, above n 54, at [50], and *ECC Quarries Ltd v Watkis (Inspector of Quarries)* [1977] 1 WLR 1386 (Ch) at 1398–1402.

61 *Milburn New Zealand Ltd v Commissioner of Inland Revenue*, above n 54, at [64].

> legitimately available, accounting principles cease to be a useful guide to tax treatment. Thus, I regard application of the accounting principles test here as producing a neutral result.

[73] In *Birkdale Service Station Ltd v Commissioner of Inland Revenue* this Court said:[62]

> The evidence showed that proper accounting treatment required the payments to be taken into the revenue account of the retailer. Such a requirement is not determinative but in this case provides a minor degree of support for the view that the payments were revenue in nature.

[74] The fifth factor — whether the payments were expended on the business structure of the taxpayer or whether they were part of the process by which income was earned — is clearly an important factor as it reflects the distinction drawn in the first of the statements of general principle by Dixon J in *Hallstroms* and recognised by Viscount Radcliffe in *Nchanga*.

[75] As Andrews J pointed out,[63] this factor also reflects the distinction drawn earlier by Dixon J in *Sun Newspapers Ltd v Federal Commissioner of Taxation* between:[64]

> … the business entity, structure or organisation set up or established for the earning of profit and the process by which such an organisation operates to obtain regular returns by means of regular outlay. … The business structure … may assume any of an almost infinite variety of shapes … In a trade or pursuit where little or no plant is required, it may be represented by no more than the intangible elements constituting what is commonly called goodwill … At the other extreme it may consist in a great aggregate of buildings, machinery and plant all assembled and systematized as the material means by which an organized body of men produce and distribute commodities or perform services.

[76] We pause at this point to emphasise:

(a) The general principles stated by Dixon J in *Hallstroms* and Viscount Radcliffe in *Nchanga* remain the best guide for distinguishing between income and capital and may well be sufficient for that purpose without resort to the *BP Australia* factors. As

[62] *Birkdale Service Station Ltd v Commissioner of Inland Revenue*, above n 37, at [55].
[63] High Court judgment, above n 1, at [135].
[64] *Sun Newspapers Ltd v Federal Commissioner of Taxation*, above n 42, at 359–360.

Richardson J recognised in *McKenzies*, the character of the payments may be clear enough not to require an application of the factors. Indeed, that was the view of Andrews J in the present case.[65]

(b) The *BP Australia* indicia are just that; as Lord Pearce recognised, they are not necessarily determinative.

(c) In the end, as all the authorities indicate, the answer will depend on a close examination of the facts of the particular case and the character of the particular payment in order to ascertain the nature and purpose or effect of the relevant expenditure.

(d) In essence there needs to be a sufficient relationship or connection between the expenditure (or loss) and the income or capital, as the case may be.[66] It is the object or effect of any given payment that will be determinative.

Intangible property

[77] There is no dispute that the general principles apply equally to the characterisation of expenditure on intangible property.[67]

[78] In *Commissioner of Taxation v Ampol Exploration Ltd* the Full Federal Court of Australia held (by a majority) that oil exploration expenses incurred by Ampol were revenue not capital because they were incurred in carrying on the company's exploration business and not for the purpose of creating or enlarging a business structure.[68] Lockhart J, with whom Burchett J agreed, applied the distinction drawn by Dixon J in *Hallstroms* and pointed out:[69]

> The payments in question were in truth part of the outgoings of the taxpayer in the course of carrying on its ordinary business activities. It was not expenditure incurred for the purpose of creating or enlarging a business structure or profit-yielding or income-producing asset.

65 High Court judgment, above n 1, at [98].
66 See above at [15](a).
67 See generally *Anglo-Persian Oil Company Ltd v Dale (Inspector of Taxes)* (CA), above n 58; and *Sun Newspapers Ltd v Federal Commissioner of Taxation*, above n 42.
68 *Commissioner of Taxation v Ampol Exploration Ltd* (1986) 13 FCR 545.
69 At 562; Burchett J at 574–577.

> There is no presumption that prospecting or exploration expenses are of a capital nature. It is a question of fact in each case. Ordinarily the purchase by a taxpayer of a right to mine is expenditure of a capital nature and would not be deductible in the absence of special statutory provision. Preliminary expenses incurred in the establishment of a mine also would ordinarily be in the nature of capital expenditure. In general, expenses incurred with a view to setting up a business or extending a business are not allowable deductions. Where expenses are incurred in establishing, developing, extending or rejuvenating a mine, they will generally be of a capital nature since they are incurred for the purpose of bringing a capital asset into existence or enhancing it.

[79] Burchett J, who referred to *Foley Bros*,[70] emphasised the necessity to define the means of production or the enterprise the subject of the inquiry and noted that an expense cannot be assigned to capital or revenue account depending on whether or not it has been successful.[71] A similar approach has been adopted in New Zealand.[72]

[80] Andrews J relied on the decision in *Ampol* to support her conclusion that Trustpower's expenditure was revenue because most of it was not primarily directed to obtaining the resource consents but was to assess the feasibility of the projects and recurrent in nature, being continually incurred to investigate and define the feasibility of the various projects.[73] While Andrews J cited the first part of the passage in Lockhart J's judgment, which we have referred to, she did not cite the second part, which emphasised that it is a question of fact in each case.

[81] The factual nature of the question is confirmed by subsequent Australian decisions that expenditure incurred in investigating a new source of income will be on capital account. In *Re Griffin Coal Mining Co Ltd v Commissioner of Taxation*, where the expenditure related to feasibility costs for a new smelter, the Full Court of the Federal Court of Australia emphasised that the expenditure was not incurred in carrying on the business of extracting and selling coal but in acquiring an asset to be used in an expanded business of the company.[74] In *Esso Australia Resources Ltd v*

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70 At 577.
71 At 574.
72 *Commissioner of Inland Revenue v L D Nathan & Co Ltd* [1972] NZLR 209 (CA) at 216; *Waste Management New Zealand Ltd v Commissioner of Inland Revenue* (1995) 17 NZTC 12,147 (CA) at 12,151; and *Milburn New Zealand Ltd v Commissioner of Inland Revenue*, above n 54, at [34]–[37].
73 High Court judgment, above n 1, at [116]–[117].
74 *Re Griffin Coal Mining Co Ltd v Commissioner of Taxation* [1990] FCA 343 at [50].

Commissioner of Taxation of the Commonwealth of Australia, where the expenditure related to the evaluation of potential coal, oil shale and mineral prospects, the Full Court of the Federal Court upheld the decision of the first instance Judge that the expenditure was of a capital nature because it was "of a preliminary nature, aimed at ascertaining whether it was commercially worthwhile to enter into mining joint ventures".[75]

[82] In both England and New Zealand expenditure incurred in obtaining resource consents and permissions has been held to be on capital and not revenue account:

(a) In *ECC Quarries Ltd v Watkis (Inspector of Quarries)* Brightman J in the English High Court held that while the permissions for a quarry would not themselves produce profits the subsequent operations of working and winning the minerals, which were permitted by the consents, would.[76] Therefore, the assets of the company had radically and enduringly changed when the permissions were granted, and on common sense principles and based on consideration of the authorities, the expenditure was of a capital nature.[77]

(b) In *Waste Management New Zealand Ltd v Commissioner of Inland Revenue* this Court indicated that expenditure incurred investigating the feasibility of a site as a landfill for disposing of industrial waste, designing the landfill and seeking the planning consents and water rights it needed was capital.[78]

(c) In *Case T53* the New Zealand Taxation Review Authority (Judge Barber), with a brief reference to the decision in *ECC Quarries Ltd*,[79] held that legal fees incurred in a successful appeal against the refusal of resource consents required to carry on a second-hand machinery business were not deductible on revenue account because

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75 *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1992] FCA 851.

76 *ECC Quarries Ltd v Watkis (Inspector of Quarries*), above n 60, at 1393–1394 and 1397.

77 At 1397.

78 *Waste Management New Zealand Ltd v Commissioner of Inland Revenue*, above n 72, at 12,150 per Richardson J.

79 *Case T53* (1998) 18 NZTC 8-404 (TRA) at [29].

the acquisition of the resource consent was an intangible asset of the objector's business, a right of benefit and advantage that did not previously exist.[80]

(d) In *Milburn New Zealand Ltd v Commissioner of Inland Revenue* Wild J in the New Zealand High Court, relying on *ECC Quarries Ltd*, held that expenditure incurred in obtaining resource consents for Milburn's quarries for sourcing aggregate and lime for its cement and concrete business was of a capital not revenue nature because it was a necessary part of the development of those quarries for production of materials for use in the taxpayer's business. It was relatively clearly of a capital nature.[81]

[83] The decisions in *Waste Management New Zealand Ltd*, *Case T53* and *Milburn* were not based on sub-pt EE provisions because, as already noted, resource consents were not added to the definition of depreciable intangible property until 2004. These decisions are significant, however, because they recognise that expenditure on intangible property, such as a resource consent, may well be on capital account.

[84] Andrews J distinguished the decisions in *ECC Quarries Ltd*, *Case T53* and *Milburn* on the ground that Trustpower's resource consents were not stand-alone assets.[82] We address this issue below.

Application of the general principles

[85] We start our consideration of the application of the general principles relating to the income/capital distinction by accepting the factual findings made by Andrews J in the High Court relating to Trustpower's development pipeline for its possible future electricity generation projects, including her finding that the resource consents were not stand-alone assets, separate from the projects to which they

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80 At [21] and [27].
81 *Milburn New Zealand Ltd v Commissioner of Inland Revenue*, above n 54, at [33].
82 High Court judgment, above n 1, at [80]–[97].

related.[83] In other words, we proceed at this stage on the basis that it is unnecessary to determine the Commissioner's challenges to those findings. We take this course because, as Mr Harley accepted in the course of argument, the correct approach is an objective one. Determining on which side of the line the expenditure falls involves an objective analysis of the factual background relating to the nature and purpose or effect of the expenditure and not a subjective approach based on the views of the witnesses for Trustpower.[84]

[86] On this basis we have little difficulty in concluding for the following reasons that the disputed expenditure was incurred on capital account.

Expenditure on potential capital projects in development pipeline

[87] First, the expenditure was incurred for the purpose of enabling Trustpower to extend or expand its electricity generation business. It was incurred in taking preliminary steps and then applying for and obtaining resource consents for four projects that were in the development pipeline. The "development pipeline" was a means of determining the viability, feasibility, and costs of building new generation capacity. In the words of Dixon J in *Hallstroms*, new generation capacity related to the acquisition of the means of production by extending the business organisation. From a practical and business point of view, the expenditure was calculated to effect the extension or expansion of Trustpower's business structure. In the words of Richardson J in *McKenzies*, the expenditure had the purpose of acquiring assets that would be part of the profit-making structure of the business, namely the addition of four new projects.[85]

[88] The fact that Trustpower may not have made its build or buy decision to commit to proceed with the projects before the expenditure was incurred is irrelevant.[86] Like all the expenditure in the development pipeline, it was incurred for the purpose of possible future capital projects. It is no answer to the Commissioner's case that all necessary Board and management approvals had not been given for the completion of any given project.

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83 At [97].
84 *Grieve v Commissioner of Inland Revenue* [1984] 1 NZLR 101 (CA) at 110.
85 *McKenzies*, above n 37, at 741.
86 Compare High Court judgment, above n 1, at [154].

[89] Determined objectively, there was a sufficient connection between the expenditure and capital. The object of the expenditure was capital even if, as a matter of Trustpower's corporate governance, the final decision to apply for the resource consents had not been made and that decision was contingent on what the preliminary work might show.

Resource consents valuable capital assets

[90] Secondly, we do not accept Trustpower's argument, which Andrews J accepted,[87] that the value of the resource consents may have been tenuous at best and would not "block" competitors from competing in the area to which they related.

[91] When considering the resource consents themselves, the starting point is to recognise that the focus is, as Dixon J put it in *Hallstroms*, on what the expenditure was calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights involved. This means that the submissions for Trustpower which analysed the legal rights conferred by the resource consents in terms of the RMA and the relevant authorities under that legislation are not determinative.

[92] In our view the resource consents gave Trustpower valuable rights, which were essential to Trustpower's long term programme of future capital works, and valuable options, which enabled Trustpower to postpone decisions for the terms of the consents until it was in Trustpower's interests to construct new generation plant. Professor Evans, an expert economist called for the Commissioner, gave evidence about the value to Trustpower of the resource consents. He agreed under cross-examination that he had not attempted to provide any value for the particular consents, explaining that any value would be very fact-specific and dependent on a whole set of matters, including the volatility of the electricity price. He also emphasised that Trustpower's option to proceed at a later date had value and that the consents would be tradeable on the market.

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87 High Court judgment, above n 1, at [95]–[96].

[93] The view that projects in the development pipeline have value as capital assets is supported by the evidence that an unsolicited offer was made to Trustpower to purchase the Kaiwera Downs site, including the resource consents, technical reports and designs, landowner agreements, and any physical assets related to the project. The fact that the offer included the resource consents as part of the project rather than as stand-alone assets does not detract from the significance of this evidence.[88]

[94] Nor do we accept Trustpower's argument that the resource consents do not "block" competitors. Acquisition of resource consents for a new hydro power station or a wind farm on a specific site would obviously "block" a competitor from obtaining a duplicate consent for the same site and, bearing in mind the practical realities involved in obtaining resource consents, would also be likely to "pre-empt" a competitor who might otherwise have sought a consent for an adjacent site.[89] It is enough that a competitor would be discouraged by Trustpower's first mover advantage. The pre-empting might happen for a range of reasons, one of which is that a rival would not want to build a plant having precisely the same wind or "fuel" properties. Trustpower's evidence that the same wind will blow across the next hill does not alter this conclusion.

Irrelevant whether resource consents stand-alone assets

[95] Third, the High Court finding that the resource consents were not stand-alone assets separate from the projects to which they related is irrelevant.[90] Acceptance of Trustpower's arguments that the resource consents were obtained in the course of taking the respective projects further along the development pipeline confirms that the disputed expenditure was for the purpose of extending or expanding Trustpower's existing business and was therefore on capital account.

No sufficient nexus between expenditure and deriving income

[96] Fourth, the disputed expenditure was not incurred "in carrying on" Trustpower's business or in earning the income of the existing business or in

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88 Compare High Court judgment, above n 1, at [96].
89 *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [84].
90 High Court judgment, above n 1, at [92]–[97].

performing the income-earning operations of the existing business. Trustpower's profit-making enterprise is the generation and retailing of electricity, not the development of its pipeline of possible new projects or the investigations of, and applications for, resource consents for those projects. Possible future projects in its development pipeline are for the purpose of extending, expanding or altering its business structure in the future, not part of the carrying on of Trustpower's ordinary business activities or the taking of steps within that framework, being the generation and retailing of electricity. In terms of s DA 1 the requisite nexus between the incurring of the expenditure and the deriving of the income is not established.

[97] This means we do not accept Trustpower's submission that the build or buy decision was so intimately connected with the revenue side of the business that the disputed expenditure was on revenue account. As Professor Evans effectively acknowledged in cross-examination, the issue for Trustpower was how much to pay for electricity: was it more economic to build its own new hydro or wind projects, which were clearly capital assets, or to buy on the market. The decision Trustpower faced is no different in principle from that of a manufacturer who must decide whether to buy some input or to invest in the capacity to build it by acquiring land and plant. Firms routinely face build or buy decisions which turn on whether the item concerned can be built more efficiently by the firm itself. By obtaining resource consents, Trustpower invested unequivocally in capacity, whether or not it was committed at that time to proceed with the build. The investment was inherently capital in nature.

[98] We therefore do not agree with Andrews J that describing the disputed expenditure as "feasibility expenditure", not limited to securing specific resource consents, makes any difference.[91] All of the "feasibility expenditure" related to possible future capital projects. It was not incurred by Trustpower in deriving income from its existing business. As Lockhart J recognised in *Ampol*,[92] preliminary expenses incurred in the establishment, development or extension of a capital item such as a mine will ordinarily be in the nature of capital expenditure. The Full Court of the Federal Court of Australia reached the same conclusion in *Re Griffin Coal*

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91 High Court judgment, above n 1, at [97], [116] and [140].
92 See above at [78].

Mining Co Ltd and *Esso Australia Resources Ltd*.[93] Similarly, as Richardson J indicated in *Waste Management New Zealand Ltd*,[94] feasibility expenditure in relation to a capital asset will be on capital account. In our view the approach in these decisions is apposite here and, contrary to Andrews J,[95] does not support Trustpower's case.

Consistent with authorities relating to intangible assets and scheme of ITA

[99] Finally, nor do we agree with Andrews J that authorities relating to intangible assets support her conclusion that Trustpower's expenditure was on revenue account.[96] In *Ampol* the expenditure incurred in oil exploration was incurred in the course of carrying on the company's ordinary business activities and not for the purpose of creating or enlarging a business structure or profit-yielding or income-producing asset. The taxpayer there was engaged in the business of exploration for oil and did not have a purpose of enlarging the framework in which it operated.[97] In Trustpower's case, however, the disputed expenditure was incurred for the purpose of enlarging the business structure and not in the course of the company's business as a generator and retailer of electricity. It may be different if, for example, the taxpayer was in the business of undertaking feasibility studies and obtaining resource consents to be sold as a package to a power generation company. For such a company, income would be generated in the process of producing and selling these "shelf" consented projects.

[100] Here the disputed expenditure was incurred in respect of possible future capital projects, including the resource consents needed to proceed with them. The decisions in *ECC Quarries*, *Case T53* and *Milburn* are analogous and not distinguishable as Andrews J considered.[98]

[101] In this context it cannot be decisive whether the applications for consents were ultimately successful or not, as the focus must be on the point in time at which

93 See above at [81].
94 *Waste Management New Zealand Ltd v Commissioner of Inland Revenue*, above n 72, at 12,150.
95 High Court judgment, above n 1, at [117]–[118].
96 At [115]–[117].
97 *Commissioner of Taxation v Ampol Exploration Ltd*, above n 68, at 577.
98 High Court judgment, above n 1, at [92]–[93].

the expenditure is incurred.[99] Consequently, expenditure on an unsuccessful application may still be on capital account.

[102] This conclusion is also supported by the scheme of the ITA. As we have already noted,[100] the ITA recognises that certain resource consents are depreciable intangible property and expenditure on them may be depreciated under sub-pt EE.

Summary

[103] Having reached this conclusion on the application of the general principles it is strictly speaking unnecessary for us to consider the application of the *BP Australia* factors, but, like Wild J in *Milburn* and Andrews J here, we do so for the sake of completeness.[101]

Application of the *BP Australia* factors

[104] In the High Court Andrews J applied the *BP Australia* factors by considering the five factors identified by Richardson J in *McKenzies*. We follow the same approach.

What was the need or occasion which called for the expenditure?

[105] In the High Court Mr Harley accepted that one of the purposes of the expenditure was to make applications for resource consents, but submitted that that was not the principal purpose. The true character of the expenditure incurred in obtaining resource consents was that it advanced projects along the feasibility pipeline, supporting pipeline optionality, and was thus of the same character as Trustpower's other operating costs.[102]

[106] Andrews J accepted Mr Harley's submissions. She said:

> [102] This question requires the determination of a factual issue. I have accepted Trustpower's evidence that the resource consents were applied

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99 Above at [79].
100 Above at [50].
101 *Milburn New Zealand Ltd v Commissioner of Inland Revenue*, above n 54, at [45]; High Court judgment, above n 1, at [98].
102 High Court judgment, above n 1, at [100].

> for and obtained in the course of taking the respective projects further along the development pipeline. I would accept that the purpose, or occasion, for the expenditure was not solely or principally to obtain resource consents. Rather, I would find that the expenditure was incurred as part of Trustpower's investigation into the feasibility of the projects, to define the parameters of possible projects, and to enable an assessment of possible projects against Trustpower's other options for sourcing electricity to sell to customers.
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> [103] Accordingly, on this aspect of the *BP Australia* indicia, I would find that the occasion or need for the expenditure points to it being on revenue rather than capital account.

[107] On appeal the Commissioner challenged the Judge's factual findings. In our view it is not necessary to determine those challenges because, even accepting the Judge's factual findings, we do not agree that characterising the expenditure as being for the purpose of investigating the feasibility of projects in Trustpower's development pipeline meant that it was of the same character as Trustpower's "other operating costs". As we have already held,[103] all of the feasibility expenditure related to possible future capital projects and was not incurred by Trustpower in earning income from its existing business. It is therefore not correctly described as the same as "other operating costs" which are incurred in earning income in the course of carrying on the company's ordinary business activities.

[108] The answer to the first *BP Australia* question therefore supports the conclusion that the disputed expenditure in this case was on capital account.

Were the payments made from fixed or circulating capital?

[109] In the High Court Mr Harley submitted that the disputed expenditure could only be seen as part of annual development costs (circulating capital) which was being turned over and in that process, yielded projects or loss.[104] He referred to the use to which the expenditure was put, contrasting expenditure that creates fixed capital assets with expenditure that funds revenue operations as cashflows circulate between purchases of supplies and receipts of sales.[105]

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103 Above at [98].
104 High Court judgment, above n 1, at [106].
105 At [109].

[110] Andrews J did not accept that Mr Harley's submission accurately reflected the formulation of this test in the authorities.[106] She went on to say that, even if Mr Harley were right in his formulation of the test, she did not find the fixed/circulating capital test useful in this case because:

> … First, there is little or no evidence as to the source of the funds used for the expenditure. Secondly, even if the focus is on the use of the expenditure, then it would require a determination of the nature of the resource consents (as capital or revenue assets) before it could be applied: in other words, on the facts of this case it would be a circular test for determining if the expenditure incurred in obtaining the resource consents is capital or revenue in nature.

[111] On appeal Mr Harley challenged the Judge's decision. He submitted that the Judge should have accepted Trustpower's contention that these costs reflected circulating capital, which was not a "circular test" any more than it was in *BP Australia* or *Carron*.[107] He emphasised that the test was not about the source of the funds but how Trustpower used them, which was covered in the evidence. He submitted that the Judge later gave the correct explanation as to why feasibility expenditure was in this case truly circulating capital.[108]

[112] We agree with Andrews J that the test as formulated by Lord Pearce in *BP Australia* does focus on the source of the funds rather than their use and that here the source is unclear. In this respect the evidence of the Chairman of Trustpower, Dr Harker, that the costs of feasibility investigations were met from "business-as-usual funds" does not really assist.

[113] Even if, however, the focus is on the use of the funds, that would not assist Trustpower for the reasons we have already given.[109] The funds were used for feasibility expenditure on potential capital projects not on "revenue operations" as Mr Harley submitted. In particular, we do not accept that the costs of acquiring the consents were indistinguishable as part of the recurring "operational expenditure of sourcing supplies of electricity for re-sale". The costs of acquiring the consents for the purpose of new capital assets are clearly distinguishable from operational

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106 At [109].
107 *Commissioners of Inland Revenue v Carron Company*, above n 37.
108 High Court judgment, above n 1, at [140]–[141].
109 Above at [87].

expenditure incurred in purchasing electricity on the market for re-sale or in generating electricity for sale.

[114] The answer to the second *BP Australia* question is therefore neutral. To the extent that Mr Harley's formulation of the test is taken into account, the answer supports the conclusion that the disputed expenditure in this case was on capital account.

Was the expenditure of a once and for all nature producing advantages which were of an enduring benefit for Trustpower?

[115] In the High Court Andrews J accepted Trustpower's submission that the disputed expenditure was recurrent and therefore revenue in nature,[110] but rejected the submission that the resource consents did not provide an enduring benefit.[111] She therefore decided that on this aspect of the *BP Australia* factors the expenditure should be regarded as on capital account.

[116] Accepting for present purposes that the disputed expenditure may be described as feasibility expenditure in respect of projects in Trustpower's development pipeline, we agree with Andrews J that the expenditure may be regarded as recurrent rather than "for once and for all". But we also agree with her that expenditure in respect of specific resource consents, as here, was expenditure which had the purpose of providing Trustpower with an enduring benefit once the consents were obtained.

[117] The short answer to Trustpower's submission is that the resource consents in respect of which the disputed expenditure was incurred were for fixed periods, commencing from 2008 to 2011 and ranging from 10 to 35 years.[112] While there may be an element of uncertainty surrounding the terms and duration of the resource consents, they do last for significant periods and do therefore provide an enduring benefit. We do not accept Mr Church's submission that resource consents are not "assets". Although consents may be of uncertain duration as they may be cancelled by a consent authority and their transferability may be restricted, this only limits

110 High Court judgment, above n 1, at [116]–[118].
111 At [123]–[125].
112 Above at [4].

their value. Juristic features of consents under the RMA do not prevent consents from being "assets" from a practical and business point of view.[113]

[118] For the reasons we have already given, we do not accept Mr Harley's submission on appeal that because there was no fixed capital created by the payments there was no relevant "asset" to be of any enduring benefit.[114]

[119] The answer to the third *BP Australia* question therefore supports the conclusion that the disputed expenditure in this case was on capital account.

How would the payment be treated on ordinary principles of commercial accounting?

[120] In the High Court Andrews J, applying the provisions of the New Zealand Equivalent to International Accounting Standards (NZIAS) 38, decided that because there was no evidence that, at the time the expenditure was incurred, Trustpower intended to complete the four projects or applied for them with the intention of selling them, the expenditure would not be recognisable as capital and would properly be recognised as revenue.[115] The Judge noted that her interpretation and application of NZIAS 38 was supported by the expert accounting evidence called for Trustpower.[116]

[121] On appeal the Commissioner did not dispute that the provisions of NZIAS 38 supported the Judge's conclusion, but submitted that this was not determinative of the issue for tax purposes.

[122] We agree with the Commissioner.

[123] At the same time we do not accept Mr Harley's submission that use of the NZIAS as a relevant "reporting standard" for the purposes of s DB 26[117] elevates this accounting standard to have significant influence. As we have already noted, this

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113 Above at [91].
114 Above at [92]–[94].
115 High Court judgment, above n 1, at [133]–[134].
116 At [127] and [130].
117 As defined by Income Tax Act 2004, s DB 27(1).

case is not concerned with s DB 26 expenditure on research and development.[118] And, as Mr Harley acknowledged in the course of argument, the fact that in other areas of the ITA there is no express reference to the NZIAS supports the conclusion that it will not be determinative in those areas.

[124] The answer to the fourth *BP Australia* question is therefore neutral in this case.

Was the expenditure incurred on the business structure of Trustpower, or as part of the process by which income was earned?

[125] In the High Court Andrews J decided that the resource consents should be found to be revenue assets.[119] Her reasons were:

> [137] I would accept Mr Harley's submission that the consents are not means by which Trustpower can produce income, in the absence of a commitment to proceed to construct the project concerned. As Mr Harley submitted, the Mahinerangi project illustrates this point. The resource consents for this project were granted in December 2008. The Trustpower Board approved construction of Stage 1 of the project in April 2010. Although the consents were necessary for the project to be constructed, they did not generate any electricity, and they did not create any income for Trustpower.
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> [138] I am satisfied that, if it is held that the resource consents are assets, they could not be regarded as part of Trustpower's business structure. I would conclude that this aspect of the *BP Australia* indicia indicates that the resource consents should be found to be revenue assets.

[126] These reasons demonstrate the fallacy in Trustpower's case. The fact that the resource consents cannot themselves generate any electricity or create any income for Trustpower does not mean that they should be found to be "revenue assets" or that expenditure on them should be on revenue account. As we have held,[120] the resource consents were acquired by Trustpower in order to move the four specific projects along its development pipeline of capital projects. Obtaining the resource consents was a critical step or integral component of the development of the four specific capital projects. The expenditure on the resource consents for that purpose was therefore clearly on capital account. The fact that no electricity was generated

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118 Above at [19].
119 High Court judgment, above n 1, at [135]–[138].
120 Above at [87].

or income created from the expenditure simply confirms that it was not on revenue account.

[127] The answer to the fifth *BP Australia* question therefore supports the conclusion that the disputed expenditure in this case was on capital account.

Summary

[128] Having, for completeness, considered the application of the *BP Australia* factors, we are satisfied that overall they support the conclusion we have already reached that, on the application of the general principles, the disputed expenditure in this case was on capital account and was therefore not deductible by Trustpower under s DA 1 of the ITA. This also means that we have rejected Trustpower's attempt to support the judgment of Andrews J on other grounds.[121] If the resource consents are viewed as stand-alone assets, the *BP Australia* factors do not mean that the expenditure was incurred on revenue account.

[129] Whether Trustpower wishes to depreciate the expenditure now under sub-pt EE of the ITA on the basis that, having obtained the four resource consents, they are depreciable intangible property is for Trustpower to decide.

Commissioner's challenge to High Court factual findings

[130] As indicated, we have determined the principal issues in this appeal on the basis of the factual findings made by Andrews J in the High Court. This has meant that it has been unnecessary for us to determine either the Commissioner's challenge to those findings or Trustpower's challenge to this Court considering the Commissioner's challenge.

[131] For completeness, however, we note that if it had been necessary for us to consider these two challenges we would have reached the following conclusions:

(a) We would not have accepted Trustpower's submission that we were precluded from considering the Commissioner's challenge to the

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[121] See above at [11].

High Court factual findings. The decision of the Supreme Court in *Austin, Nicholls & Co Inc v Stichting Lodestar* would have required us to form our own opinion of the evidence and, if necessary, not to have deferred to the assessment of the acceptability and weight to be accorded to the evidence made by Andrews J.[122]

(b) We would have accepted the Commissioner's submissions that the evidence before the High Court supported the conclusion that the disputed expenditure was on capital account and that Andrews J erred in making factual findings that suggested otherwise. We would have done so, however, not because Trustpower had met the Commissioner's "commitment" test but because the evidence put beyond doubt that the expenditure was sufficiently connected to a capital item to be on capital account.

Date Trustpower "committed" to acquiring the resource consents

[132] In view of the decision we have reached that all of the disputed expenditure in this case was on capital account whether or not Andrews J was correct in concluding that the resource consents were not stand-alone assets it is unnecessary for us to determine this issue. In our view the Judge's findings about commitment date are academic. If the Commissioner chooses to adopt a date rather than sufficient connection as the test that is a matter for the Commissioner.

[133] We note for completeness that at stake is $6,565,936 of the disputed expenditure of $17.7 million which the Commissioner classified as incurred as part of the "consenting" process rather than as part of the "feasibility" process. The parties agreed that:

(a) the former was on capital account and the latter on revenue; and

(b) "feasibility" expenditure ceases to be on revenue account when a decision to acquire an asset is made, that is when Trustpower

[122] *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 6, at [16].

"committed" to applying for resource consents.

[134] The Commissioner considers that consenting expenditure was committed when Trustpower decided to seek the resource consents for each of the four projects and this occurred when work began to prepare applications for consents. Trustpower's contention is that there is no commitment until its Board in fact decided to apply for the particular resource consents. In the High Court Andrews J accepted Trustpower's contention.[123]

[135] In our view the fact that Trustpower's Board may not have made a final decision to apply for the particular resource consent did not mean that when the disputed expenditure was incurred it was not sufficiently connected to a capital purpose.[124] For tax purposes that question may be appropriately determined in hindsight because taxpayers invariably file their returns after the event. In this context, "commitment" in relation to any given payment simply means that the payment is sufficiently connected to the capital purpose of obtaining a resource consent. Contrary to Trustpower's submission, it is not decisive that the employees who commissioned the AEEs did not have the power to decide whether Trustpower would apply for the consents. Regardless of whether there was a Board or management decision, the commissioning of AEEs was sufficiently connected to a capital purpose.

[136] At the same time, however, the fact that the Commissioner has selected a date of commitment by Trustpower does not mean that the Commissioner was in error in doing so. It was open to the Commissioner to adopt a pragmatic approach to this issue.[125]

[137] Consequently, the Commissioner was entitled to consider that Trustpower was committed to the expenditure in respect of the four projects on the following dates:

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123 High Court judgment, above n 1, at [154]–[156].
124 Above at [88]–[89].
125 Tax Administration Act 1994, s 6A; *Fairbrother v Commissioner of Inland Revenue* [2000] 2 NZLR 211 (HC) at [27]; and *Accent Management Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,366 (CA) at [13].

Arnold	-	November 2005
Wairau	-	September 2004
Kaiwera Downs	-	28 May 2007
Mahinerangi	-	November 2005

[138] The parties are in agreement that as some expenditure incurred by Trustpower after these dates should be classified as on revenue account this issue of classification should be remitted to the High Court for determination. We make an order to that effect by consent.

Result

[139] Accordingly, for these reasons:

(a) The appeal is allowed.

(b) The Commissioner's re-assessments disallowing Trustpower's deductions claimed for the 2006, 2007 and 2008 tax years are confirmed.

(c) By consent the allocation of particular expenditure as capital rather than revenue after the dates Trustpower committed to applying for the resource consents for the four projects is remitted to the High Court for determination.

[140] As the parties agreed, costs should follow the event. Trustpower is ordered to pay the costs of the Commissioner for a complex appeal on a band B basis. We certify for second counsel.

[141] The order for costs made against the Commissioner in the High Court is quashed and Trustpower is ordered to pay the costs of the Commissioner in that Court.

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