[2014] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 146/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN ADVANTAGE GENERAL INSURANCE COMPANY LIMITED APPELLANT

AND THE COMMISSIONER OF TAXPAYER APPEALS RESPONDENT

Michael Hylton QC and Kevin Powell instructed by Michael Hylton and Associates for the appellant

Ms Althea Jarrett instructed by the Director of State Proceedings for the respondent

14 January 2013 and 7 February 2014

PANTON P

[1] I have read, in draft, the judgment of my brother Brooks JA. I agree with his reasoning and conclusions and have nothing to add.

McINTOSH JA

[2] I have read, in draft, the judgment of Brooks JA. I too agree with his reasons and conclusion.

BROOKS JA

[3] Advantage General Insurance Company Limited (referred to hereafter as Advantage General or "the Company") is in the general insurance business. In 2004, the company filed amended tax returns claiming tax refunds for losses incurred in the years 2000 through to 2003. The company had, however, in its previous returns for the years 2000 through to 2002, assessed itself to be liable to pay taxes based on profits made during that period. The reversals resulted from the fact that the company had, in 2001, restated its financial statements for the year 2000, and in those restated statements, had changed the amount provided for expense reserves. The change resulted in a massive loss being reflected in the accounts, where previously, a profit had been shown.

[4] The Commissioner of the Taxpayer Audit and Assessment Department ("the CTAA"), who is charged by statute to consider returns by taxpayers, made no timely response to the amended returns. In 2007, the CTAA, although not interfering with the company's 2000 tax returns, rejected the basis on which the 2000 financial statements had been restated. The CTAA then sought to use the figures in the original 2000 financial statements as the basis for imposing a tax liability on the company for the tax year 2003 (the 2003 assessment).

[5] The company objected to the 2003 assessment. It asserted that it had restated its financial statements on the advice of its actuaries. It was obliged, it said, by virtue

of the provisions of the Insurance Act ("the Act"), which came into effect in 2001, to obey the advice of its actuaries.

[6] The CTAA rejected the company's objection. According to the CTAA, the Act had no retrospective effect. The CTAA therefore confirmed the 2003 assessment. The company appealed to the Commissioner of Taxpayer Appeals ("the Commissioner"), who, in 2008, ruled in favour of the CTAA. The company further appealed to the Revenue Court against the Commissioner's decision. Anderson J heard the appeal and, on 8 November 2011, ruled that the Commissioner was correct in confirming the 2003 assessment.

[7] Advantage General has appealed to this court against the order of Anderson J. There are no real disputes as to fact involved in the appeal. Two main issues are raised by the appeal. The first is, whether the company was entitled to restate its financial statements. The resolution of that issue, turns, essentially, on the answer to the following question:

> Was the restatement of the company's accounts a result of a fundamental change in accounting policy or due to a change in an estimate of an item in the accounts?

The second main issue is whether the CTAA was barred, in 2007, by the six-year limitation period created by the Income Tax Act, from rejecting the restating of the company's accounts for the year 2000.

[8] The factual background shall be outlined before considering the issues.

The factual background

[9] The company's operations are subject to the provisions of the Act, and to regulations promulgated pursuant to the provisions of the Act. One of the requirements of the Act is that every registered insurer is required to engage the services of actuaries. Another requirement is that the actuaries, so appointed, are to value the actuarial reserves and policy liabilities of that insurer, as at the end of each financial year.

[10] The actuarial reserves and policy liabilities are deemed to be "permitted insurance reserves". They are considered as a liability to the company and may be used in reducing any profit that a general insurance company would have made for the respective financial year. Section 48(2) of the Income Tax Act demonstrates that permitted insurance reserves in place at the end of a financial year are to be a deduction in the calculation of an enterprise's profit.

[11] Advantage General appointed actuaries as required by the Act and, relying on the advice of its actuaries, changed the basis on which it valued its actuarial reserves. That change resulted in a steep increase in the sums required for actuarial reserves.

[12] It is of note that the original financial statements for 2001, considered the actions and advice of the actuaries. The company's then auditors were Strachan, Strachan and Co. Apparently, during the tenure of those auditors, Advantage General filed its tax returns for the years 2000 and 2001. It filed its annual tax returns for the year 2000 in June 2001, whilst those for 2001 were filed in November 2002.

[13] The tax returns for 2002 were filed in July 2003 but, by June 2003, the company had changed its auditors to KPMG Peat Marwick. In 2004, the company filed re-stated accounts and amended tax returns for the years 2000, 2001 and 2002. The amended returns were all dated 30 September 2004 and were filed within a short time of each other.

[14] The restated 2000 financial statements and the amended 2000 return, converted what the company had originally assessed as a tax liability of $14,453,482.00, based on profits made in 2000, to a claimed loss of $692,182,606.00 for that year. As a result of the restated financial statements, Advantage General claimed tax refunds of $38,816,850.00 for the year 2000, $39,758,538.00 for 2001 and $49,061,743.67 for 2002.

[15] It is apparent that, on a date subsequent to September 2004, the company submitted a tax return for the year 2003 to the CTAA, and that tax return reflected the loss claimed for the year 2000. Although extensive correspondence passed between the parties concerning that 2003 return, it has not been placed in the record of appeal. Its absence is, however, not detrimental to the consideration of the issues to be decided.

[16] The next occurrence, that is relevant to this matter, was that the CTAA, by letter dated 30 November 2007, notified the company that the CTAA had rejected the basis on which the 2000 accounts had been re-stated and the tax return amended. The

CTAA, in delivering adjusted returns to Advantage General for the years 2001-2004, stated:

> "The loss of Six Hundred and Ninety-Two Million, One Hundred and Eighty-Two Thousand, Six Hundred and Six Dollars ($692,182,606.00), brought forward from Year of Assessment 2000 was disallowed as the amendments made to your return, creating this loss, **would not have resulted from the legislative changes in the Insurance Act of 2001**." (Emphasis supplied)

[17] On 19 February 2008, based on that adjustment, the CTAA issued to the company, a notice of additional assessment of taxes for the year ending 2003 indicating an income tax liability of $26,562,251.84. This is what has been referred to above as "the 2003 assessment". Advantage General objected to the 2003 assessment and the appellate process before the Commissioner and the Revenue Court was initiated and completed.

[18] There was no dispute, before either the Commissioner or Anderson J, that the company's actuaries had advised it in the manner reflected by the restated accounts. The CTAA accepted that that advice had been given. Neither was there any dispute that, had the adjustment been made in a current year of assessment, the adjustment would have been allowable. The learned judge noted, at pages 12-13 of his judgment, that the CTAA had conceded, in the hearing before the Commissioner, that:

> "...if the re-statement of [the] financial statements were made for a year of assessment that was within the six year period of limitation, the adjustment, whether substantial or not would have been allowed, as the reserves were allowable deductions under the Income Tax Act."

It is for that reason, that this judgment will not consider the first ground of appeal mentioned below. In light of the concession by the CTAA, it was unnecessary for the learned trial judge to have made a finding as to whether the reserves would have been allowable losses if they were included in financial statements filed in a current year of assessment.

[19] The issue before the learned judge turned largely on whether the company was entitled to utilise the provisions of the Act as the basis for restating its accounts for a period prior to the promulgation of the Act. As will be explained below, a critical point in this appeal is whether the adjustment of the reserves entitled the company to restate its financial statements for a previous year.

The appeal

[20] The company has filed six grounds of appeal as follows:

> "a. The learned judge misdirected himself on the law and erred in finding that it was unnecessary to determine whether the adjustments to the Appellant's insurance reserves were allowable losses if made to current financial statements.
>
> b. The learned judge misdirected himself on the law in construing the application of IAS 8 in the Appellant's decision to retroactively adjust its insurance reserves.
>
> c. The learned judge erred in finding that there was nothing in the provisions of the Insurance Act or the Insurance Regulations which would have allowed the Appellant to retrospectively apply the actuarial revaluation of its insurance reserves.
>
> d. The learned [judge] misdirected himself on the law in finding that the Appellant would only have been

permitted to retrospectively apply the actuarial revaluation of its insurance reserves if the Insurance Act and the Insurance Regulations were of retrospective application.

e. The learned judge erred in finding that the purposive approach to the interpretation of statutes was limited to "Revenue [Statutes]" and as the Insurance Act was not a revenue statute that approach should not be applied to its interpretation.

f. The learned judge erred in finding that on a proper construction of the Income Tax Act the disallowance in 2007 of an amended loss incurred in 2000 is not an assessment of a statute-barred year under the provisions of the Income Tax Act."

[21] Mr Hylton QC, appearing for the company, argued those grounds of appeal under three main headings, namely:

"a) Whether on a proper construction of the Insurance Act and the Regulations the Company should have implemented the recommendations of its actuary.

b) Whether the relevant accounting standard was properly construed by the learned judge.

c) Whether the [CTAA] was entitled to disallow in the year 2007 a loss incurred in the year 2000."

[22] Those formulations, in my view, do not accurately pose the questions raised by the issues in dispute. I find that the issues would be more definitively addressed by an assessment under the following headings:

a) Whether the Insurance Act had retrospective effect and therefore allowed the company to restate its accounts for a year prior to the promulgation of the Act.

b) Whether the learned judge was correct in deciding that the company had made a change in its accounting estimates.

c) Whether the CTAA was entitled, in the year 2007, to adjust the returns for the year 2000.

Each heading will be addressed in turn.

Whether the Insurance Act had retrospective effect and therefore allowed the company to restate its accounts for a year prior to the promulgation of the Act.

[23] A lot of time and effort was spent by learned counsel on both sides in respect of this issue. The learned judge also dedicated much attention to it.

[24] Having considered the matter, I have taken the view, with the greatest of respect to the efforts involved in those legal opinions, that the effect of the Act is immaterial to the issue. It is only necessary to observe that re-statement of the previous year's accounts was not prohibited by the Act. In my view, the re-valuation of the reserves by the actuaries, although a requirement of the Act, could have been made independently of the Act. It is the decision by the company, with the approval of its auditors, to restate the 2000 accounts, which is the critical factor in this case. The appropriateness of that decision is solely dependent on whether the re-stating of the 2000 financial statements was in accordance with normal accounting standards. That issue will be discussed in the analysis of the second heading identified by Mr Hylton, but

out of deference to the effort put into the current point, I shall set out the relevant provisions of the Act and the regulations and briefly identify the contending opinions.

[25] The Act was aimed at the improvement of the legislative framework for the financial sector and, in particular, effecting overall improvements in the insurance industry. Section 44 of the Act is particularly relevant. It states, in part:

> "(1) Every registered insurer shall appoint an actuary and shall notify the Commission in writing of such appointment.
>
> (2) Subject to subsection (3), the actuary shall value-
>
> (a) **the actuarial reserves and other policy liabilities of the insurer as at the end of each financial year**; and
>
> (b) any other matter specified in any direction given by the Commission."
>
> (3) In relation to a registered insurer carrying on general insurance business, the frequency of the actuarial valuation under subsection (2) shall be as determined by the Commission.
>
> (4) The actuarial valuation shall be conducted in accordance with generally accepted actuarial practice and with such directions as may be given by the Commission.
>
> ..." (Emphasis supplied)

[26] The relevant portions of the Insurance Regulations 2001, promulgated pursuant to the Act, stipulate, among other things, standard accounting practices for the insurance industry. Regulation 87 addresses the various methods for calculating unearned premium reserves while regulation 2 defines "unearned premiums" as:

> "…**the amount set aside as at the end of the financial year of a company** out of premiums in respect of risks **to be borne by the company after the end of that year** under contracts of insurance entered into before the end of that year;" (Emphasis supplied)

[27] Regulation 2 also defines the term "unearned premium review" as meaning:

> "…**the amount set aside out of net premiums at the end of the financial period** in respect of risks **to be borne by the insurer subsequent to the accounting period** under contracts of insurance entered into on or before that date;" (Emphasis supplied)

[28] Regulation 92 allows the consideration of other standards that are not unique to the insurance industry. It states:

> "The standards stated in these Regulations supplement other standards of standard accounting practice which also apply to the general insurance companies unless they are specifically exempted in a standard."

One of the "other standards of standard accounting practice" that is relevant to the issues in this case is International Accounting Standard 8 (IAS8), established by the International Accounting Board. IAS 8 is accepted in this country as an appropriate standard for accounting practice. It deals specifically with when and how financial statements may be restated.

[29] The learned judge ruled that the Act had no retrospective effect and therefore the company was not entitled to rely on the Act in restating its 2000 financial statements. The company has criticised the learned judge's ruling on this point stating that he wrongly refused to apply a purposive interpretation to the Act. The

Commissioner has accepted that a purposive interpretation was appropriate but that the application of a purposive interpretation would have resulted in the same conclusion that the learned judge had arrived at.

[30] It is my view, that a reading of the section and the regulations, quoted above, support the rather obvious position taken by the Commissioner in this appeal, that the Act did not require the actuaries to evaluate reserves for years prior to the promulgation of the Act. The regulations address future risks, that is, those that may materialise after the current accounting year. The actuaries were not required to contemplate reserves to be put in place for prior years. It has also been observed above that the actuaries were also not prevented by the Act from evaluating reserves for prior years. I find that it is the application of IAS 8 to the 2001 financial statements that will determine whether Advantage General was entitled to restate its 2000 financial statements.

[31] The discussion as to whether the Act had retrospective effect and whether it should be given a purposive interpretation is, in my view, irrelevant to the key issues to be considered in this appeal. The first key issue is whether the adjustment by the actuaries, in the method of calculating the reserves for 2001, justified the auditors in restating the reserves for the year 2000, or put another way, "was the appropriate accounting standard used?"

Whether the learned judge was correct in deciding that the company had made a change in its accounting estimates.

[32] The essence of the issue under this heading is whether the change by the actuaries in the method of calculating the actuarial reserves amounted to "a fundamental change in an accounting policy" or "a change in accounting estimates". The auditors, Strachan, Strachan and Co, at various places in their notes to the 2001 financial statements, described the changes that were effected as a result of the actuaries' advice. The first reference is at page 8 of the financial statements (page 102 of the record of appeal), under the heading "CHANGE IN ACCOUNTING POLICY":

> "The Insurance Act 2001 requires that the claims and policy liabilities be the same as those calculated by the actuaries within a small tolerance. Accordingly, **the estimated provisions previously calculated by management have been superseded by the calculations of the actuaries** (See note 14)." (Emphasis supplied)

The heading mentioned above, along with the reference to "estimated provisions" will be important to the discussion as to whether the company was entitled to restate its 2000 accounts.

[33] Note 14, referred to in the last note, is the second place at which the auditors addressed the change. It is set out at pages 105-106 of the record and bears being quoted in full:

"INSURANCE FUNDS:

		2001	2000
		$	$
a)	Unearned Premiums	855,098,347	721,259,560
	Unexpired Risks	41,859,000	4,703,000
		896,957,347	725,962,560
	Outstanding Claims (including [Incurred But Not Reported])	1,493,972,000	1,305,901,000
		2,390,929,347	2,031,863,560

b) During the year an actuarial review was performed by Eckler Partners Consultants and Actuaries on the loss and loss adjustments on Expense Reserves for 2001. The actuaries applied inter alia, historical loss statistics, statistical fluctuations, and considerations of the economic environment which served as a guide for the **estimates of the reserves**.

Based upon their review and calculation they are of the opinion that the provisions in respect of prior years were unreasonable and accordingly the provisions existing at 31 December 2000 were adjusted to give retrospective effect to their findings (note 18)." (Emphasis supplied)

In note 18 (page 107 of the record), under the heading, "PRIOR YEAR ADJUSTMENT", the auditors state that the required adjustments to the claims provisions for 31 December 2000 were "calculated by the Actuaries". That item is set out in the profit and loss account as (789, 526,859). The brackets indicate a negative value.

[34] The figure of $2,031,863,560 mentioned in note 14 was reflected in the company's balance sheet (page 97 of the record) as being one of the items of "Non-Current Liabilities". It was listed under the appellation, "Insurance funds". The figure was one of several figures described as being "restated" for the year 2000.

[35] The figure for "Insurance funds" in the original balance sheet for 2000 was $1,242,336,701. That figure was explained in note 13 of the 2000 financial statements (page 82 of the record):

"INSURANCE FUNDS:

	2000	1999
	$	$
Unearned Premiums	721,259,560	609,284,011
Claims Equalisation	74,085,591	35,583,494
Unexpired Risks	74,085,591	35,583,494
	869,430,742	680,450,999
Outstanding Claims Provision	372,905,959	297,868,221
	1,242,336,701	978,319,220

The **estimated claims outstanding** include an amount for claims incurred but not reported (IBNR)." (Emphasis supplied)

[36] The issue as to whether these changes were changes to estimates, or fundamental changes to accounting policy, was joined before the learned judge. He found that the change was a change in estimates of the reserves.

[37] Mr Hylton agreed with Ms Jarrett's submission, on behalf of the Commissioner, that the critical issue joined between the parties was whether:

> "...the learned Judge was correct in finding that the adjustment by the [company] to its reserves in 2001, was a change in accounting estimates and not a fundamental change in an accounting policy." (Paragraph 31 of Miss Jarrett's written submissions)

They, of course, had opposite views in respect of the resolution of that issue.

[38] The essence of Mr Hylton's submissions in respect of this heading was that the learned judge applied a 2005 version of the IAS 8 instead of the 1995 version, which was the applicable version at the time of the company's actions. In addition to that submission, learned Queen's counsel argued that, even then, the learned judge misconstrued the provisions of the 2005 version. Mr Hylton submitted at paragraph 25 of his written submissions:

> "...that on a proper construction of the applicable accounting standard there was therefore a change in the Company's accounting policy as a consequence of the Act and the Regulations and the result was a prior year adjustment to the Company's financial statements."

In addition to others, he relied on, as authority for his submissions, sections 3.2 and 3.3 of the Statements of Standard Accounting Practice (Jamaica GAAP). "GAAP" is the acronym for "generally accepted accounting principles", and is used as term of reference to a national standard.

[39] It is at this point that the interpretation of Regulation 92 of the Insurance Regulations, IAS 8 and Jamaica GAAP, respectively, becomes critical. It is important to note that the various international accounting standards are revised from time to time. It is also apparent that the learned judge made reference to the 2005 version of IAS 8.

[40] In her submissions, Ms Jarrett conceded that the learned judge incorrectly used an IAS 8 standard promulgated in 2005, instead of the one established in 1995. On her submissions, however, the effect of both standards is the same, and the difference in

wording between them does not affect the validity of the learned judge's reasoning and finding.

[41] In addressing this issue it should first be noted that the IAS 8 for 1995 states its objective as follows:

> "The objective of this Standard is to prescribe the classification, disclosure and accounting treatment of certain items in the income statement so that all enterprises prepare and present an income statement on a consistent basis. **This enhances comparability both with the enterprise's financial statements of previous periods and with the financial statements of other enterprises.** Accordingly, this Standard requires the classification and disclosure of extraordinary items and the disclosure of certain items within profit or loss from ordinary activities. **It also specifies the accounting treatment for changes in accounting estimates, changes in accounting policies and the correction of fundamental errors**." (Emphasis supplied)

[42] Certain other portions of this version of IAS 8 assist in the current analysis. The first is the definition given for accounting policies:

> "*<u>Accounting policies</u> are the specific principles, bases, conventions, rules and practices adopted by an enterprise in preparing and presenting financial statements.*" (Italics as in original)

[43] The 1995 IAS 8 also discusses changes in accounting estimates. Although a definition of the term "accounting estimates" is not specifically set out, paragraph 23 allows for an interpretation of what the term means. The paragraph states :

> "As a result of the uncertainties inherent in business activities, many financial statement items cannot be measured with precision but can only be estimated. **The estimation process involves judgments based on the latest**

> **information available.** Estimates may be required, for example, of bad debts, inventory obsolescence or the useful lives or expected pattern of consumption of economic benefits of depreciable assets. The use of reasonable estimates is an essential part of the preparation of financial statements and does not undermine their reliability." (Emphasis supplied)

[44] Paragraph 42 of that version of IAS 8 outlines when a change in accounting policy should be made. It states:

> "***A change in accounting policy should be made only if required by statute, or by an accounting standard setting body, or if the change will result in a more appropriate presentation of events or transactions in the financial statements of the enterprise***." (Emphasis and italics as in original)

[45] At paragraph 49, IAS 8 stipulates that changes in accounting policy should be applied retrospectively. It states:

> "***A change in accounting policy should be applied retrospectively unless the amount of any resulting adjustment that relates to prior periods is not reasonably determinable. Any resulting adjustment should be reported as an adjustment to the opening balance of retained earnings. Comparative information should be restated unless it is impracticable to do so***." (Emphasis and italics as in original)

A footnote to that extract refers to transitions from national GAAP to IAS standards of accounting.

[46] Learned counsel have kindly provided us with a copy of an extract of the Jamaica GAAP. The learned judge also made reference to the Jamaica GAAP. That document,

although providing more than one definition of accounting policies, does not differ significantly in the definition of the term as quoted from the 1995 IAS 8. One example is set out at page 3111 at paragraph 16:

> "**Accounting policies** are the specific accounting bases selected [and] consistently followed by a business enterprise as being, in the opinion of the management, appropriate to its circumstances and best suited to present fairly its results and financial position." (Emphasis as in original)

[47] The Jamaica GAAP also states when it is permissible to make prior year adjustments. In section 3.3, it gives some specific guidance on when those adjustments are permissible. At paragraph 7, on pages 3115-6, it states, in part:

> "Prior year adjustments, that is prior year items which should be adjusted against the opening balance of retained profits or reserves, **are rare and limited to items arising from changes in accounting policies and from the correction of fundamental errors**....The majority of prior year items however should be dealt with in the profit and loss account of the year in which they are recognised and shown separately if material. They arise mainly from the corrections and adjustments which are the natural result of estimates inherent in accounting and more particularly in the periodic preparation of financial statements. Estimating future events and their effects requires the exercise of judgment and will require reappraisal as new events occur, as more experience is acquired or as additional information is obtained. **Since a change in estimates arises from new information or development it should not be given retrospective effect by a restatement of prior years**." (Emphasis supplied)

[48] Paragraph 8, on page 3116, of the Jamaica GAAP also gives guidance on changes in accounting policies. It states, in part:

> "...A change in accounting policy should therefore not be made unless it can be justified on the ground that the new policy is preferable to the one it replaces because it will give a fairer presentation of the results and of the financial position of the business. **For example, the issue of a Statement of Standard Accounting Practice that creates a new accounting basis or expresses a preference for a basis not at present in use in the company is sufficient ground for making a change….An example of a change in accounting policy would be a change in the method of computing the cost of stock and work in progress from one which includes no overheads to one which includes all productions overhead**." (Emphasis supplied)

[49] Learned counsel, depending on their individual perspective, pointed to one or other of the various portions of these documents (some of which have not been quoted herein), as supporting their respective stance. What is clear, however, is that neither document spoke to the specific issue of reserves. It is also clear that neither party provided any expert evidence before the learned judge as to the categorisation that the accounting profession would make of this item that is in dispute.

[50] The learned judge, who is very experienced in revenue matters, after sifting the issues in dispute and making reference to the definition of "Accounting policies", albeit from the 2005 version of the IAS 8, concluded that:

> "It seems clear to me that what has occurred here is a change in accounting estimate and not a 'fundamental change in accounting policies'." (page 25 of the record of appeal)

[51] He decided that the change was not one that was "allowed" by statute. Based on what I have stated in respect of the first heading discussed above, and based on the

term used at paragraph 42 of the IAS 8, I would not agree with the use of the term "allowed" in that context and would prefer to use the term "required" as being more accurate. The finding would, nonetheless, eliminate one basis for defining this adjustment by the company as a fundamental change in accounting policy.

[52] The learned judge found that as the company had failed to show that "a mere increase in the reserve position, albeit arising from an actuarial valuation, is a 'fundamental change in accounting policy'", it had, therefore, not demonstrated that the loss was allowable.

[53] In coming to his decision, the learned judge made reference to the principle that where "it is difficult to distinguish between a policy and an estimate change, the change should be treated as a change in estimate". That principle is supported by the 1995 IAS 8. At paragraph 25, the IAS 8 deals with difficulties in distinguishing between a change in accounting policy and a change in accounting estimate. It states:

> "Sometimes it is difficult to distinguish between a change in accounting policy and a change in an accounting estimate. **In such cases, the change is treated as a change in an accounting estimate, with appropriate disclosure**." (Emphasis supplied)

[54] The Jamaica GAAP also supports that stance. At page 3116 of that document, a portion of paragraph 7 states:

> "Sometimes a change in estimate may have the appearance of a change in accounting policy and care is necessary in order to avoid confusing the two. For example, the future benefits of a cost may have become doubtful and a change may be made from amortising the cost over the period of

> those benefits to writing it off when incurred. **Such a change should be treated as a change in estimate and not as a change in accounting policy**." (Emphasis supplied)

[55] I conclude this analysis by stating that I respectfully agree with the learned judge's conclusion that this was a change in an accounting estimate. It was not required by statute, it was not required by an accounting standard setting body and there is no evidence to support the finding that the change would have resulted "in a more appropriate presentation of events or transactions in the financial statements of the enterprise" (paragraph 42 of the 1995 IAS 8). I have no basis for disturbing the finding of the experienced revenue judge in respect of this issue.

[56] The fact that the learned judge erroneously referred to the 2005 IAS 8 did not invalidate his reasoning and conclusion. I accept Miss Jarrett's submission that there was no material difference between the two versions of the standard in this area.

[57] I, however, reject Miss Jarrett's submission that the learned judge's finding, that this was an accounting estimate, was a finding of fact. In my view, this was a finding based on the interpretation of the various standards as applied to the undisputed facts. It did not turn on any dispute on the evidence placed before the learned judge. He had no advantage over this court in respect of the matter in issue.

[58] The grounds of appeal reflected in this heading, therefore, fail.

Whether the CTAA was entitled, in the year 2007, to adjust the returns for the year 2000.

[59] On the finding made above, Advantage General was not entitled, on the basis of the re-valuation of the actuarial reserves, to submit an amended tax return for 2000. The CTAA, however, did nothing about the amended tax return. It has conceded that, in 2007, it was precluded, by the six-year limitation period, established by section 72(4) of the Income Tax Act, from rejecting the company's tax return for 2000.

[60] The Commissioner argued that the CTAA was, nonetheless, entitled to reject the carrying-forward of the figures representing the re-valued reserves into the 2003 financial statements. The Commissioner argued before the learned judge, that the CTAA, in rejecting that carry-forward, did not make an assessment for 2000 but rather an adjustment to the 2000 returns.

[61] The learned judge accepted the Commissioner's submissions on the point, but Mr Hylton has submitted that the learned judge erred in so doing. The pith of Mr Hylton's submissions on the point was that the CTAA was prevented from effecting any such adjustment. This, he said, was because the CTAA did not challenge the validity of the actuarial re-valuation. He stated this at paragraph 69 of his written submissions:

> "The [CTAA] has proceeded on the basis that the Amended Loss was an error that it was permitted to correct in its carrying-forward in subsequent years. It is submitted that proceeding on this basis was misconceived. **The Amended Loss was the direct result of the actuarial revaluation of the Company's reserves, which was never challenged by the [CTAA], whether as being erroneous or otherwise**." (Emphasis supplied)

[62] The flaw in that submission is that the CTAA, although not contesting the validity of the actuarial re-valuation of the reserves, did contest its being used in the 2000 amended returns. It is true that its basis for rejecting the company's use of the restated accounts in the 2000 amended returns was that the Insurance Act had no retrospective effect. Nonetheless, it did contest the amended return for that year as having wrongly utilised the restated accounts and it did protest the carrying forward of the re-stated figures, into 2003. In submitting the adjustments of the income tax returns for the years 2001-2004, the CTAA said in respect of each:

> "The loss of Six Hundred and Ninety-Two Million, One Hundred and Eighty-Two Thousand, Six Hundred and Six Dollars ($692,182,606.00), brought forward from the Year of Assessment 2000 was disallowed as the amendments made to your return, creating this loss, would not have resulted from the legislative changes in the Insurance Act of 2001." (Pages 131, 134, 137 and 140 of the record of appeal)

[63] After considering the company's objection to that adjustment, the CTAA, in stating its decision in respect of the objection, said in part, in its letter dated 23 September 2008:

> "On the issue of te legislative changes brought about by the Insurance Act 2001, it should be noted that these changes could not have given raise [sic] to the loss of Six Hundred and Ninety-Two Million, One Hundred and Eighty-Two Thousand, Six Hundred and Six Dollars ($692,182,606.00) for the Year of Assessment 2000 as stated in your letter [of objection].
>
> The adjustments were made to a period outside the commencement of the Insurance Act 2001 and therefore the amount so stated was adjusted.

> Furthermore, research shows that the Insurance Act 2001 was not retroactive." (page 149 of the record of appeal)

[64] The Commissioner, in submissions before the learned judge, relied on the Canadian case of **Leola Purdy Sons Ltd v R** [2009] 4 CTC 2041 as authority for the distinction between an assessment and an adjustment. The facts of that case are that, in 2005, the tax authorities rejected a company's tax return, in which it claimed that it had made a capital gain in trading in certain futures contracts. The company eventually conceded that the tax authorities were correct in principle. It, however, sought to rely on the same principle and claimed that it was entitled to rely on losses made in similar trading in 1998, which losses it had previously treated as capital losses. It wished to carry forward those losses as trading losses into the years after 1998.

[65] The tax authorities opposed the claim. They insisted that the only way to change the capital loss in 1998 into a non-capital loss, was to re-assess the 1998 return. They indicated that 1998, was, however, a statute-barred year, and thus no change to the return for that year could be countenanced.

[66] The court found that although 1998 was a statute-barred year, there was nothing to prevent an error, which was made in that year, being corrected in subsequent years. Rip CJ said at paragraphs 28-29 of his judgment:

> "…Nobody is saying that a statute-barred year can be reassessed. The tax the taxpayer has been assessed for the statute-barred year cannot be changed. The assessment of tax for the statute-barred year is 'deemed valid and binding notwithstanding any error, defect or omission in the

> assessment….But it is valid and binding only for the year assessed. **If an error was made in the assessment of the statute-barred year which affects another year, the Minister, in assessing the other year, must follow the *Act* and if there was an error in law in a previous year, including a statute-barred year, that error ought to be corrected so that the assessment for the current year is correct**…Where there is a sound and practical reason to assess in a consistent manner that is not prohibited by statute, the Minister should not fear doing so. (Emphasis supplied)

[67] I respectfully agree with Anderson J that the reasoning and decision in **Purdy** is correct and helpful in the assessment of the instant case. Applying the principle to be gleaned from that case, the conclusion to be drawn is that the CTAA is not entitled to re-assess the company's tax situation for 2000 but it is entitled to correct the error that the company made in re-stating the financial statements for that year. As a result, there would be no loss carried forward from the year 2000.

[68] Based on that reasoning the grounds of appeal reflected in this heading also fail.

Conclusion

[69] The six grounds of appeal filed in this matter were assessed under three headings. The answers to the questions raised under the headings were that the Insurance Act did not have retrospective effect but that it incorporated the application of accounting standards, which did allow, in appropriate circumstances, a restatement of financial statements for a year prior to the promulgation of the Act. An application of the relevant accounting standards deemed that the actuarial revaluation did not qualify

for a restatement of the financial statements, and the company was wrong to have filed an amended tax return for the year 2000 based on the actuarial revaluation.

[70] Although the company had made that error, the amended return for the year 2000, having been ignored by the CTAA until the year 2007, had become statute-barred. The CTAA could, therefore, not re-assess the return for the year 2000. It could, however, correct the error and carry forward the correct figure to succeeding years. In the circumstances, I would order that the appeal be dismissed.

PANTON P

ORDER

a. The appeal is dismissed.

b. Costs to the respondent to be taxed if not agreed.