Hilary Term

[2016] UKPC 8

Privy Council Appeal No 0093 of 2014

JUDGMENT

Advantage General Insurance Company Limited (Appellant) vThe Commissioner of Taxpayer Appeals (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Mance

Lord Clarke

Lord Sumption

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

7 March 2016

Heard on 13 October 2015

Appellant	Respondent
Michael Hylton QC	Nicole Foster-Pusey QC
Kevin Powell	(Solicitor General of Jamaica)
	Althea Jarrett (Director of State Proceedings)
(Instructed by Myers Fletcher & Gordon)	(Instructed by Charles Russell Speechlys)

LORD CARNWATH: (with whom Lord Mance, Lord Clarke and Lord Hodge agree)

1.

The appellant company's business is in general insurance. The appeal concerns the tax consequences of a change in practice for valuation of its reserves, arising from the Insurance Act 2001. Although the Act came into operation on 21 December 2001 and was not retrospective, the company adopted the new approach to restate its financial statements for the calendar year ending December 2000, and submitted an amended tax return on that basis. The effect of the amendments if accepted was to create a substantial loss in that year, which the company sought to carry forward to set against profits in subsequent years up to and including 2003. The appeal concerns an assessment issued by the Commissioner of Taxpayer Audit and Assessment Department ("CTAAD") for that year.

Factual background

2.

The story begins on 1 June 2001, the date of the company's audited financial statements for the calendar year 2000. The notes to the financial statements (under the general heading "significant accounting policies") included a section on "underwriting results". These had been determined after making provision for "inter alia, claims equalisation, unexpired risks, unearned premiums and outstanding claims". "Claims equalisation" was explained as an amount set aside to "reduce exceptional fluctuations in the amount charged to revenue in subsequent years" calculated as 5% of the year's net premium. The last item (which included "claims incurred but not reported" - "IBNR") was explained as follows:

"Outstanding claims represent 24% (1999-25%) of net premium income for motor vehicle business and the estimated amount of claims reported for the other classes of business."

This item amounted to $372.9m, out of a total for "insurance funds" of $1,242.3m (Note 13). (The figures here and below have been rounded to one decimal point.)

3.

The statement showed profit before tax as $84.8m. A tax return based on this statement was submitted on 20 June 2001. It showed "statutory income" as $97.3m and tax payable as $14.5m. The return would in principle have triggered liability to pay under a "deemed assessment" (ITA section 67(5) see below), so far as not already paid during the year as estimated tax (section 65); but there appears to be no indication in the papers before the Board whether or when any payment of tax was made pursuant to this return.

4.

In 2001, in accordance with the new Insurance Act, the company appointed actuaries to value its actuarial reserves and other policy liabilities, including its reserves as at 31 December 2001. The financial statement for 2001 was dated October 2002. In accordance with standard accounting practice, comparative figures were given for 2001 and the previous year. In the equivalent section under "significant accounting policies" it was stated that the "underwriting results" had been determined after making provisions for "inter alia, unearned premiums, unexpired risks and outstanding claims as computed by the actuaries". There was no specific provision for "claims equalisation", as in the previous financial statement. The final item was explained:

"Outstanding claims represent a percentage of net premium for motor vehicle business and the estimated amount of claims reported for the other classes of business as determined by the actuaries."

5.

Under the heading "change of accounting policy" it was stated:

"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)."

Note 14 referred to the “actuarial review” performed by consultant actuaries on “the loss and loss adjustments on expense reserves for 2001”. The actuaries’ estimates had been guided by “inter alia, historic loss statistics, statistical fluctuations, and considerations of the economic environment”. The note added:

“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).”

Note 18 described the “prior year adjustment” as that required “to reflect the required amounts at 31 December 2000 as calculated by the actuaries”. The resulting figures, again under the heading “insurance funds”, were given for 2001 and 2000. The amended 2000 figure for “outstanding claims” was $1,306m, out of a total of $2,031.9m, resulting in a loss for that year of $704.4m. A tax return for 2001 based on these figures was submitted on 22 November 2002. It showed “losses for previous years (brought forward)” of $692.2m, contributing to a “statutory” loss of $733.1m.

6.
The financial statement for 2002 (dated 6 June 2003) was prepared again in accordance with the requirements of the 2001 Act. Under “significant accounting policies” there was a somewhat fuller explanation than in the previous statement of the provision for outstanding claims. They had, it was said, been “actuarially determined” with reference to estimates of claims notified before the closure of the records, and of the probable cost of claims incurred but not reported. (In an unexplained departure from the previous statement, there was no indication that motor vehicle claims had been dealt with on a separate, percentage basis.)

7.
In September 2004 the company submitted a tax return for 2002, showing “brought forward” losses of $733.1m, and a statutory loss of $728.4m. At the same time it submitted an amended return for 2000 showing a statutory loss of $692.2m (equivalent to the loss which had been “brought forward” in the 2001 return). Although they are not before the Board, it appears that returns were in due course made for 2003 and 2004.

8.
The Board have not been shown any contemporary letter or document explaining the change to the 2000 return. According to an affidavit sworn in these proceedings by its Vice President of Finance, the company “had to restate” its 2000 financial statements because this was required by “the applicable accounting standards, particularly International Accounting Standard 8”. (In the documents before the Board the change appears only in the comparative previous year figures, as shown in the 2001 statement. The papers do not include an amended financial statement for the year 2000 as such.)

9.
There appears to have been no response from the tax authorities to any of these submissions, by way of assessment or otherwise, until 30 November 2007. On that date the CTAAD sent an “adjustment” of the tax returns to the years 2001-2004. The returns for each of the four years had been adjusted to give effect to the decision to “disallow” the loss of $692.2m brought forward from 2000, “as the amendments … creating this loss would not have resulted from the legislative changes in the Insurance Act of 2001”.

10.

Before returning to the formal decision under appeal, and the subsequent proceedings, it is convenient to refer to the relevant statutory provisions.

Statutory provisions

Insurance

11.
Although there was much discussion of the Insurance Act of 2001 in the courts below, it has played little part in the submissions to the Board. Its relevance is chiefly as providing the trigger for the company's restatement of its 2000 accounts. It can be dealt with very shortly. The Act replaced the Insurance Act 1972. As appears from its "Memorandum of Objects and Reasons", it followed a detailed examination of "the problems experienced in the insurance industry" and was designed to effect overall improvements, including regulations relating to solvency standards and the appointment and duties of actuaries. Section 44 required every registered insurer to appoint an actuary, whose duties would include the valuation of "the actuarial reserves" as at the end of each financial year "in accordance with generally accepted actuarial practice". The Act took effect in December 2001. There is nothing in it to indicate that it was intended to have retrospective effect for years before 2001.

Income Tax

12.
The governing taxing statute is the Income Tax Act. Section 5 imposes a charge to tax on annual profits and gains arising (inter alia) from a trade or business carried on in the Island. The rates are set out in section 30. Section 13 provides that, for the purpose of ascertaining the chargeable or statutory income of any person, there are to be deducted "all disbursements and expenses wholly and exclusively incurred by such person in acquiring the income". Permitted deductions include "the amount of any loss" sustained in the business "which, if it had been profit, would have been assessable … during the year of assessment and previous years of assessment", subject to disallowing any loss allowed against the income of a previous year (section 13(1)(h) emphasis added). Thus, carried forward losses are not limited to losses from the immediately preceding year.

13.
Section 48 makes special provision for (inter alia) insurance companies. The gains and profits on which tax is payable are to be ascertained in accordance with a table set out in the section. This provides for the deduction of the "permitted insurance reserves" as at the end of the year, and the addition of their amount at the beginning of the year. "Permitted insurance reserves" are defined as -

"at any date … the insurance reserves established by the company, and accepted by the Commissioner as reasonable for the purposes of computing gains or profits on which tax is payable, in relation to the policies in force up to that date." (section 48(2A)(c))

14.
Section 65 requires a taxable person, before 15 March in any year of assessment, to make an estimate of his tax for the year, and to make payments in four equal instalments during the year. Section 67 requires him by 15 March in the following year, to make a return of his income from every source for the year of assessment. The return must be accompanied by a statement in prescribed form of the tax chargeable on that income, indicating how much (if any) of that tax remains unpaid. The tax so indicated -

“… shall be treated as if it had been the subject of a notice of assessment served on that person and specifying as the collection date the 15 of March next following the end of the year of assessment.” (section 67(5))

15.
By section 72(1), save where all unpaid tax is the subject of a “deemed assessment” under section 67(5), the Commissioner is required to “proceed to assess every person liable to the payment of tax” as soon as may be after the expiry of the time allowed for delivery of his return. Section 72(4) imposes a time-limit in the following terms:

“Where it appears to the Commissioner that any person liable to tax in respect of any year of assessment has not been assessed or has been assessed to a less amount than that which ought to have been charged the Commissioner may, within the year of assessment or within six years after the expiration thereof, assess such person at such amount or additional amount or surcharge, as according to his judgment ought to have been charged.”

Section 76 provides a right of appeal to the Revenue Court, which may be on fact or law. Income tax due under the assessment is payable without further demand (section 78).

Amending a tax return

16.
There is no express provision in the statute for amending a tax return once made, nor for recovery of any tax overpaid in consequence of such an amendment. In this respect the Jamaican statute differs for example from the United Kingdom Taxes Management Act 1970, as it stood before the introduction of self-assessment in 1997. Section 33 (“Error or mistake”) allowed a claim to the Board for relief, within six years of the end of the year of assessment, on the basis that an assessment was excessive “by reason of some error or mistake in a return”. However, no relief could be given if the return had been made “in accordance with the practice generally prevailing at the time …”.

17.
It is common ground that there is no statutory equivalent to this “error or mistake” power in Jamaican tax law. However, in an agreed post-hearing note on the Jamaican tax assessment regime, submitted at the request of the Board, the position is stated as follows:

“While the ITA is silent on the issue of amendments to returns filed by the taxpayer, the accepted practice is that the Commissioner does in fact permit amendments to returns within the same six-year limitation period as the ITA provides for amendments by the Commissioner.”

18.
The Board is grateful for this clarification of the basis on which the appeal appears so far to have proceeded without objection. It remains unclear, however, from what legal source the Commissioner can derive such a non-statutory dispensing power, in effect to waive tax which has already become due and payable under the statute. It also begs the question, even assuming the existence of such a power, whether its exercise is subject to any constraints and if so what. In particular, what criteria should the Commissioner apply in deciding how to exercise his non-statutory discretion (as in this case) to permit a retrospective restatement for tax purposes of a return prepared in accordance with accepted practice at the time? The common assumption in this appeal seems to have been that, if the restatement was required, or at least permissible, under applicable accounting standards, then the Commissioner should not merely accept the change as “reasonable” under section 48, but also treat

that as a sufficient basis for retrospectively adjusting the company's tax liability. The Board will proceed to examine the respective submissions, without for the moment questioning the validity in law of that assumption. Before doing so, it is necessary to return to the procedural history.

The Commissioner's decision and the appeal proceedings

19.
In a letter dated 14 December 2007 the company's accountants, KPMG, objected to the adjustments. Their letter noted that there had been "no official assessment" for the years 2001-2004, and that, no assessment having been previously raised for the year 2000, an assessment for that year would be outside the six-year limit imposed by section 72(4) of the Income Tax Act. CTAAD responded (by letter dated 7 January 2008) asserting that he had power to adjust "anything that affects the revenue within the statute period", and that a notice of assessment would follow. The notice of assessment (dated 20 March 2008) was for the year 2003. It seems that this year was taken as the earliest for which an assessment could be made within the six-year limit. The loss of $692.2m was disallowed for the reason stated previously.

20.
By letter of 8 April 2008 KPMG objected to the assessment, on the grounds that it was statute-barred and that in any event it had been a legitimate change arising from the new Insurance Act:

"The financial statements for the year ended 31 December 2000 were effectively restated because the legislative change brought about by the Insurance Act 2001 required a change to a fundamental accounting policy of the company. Accounting Standards require that such changes automatically warrant a restatement of the prior year's financial statements."

21.
On 23 September 2008 CTAAD affirmed his decision, on the grounds that the adjustments related to a period "outside the commencement of the Insurance Act 2001" which was "not retroactive". By letter dated 23 October 2008 KPMG appealed to the Taxpayer Appeals Department. The letter expanded on the grounds previously stated, arguing that the assessment was statute barred and that the change was in any event justified by reference to the legislative requirements of the Insurance Act resulting in "fundamental change to a company's accounting policy". Although the Insurance Act 2001 was not retro-active, "accounting standards require the retroactive adjustment".

22.
There was a hearing before the Acting Commissioner of the Taxpayer Appeals Department, attended by representatives of both sides, including three from KPMG. The respective arguments are set out in some detail in the decision-letter dated 20 July 2009. Mr Galbraith of KPMG is recorded as arguing that it should not matter whether the adjustment was done in 2001 or 2002 as "cumulatively the result would be the same". He relied on the principle of accounting (in IAS8) that whenever there was "a fundamental change" in an accounting practice, there should be "a restatement of the prior year's financial statements". There was no loss to the Revenue as the adjustment could have been effected in year 2001 but was done partly in 2000 and partly in 2001. The CTAAD representative argued that the section 72(4) time-limit applied to assessments, rather than adjustments to losses brought forward; and that, although "accounting principles" might require a restatement of prior years, "the provisions of the Income Tax Act did not allow prior year adjustments". (This submission appears to contradict the "accepted practice" referred to above as common ground.)

23.

In his decision the Acting Commissioner referred to the relevant provisions of the Income Tax Act, including section 48 relating to insurance companies. On the first issue, relating to the effect of the change in accounting practice, he referred to IAS8 under which “a retrospective restatement of a change in accounting policy” was applied “to comparative information for prior periods”. He noted that, as stated in the notes to the 2001 financial statement, “the actuary recommended the revaluation of the reserves” for the year 2000. The question was whether the “revalued reserves” were an allowable deduction under the Income Tax Act. His answer was no: first, because section 48(2A)(c) defined reserves as those “accepted by the Commissioner as reasonable”, which he had not done; and secondly because the Insurance Act was not retrospective. On the second issue, relating to the six-year time-limit, he held, following the Canadian case (Leola Purdy & Sons Ltd v The Queen [2009] TCC 21) that the time-limit on assessments did not restrict adjustments designed to correct errors affecting subsequent years.

24.
The company’s appeal to the Revenue Court was heard in September 2010 by Anderson J (described by the Court of Appeal as an “experienced revenue judge”). The grounds of appeal included arguments that the restatement for 2000 had resulted from a “change of a fundamental accounting policy” for which “the applicable accounting standards required a retroactive adjustment”; that the Commissioner was time-barred by section 72(4) from disallowing the loss in 2000; and further that whether the adjustment was made in 2000 or 2001 “the result would have been the same: an increase in the reserves resulting in an actual loss by the appellant”. Although such an appeal is on fact and law, and it would have been open to the parties to call expert accounting evidence, neither did so. Mr Hylton QC led for the company, as he has done before the Board.

25.
Having summarised the submissions, the judge first noted in order to reject the Acting Commissioner’s reasoning under section 48(2A)(c) of the Income Tax Act, that CTAAD had not dealt with the question of reasonableness as a basis for his decision, nor had his statement of case made any averment that the amended reserves were unreasonable; accordingly the issue did not arise for determination in the appeal (para 25).

26.
On the effect of IAS8, the judge noted that it was “common ground” that it applied so as “to require ‘an entity to restate the financial statement of prior years once there was a fundamental change in accounting policy in the current year’” (para 37). He contrasted a change of accounting policy with a “change in accounting estimate”, holding that it was the latter which had occurred in this case (para 39). Although he did not accept the CTAAD’s contention that IAS8 only applied to correct “prior period errors”, it did not “mandate” the changes in the 2000 statement so as to give rise to a loss “within the definition of a loss within section 13(1)”. Accordingly the company had failed to show that “a mere increase in the reserve provision, albeit arising from an actuarial valuation, is a ‘fundamental change in accounting policy’” (paras 44-45). Finally he agreed with CTAAD, following the Canadian case, that the adjustment to disallow the loss arising from the actuarial revaluation of the 2000 statement was not an “assessment” for the purpose of the statutory time-limit (para 54).

27.
The appeal to the Court of Appeal was heard in January 2013 and dismissed in a judgment given on 7 February 2014 by Brooks JA, agreed by Panton P and McIntosh JA. The judgment recorded that there had been no dispute below that the company’s actuaries had advised in the manner reflected by the restated statement, nor that, had the adjustment been made in the current year of assessment, it

would have been allowable (para 18). Having set out the grounds of appeal and the “three main headings” adopted by Mr Hylton, Brooks JA restated the issues in his own terms:

“(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 CTAAD was entitled, in the year 2007, to adjust the returns for the year 2000.”

28.
On the first issue, he agreed with CTAAD that the Act was not retrospective, in the sense of requiring the actuaries to review reserves in years before 2001. However, that was irrelevant to the issues in the appeal. There was nothing in the Act to prevent them from evaluating reserves for prior years. Whether they were justified in doing so depended on whether, in accordance with “the appropriate accounting standard”, the adjustment by the actuaries of the method of calculating reserves for 2001 justified the restatement of the 2000 reserves (paras 30-31).

29.
He saw the second issue as turning on whether the change by the actuaries amounted to a “fundamental change in an accounting policy” or “a change in accounting estimates” under the relevant accounting standards. He noted a number of references in the statements themselves to the relevant items as “estimates”. (paras 32-33) These were highlighted in the judgment. He cited various references in 1995 IAS8 to “accounting policies” and “accounting estimates”, and similar references in the Jamaica GAAP (see below). He observed that neither party had provided any expert evidence on the distinction between the two categories. He attached weight to the conclusion of the experienced judge that what had occurred here was a change in accounting estimate rather than a “fundamental change in accounting policies” (paras 38-50). He found support for that view in the Jamaica GAAP para 7, which noted that a change in estimate may sometimes “have the appearance of a change in accounting policy” (para 54). He concluded, in agreement with the judge, that this was a change in accounting estimates:

“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 accurate presentation of events or transactions in the financial statements of the enterprise’.” (citing IAS8 para 42)

However, he rejected the submission that the judge’s conclusion was a finding of fact; it was rather “a finding based on the interpretation of the various standards as applied to the undisputed facts” (paras 55-57). Finally, on his third issue, he agreed with the judge, relying on the Canadian case, that the adjustment was not time-barred by section 72(4) (para 67).

The issues in the appeal

30.
The following issues have been agreed:

i)
Whether the revaluation of the company’s actuarial reserves was required on a proper interpretation of the Insurance Act and the Insurance Regulations.

ii)
Whether the revaluation of the company's actuarial reserves was caused by a [fundamental] change in accounting policy resulting in the restatement of the company's financial statements and amended income tax returns for the year 2000. (As appears below, it is now common ground that it is not necessary for the change in accounting policy to be "fundamental".)

iii)
Whether the increase in the company's actuarial reserves being an allowable loss under the Income Tax Act, it should have been permitted to carry forward that loss to the current year of assessment.

iv)
Whether the CTAAD should be permitted to disallow in 2007 a loss incurred by the appellant in the year 2000.

31.
The first and last issues can be disposed of shortly. They were not strongly pressed in oral argument by Mr Hylton. On issue (i), as was effectively conceded by KPMG in the early exchanges, the Insurance Act as such did not have retrospective effect; neither it nor regulations under it could have imposed any "requirement" to restate the 2000 statement. Any such requirement arose if at all from the applicable accounting standards. These are properly considered under issue (ii).

32.
On issue (iv), the Board sees no reason to disagree with the unanimous view of the judges below, and the Assistant Commissioner, supported also by the Canadian decision in Leola Purdy & Sons Ltd v The Queen [2009] TCC 21; [2009] 4 CTC 2041. Section 72(4) on its face precludes an assessment outside the time-limit for a particular year, but not the correction of alleged errors in respect of that year in so far as they are relevant to a timely assessment for a later year.

Accounting standards

33.
It is common ground before the Board (as in the Court of Appeal) that the applicable standards at the relevant time were to be found in the 1995 version of the International Accounting Standard IAS8 (not the 2005 version) and the Jamaica GAAP ("Generally accepted accounting practice"). The main passages to which reference was made were as follows.

34.
IAS8 is a section headed "Net profit or loss for the period, Fundamental errors and Changes in accounting policies". The objective is said to be to prescribe the treatment of certain items in the income statement to ensure consistency and enhance comparability with an enterprise's financial statements of previous periods and those of other enterprises.

35.
"Accounting policies" are defined as -

"the specific principles, bases, conventions, rules and practices adopted by an enterprise in preparing and presenting financial statements." (para 6)

A passage headed "Changes in accounting estimates" (paras 23-26) notes that certain items cannot be measured with precision and can only be estimated. It comments:

“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.” (para 25)

36.
There is a later section dealing with “Changes in accounting policy” (para 41). It is noted that to ensure comparability, the same accounting policies are normally adopted in each period:

“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.” (para 42)

Under the same main heading, following a passage dealing with “Adoption of an international accounting standard”, there is a passage headed “Other changes in accounting policies - Benchmark treatment”. It is said that a change in accounting policy “should be applied retrospectively” unless the amount of the resulting adjustment for prior periods is “not reasonably determinable”. Comparative information should be restated “unless it is impracticable to do so”: This is further explained in the following paras 50-51:

“The financial statements, including the comparative information for prior periods, are presented as if the new accounting policy had always been in use. Therefore, comparative information is restated in order to reflect the new accounting policy ...

The restatement of comparative information does not necessarily give rise to the amendment of financial statements which have been approved by shareholders or registered or filed with regulatory authorities. However, national laws may require the amendment of such financial statements.”

37.
The Jamaica GAAP has a section 3.2, dealing with “Disclosure of Accounting Policies”. It distinguishes between “fundamental accounting concepts”, “accounting bases”, and “accounting policies”, each of which is defined (paras 14-16). Fundamental accounting concepts are “the broad basic assumptions” which underlie the periodic accounts, such as the “going concern” and the “accruals” concepts. Accounting bases are the “methods developed for applying fundamental accounting concepts to financial transactions and items” for the purpose of the accounts, such as for determining the allocation of revenue and costs to accounting periods or “the amounts at which material items should be stated in the balance sheet”. 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 the circumstances and best suited to present fairly its results and financial position.”

38.
Section 3.3 deals (inter alia) with “prior year adjustments” (para 7). They are said to be “rare and limited to items arising from changes in accounting policies and from the correction of fundamental errors”. Most such items should be dealt with in the accounts of “the year in which they are recognised”, as they arise mainly from the “corrections and adjustments” inherent in the process of estimation. The paragraph continues:

“Since a change in estimates arises from new information or development it should not be given retrospective effect by a restatement of prior years. 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 off when incurred. Such a change should be treated as a change in estimate not as a change in accounting policy."

(The final sentence is as quoted by Brooks JA with "emphasis supplied": para 54.)

39.
The following para 8 deals with "Changes in accounting policies". In the interests of consistency, such a change should not be made unless justified on the basis that it will give "a fairer presentation" than the one it replaces "of the results and of the financial position of the business". "Prior year adjustments" are defined as "material adjustments" applicable to prior years arising from "changes in accounting policies" or the correction of "fundamental errors" (para 12). Such adjustments should be accounted for by "restating prior years, with the result that the opening balance of retained profits will be adjusted accordingly" (para 16).

40.
Before turning to the submissions of the parties, the Board would make two observations on these extracts. First, they do not on their face provide any precise or even consistent guidance for identifying changes in "accounting policies", fundamental or not. Even the definitions of "accounting policies" differ as between the two documents (compare paras 35 and 37 above). Secondly, IAS8 draws an important distinction (see paras 50-51, quoted in para 36 above) between changes of the previous year figures made purely for comparative purposes in the current year accounts, and a retrospective amendment of the actual financial statements for that year as "approved by shareholders or registered or filed with regulatory authorities". It is not entirely clear from the material before the Board whether the restatement of the 2000 figures, as presented in the 2001 financial statements in October 2002, was intended, at least initially, to be used for more than comparative purposes. On neither issue is it easy for a court to reach clear conclusions unaided by expert accountancy evidence.

Submissions of the parties

41.
On issue (ii) Mr Hylton submitted that the courts below had been wrong to categorise the change as simply one of "accounting estimates". Consideration of the relevant accounting standards and the legislative regime showed that the increase resulted from a change in the method of calculating the reserves, which was properly regarded as a change in accounting policy, as it was correctly designated in the financial statements themselves. On issue (iii) (with the assistance of his junior Mr Powell) he relied on the effect of section 48(2), under which the company was permitted to deduct the difference between the reserves as at the beginning and end of the year. Once it was accepted, as it had been in the courts below, that the difference brought about by the change in practice pursuant to the Insurance Act was in principle allowable, it should not matter whether it was brought into year 2000 or 2001. In either event it was a loss which could be carried forward (under section 13(1)(h)) to 2003, the year of assessment.

42.
The Solicitor General relied on the reasoning and conclusions of the Revenue Court and the Court of Appeal. She accepted that there was nothing in the accountancy principles to show that the change in policy had to be "fundamental", as the judge had understood (relying, not unreasonably, on the company's own submissions). However, this was immaterial. It was clear from the passages quoted by them that the restatement was a matter of accountancy estimation rather than policy. Even if it was a

matter of policy, that was only relevant under IAS8 as applied to "transactions or events" in the prior year; the reserves were liabilities, not transactions or events. On issue (iii) there was no dispute that the reserves would have been allowable in respect of the current year 2001, but that was not the issue before the courts.

Discussion

43.
Issue (ii) is expressed as one relating to the treatment of the revaluation for accounting purposes. That issue can only be addressed in the context of the relevant provisions of the Income Tax Act. Under section 48(2A)(c), "permitted" reserves must be "established by the company", and "accepted by (CTAAD) as reasonable" for the purpose of computing taxable gains or profits. However, the Board agrees with the judge in rejecting the Acting Commissioner's contention that "reasonableness" depends solely on the judgment of CTAAD. There is no reason why his judgment on that issue, as on any other relevant matter, should not be reviewable on appeal. Further, it seems to have been common ground that, even though the Insurance Act did not have direct effect in 2000, it was open to the company to argue that the restatement of the reserves for that year was required, or at least justified, by the applicable accountancy standards, and therefore "reasonable" within the meaning of section 48(2A)(c).

44.
Brooks JA, in the Court of Appeal, described the judge's conclusion as "a finding based on the interpretation of the various standards as applied to the undisputed facts"; and thus, by implication, as a matter on which the court could form its own view unassisted by expert evidence. That would be understandable if the standards contained readily identifiable guidance on the particular issue before the court. But as already noted they do not give clear or precise guidance, particularly as applicable to the unusual circumstances created by the 2001 Act. It is unfortunate in the Board's view that neither side thought it necessary to call expert evidence on this issue, nor even to adduce a copy of the actuaries' report on which the retrospective change was said to be based. Without such assistance the views expressed by the Board in this case cannot be regarded as determinative on an issue which could be of some general importance in other cases. There is also a surprising lack of evidence either as to the company's reasons for seeking to apply the change retrospectively, or on its practical effects whether for tax purposes or otherwise.

45.
Accepting those limitations, and on the basis of the case as argued, the Board is on balance persuaded by Mr Hylton's submission that the change should be regarded as one of accounting policy. The definition of "accounting policy" in IAS8 is wide, referring to the specific "principles, bases, conventions, rules and practices" adopted by the company in presenting its financial statements (para 6). The Board sees no reason why the change required by the new Insurance Act should not be regarded as a change at least of its "practices" in presenting its financial statements, whatever view is taken of the other terms within that definition. Under the same standard (para 42) the change needed to be either "required by statute" or justified as resulting in a "more appropriate presentation" of "events or transactions in the financial statements of the enterprise". It is true that it was not required by statute in 2000. But the same policy reasons which led the legislature to make it a statutory requirement in 2001 could reasonably be said to point to it as providing a "more appropriate presentation" in the previous year.

46.

To take the most striking example, the outstanding claims provision in the amended 2000 accounts (as noted above: paras 2-5) was increased to $1,306m from $372.9m in the original accounts. This very substantial change followed the advice of the actuaries, appointed under the 2001 Act, that the provision previously made for prior years was "unreasonable"; with the result that their calculations were substituted for "the estimate provisions previously calculated by management". The detail of the change is not clear from the papers before us, but it is noted that the actuaries' estimates were guided by "inter alia, historic loss statistics, statistical fluctuations, and considerations of the economic environment". It is clearly involved a significantly more scientific approach.

47.

In the Board's view, it difficult to regard a change of this scale, motivated in effect by the same policy reasons as were endorsed by the legislature in the 2001 Act, as no more than a change of estimating technique. In the words of the Jamaican GAAP section 3.2, para 16 (para 37 above) it could be seen as a change in "specific accounting bases" selected by management as "appropriate to the circumstances and best suited to present fairly its results and financial position." Further, in terms of section 3.3, paras 7-8 (paras 38-39 above), the radically different reserves and resulting changes to the figures for 2000 did not arise from any "new information or development", but were necessary to give "a fairer presentation" (and might well also be seen as having corrected a "fundamental error") in respect of that prior year. The Board is unconvinced by the Solicitor General's response which depends on an artificially narrow reading of the words "events or transactions" in IAS8, para 42. Finally the sheer scale of the financial difference resulting from the change makes it difficult to regard it as merely a change in estimating technique.

48.

It is significant also that the change was described as one of accounting policy by the accountants in the financial statements, and no evidence was called by the CTAAD to rebut that treatment. Indeed, at the hearing before the Acting Commissioner, which was the only hearing in which the accountants played a direct role, no-one seems to have questioned them on that aspect. The only point taken by the CTAAD at that stage was that the retrospective change was not required by the Insurance Act. The basis of the Acting Commissioner's decision was, not that the change was wrongly categorised in the financial statements, but that it had not been accepted as reasonable by CTAAD.

49.

The company is therefore entitled to succeed under issue (ii). This conclusion makes it unnecessary to determine issue (iii), which was not so fully argued. However, on the submissions it has heard the Board's view is that the company would be entitled to succeed also under that head. The submission, in simple terms, is that it makes no difference for the purpose of this appeal in which year (2000 or 2001) the notional loss resulting from the change in accounting policy is shown in the accounts. The effect on the allowable loss in 2003, the year of assessment, is the same. Although this issue does not appear to have attracted attention in the lower courts, it was clearly raised in the original grounds of appeal, and is open for consideration on this appeal.

50.

The starting point is section 48 which defines "permitted insurance reserves" and shows how they are to be brought into account for tax purposes. The table in section 48(2) requires in effect a simple arithmetical comparison between the reserves respectively at the beginning and end of the year. In other words, any increase in the reserves during the year, whatever the cause, is converted into an allowable loss for tax purposes. No doubt for this reason, it was common ground that the increase resulting from the change in practice required by the Insurance Act 2001 would have been allowable, if first claimed in the tax year 2001 when that requirement took effect.

51.
For the purpose of this issue, it must be assumed that issue (ii) has been decided against the company, which accordingly was not entitled for tax purposes to increase retrospectively its reserves for the year 2000. It would follow that, for the purposes of the calculation under section 48(2), the end year figure for reserves would be reduced to the figure which was the basis of the original 2000 tax return submitted in June 2000. The same change would then have to be made to the beginning of year figure for 2001. The resulting figure would be the starting-point of the calculation of the difference in permitted reserves for that year, which as noted involves a purely arithmetical comparison of the beginning and end year figures. There is no reason, and none has been suggested, why the resulting figure should be any different merely because it has been allocated to a different year.

52.
It was suggested by the Solicitor General that a revised return would have been required for 2001. Although this issue was not fully explored in argument, the Board finds it hard to see why that should be necessary. It has to be borne in mind that the appeal is not directly concerned with the treatment of reserves in the year 2000 or 2001. The assessment under appeal is that for the year 2003. The losses in the year 2000 are only relevant to the extent that the company seeks to carry them forward into their tax return for the year 2003. For that purpose it does not matter whether the loss in question is properly attributable to year 2000 or 2001, nor how it was treated in the returns for those years. The only limitation on carry forward of previous losses under section 13(1)(h) is that it should not have been used to set against income in a previous year.

53.
One consequence of reallocating this loss to 2001 might be that the loss would not have been notionally available to set against the profit for 2000 as reflected in the original tax return for that year. As noted above, the Board has no information about what tax if any was paid for the year 2000, or what was thought to be the practical effect for tax purposes in that year of the retrospective change to the reserves. In any event those issues are not directly before the Board. As far as concerns the 2003 return, which is the subject of the appeal, the only practical effect of disallowing any set-off otherwise claimable in 2000 would be to increase the unused amount of loss available to be carried forward under section 13(1)(h). That cannot detract from the company’s right to set off at least the amount now claimed as a carried-forward loss in the year 2003.

Conclusion

54.
For these reasons the Board will humbly advise Her Majesty that the appeal should be allowed. The parties are invited to make submissions on the form of order and consequential matters (if not agreed) within 28 days of this judgment.

LORD SUMPTION:

55.
I agree with the advice which the Board proposes to tender to Her Majesty that this appeal should be allowed. But I would have advised that it should be allowed only on the ground that the taxpayer company was entitled to carry forward to the 2003 financial statements the loss first recognised in the

financial statements for 2000. On that point, I have nothing to add to the analysis of Lord Carnwath at paras 49-53.

56.
My concern in this note of dissent is with the view of the majority of the Board that the restatement of the accounts for the financial year 2000 arose from a change of accounting policy. I acknowledge that that view is tentatively stated in the absence of expert evidence on a point on which the published accounting standards are inconsistent and obscure: see para 44. But even in the absence of such evidence I think it clear that there was no change of accounting policy in this case.

57.
A company's accounting policies comprise the principles on which it recognises revenue and costs or values assets and liabilities in its published financial statements, and the assumptions on which those principles are applied.

58.
The accounting policies applied before the 2000 accounts were restated were set out in Note 2 to the financial statements originally published for that year. Note 2(c) states that the "underwriting results of the company are determined after making provisions for, inter alia, claims equalisation, unexpired risks, unearned premiums and outstanding claims." "Outstanding claims" were assessed by taking a fixed proportion (24% in 2000) of net premium income in the case of motor business and "the estimated amount of claims reported" for all other classes of business: see Note 2(c)(iv).

59.
The corresponding accounting policy applied when the accounts were restated was described in Note 2 of the financial statements for the following year, 2001. The basic policy for recognising underwriting profits was unchanged except that no provision was made for "claims equalisation", which was essentially an additional provision of 5% of net premium income deigned to smooth results from year to year by reducing "exceptional fluctuations" in revenues. Nothing turns on the omission of claims equalisation. The accounting policy for assessing "outstanding claims" was the same as before, ie a fixed proportion of net premium income for motor business and the estimated cost of reported claims for all other business.

60.
The only change which occurred when the 2000 accounts were restated in the following year was described in Note 3 to the financial statements for 2001. This reads as follows:

"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)."

The function of the actuaries was described in Note 14. They "applied inter alia, historical loss statistics, statistical fluctuations, and considerations of economic environment which served as a guide for the estimates of the reserves." The result of that process was that the provisions made for prior years were found to have been unreasonably low. We are not told how the management had estimated non-motor loss provisions in earlier years, but there is no suggestion in Note 3 that it was any different. This is not particularly surprising. All loss reserving, by whomever it is done, is ultimately based on past loss experience combined with some assessment of any other factors which suggest that future experience may be different. That is presumably why the only change is said to be the use of actuaries to make the estimate. The restatement of the loss provisions is said in Note 14 to be the result of that change.

61.

It follows that all that happened when the accounts were restated in 2001 was that claims were now estimated by a professional who could be expected to perform the task with greater expertise and objectivity than the management. I decline to accept that the use of a more skilful and independent agent to carry out this task is a change of accounting policy. It is only a better way of applying the same accounting policy.