Practitioner's viewpoint: Shortfall penalties and UOMI: the straws that break the camel's back, 01 December 2014

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For taxpayers with unpaid tax, the imposition of shortfall penalties and use of money interest can create a significant financial burden. In this article, Mark Keating, Senior Lecturer in tax at the University of Auckland Business School and Kirsty Keating, partner at EY Law review the effects of the penalties and interest regimes and ask whether the pendulum has swung too far in favour of Inland Revenue.

The present shortfall penalties (SFP) and use of money interest (UOMI) regimes came into effect on 1 April 1987.[1] Those regimes have now been operating in tandem for almost 20 years. Accordingly, it is worth considering whether they are fulfilling their stated purpose. In particular, it may be worth examining whether the imposition of UOMI and/or SFP by Inland Revenue (IR) is "proportionate to the seriousness of the breach". This question is particularly relevant to taxpayers who find themselves in a dispute with IR. In addition to the underlying core tax, these taxpayers face being financially overwhelmed by the certain

imposition of UOMI and the likely application of an SFP. The combined effects of these additional charges compound the risk faced by taxpayers — and are often blamed for forcing taxpayers to settle winnable disputes under duress. As such, it is worth asking whether the imposition and quantum of both an SFP and UOMI are themselves undermining the integrity of the tax system.

The SFP regime is found in Pt IX of the Tax Administration Act.[2] The stated purpose of the UOMI regime is to compensate the Commissioner (or taxpayer) for the loss of use of money through taxpayers paying too little/much tax and to encourage taxpayers to pay the correct amount of tax on time.[3]

Section 120A also stipulates that "Interest payable under this Part is not a penalty".[4] This means the imposition of UOMI cannot be disputed or challenged by the taxpayer.[5]

Likewise, the purpose of the penalties regime is expressed as:

> to encourage taxpayers to comply voluntarily with their tax obligations and to cooperate with the Department … and to sanction non-compliance with tax obligations effectively and at a level that is proportionate to the seriousness of the breach.[6]

But anecdotal evidence suggests taxpayers increasingly feel the operation of those regimes is both punitive and excessive.

Quantum of shortfall penalties

The quantum of the applicable SFP increases correspondingly to the degree of culpability of the underlying breach. Innocent, minor or explicable errors in a taxpayer's tax position do not attract any SFP.[7] A mere lack of care in completing a return or interpreting the applicable law results in a 20% penalty.[8] A grossly careless error warrants imposition of a 40% penalty.[9] The quantum of those penalties seems both reasonable and proportionate to the taxpayer's culpability.

But the SFPs of 100% for an abusive tax position and 150% for evasion seem disproportionate — particularly in light of the sanctions imposed under earlier penalties regimes. For instance, prior to 1996 the only sanction that could be imposed for taxpayer error was for evasion, which was punishable by the imposition of "penal tax". But even then the quantum of that penalty varied widely between 10% and 300%.[10] When imposing the appropriate rate of penal tax the Commissioner (and the court hearing a case stated) had to take account of the nature and degree of the offence or the reason for the imposition of the penal tax.[11]

Not surprisingly, the range of penal taxes imposed varied widely and a body of case law developed as to what factors were to be considered when determining the correct quantum.

The leading cases were:

- *Case* G29 (1985) 7 NZTC 1,113 where Bathgate DJ identified more than 15 factors arising from the offending and the taxpayer's individual circumstances that should be taken into account when setting the quantum, and
- *Case* Q21 (1993) 15 NZTC 5,112, where Barber DJ cited with approval those factors identified in *Case* G29 and then added a further 11 criteria that may be relevant to that determination.

As a result, the eventual quantum of penal tax varied widely from case to case. In an attempt to bring order to that process, from 1 September 1989 the Commissioner adopted a "benchmark" of 150% penal tax for first offences of evasion. This approach was discussed by Willy DCJ in *Case* P86 (1992) 14 NZTC 4,575. His Honour explained (at 4,577):

> I now deal with the question of the amount of the penalty tax imposed. The range, of course, as provided by the statute is from 0 to 300 percent. The Commissioner, no doubt, in an endeavour to be helpful to taxpayers and in order to give them some indication of the view that he takes of these sorts of matters has put out a booklet entitled "Putting Your Tax Affairs Right". In that booklet at p 7 he says:

> The benchmarks used by the Department when imposing penal tax in cases arising from an inquiry or an investigation commenced on or after the 1st of September 1989 are income tax 150 per cent of tax evaded for a first offence.

However, after considering the consequences of adopting that benchmark, Willy DCJ found it excessive and reduced it to 100%, stating (at 4,578):

> … with the guidance of what His Honour had to say in Case G29, I have come to the conclusion that the public interest will be served and the interests of justice met if the objector is subject to a 100 percent penalty tax on the amount of income tax evaded by him in the manner in which I have described. The amount of penal tax assessed to the objector is excessive. It ought to be amended by substituting the figure 100 percent for the figure 150 percent.

A benchmark of 100% for penal tax subsequently became the norm, with the Commissioner imposing penal tax in excess of that rate only in the most egregious cases of evasion. However, even when that reduced benchmark was imposed, the Taxation Review Authority routinely identified a range of mitigating factors in favour of the taxpayer that warranted a reduction in the quantum of penal tax. For instance, in *Case* H3 (1986) 8 NZTC 112 the Authority reduced an imposition of 100% penal tax down to 80% on the grounds that "penal tax for evasion of 100% … is excessive".

Likewise, in:

- *Case* S60 (1996) 17 NZTC 7,381, penal tax of 110% was reduced to 60%
- *Case* E91 (1982) 5 NZTC 59,477, an already low penal tax assessment of 15% was reduced further to the minimum of 10%
- *Case* L27 (1989) 11 NZTC 1,167, penal tax of 100% for long-standing evasion was reduced to 30% for the initial early years and to 50% for the later years, and
- *Case* M80 (1990) 12 NZTC 2,469, penal tax of 75% was reduced to the minimum of 10%.

The rationale for these reductions in the quantum of penal tax was explained by Barber DJ in *Case* Q21 (1993) 15 NZTC 5,112. In doing so, the Authority appears to have set itself against what it saw as the unwarranted increase in the quantum of penal tax being routinely imposed by the Commissioner (at 5,120):

> In recent years I have quite often observed that each penal tax assessment must be considered individually in terms of the particular nature and degree of that offending. While the Department's benchmark rates for so-called standard offending must be useful as a Departmental administrative guide to quantum, they do not provide any justification for the amount of an assessment. I appreciate, of course, that the maximum percentage of deficient tax for penal tax purposes is 300%. While the apparent current Departmental benchmark of 150% of deficient tax may seem moderate in relation to the maximum, I have found that much evasion does not warrant penal tax at more than 100% of deficient tax. In my view, every case must be examined on its own facts and the benchmark approach can be dangerous except as the first feeler of the situation. In 1981 I understood the Department's benchmark to be 66% of deficient tax. For some reason or other, it seemed to be raised to 100% in about 1986 and to 150% in about 1988.

Significantly, the Authority felt obliged to consider the effect an imposition of penal tax has upon the taxpayer concerned — a factor that the Judges felt was often overlooked by IR. Barber DJ then concluded (at 5,121):

> Where the amounts of deficient tax are less than, say, $15,000, it might be more efficient and cost effective to keep penal tax to between 25% and 50% of deficient tax and dispose promptly of such penal tax assessments. The taxpayer still gets taught a lesson at the 25% to 50% level. The application of high percentages seems to trigger the taxpayer into proceeding to a hearing. Sometimes, this must be uneconomic in terms of costs to the State, particularly if penal tax is then reduced from 100%–150% to nearer 50%.

Focus on liability

By contrast, one of the most notable features of the SFP regime introduced in 1996 was that consideration of the quantum of penalties no longer arose, as they are now mandated by statute. If the taxpayer's culpability

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or conduct falls within a given category, then the quantum of the SFP is automatic. Accordingly, only the taxpayer's liability (and not the quantum) of the SFP can be disputed.

This change meant the Commissioner no longer needed to consider or justify the quantum of the penalty imposed. External factors and the individual circumstances of the taxpayer are now irrelevant. Unfortunately this means the former requirements to recognise the nature and degree of the offending or the reasons for the shortfall will no longer apply. Those factors and criteria developed by the TRA in *Case* G29 and *Case* Q21 to determine the proper quantum of penal tax are therefore ignored. Normal factors relevant to the mitigation of penalties applicable in other areas of the law are rejected. The sole remaining grounds for reduction in the quantum of an SFP are making a voluntary disclosure or previous good behaviour.[12] It is therefore not surprising that taxpayers may feel the regime too harsh and unmindful of their individual circumstances.

When setting the appropriate level of the evasion penalty in s 141E at 150%, Parliament appears to have simply adopted the Commissioner's much-criticised benchmark for the imposition of penal tax. The quantum of penalty imposed for less culpable behaviour (avoidance, carelessness etc) was then reduced from that benchmark accordingly. However, the result of that approach is that negligent or even grossly careless errors now incur a level of SFP that exceeds the penal tax previously imposed on taxpayers guilty of evasion. In light of that history it must be questioned whether the present regime truly punishes taxpayers according to their "degree of culpability".

Abusive tax position

The most striking instance of this over-punishment is with respect to the SFP of 100% imposed on taxpayers for adopting an abusive tax position. As noted above, few instances of evasion warranted penal tax assessments of this quantum, with most being significantly less. It must be remembered that no matter how dimly the Commissioner may view tax avoidance or similar conduct, it is entirely lawful. Courts at the highest level have been at pains to stress that no stigma should attach to tax avoiders who have engaged in entirely lawful conduct.[13] Accordingly, the imposition of an SFP at the level of 100% is arguably excessive.

It appears that IR is attempting to reduce uncertainty by considering whether that SFP should automatically apply to all tax avoidance as part of its policy process. In Draft Questions We've Been Asked (QWB0110, 13 June 2012), IR concluded:[14]

> There is a key difference between the circumstances where s BG 1 applies and those where the penalty applies. Section BG 1 requires the tax avoidance purpose or effect of the arrangement to be more than merely incidental. In contrast, s 141D applies where there is a dominant purpose of avoiding tax. The key difference, therefore, is the requirement for the arrangement to have a dominant purpose of avoiding tax for s 141D to apply.

While it appears this draft QWBA has never been finalized, it is true that differences in the statutory tests have resulted in the imposition of the abusive tax position in cases of avoidance being somewhat patchy. For instance, that penalty was imposed in *Ben Nevis*[15] but not in the companion GST tax avoidance decision in *Glenharrow*[16]. While the imposition of the penalty was upheld in *Krukziener*[17], it was not even at issue in either the BNZ or Westpac structured finance cases[18] (presumably because the taxpayers had followed the favourable binding ruling earlier issued by the Commissioner), or in *Penny & Hooper*[19]. In *White*[20], the Commissioner expressly disavowed the imposition of that penalty but in *Alesco*[21] it was again imposed and upheld (even though that taxpayer had also followed the relevant determination issued by the Commissioner).

This inconsistency was explained by one commentator as follows:[22]

> The abusive tax position penalty was never intended to apply to all avoidance, but the wording of the provision imposing that penalty is dense and sufficiently ambiguous that it is difficult to predict which instances of avoidance it ought to apply to.

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Instances of tax avoidance often arise from the slight and honest misjudgment by taxpayers and their advisers of the line between permitted tax planning and unpermitted tax avoidance. In the past decade, New Zealand has experienced a "sea change"[23] in tax avoidance jurisprudence, culminating in three decisions of the newly established Supreme Court and numerous lower court decisions.[24] The courts have formulated and applied the new "Parliamentary contemplation" test while rendering redundant much of the previous case law on tax avoidance.[25] This application of the general anti-avoidance provision has resulted in virtually all recent cases being decided in favour of the Commissioner — a significant improvement over the Commissioner's patchy success prior to 2006.

For example, the taxpayer in *Alesco* filed its disputed tax returns claiming the OCN deemed deduction in the years from 2003–2008. Accordingly, those returns were filed before most of the recent judicial developments and predate:

- The Court of Appeal and Supreme Court decisions in *Ben Nevis* (2007[26] and 2009[27]) and *Glenharrow Holdings Ltd v C of IR* (2007 and 2009)[28]
- The structured finance litigation (2009),[29] and
- The Court of Appeal and Supreme Court decisions in *Penny & Hooper* (2010–2011).[30]

By contrast, the taxpayer's returns were filed following:

- The Privy Council decision in *C of IR v Auckland Harbour Board* (2001)[31]
- The Court of Appeal decision in *C of IR v BNZI Investments Ltd* (2001),[32] and
- The Privy Council decision in *Peterson v C of IR (No 2)* (2005).[33]

It is noteworthy that all of those earlier cases, some involving arrangements with much less commercial reality than in *Alesco*, were decided in favour of the taxpayers. It is arguable that the law on tax avoidance in New Zealand has changed significantly. Even the terminology of the judicial analysis (the "Parliamentary contemplation" test) is expressed quite differently post-*Ben Nevis* from the previous articulation.

Section 141B(7) of the Tax Administration Act 1994 stipulates that, when determining the correctness of a taxpayer's position, the court must consider only relevant case law delivered up to one month before the taxpayer filed its return; subsequent decisions must be disregarded. Despite this, both the High Court and Court of Appeal in *Alesco* found the taxpayer had adopted an unacceptable interpretation of the general anti-avoidance provision when it entered the arrangement in 2003. Apparently overlooking recent developments in the law on tax avoidance since that time, the Court stated "the principles we have applied were settled by 1998".[34]

Given the development in tax avoidance jurisprudence over the past decade, that conclusion is, with the greatest of respect, doubtful. Certainly Glazebrook J, writing extra-judicially on the development of tax avoidance jurisdiction under the Supreme Court, acknowledged a number of changes in approach, emphasis and application.[35] As such, it seems unwarranted to impose a 100% SFP on taxpayers who have simply failed to anticipate changes to the application of the law in an extremely uncertain and difficult area of tax law.

Finally, the words by Barber DJ in *Case* Q21 are worth remembering. While his Honour was referring to the imposition of penal tax for evasion he concluded that "[t]he taxpayer still gets taught a lesson at the 25% to 50% level". Even with the reduction of SFP of 50% for a taxpayer's prior good behaviour,[36] to impose an SFP of that level appears excessive. Remember, tax avoidance is both lawful and morally neutral.[37]

UOMI

It may seem hard to remember now but until 1996 the consequences of delay in determining taxpayers' liabilities were very taxpayer-friendly. Under s 398 of the Income Tax Act 1976, when a taxpayer contested its assessment there was no requirement to pay the tax in dispute, no further additional tax would be imposed and no interest on the ultimate tax liability would accrue. Especially in a period of double-digit

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inflation, a canny taxpayer would be fiscally advantaged by continuing a dispute, regardless of whether they ultimately won or lost.

That financial consequence created a perverse incentive for taxpayers to bring weak or unmeritorious disputes with a view to delaying the final determination and payment of tax. To change that incentive, the UOMI regime was introduced in 1996 to impose interest on underpaid tax, including tax in dispute.

The operation of that regime has now virtually reversed the economic incentives — it is now taxpayers who bear the cost of delay in resolving tax disputes. The compounding effect of UOMI on a lengthy dispute can become prohibitive. In fact, many criticisms of the current disputes regime in Pt IVA identify the heavy financial impact the UOMI regime has on taxpayers during a dispute.[38] Suggestions have been made by taxpayers' representatives for UOMI to be suspended or reduced while the dispute progresses through the statutory procedure. However, these suggestions have been rejected by IR, which insists UOMI must be imposed on all underpaid tax without concession:[39]

> UOMI is a 'no fault' concept, designed to be administratively workable by ensuring that exceptions are kept to a minimum. Suspending UOMI for the period of a dispute could therefore be seen as a mechanism for encouraging non-compliant taxpayers to 'stop the clock' by engaging in the disputes process.

Of course it is not quite correct to say it is a "no fault" concept in the sense that the differential between interest owed by the Commissioner for overpaid tax and the interest owed by the taxpayer for underpaid tax demonstrates clearly where the fault is considered to lie on taxpayer shortfalls. It is a penalty rate designed to deter behaviour as well as a reimbursement for the time cost of the underpaid tax. Even when delays in resolving the dispute have been caused by administrative steps or missed deadlines by IR itself, the Commissioner considers UOMI should continue to accrue:

> Suspending UOMI when the Commissioner fails to meet an administrative deadline would not recognise the fact that some administrative deadlines relate to periods when both parties to a dispute exert a certain degree of control, such as the conference. For example, a blanket suspension of UOMI for a failure by the Commissioner to advance to the next stage of the dispute following the conference would not take into account the fact that taxpayers can also delay the process.

Accordingly, UOMI will continue to accrue indefinitely until any outstanding tax subject to a dispute is paid in full. By way of example, in *Thompson* v *C of IR* (2011) 25 NZTC ¶20-041 (CA) the Court of Appeal noted that:

> [67] Mr Thompson also complains about the punitive late payment penalties applied to the GST assessments. The Commissioner's default assessments originally totalled around $365,000. We were told that the debt is now more than $2,000,000 due to compounding interest and penalties.

Likewise, much publicity has been afforded to the monumental unpaid tax debt accumulating to Mr J G Russell, whereby an alleged tax liability initially assessed at $5m inflated to some $138m when proceedings reached the High Court, and in excess of $177m by the time of the subsequent appeal.

By June 2014 it had increased to $367m and is presumably still rising fast.[40] Figures provided by IR confirm the combined compounding effect of both UOMI and late payment penalties on unpaid taxes is 26.5% for the first year and 25.3% for each subsequent year.[41] But even for less extreme cases, the UOMI imposed on unpaid tax is a still a significant cost.

Effect of UOMI rates debated

Unfortunately IR does not publish statistics on the amount of UOMI it collects from, or pays to, taxpayers each year. However, estimates by commentators put the total annual net UOMI collected by the Commissioner at approximately $400m.[42] This net gain to IR arises from the disparity in rates set by Order in Council between the overpayment and underpayment of tax. This disparity is justified by IR on the following basis:

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> The underpayment rate attempts to reflect the fact that the government is an involuntary and unsecured lender, and is unable to assess the actual credit-worthiness of each taxpayer. The overpayment rate is designed to discourage taxpayers from using IR as an investment opportunity.

At present the applicable rate for underpayment of tax is 8.4% while the overpayment rate is 1.75% — a margin of 6.65%, which seems unjustifiably wide given the present historically low interest rates. No wonder this disparity is generally considered by taxpayers and their advisers as being much wider than properly required to compensate the Commissioner for not receiving the underpaid tax. Instead it appears to be designed to make it prohibitive for taxpayers who fail to pay the correct amount of tax. For instance, in December 1998 the Committee of Experts on Tax Compliance noted in its report that:[43]

> … even though a rational basis for setting the [UOMI] rates exist, and even though an efficient administrative system calculates taxpayer liabilities, it does not necessarily follow that the rules are seen by taxpayers as operating equitably.

This reason for this perception is that the UOMI regime appears to give more emphasis to its purpose of enforcing tax compliance rather than to truly compensating the Commissioner for any underpayment.

In 2011, taxation commentator Peter Vial published a paper explaining the changing methodology used by IR when setting the respective UOMI rates.[44] He has also quantified the spread between the under- and over-payment rates those methods have produced over time. The author demonstrates that:

- The UOMI rates have been amended periodically but not in a regular, consistent pattern and often not in response to movements in the underlying Reserve Bank of New Zealand interest rates.
- The multiplier (being the number of times the underpayment rate exceeds the overpayment rate) has varied between 1.7 and 4.9 times.
- The spread between the underpayment rate and the overpayment rate has varied between 5.50 and 7.69 basis points.

Review of rates advocated

The joint submission by the (then) New Zealand Institute of Chartered Accountants and the New Zealand Law Society in 2008 identified UOMI as a significant contributor to flaws in the operation of the disputes procedure. It stated:[45]

> If there is a substantive dispute as to whether tax is due in the first place, and the taxpayer is unable to fund a voluntary payment of tax to stop the interest accruing, the UOMI regime gives rise to very serious financial risk for taxpayers (which must be reported in their accounts) … It is taxpayers who are penalised for Inland Revenue's inefficiency by way of an imposition of UOMI on underpaid tax at a very high rate. … We believe the rate differential between the Inland Revenue's paying rate and the taxpayer's paying rate is far too wide and needs to be reviewed. The UOMI regime has become a penalty on taxpayers and requires reconsideration.

The submission recommended that UOMI be suspended entirely or imposed at the lower overpayment rate during a tax dispute, particularly if IR fails to progress that dispute in accordance with its published time-frames. These submissions were rejected by IR as part of the review of the disputes procedure in 2009 — so the criticisms were repeated again in 2010.[46] However, no substantive change has been made to the UOMI regime.[47]

As a result the rate charged on underpayments of tax is both higher than it needs to be to encourage taxpayers to meet their tax payment obligations on time, and tends to discourage taxpayers from pursuing genuine disputes. No wonder that when debit UOMI rates were increased in 2007, one professional firm criticised the new 14.24% rate as usurious, out of step with market interest rates, more than a reimbursement of the government for being out of funds and effectively a penalty.[48]

In recent cases involving entirely new arguments the Commissioner's imposition of an SFP, together with UOMI, significantly increases the relevant tax bill. In cases involving unprecedented legal arguments the UOMI and SFPs regimes are particularly unsatisfactory.

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In its Annual Report for 2014 IR confirm that UOMI and penalties make up approximately $3 billion, or almost half of total outstanding taxpayer debt of $6.2 billion. In fact, IR concedes that "from June 2012, the main driver of the increase [in overdue debt] was penalties and interest charges".[49] As a result, IR "have started reviewing the implications of our penalties and interest regime, particularly its effect on compliance".[50]

Options for reform of the UOMI and penalties rules presently being considered include:[51]

1. Introduce a general interest charge in place of a late payment penalty.
2. Maintain the current framework but reduce the late payment penalty rate(s).
3. Maintain the initial late payment penalty but apply a general interest charge thereafter.
4. Introduce a late payment penalty cap.
5. Give IR discretion over whether to impose a late payment penalty.

From a taxpayer's perspective, any reform which reduces the penalties and interest added to unpaid tax would be welcomed.

Conclusion

Errors or underpayments of tax may arise for many reasons, from innocent oversight to deliberate under-reporting. Yet the imposition of UOMI applies to all taxpayers equally, and at rates inconsistent with the statutory duty merely to compensate the Commissioner for being out of the funds. Rather, the applicable interest rates appear to financially punish taxpayers for their underpayment by making the Commissioner a more expensive creditor than all but the most usurious of lenders.

Likewise, the quantum of SFP for even less-culpable errors under the present regime dwarfs the levels of penal tax previously imposed for evasion. As such, the effect of SFP and UOMI seemingly combine to punish taxpayers out of proportion to their errors. The result is growing taxpayer perception that disputes are not conducted on a level playing field.

Footnotes

1 From the Taxpayer Compliance, Penalties and Disputes Resolution Bill, enacted as the Tax Administration Amendment Act (No 2) 1996 on 26 July 1996.

2 All references in this article are to the Tax Administration Act 1994, unless provided otherwise.

3 Section 120A(1) of the Tax Administration Act 1994.

4 Section 120A(2) of the Tax Administration Act 1994.

5 Section 138E(1)(e) of the Tax Administration Act 1994.

6 Section 139 of the Tax Administration Act 1994.

7 See explanation in Inland Revenue Officials' Report on the Bill to the Finance and Expenditure Committee at the time the SFP regime was introduced, 14 June 1996 at p vii.

8 Sections 141A and 141B of the Tax Administration Act 1994.

9 Section 141C of the Tax Administration Act 1994.

10 Section 190 of the Tax Administration Act 1994.

11 Section 423(1) of the Income Tax Act 1976.

12 Under ss 141FB and 141G of the Tax Administration Act 1994.

13 For instance, see *O'Neil* v *C of IR* (2001) 20 NZTC 17,051 (PC) at 17,057; and *Ben Nevis Forestry Ventures Ltd* v *C of IR*; *Accent Management Ltd* v *C of IR*[2008] NZSC 115; (2009) 24 NZTC 23,188.

14 QWB0110 at [41].

15 *Ben Nevis Forestry Ventures Ltd* v *C of IR*; *Accent Management Ltd* v *C of IR* (2009) 24 NZTC 23,188 (SC).

16 *Glenharrow Holdings Ltd* v *C of IR* (2009) 24 NZTC 23,236 (SC).

17 *Krukziener* v *C of IR (No 3)* (2010) 24 NZTC 24,563 (HC).

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18 *BNZ Investments Ltd* v *C of IR* (2009) 24 NZTC 23,582 (HC) and *Westpac Banking Corp* v *C of IR* (2009) 24 NZTC 23,834 (HC).

19 *Penny and Hooper* v *C of IR* (2011) 25 NZTC ¶20-073 (SC).

20 *White* v *C of IR* (2010) 24 NZTC 24,600 (HC), the only significant victory for taxpayers in recent years.

21 *Alesco NZ Ltd* v *C of IR* (2013) 26 NZTC ¶21-003 (CA).

22 S Griffiths, "The 'Abusive Tax Position': An unstable standard for a penal provision?" (2009) NZJTLP 159, at 159.

23 This is the terminology and conclusion reached by C. Elliffe and J. Cameron "The Test for Tax Avoidance in New Zealand: A Judicial Sea Change" (2010) 16 NZBLQ 440.

24 For statistics on the volume of recent tax avoidance litigation, see M. Keating and K. Keating "Tax Avoidance in New Zealand: The Camel's Back that Refuses to Break!" (2011) 17 NZJTLP 115.

25 For instance, the Supreme Court in *Ben Nevis* above, fn 15, at [110] stated bluntly: "English decisions provide limited direct assistance."

26 *Accent Management*, (2007) 23 NZTC 21,323 (CA).

27 *Ben Nevis*, above fn 15.

28 *Glenharrow Holdings Ltd* v *C of IR* (2007) 23 NZTC 21,564 (CA); *Glenharrow (SC)* , above fn 16.

29 *BNZI* (2009), above, fn 18, and *Westpac*, above, fn 18.

30 *C of IR* v *Penny & Hooper* (2010) 24 NZTC 24,287 (CA); *Penny & Hooper (SC)*, above fn 19, — note the High Court judgment was in favour of the taxpayer: *Penny & Hooper* v *C of IR* (2009) 24 NZTC 23,406 (HC).

31 *C of IR* v *Auckland Harbour Board* (2001) 20 NZTC 17,008 (PC).

32 *C of IR* v *BNZ Investments Ltd* (2001) 20 NZTC 17,103 (CA).

33 *Peterson* v *C of IR*(2005) 22 NZTC 19,098 (NZPCC).

34 *Alesco NZ*, above fn 21, at [140].

35 See Glazebrook J, "Statutory interpretation, tax avoidance and the Supreme Court: reconciling the specific and the general", at: http://www.courtsofnz.govt.nz/speechpapers/23-December-2013_-_Justice-Susan-Glazebrook_-_Accountants-Society-Paper.pdf.

36 Section 141FB of the Tax Administration Act 1994.

37 *O'Neil v C of IR*, above, fn 13.

38 See Taxation Committee of NZLS and National Tax Committee of NZICA, "Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994", Wellington, August 2008.

39 Taxation (Tax Administration and Remedial Matters) Bill, Officials' Report to the Finance and Expenditure Select Committee on Submissions on the Bill, April 2011, at 53.

40 "IRD wins $367m tax case against 79-year-old", New Zealand Herald, 11 June 2014.

41 "Penalties", M Pallot, presentation to NZICA Tax Conference, Auckland, 1 November 2014.

42 See P Vial, "Use of Money Interest: A Fair Deal for Taxpayers?", at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140527.

43 "Tax Compliance", Committee of Experts on Tax Compliance, December 1998, at para 11.35.

44 See P Vial, "Use of Money Interest: A Fair Deal for Taxpayers?", at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140527. Joint Submission by the Taxation Committee of NZLS and National Tax Committee of NZICA on "The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the TAA 1994", 4 August 2008.

45 Joint Submission by the Taxation Committee of NZLS and National Tax Committee of NZICA on "The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the TAA 1994", 4 August 2008.

46 NZLS and NZICA joint submission to Inland Revenue on Disputes: A Review — An Officials' Issues Paper, July 2010; 3 September 2010, at 5, para 3.3.

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47 Note, the deductibility of UOMI paid by all taxpayers was confirmed by the enactment of section DB 3A of the Income Tax Act 2007 in 2011.

48 See “IRD UOMI rate ‘usury’”, at www.scoop.co.nz/stories/BU0704/S00327.htm.

49 Inland Revenue 2014 Annual Report, at 22.

50 Inland Revenue 2014 Annual Report, at 23.

51 “Penalties”, M Pallot, presentation to NZICA Tax Conference, Auckland, 1 November 2014.

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