Tax Avoidance in New Zealand: The Camel's Back that Refuses to Break!

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The principles of a good tax system require low administrative and few dead-weight costs. Ideally, disputes should be rare and, when they do arise, should be resolved efficiently. However, in the area of tax avoidance those principles are not being met. Disputes over the scope and application of the general anti-avoidance provisions consume a disproportionate amount of the resources of Inland Revenue, taxpayers, the courts and practitioners. On most measures, it takes up approximately 20 to 30 per cent of those resources, which most practitioners would conclude is far in excess of its actual incidence. Yet when such disputes do arise, they are fought long and hard by all sides, generating numerous court decisions, which in turn give rise to numerous journal articles and conference papers. On that measure, whatever the reader's view on tax avoidance and the results of individual cases, the law on tax avoidance is far from what we should expect from a good tax system. This article examines the raw statistics recording the disproportionate extent to which tax practice in New Zealand is weighed down by the topic of tax avoidance. It also attempts to explain why, despite repeated decisions at the highest level in favour of the Commissioner of Inland Revenue, tax avoidance cases continue to be fought. The article concludes that the lack of precision inherent in the general anti-avoidance provisions, the Commissioner's apparent inability to provide sufficient guidance on their application, and the courts' refusal to provide clear rules, simply fuel further disputes to the detriment of our entire tax regime.

1.0 INTRODUCTION

What is it about tax avoidance that causes so much controversy? No other single provision of the Income Tax Act is so commonly litigated. No other aspect of tax generates as much heated debate in both tax practice and academic circles. All leading cases are reviewed and analysed endlessly, and every new decision is seized upon.

Tax avoidance is one of the few areas in which the role of tax policy and judicial activism is demonstrated so clearly. As a result, much of the debate focuses less upon what the law is and more on what each commentator believes it should be. The question often becomes less about what is the current state of the law and more about what that law ought to be. To a discipline almost uniquely used to absorbing rapid and substantial changes to the law, it seems strange that subtle nuances in the interpretation and application of this single provision cause such consternation, yet they do.

Perhaps because of the strong feelings generated by this topic, tax avoidance disputes make up a disproportionately large part of our tax landscape. Over the past decade, almost 20 per cent of all **[(2011) Vol 17:1 NZJTLP 115, 116]** adjudication reports issued by Inland Revenue have involved tax avoidance as one of the grounds in dispute. Over the same period, nearly 30 per cent of all reported tax judgments have dealt with tax avoidance – this includes the myriad cases involving JG Russell's template arrangement, which alone make up 10 per cent of all reported decisions over the past 10 years. But even excluding the various JG Russell cases, approximately 20 per cent of all tax cases have dealt with tax avoidance. At the same time, academic journals and tax conferences have over-flowed with papers dealing with various aspects of tax avoidance.

This article examines the raw statistics recording the extent to which tax practice in New Zealand is weighed down by the topic of tax avoidance. Before considering the statistics, it briefly reviews in section 2 the uncertainty that exists for taxpayers with tax planning. Then, in section 3 it sets out the process by which Inland Revenue approves assessments under s BG 1 of the Income Tax Act 2007 and s 76 of the Goods and Services Tax Act 1985. Sections 4 to 6 review the statistics that show that a disproportionate amount of time is spent by Inland Revenue, taxpayers, practitioners and the court on both the procedural and the substantive aspects of tax avoidance disputes. The article also attempts to explain why, despite decisions at the highest level repeatedly in favour of the Commissioner of Inland Revenue (Commissioner), tax avoidance cases continue to be fought. Section 7 reviews the extent to which tax avoidance is discussed in conferences and in academic and professional publications, with the morality of tax avoidance considered in section 8. Section 9 reviews the search for certainty in the context of tax avoidance. Then, based on the prior analysis, the article concludes in section 10 that the lack of certainty inherent in the general anti-avoidance

provisions, and the courts' apparent refusal to provide sufficient guidance on their application, simply fuel further disputes, which are to the detriment of our entire tax system.

2.0 INLAND REVENUE'S APPROVAL PROCESS FOR USE OF SECTION BG 1 OF THE INCOME TAX ACT AND SECTION 76 OF THE GOODS AND SERVICES TAX ACT 1985

As demonstrated in Table 1 (below), Inland Revenue has sought to invoke the general anti-avoidance provisions of both the income tax and the GST Acts frequently.

Year	2004	2005	2006	2007	2008	2009	2010	Total
Submissions	461	41	107	69	36	47	44	805
Approved	458	35	87	53	29	29	33	724

Between 2004 and 2010 (the only period for which statistics were kept), Inland Revenue investigators sought approval to invoke s BG 1 and/or s 76 a total of 805 times. Interestingly, the courts have repeatedly confirmed that the application of the general tax avoidance provision does not depend upon the decision by the Commissioner but simply applies to the taxpayer like all other provisions of **[(2011) Vol 17:1 NZJTLP 115, 117]** the Act. This was made clear in *O'Neil v Commissioner of Inland Revenue*, in which the Privy Council stated:

> "It is relevant to observe that the question of whether an arrangement is void against the Commissioner under s 99(2) is not a matter for his discretion or policy. The Act says that an arrangement falling within the terms of the section 'shall be absolutely void.' Likewise, the Commissioner is under a statutory duty to reassess the taxpayer's assessable income to counteract any tax advantage. Discretion enters into the matter only as to the method of calculation by which the Commissioner discharges that duty."

2.1 Delegations

As a result, the application of s BG 1/s 76 does not require a decision by the Commissioner to invoke those sections. Nevertheless, the rigid practice of Inland Revenue is to preclude any officer from making an assessment relying upon those sections without first having obtained the approval of senior management. This administrative requirement is apparently imposed under the "Revenue Delegations" made in accordance with s 7 of the Tax Administration Act 1994. While the Commissioner has responsibility for the collection of taxes and protection of the integrity of the Inland Revenue Acts, he also has the power to delegate his various statutory powers and discretions to other Inland Revenue officers. He may delegate "all or any of the powers of the Commissioner, except [the] power of delegation." Accordingly, all actions by Inland Revenue rely upon the relevant officer holding the Commissioner's delegation to perform that task. As a result of this statutory requirement, all actions by an Inland Revenue officer without the necessary delegation are invalid. Common law rules such as apparent authority or estoppel cannot be relied upon by either Inland Revenue or taxpayers to validate an invalid action.

Inland Revenue's current Revenue Delegations require investigators to obtain the approval of senior managers before they may raise an assessment in reliance on s BG 1/s 76. The importance of obtaining the correct delegation for a reassessment was demonstrated in *Commissioner of Inland Revenue v Russell*. That case arose from the prosecution of Mr JG Russell for failing to provide information requested under s 17 of the Tax Administration Act 1994. The prosecution was dismissed on the grounds that the officer that laid the charges lacked the correct delegation to do so. In reaching that decision, the Judge concluded that:

> "… in my view these particular proceedings are a nullity and that cannot be overcome. In other words, in terms of my views and reasoning the defendant escapes these prosecutions because at material times, Mrs Latimer's actual work did not fit her departmental title, so that she also did not fit the slightly complicated but sophisticated system of delegations. …
> " **[(2011) Vol 17:1 NZJTLP 115, 118]** "It follows that all these prosecutions are hereby dismissed."

The *Russell* case demonstrates that a lack of delegation can be a complete answer to an assessment or prosecution. Accordingly, it is often prudent to verify whether the delegation for a particular function was correctly held.

2.2 Memorandum for Approval and Subsequent Decisions

Generally, the necessary delegation to invoke s BG 1/s 76 is contained in a detailed memorandum seeking that approval and recording the decision. Importantly, these memorandums are available to taxpayers under the Privacy Act 1993 or the Official Information Act 1982 or through the litigation discovery process. As this type of memorandum simply records the Commissioner's reasons for making an administrative decision, it does not constitute legal advice and, therefore, does not qualify for legal privilege. Even when the particular officer making that decision is a qualified and practicing solicitor, that memorandum does not attract legal privilege as the contents of that memorandum are an administrative act by the officer and not the provision of legal advice. This was made clear in *Miller v Commissioner of Inland Revenue*, in which the participants in the JG Russell template sought discovery of the memo prepared by the relevant Inland Revenue officer (who happened to be a practicing lawyer) that the predecessor of s BG 1 be invoked. The Court found that the memo simply recorded that administrative decision leading up to the assessment and did not purport to provide any legal advice and, therefore, was not subject to legal professional privilege.

Likewise, these memorandums are invariably prepared and approved by the delegated officer at the commencement of the disputes procedure, often long before any eventual assessment invoking s BG 1/s 76 is issued. As such, the memos would also not attract any litigation privilege as they are prepared for the dominant purpose of issuing an ultimate assessment and not in bringing or defending any (eventual) litigation regarding the correctness of that decision. Accordingly, the reasoning in *Glenharrow Holdings Ltd v Commissioner of Inland Revenue (No 2)* – that only advice or documents created under the disputes procedure after the exchange of SOPs can attract litigation privilege – would likely apply.

From the discussion above, it appears that Inland Revenue cannot withhold the memorandum recording its official reasoning for invoking s BG 1 from taxpayers. Obtaining this memorandum is often a helpful insight into the Commissioner's thinking and approach. It should therefore be sought by taxpayers in every instance.

2.3 Changing Grounds of Assessment

Interestingly, once the delegated decision is made (and recorded in the memorandum), there is no obligation on Inland Revenue to reconsider its application of s BG 1/s 76 during any subsequent dispute. It appears that, once the Commissioner has made the decision at the outset, there is no requirement for that decision-maker to reconsider in light of additional facts or legal arguments as the dispute progresses. Such an approach appears contrary to the purpose of the statutory disputes regime, **[(2011) Vol 17:1 NZJTLP 115, 119]** that is, to allow the parties to develop their respective arguments, and this includes shifting positions during that process.

The developing nature of the disputes procedure has specifically been advanced by the Commissioner and accepted by the High Court in *Commissioner of Inland Revenue v Delphi Fishing Company Ltd*. In that case, the Commissioner attempted to belatedly change his grounds of assessment, while the taxpayer attempted to hold Inland Revenue to the grounds set out in its Notice of Proposed Adjustment (NOPA) and subsequent Statement of Position (SOP). However, France J concluded:

> "… it is clear also that the dispute resolution process is about an exchange of views. Mr Lennard described the process as 'iterative' and 'almost dialectic'. Some changes must be envisaged otherwise what is the point of the process? If from the first time at which a matter is raised, the Commissioner is thereafter stuck with that basis for the imposition of taxation, then there is not much point in consultation. A comparison can be made with the previous process under which an assessment was raised and then there was dialogue …"

Accordingly, while the Commissioner may continue to have regard to the content of the initial memorandum, it would be expected that this decision will be revisited in the light of subsequent facts and legal analysis that develops through the dispute. However, it appears that any subsequently discovered facts or arguments do not impact upon the earlier decision to invoke s BG 1/s 76, even though it may be arguable that that decision is no longer appropriate.

3.0 DECISIONS TO INVOKE SECTION BG 1 AND/OR SECTION 76

Table 1 (above) shows that Inland Revenue officers have applied 805 times to invoke s BG 1/s 76 in the period 2004-2010 and approval has been granted in 724 instances, being 89.9 per cent of the time. In effect, senior managers have approved virtually 90 per cent of all applications by investigators to apply the general anti-avoidance provision.

Perhaps surprisingly, Table 1 does not record an increase in the number of applications or approvals over the period. Perhaps this apparent consistency is explained by an anomaly in the statistics kept by Inland Revenue. Applications and approvals are presumed generally to relate to individual taxpayers' participation in a particular arrangement. However, a number of recent tax avoidance cases have dealt with template or mass-marketed schemes involving dozens or even hundreds of taxpayers. In that instance, the Commissioner's decision to apply the general anti-avoidance provision may be recorded either:

- In a single memorandum applicable to all participants in that arrangement; or
- In a number of separate, duplicate memoranda applicable to each participant.

Presumably, the latter approach explains the huge number of applications and approvals in 2004 (461/458) compared with those in other years for which statistics were kept. On this point, Inland Revenue has explained: **[(2011) Vol 17:1 NZJTLP 115, 120]**

> ".. during the late 1990s and early 2000s IRD successfully challenged a number of mass marketed avoidance schemes. This required invoking the general anti-avoidance provisions against numerous participants in those schemes, thereby impacting the numbers in those years."

Unfortunately, available Inland Revenue data does not consistently distinguish between those two approaches and, therefore, the statistics for all years (and not only 2004) may record a combination of both. The best analysis that can be applied to these statistics is that they record the Commissioner's decision to apply s BG 1/s 76 to *at least* that number of arrangements in each year (although it cannot be determined how many taxpayers actually participated in those arrangements).

4.0 ADJUDICATION DECISIONS ON SECTION BG 1/SECTION 76

As demonstrated in Table 2 below, from 2001 until 2010, a total of 126 separate disputes involving tax avoidance have progressed through the statutory disputes procedure to the point where Inland Revenue issues an adjudication report. This number represents 19 per cent of all completed disputes. Of those disputes, 112 (86.5 per cent) were decided by the Adjudication Unit in favour of Inland Revenue's proposed assessment of the taxpayer/s on the grounds of tax avoidance. Only 14 of the 126 allegations of tax avoidance in the past decade have been rejected by the Adjudication Unit.

Year 30 June	Adjudications Completed	Adjudications with Tax Avoidance as One Ground	Adjudications where Tax Avoidance Upheld	Adjudications where Tax Avoidance Rejected	Adjudications where Tax Avoidance Not in Issue
2001	71	6	3	3	65
2002	63	10	9	1	53
2003	63	10	6	4	53
2004	67	16	16	-	51
2005	20	2	1	1	18
2006	82	16	14	2	66
2007	83	13	13	-	70
2008	66	21	20	1	45
2009	61	18	16	2	43
2010	86	14	14	-	72
Totals	**662**	**126**	**112**	**14**	**536**

[(2011) Vol 17:1 NZJTLP 115, 121]

By comparison, over that period (2001-2010) the Adjudication Unit decided and issued a total of 662 reports. Accordingly, the 126 adjudication reports involving tax avoidance made up 19 per cent of all tax disputes resolved by the Adjudication Unit. This number may seem lower than expected. However, it is important to note that, prior to the enactment of s 89N of the Tax Administration Act 1994, there was no obligation on the Commissioner to complete the statutory procedure and have the dispute determined by the Adjudication Unit. Even following the application of s 89N, after the exchange of SOPs there is still no obligation on Inland Revenue to refer the dispute to the Adjudication Unit for determination.

The limited role of the Adjudication Unit was acknowledged by Inland Revenue in the discussion document, *Resolving Tax Disputes: A Legislative Review*, which states that there was never an intention to require the Commissioner to refer matters to the Adjudication Unit for all disputes because adjudication is an "administrative process". This stance was confirmed in the more recent decisions of both the High Court and the Court of Appeal in *ANZ National Bank Ltd v Commissioner of Inland Revenue*. In that case, the Commissioner had reassessed the taxpayer for the first year of an alleged tax avoidance arrangement and the taxpayer had challenged that assessment. The Commissioner declined to issue SOPs for later years and argued the challenge against the earlier years be heard.

The Commissioner argued that the circumstances of the case meant that it was best resolved in the courts. In particular, he pointed to the substantial amounts of tax involved, the level of complexity of the dispute, and the likelihood of contested facts and experts' opinion as all warranting the challenge to proceed instead of the disputes process. In reaching its decision, the High Court stated that it "… [did] not consider that it is realistic to expect that the matters in issue in these proceedings could be resolved in the [Adjudication] Unit." It accordingly concluded that the court was best placed to resolve this dispute. In doing so, it gave weight to "the Commissioner's clearly expressed decision that it is in the public interest not to progress the transactions through the disputes procedures."

While most disputes should complete the full disputes process, there was no obligation on the Commissioner to refer cases to the Adjudication Unit where the court was a more "expeditious and efficient" venue to determine the matters in issue. A number of factors were relevant in that decision, namely:

- The nature and complexity of the transactions;
- The fact that the plaintiffs have not yet made full disclosure or discovery of all the relevant documents;
- The fact that tax avoidance issues are strongly disputed by the plaintiffs; and
- The substantial amounts of core tax at issue in the proceedings and other proceedings already before the court.

[(2011) Vol 17:1 NZJTLP 115, 122]

The Court of Appeal confirmed that decision and ruled that there is no obligation on the Commissioner to refer disputes to the Adjudication Unit where he considers that the matter should properly be decided by the court. While there is scope for arguing that the *ANZ* decision only applies *once a matter is before the court*, it seems likely that the discretion to issue an assessment without referring the completed SOP to the Adjudication Unit applies also for disputes governed by s 89N. In particular, the exception to s 89N permitting the Commissioner to truncate the dispute procedure was interpreted widely in *ANZ National Bank Ltd v Commissioner of Inland Revenue (No 2)*, despite Inland Revenue's policy that it will be used "only in exceptional circumstances". That case was part of the structured finance litigation involving alleged tax avoidance by the major trading banks and, therefore, may indicate the Commissioner's approach to completion of the disputes procedure in tax avoidance disputes.

Accordingly, it can be presumed that a substantial portion of all tax avoidance disputes did not progress through for decision by the Adjudication Unit and, therefore, are not recorded in the statistics. It will therefore be interesting to see whether the number of tax avoidance disputes resolved by the Adjudication Unit increases once the application of s 89N becomes fully felt.

5.0 CASE LAW ON TAX AVOIDANCE

As demonstrated in Table 3 below, from 2001 until 2010, the New Zealand courts at all levels determined a total of 642 separate disputes. Of those cases, 162 were decided by the Taxation Review Authority (TRA) (25.2 per cent), while the remaining 480 cases were decided by the High Court, Court of Appeal and Privy Council/Supreme Court. Of all those disputes, 155 (29.9 per cent)

involved either substantive tax avoidance disputes or (more commonly) procedural disputes arising from the investigation, reassessment or litigation of the substantive dispute. This preponderance of tax avoidance disputes was foreshadowed by Inland Revenue in its 2002 *Annual Report* when it noted:

> "Aggressive tax issues are frequently disputed. The current audit emphasis on aggressive tax will exacerbate this. 48% of all cases in dispute involve aggressive tax stances."

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Year	Total Reported in the NZTC	Avoidance Cases in the TRA	Avoidance Cases in Higher Courts	Substantive Tax Avoidance	Procedural Tax Avoidance	Including JG Russell Template (Substantive and Procedural)
2001	42	1	6	2	5	2
2002	56	2	9	4	7	1
2003	55	3	9	5	7	6
2004	71	14	10	4	20	16
2005	56	3	13	7	9	6
2006	52	3	11	2	12	3
2007	57	3	16	5	14	3
2008	36	5	15	2	18	0
2009	61	6	13	7	12	1
2010	32	4	9	6	7	2
Total	**518**	**44**	**111**	**44**	**111**	**40**

Examining those 155 decisions, tax avoidance litigation represents virtually 30 per cent of all reported tax cases. Breaking that figure down further, 8.5 per cent of all cases involve substantive disputes regarding the operation of s BG 1/s 76, while 21.4 per cent of cases were procedural wrangles undertaken against the background of a tax avoidance challenge. Significantly, of those 155 cases, litigation by Mr JG Russell and taxpayers that participated in his tax avoidance template resulted in 40 reported decisions (7.7 per cent). Accordingly, even without the seemingly indefatigable appetite for litigation demonstrated by Mr Russell (and his clients), tax avoidance decisions involving other taxpayers still make up more than 20 per cent of all reported decisions.

In examining the 155 reported cases involving tax avoidance:

- Forty-four (28.4 per cent) determine the substantive tax dispute; and
- One hundred and eleven (71.6 per cent) deal with procedural wrangles.

Each of these types of cases raises different issues and these are now discussed.

[(2011) Vol 17:1 NZJTLP 115, 124]

5.1 Substantive Disputes

The courts at all levels have been called upon to resolve 44 substantive tax avoidance disputes (8.5 per cent of all reported tax cases) over the period 2001 to 2010. Of those cases, only 8 (18.1 per cent) were decided entirely or substantially in favour of the taxpayer. By comparison, the remaining 36 cases (81.9 per cent) were decided in the Commissioner's favour.

These statistics record that the Commissioner wins more than 80 per cent of all tax avoidance disputes. In fact, the only significant cases ultimately lost by the Commissioner over the past decade have been *BNZ Investments Ltd* (decided by the Court of Appeal) and *Peterson* (by a slim majority in the Privy Council, overturning the unanimous decision of the Court of Appeal). The few other taxpayer-wins in tax avoidance disputes came in the TRA, and were each decided largely on a factual basis and were, therefore, not appealed by the Commissioner.

Given the Commissioner's continued success in substantive tax avoidance litigation, it should be presumed that the case law in this area is relatively settled and well-understood. No other single aspect of tax has been so thoroughly litigated over that period – and certainly not with such a one-sided outcome. In any other matter, taxpayers and their advisers would wisely take note of the growing body of case law in that matter and not take tax positions that might end up in litigation – yet in tax avoidance, that appears not to have been the case.

In the landmark decisions in *Ben Nevis* and *Glenharrow*, the Supreme Court acknowledged the inconsistency among previous authorities, particularly decisions of the Privy Council, and Elliffe and Cameron observe that the Supreme Court therefore took the opportunity to lay down the law on tax avoidance in New Zealand. The Supreme Court stated in *Ben Nevis*:

> "There is therefore continuing uncertainty about the inter-relationship of the general anti-avoidance provision with specific provisions. That makes it desirable for this Court to settle the approach which should be applied in New Zealand."

But even since those decisions, a further 11 decisions have been delivered. Of those decisions, the Commissioner has (to 30 November 2010) won 10 – although the Supreme Court has granted leave to the taxpayers to appeal the Court of Appeal decision in *Penny and Hooper*.

[(2011) Vol 17:1 NZJTLP 115, 125]

5.2 Procedural Disputes

Procedural disputes have become a significant part of tax litigation in recent years. As detailed in Table 3, 111 of the 155 tax avoidance cases (71.6 per cent) involved procedural "wrangles" fought against the background of a tax avoidance challenge. In virtually none of these cases was the taxpayer successful. Despite the low chance of success, taxpayers continued to litigate procedural points in tax avoidance cases, as has been noted by a number of commentators. Of those disputes, the vast majority have been judicial review applications by taxpayers seeking to obtain some procedural concession or advantage against the Commissioner prior to the hearing of the substantive challenge. From the position of an independent observer, the procedural "wrangles" often appear a waste of time and resources that generally result in little practical benefit. Most cases resulted in emphatic victories for the Commissioner.

For the period January 2005 until December 2009, there were 353 reported cases in the *New Zealand Tax Cases*. Of those cases, 62 (or 18 per cent) were judicial review applications by taxpayers – virtually all of them taken against the background of a tax avoidance challenge. The breakdown of those decisions year by year is in Table 4, as follows:

Year	Reported Cases	Judicial Review	Percentage
2005	57	13	22.8
2006	59	7	11.8
2007	82	13	15.8
2008	59	6	10.1
2009	82	21	25.6
2010	14	2	14.2
Total	**353**	**62**	**17.5**

By comparison, during the same period in Australia, there were 378 decided cases, of which only 16 (or 4 per cent) were judicial review applications by taxpayers. While the number of judicial review **[(2011) Vol 17:1 NZJTLP 115, 126]** cases in Australia appear to be almost de minimus, the New Zealand figures record that nearly 20 per cent of all tax cases involve not an examination of the correctness of the assessment but rather a review of the process by which the Commissioner made or enforced that (mainly tax avoidance) assessment.

It is therefore not surprising that the Commissioner and the courts grew frustrated with these procedural disputes. In those circumstances, it was likely that the New Zealand courts would emphasise the primacy of the statutory challenge process and curtail the use of judicial review in tax disputes.

In *Westpac Banking Corp v Commissioner of Inland Revenue*, the Court of Appeal unanimously held that virtually all tax disputes should be resolved through the statutory challenge proceedings in Part VIIIA of the Tax Administration Act 1994, and that procedural arguments are only available in extremely limited circumstances. Having adopted the reasoning of the Australian High Court in *Commissioner of Taxation v Futuris Corp Ltd*, the Court confirmed its earlier decision in *Commissioner of Inland Revenue v Abattis Properties Ltd* that taking procedural points outside of the substantive challenge in other than exceptional circumstances is an abuse of process. The Supreme Court declined to grant to Westpac leave to appeal against that decision, observing that it was "satisfied that it is not reasonably arguable that the Court of Appeal's approach to the law, including its view of the effect of the policy of the legislation, was wrong."

Despite that strong statement, taxpayers have continued to bring procedural arguments. Since the Court of Appeal decision in *Westpac* was delivered on 20 February 2009, there have been a further 52 reported tax decisions. Remarkably, 18 of those reported cases (some 34 per cent) involved either judicial review or some other entirely procedural claim by the taxpayer, again most against a background of tax avoidance. In only one of those (non-tax avoidance) cases was the taxpayer successful – and that decision simply allowed the taxpayer's application to re-enter the statutory disputes procedure outside the normal time limit on the grounds of "exceptional circumstances". In no instance has any taxpayer succeeded in having a substantively correct tax avoidance assessment declared void on procedural grounds. But that has not stopped taxpayers trying – with a notable lack of success. Given the continued failure to achieve traction with procedural arguments, the question must be asked: what is driving this relentless pursuit of procedural points in tax avoidance disputes?

In most recent cases, the courts have generally treated taxpayers' procedural allegations with suspicion. The courts have persistently refused to permit taxpayers to frustrate and delay the **[(2011) Vol 17:1 NZJTLP 115, 127]** Commissioner's lawful assessment and collection of tax on some procedural foot-faults. The merits of many procedural points taken by taxpayers in Australia were summarised by the Australian Taxation Office's submission to the Australian Administrative Review Council:

> "It is of note that virtually every AD(JR) application in relation to recovery has been by a taxpayer associated with the tax avoidance industry or with a history of non-cooperation and non-payment of tax."

That statement could just as accurately be made in New Zealand. In most cases, procedural arguments appear only to have been raised because the taxpayer's substantive challenge against the correctness of the assessment was bound to fail. This factor explains both why virtually all judicial review cases take place against a background of alleged tax avoidance and why taxpayers seem willing to spend their resources taking every conceivable procedural argument, apparently without regard to the cost involved or the prospects of success.

This approach was most obvious in the plethora of procedural arguments brought by participants in the JG Russell template arrangement to have their assessments set aside, an arrangement that was described by the Privy Council as "[the very] paradigm of the kind of arrangement which s 99 was intended to counteract." It was also apparent in the structured finance tax avoidance litigation involving the major trading banks. That litigation resulted in no fewer than 29 separate reported judgments on various procedural wrangles before any of the substantive challenges was heard. It is notable that the Commissioner was entirely or largely successful in each procedural decision. With hindsight, it is difficult to see what advantage the banks gained from these protracted procedural disputes as, ultimately, they were still required to justify the correctness of their substantive tax position. Perhaps, given the sheer amount of tax in dispute, the taxpayers involved wished to leave no procedural stone unturned.

Another recent example of this phenomenon is found in the *McIlraith* cases. After losing his substantive challenge, the taxpayer brought a judicial review against the validity of that tax avoidance assessment. The Court of Appeal dismissed the taxpayer's judicial review application as meritless, and noted that "[t]hroughout the investigation, Mr McIlraith had been less than forthcoming with **[(2011) Vol 17:1 NZJTLP 115, 128]** information requested." Based on that lack of cooperation by the taxpayer, Tipping J held that "there was nothing unfair, improper or unlawful in the exercise which was undertaken [by the Commissioner]. It was a proper response in the circumstances." Having failed on this judicial review, the taxpayer then re-applied to have the Court of Appeal judgment recalled on the grounds that it did not sufficiently specify the statutory basis for the assessment. Again, the Court of Appeal dismissed that application.

If possible, an even more egregious example involved the participants in the Trinity tax avoidance arrangement who, having lost their substantive challenge at every level, subsequently changed tack and attempted to have either or both the Commissioner's original assessment and the High Court judgment declared void on what can only be considered extremely flimsy procedural

grounds. It was not surprising that both applications failed. Presumably, both the tax and the reputational issues at stake compelled the taxpayers to "clutch at every procedural straw" rather than accept the unpalatable outcome of the failed challenge proceedings.

Perhaps, it is the unsympathetic nature of the particular taxpayers in these cases that has influenced the courts to deny relief for any procedural irregularities by the Commissioner in the investigation and assessment process. The courts may consider that, compared to the conduct of the taxpayers themselves, any defects in procedure by the Commissioner seem tame, therefore warranting the refusal of what remains a discretionary remedy.

6.0 SIZE OF THE PROBLEM

Given the continued focus by Inland Revenue, practitioners and the courts, it is interesting to examine the quantum of tax actually in dispute in tax avoidance cases. Each year, in its annual report Inland Revenue separately quantifies the amount of tax assessed by its various audit divisions in respect of "aggressive tax" issues. While this category is not defined, it presumably is a euphemism or proxy for actual or alleged tax avoidance, and can be contrasted with the corresponding assessments in respect of "evasion or fraud". The amounts calculated by Inland Revenue for those two categories are set out below.

Year	Total Audit Discrepancy	Aggressive Tax (%)	Evasion (%)
2002	$748.3m	$137.7m (18.4%)	$32.6m (4.3%)
2003	$899.4m	$146.1m (16.2%)	$54.5m (6%) **[(2011) Vol 17:1 NZJTLP 115, 129]**
2004	$787m	$181.3m (39.6%)	$49m (6.2%)
2005	$763m	$165m (21.5%)	$76m (9.9%)
2006	$980m	$254m (25.9%)	$72m (7.3%)
2007	$996m	$247m (24.7%)	$128m (12.8%)
2008	$1,449m	$313m (21.6%)	$75m (5.1%)
2009	$1,269m	$123m (9.6%)	$127m (10%)
2010	$2,866m	$156m (5.4%)	$174m (6%)
Total	$10,757.7m	$1,723.1m (16%)	$788.1m (7.3%)

These figures show that Inland Revenue has re-assessed a total of $1.723 billion as a result of tax avoidance investigations in the past nine years, making up 16 per cent of total audit reassessments. By contrast, over the same period only $788.1 million was re-assessed as a result of evasion or fraud, being 7.3 per cent. This shows that more than twice as much revenue was re-assessed on the grounds of tax avoidance as for evasion. It is unknown whether this accurately quantifies the quantum of tax avoidance arrangements compared with the black economy, or simply reflects the focus of Inland Revenue's investigation of the respective problems. Nevertheless, based on Inland Revenue's own figures, the quantum of actual tax being avoided is somewhat less than the degree to which it dominates our tax system.

Interestingly, Inland Revenue's own figures appear to under-report the quantum of tax being avoided. Certainly, a number of the high-profile tax avoidance arrangements involved larger sums of tax in dispute (or at least potentially in dispute over the full term of those arrangements, which often encompassed future years). For instance, the Trinity arrangement over its projected 50 years involved total potential deductions for the licence fee and insurance components of almost $10 billion. Likewise, the structured finance tax avoidance litigation against the trading banks was ultimately resolved by the payment of approximately $2.2 billion of additional tax, in what Inland Revenue's own media release described as "believed to be the largest commercial settlement in New Zealand's history." The National Australia Bank media release announcing that settlement acknowledged that "under the settlement BNZ has paid Inland Revenue NZ$ 658 million, which represents 80% of the full amount of tax and interest." However, these figures do not appear to be reflected in Inland Revenue's own statistics in its annual report.

7.0 PROFESSIONAL AND ACADEMIC TAX JOURNALS AND CONFERENCES

As detailed above, tax avoidance disputes have disproportionately consumed the resources of both the Commissioner and the courts. But, equally, the topic has occupied the minds of academic commentators and practitioners over the same period.

From 2001 to the present, New Zealand has had only two dedicated tax journals that generally accept articles and comments for

publication. These are: **[(2011) Vol 17:1 NZJTLP 115, 130]**

- The peer-refereed *New Zealand Journal of Taxation Law and Policy*, published by Thomson Reuters; and
- The non-peer-refereed *NZ Tax Planning Reports*, published by CCH/Walters Kluwers.

On the basis that the pages of those journals contain the topics of importance to its contributors and readers, the articles published over that period should reflect the degree to which particular issues occupy the tax community in general. While certainly not a scientific approach, a review of those journals shows that the topic of tax avoidance takes up an equally large part of the academic and practitioner literature over the period. Twenty-seven (27) of the 162 articles and comments published in the *New Zealand Journal of Taxation Law and Policy* (16.6 per cent) over the past 10 years (to the end of 2009) have dealt with the topic of tax avoidance (see Table 6). Likewise, 20 of the 84 articles contributed to the *NZ Tax Planning Reports* (20 per cent) over that period dealt with tax avoidance or related issues (see Table 7).

	March	June	September	December	Total
2001	0/3	1/3	1/3	1/5	3/14
2002	2/4	1/6	1/3	1/5	5/18
2003	1/5	1/4	1/6	1/4	4/19
2004	0/3	0/3	0/5	2/6	2/17
2005	2/6	1/5	1/5	1/5	5/21
2006	0/4	0/4	0/3	1/3	1/14
2007	0/4	1/8	2/7	1/6	4/25
2008	0/4	0/5	0/6	0/4	0/19
2009	0/3	2/4	0/3	1/5	3/15
Total					27/162 = 16.6%

	February	April	June	August	October	December	Total
2001	0/2	0/2	1/2	0/1	0/1	0/2	1/10
2002	0/1	1/1	0/2	1/1	0/2	1/1	3/8
2003	1/1	1/2	0/2	1/1	1/1	0/1	4/8
2004	0/1	0/2	0/1	0/2	1/2	1/2	2/10
2005	0/2	1/2	0/1	0/1	1/2	0/2	2/10
2006	0/2	0/2	1/1	0/2	0/1	0/2	1/10
2007	0/1	0/1	2/2	1/1	0/1	0/1	3/7 **[(2011) Vol 17:1 NZJTLP 115, 131]**
2008	1/1	1/2	0/1	0/2	0/1	0/1	2/8
2009	1/1	1/1	0/2	1/2	1/2	0/2	4/10
2010	0/1	0/1	1/1	0/1			1/4
Total							21/84 = 20%

Interestingly, the publication of tax avoidance articles in both journals appears to follow a predictable pattern. A number of articles appear quickly after an important judgment. This is best shown in the spike in articles that appeared:

- In 2002 following the Court of Appeal decision in *BNZ Investments* in May 2001;

- In 2005 following the Privy Council decision in *Peterson* in February 2005; and
- In 2009 following the Supreme Court decisions in *Ben Nevis* and *Glenharrow* in December 2008.

Strangely, there was no similar blip following the other major tax avoidance judgment in that period – the Privy Council decision in *O'Neil v Commissioner of Inland Revenue*, delivered in April 2001. Perhaps, there was little to say about an arrangement that was described as "highly artificial" and "a paradigm of the kind of arrangement which s 99 was intended to counteract."

By contrast, there is likely to be a significant spike in articles following the recent *Penny and Hooper* decision by the Court of Appeal, and will no doubt peak again after the Supreme Court decision in that case is delivered. For instance, at both the 2010 tax conferences of the New Zealand Law Society and the New Zealand Institute of Chartered Accountants (NZICA), tax avoidance was the focus of many papers. At the NZICA tax conference, no fewer than two plenary presentations and three concurrent papers dealt with various aspects of recent tax avoidance developments.

8.0 THE MORALITY OF TAX AVOIDANCE?

Much of this academic and practitioner discussion comes with a vehemence not found in other tax topics. Tax avoidance generates strong feelings. For instance, one commentator recently called for "the appropriate amount of outrage" from the tax community when discussing the Court of Appeal decision in *Penny and Hooper* and encouraged all practitioners that "we have to fight our own corner" and protect other taxpayers who may find themselves "the victims" of that decision.

The courts have repeatedly attempted to neutralise such passions by stating that tax avoidance does not carry any implication of immorality. Courts at the highest level have stressed that no stigma should **[(2011) Vol 17:1 NZJTLP 115, 132]** attach to tax avoiders, who have engaged in entirely lawful behaviour. These reassurances are based on the distinction between taxpayers who deliberately cheat the tax system (that is, *tax evaders*) and those who arrange their affairs to reduce the potential tax liability (that is, potential *tax avoiders*). Given that difference, the courts have determined that lawful conduct amounting to tax avoidance should not be ascribed with any moral dimension. As Lord Hoffman observed in *O'Neil v Commissioner of Inland Revenue* when considering the JG Russell template:

> "The other [point about tax avoidance] is that [we] doubt the wisdom of using the concept of 'impropriety' instead. This suggests a moral judgment which their Lordships think is inappropriate and has been constantly repudiated in cases on tax avoidance schemes in England and New Zealand."

More recently, the Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* noted the judicial approach to an alleged tax avoidance:

> "… must enable decisions to be made on individual cases through the application of a process of statutory construction focusing objectively on features of the arrangements involved, without being distracted by intuitive subjective impressions of the morality of what taxation advisers have set up."

It appears therefore that, in New Zealand, lawful tax avoidance has no moral dimension and ought to be viewed simply as a technical dispute like any other. Accordingly, the strength of feeling on this topic seems a bit curious.

One consideration is the likely imposition of shortfall penalties on participants in tax avoidance arrangements. The Commissioner often imposes the abusive tax position penalty of 100 per cent of the tax shortfall on such taxpayers. The applicability of such an "onerous" penalty was confirmed by the Supreme Court in *Ben Nevis*, which acknowledged that it was imposed as a sanction on taxpayers who take "inappropriate tax positions". Some commentators have understood that decision to (incorrectly) justify the Commissioner's imposition of the abusive tax position penalty in all instances of tax avoidance. However, in practice that appears not to have been the case.

While that shortfall penalty was imposed in *Ben Nevis*, it was not imposed in the companion GST tax avoidance decision in *Glenharrow*. Likewise, while the imposition of the abusive tax position penalty was upheld in the *Krukziener* case, it was not even at

issue (presumably on the grounds that it had not **[(2011) Vol 17:1 NZJTLP 115, 133]** been imposed by the Commissioner) in either the *BNZ* or the *Westpac* structured finance cases, or in *Penny and Hooper*. Furthermore, in the *White* case the Commissioner expressly disavowed the imposition of shortfall penalties given the finely balanced nature of that tax avoidance dispute. Therefore, an assessment of penalties on tax avoiders is far from certain.

Apart from the possible imposition of shortfall penalties, allegations of tax avoidance do carry a significant reputational dimension, which taxpayers quite obviously seek to limit. For instance, during the Trinity litigation the participations in that scheme fought (unsuccessfully) to keep their identities secret in order to prevent "the prospect of unpleasant publicity". The Court of Appeal refused the taxpayers' request for suppression orders in the interest of open justice and a wider public interest. In reaching that decision, Young J issued a warning to participants in such arrangements:

> "Nor are we particularly sympathetic to the appellants. Major litigation is for neither the faint hearted nor the thin-skinned. The risk of publicity is often enough a significant factor in settlement decisions. Those who contemplate taking what might later be regarded as aggressive tax positions must accept the possibility that later associated disputes may attract publicity."

Despite that stern view, reputation risk is a real factor in many tax avoidance disputes. As one commentator described:

> "This risk relates to getting along with revenue authorities and creating (and maintaining) an appropriate image in the market. … In this writer's experience, reputation risk is a big deal for a number of institutions. We are often specifically asked to address reputational risk as part of our analysis of tax risk."

The threat of adverse publicity was wrongly used by a plaintiff when bringing legal proceedings against another alleged tax avoider in *Bradbury v Westpac Banking Corp*. In that case, Mr Bradbury threatened his former client with "a PR nightmare" relating partly to that client bank's own participation in another tax avoidance arrangement. After those proceedings were ultimately **[(2011) Vol 17:1 NZJTLP 115, 134]** abandoned by Mr Bradbury as untenable, the Court of Appeal confirmed that his improper threat of bad publicity amounted to misconduct and warranted the rare imposition of indemnity costs against him.

Interestingly, even being identified as having advised clients on their participation in tax avoidance arrangements can carry a reputational risk. There is also the (unlikely) possibility that disgruntled clients who were found to have participated in a tax avoidance arrangement on the basis of advice received, may seek to hold that adviser liable. It is presumably a combination of these legal and non-legal factors that explains the strength of feeling by taxpayers and their advisers.

9.0 TAX AVOIDANCE AND THE SEARCH FOR CERTAINTY?

As propounded by the Victoria University of Wellington Tax Working Group, certainty is one of the key cornerstones of an efficient tax system. The Group's report proposes that a "world class tax system" reduces the economic inefficiencies caused by the "deadweight cost" of taxation. In particular, it advised:

> "**Compliance and administration cost**: The tax system should be as simple and low cost as possible for taxpayers to comply with and for the Inland Revenue Department to administer."

To that end, the Group's report concludes that the New Zealand tax system ought to strive for "administrative simplicity, and reduced opportunity for tax avoidance and arbitrage". One of the tools provided to achieve this aim are the general anti-avoidance provisions found in s BG 1 of the Income Tax Act 2004 and s 76 of the Goods and Services Tax Act 1985. These provisions are designed to protect government revenue from schemes that have, in all other respects, fully complied with the relevant law but that, nevertheless, contravene the normal or expected operation of the legislation. In *Ben Nevis*, the Supreme Court explained the role of s BG 1 of the Income Tax Act 2007 in the following terms:

> "Parliament must have envisaged that the way a specific provision was deployed would, in some circumstances, cross the line and turn what might otherwise be a permissible arrangement into a tax avoidance arrangement. …"[Section BG 1's] function is to prevent uses of the specific provisions which fall outside their intended scope in the overall scheme of the Act.

> Such uses give rise to an impermissible tax advantage which the Commissioner may counteract."

Not surprisingly, the operation of s BG 1, and its GST equivalent in s 76 of the Goods and Services Tax Act 1985, is both controversial and uncertain. By definition, the general nature of these provisions **[(2011) Vol 17:1 NZJTLP 115, 135]** makes their scope and application imprecise. This has led some commentators to draw a comparison between the operation of s BG 1 and art 58 of the Soviet-era Russian SFSR Penal Code enacted under Stalin. This infamous art 58 made illegal all "counter-revolutionary" or "anti-Soviet" activities, and formally introduced the notion of "enemy of the workers". It was under this article that Stalin's show trials were conducted and many victims of the Great Purge were convicted.

The breadth of art 58, with its deliberately wide and imprecise meaning, obviously undermined the rule of law. "Article 58 was carte blanche for the secret police to arrest and imprison anyone deemed suspicious, making for its use as a political weapon." Most odiously, its lack of clarity made it impossible for defendants to reasonably establish whether any particular conduct was in breach.

While obviously hyperbole, it is conceded that a similar criticism can be made against a general anti-avoidance provision. Taxpayers who have carefully complied with all other provisions of the Acts, including the existing specific anti-avoidance provisions, may nevertheless find themselves in breach of a deliberately ill-defined general anti-avoidance provision. As was explained by the High Court in *Miller v Commissioner of Inland Revenue*:

> "It is of the nature of tax avoiders to manoeuvre skilfully around the express rules of the general law and the tax legislation and end with the innocent submission – as I have not infringed them I have succeeded. That is the very reason for generally expressed anti-avoidance provisions which begin their operation when other provisions have had their effect."

This problem was best summarised by the Privy Council in *Peterson*:

> "One of the main difficulties, as it seems to us, to which the application of the section may give rise … is the difficulty of distinguishing between those tax advantages which are to be nullified by the Commissioner and those tax advantages which are legitimate and could not have been intended by the legislature to be at risk under s 99."

Criticism of the vagueness of s BG 1 is common. As one commentator complained:

> "The problem is still an obvious one; how do you know when you have crossed an imaginary line?"

Even academic commentators have concluded that there is a "radical uncertainty" as to the scope and application of s BG 1 and that there is no "coherent set of guidelines as to how it might be recognised." It was even suggested that "the idea of tax avoidance is simply not susceptible to coherent explication." Responding to taxpayer criticism about the difficulty of complying with such a **[(2011) Vol 17:1 NZJTLP 115, 136]** nebulous provision, the courts have concluded: "certainty and predictability are important but not absolute values."

Taxpayer criticism of the role and application of s BG 1 was ultimately dismissed by the Supreme Court in both *Ben Nevis* and *Glenharrow*. In both cases, the taxpayers contended that the general anti-avoidance provisions should be read-down in the interests of taxpayer certainty. The Court of Appeal in *Accent Management* had already noted that "[t]his approach … does not leave much scope for a general avoidance provision" and criticised the taxpayers' arguments as "sometimes [coming] close to maintaining that general anti-avoidance provisions have no role at all".

In *Ben Nevis*, the Supreme Court noted that the wording of s BG 1 was imprecise and reasoned that it must remain deliberately vague because, no matter how carefully such a provision is drafted, the ingenuity of taxpayers cannot be predicted. The Supreme Court stated:

> "The appellants also argued that tax avoidance legislation should be interpreted in a way which gives taxpayers reasonable certainty in tax planning. But Parliament has left the general anti-avoidance provision deliberately general. … The courts should not strive to create greater certainty than Parliament has chosen to provide. We consider that the approach we have

> outlined gives as much conceptual clarity as can reasonably be achieved."

Accordingly, the Supreme Court rejected the taxpayers' arguments:

> "The appellants made a sustained plea that the courts should not deprive commercial and other parties of tax beneficial choices. On the approach we have set out, taxpayers have the freedom to structure transactions to their best tax advantage. They may utilise available tax incentives in whatever way the applicable legislative text, read in the light of its context and purpose, permits. They cannot, however, do so in a way that is proscribed by the general anti-avoidance provision."

With a notable lack of sympathy for taxpayers, the Court acknowledged that, while there may be difficult cases on the margins, generally an examination of the facts and the economic substance of each arrangement "will [make it] possible … to decide on which side of the line a particular arrangement falls."

Simultaneously, in *Glenharrow* the taxpayer also argued that s 76 ought not to be permitted to interfere with a bargain honestly reached by arm's-length parties, as to so permit would create unwelcome uncertainty for taxpayers. However, the Supreme Court explained:

> "… uncertainty is inherent where transactions have artificial features combined with advantageous tax consequences not contemplated by the scheme and purpose of the Act. There will also inevitably be uncertainty whenever a taxing statute contains a general anti-avoidance provision intended to deal with and **[(2011) Vol 17:1 NZJTLP 115, 137]** counteract such artificial arrangements. It is simply not possible to meet the objectives of a general anti-avoidance provision by the use, for example, of precise definitions …"

For taxpayers seeking certainty, the Supreme Court recommended that they obtain a binding ruling under Part VA of the Tax Administration Act 1994 to determine the Commissioner's view on the tax effectiveness of their arrangements. That may be unwelcome advice to taxpayers who have experienced the increasing cost and extended delays typical of the binding rulings regime. However, the worth of obtaining a binding ruling was demonstrated in the structured finance litigation, where only those arrangements for which the banks had obtained a binding ruling were protected from the later application of s BG 1.

This somewhat harsh attitude by the court has been justified by a leading commentator:

> "Despite their claims to the contrary, people caught by such provisions generally do intend to minimise tax. What they are relying on in such situations is … a hope or expectation that their arrangements will pass as effective for tax. When an assessment catches such transactions a sense of moral outrage seems inappropriate."

This uncertainty may give taxpayers pause before embarking on tax-aggressive arrangements. It may therefore serve a secondary purpose of discouraging such abusive behaviour by deliberately creating doubt over the tax treatment of aggressive tax transactions. It will be difficult for taxpayers to structure an arrangement to come as close as possible to the "line" of tax avoidance without crossing it, if the precise location of that line always remains uncertain.

This point was addressed by the Court of Appeal in *Penny and Hooper*. While many taxpayers had hoped that the Court's decision would give certainty regarding the use of this type of tax structure, the majority expressly refused to provide it:

> "Much as professional advisers may yearn for all-encompassing templates, to ask the courts to attempt to anticipate other possible situations and produce clear, bright-line rules is undesirable and impracticable in taxation law."

Given that apparent deliberate lack of certainty, even the most honest and diligent taxpayers and their advisers are left struggling to distinguish between legitimate tax planning and impermissible tax **[(2011) Vol 17:1 NZJTLP 115, 138]** avoidance. The failure by Inland Revenue to update or finalise its draft policy statement on the application of s BG 1 after more than six years merely adds to taxpayer uncertainty. That draft policy was first released in September 2004 but has never been finalised and is currently described

as “a work in progress … likely to be reconsulted in 2010”. Unfortunately, an updated version of that policy has still not been released. Accordingly, Inland Revenue appears unable to provide the guidance that taxpayers seek. The updated policy will obviously carry great significance for the operation of Inland Revenue and the behaviour of taxpayers when it is finally released.

The financial stakes are high and professional reputations are often “on the line”. In those circumstances, it is hardly surprising that both taxpayers and Inland Revenue seem prepared to fight allegations of tax avoidance harder than most other types of tax dispute. Unfortunately, the inherent uncertainty and lack of judicial guidance has directly increased the administrative burden faced by both taxpayers and Inland Revenue. As demonstrated in this article, the size of that burden in resolving tax avoidance disputes is disproportionately large.

10.0 CONCLUSION

As part of its brief, the Victoria University of Wellington Tax Working Group was required to consider the extent to which New Zealand’s current tax regime conforms to the “principles of a good tax system”. The Working Group’s final report considered that one of the key features of such a system is low administrative and dead-weight costs, which arise “because of the way that taxes affect how people act (a tax bias cost) and because of the costs to taxpayers in complying with the tax and to the government in administering the tax.”

Tax avoidance is a major feature of the New Zealand tax landscape. Disputes over the scope and application of s BG 1/s 76 consume a disproportionate amount of the resources of Inland Revenue, taxpayers, the courts and practitioners. On most measures, it takes up approximately 20 per cent to 30 per cent of those resources, which most practitioners would conclude is far in excess of its actual incidence. Yet when such disputes do arise, they are fought long and hard by all sides, generating numerous court decisions, which in turn give rise to numerous journal articles and conference papers.

On that analysis, whatever the reader’s view on tax avoidance, it appears that the current system is failing us all. The lack of precision inherent in the general anti-avoidance provisions, the Commissioner’s apparent inability to provide sufficient guidance on their application, and the court’s refusal to provide clear rules, simply fuel further disputes. On that measure, whatever the result in individual cases, the law on tax avoidance is far from what we should expect from a good tax system.

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FOOTNOTES

1 Statistical information obtained from Inland Revenue under the Official Information Act 1982; response on 2 September 2010 from Martin Scott, Group Manager Assurance.

2 Much of the statistical information gathered for this article was collated by Ruth Dobbie, a MTaxS student at the University of Auckland. The authors would like to thank Ruth for her assistance with compiling these figures.

3 *O’Neil v Commissioner of Inland Revenue*(2001) 20 NZTC 17,051 (PC) at 17,059, [23]; also reported as *Miller v Commissioner of Inland Revenue*[2001] 3 NZLR 316 (PC) at 330, [23].

4 Pursuant to ss 6 and 6A of the Tax Administration Act 1994.

5 Section 7 of the Tax Administration Act 1994.

6 See *Cates v Commissioner of Inland Revenue*[1982] 1 NZLR 530, (1982) 5 NZTC 61,237, (1982) 5 TRNZ 603 (CA).

7 See *Kemp v Commissioner of Inland Revenue*(1999) 19 NZTC 15,110 (HC), where a concluded settlement with a taxpayer was nevertheless overturned by the Court once it became apparent that the Litigation Management Unit lacked the necessary delegation. See also the discussion in *Accent Management Ltd v Commissioner of Inland Revenue*(2005) 22 NZTC 19,027 (HC) at 19,078-19,081, [328]-[353], where a special delegation permitting an officer to impose a shortfall penalty was found to be valid.

8 *Commissioner of Inland Revenue v Russell*(2005) 22 NZTC 19,664 (DC).

9 Ibid, at 19,679, [65]-[66].

10 *Miller v Commissioner of Inland Revenue (No 1)*(1997) 18 NZTC 13,001 (HC).

11 Ibid, at 13,020-13,021.

12 *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*(2003) 21 NZTC 18,102 (HC).

13 See s 89A of the Tax Administration Act 1994.

14 *Commissioner of Inland Revenue v Delphi Fishing Company Ltd*(2004) 21 NZTC 18,525 (HC).

15 After the initial exchange of SOPs between the parties, the Commissioner attempted to assert an entirely new ground for the assessment in an Addendum to the SOP, under s 89M of the Tax Administration Act 1994.

16 *Commissioner of Inland Revenue v Delphi Fishing Company Ltd*, above n 14, at 18,531, [49] and [52].

17 Statistical information obtained from Inland Revenue under the Official Information Act 1982; response on 2 September 2010 from Martin Scott, Group Manager Assurance, Inland Revenue.

18 In Part IVA of the Tax Administration Act 1994.

19 Inland Revenue *Resolving Tax Disputes: A Legislative Review* (2003) at 18, [3.17].

20 *ANZ National Bank Ltd v Commissioner of Inland Revenue (No 3)*(2006) 22 NZTC 19,987 (HC); and *Commissioner of Inland Revenue v ANZ National Bank Ltd*(2007) 23 NZTC 21,167 (CA), overturning *Alpe v Commissioner of Inland Revenue*(2001) 20 NZTC 17,372 (HC).

21 This dispute arose prior to the commencement of s 89N of the Tax Administration Act 1994 on 1 April 2005.

22 *ANZ National Bank Ltd v Commissioner of Inland Revenue (No 2)*(2006) 22 NZTC 19,835 (HC) at 19,841, [18].

23 Ibid, at 19,842, [23].

24 *Commissioner of Inland Revenue v ANZ National Bank Ltd*(2007) 23 NZTC 21,167 (CA).

25 Despite this legal position, Inland Revenue policy maintains that "it is the Commissioner's policy and practice that all disputes are to be sent to the Adjudication Unit for review, irrespective of the complexity or type of issues or amount of tax involved": see Inland Revenue "SPS 08/01: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue" (2008) 20(6) Tax Information Bulletin 38 at 62-63, [286]. However, see the views of Justice William Young, writing extra-judicially, doubting the correctness of this policy in Hon Justice William Young "Tax Disputes in New Zealand" [2009] 4 Journal of the Australasian Tax Teachers Association 1 at 4, citing Mark Keating "Comment: New Zealand's Tax Disputes Procedure: Time for a Change" (2008) 14 New Zealand Journal of Taxation Law and Policy 425. His Honour concluded that "in this respect the courts are less demanding than the Commissioner's own policy statement".

26 *ANZ National Bank Ltd v Commissioner of Inland Revenue (No 2)*(2006) 22 NZTC 19,835 (HC).

27 See Inland Revenue "Disputes Resolution Process Commenced by the Commissioner of Inland Revenue – SPS 05/03" (2005) 17(3) Tax Information Bulletin 27 at 40, [131]. This Standard Practice Statement was applicable until 13 June 2008, but it had not yet been superseded.

28 Inland Revenue *Annual Report 2001-2002* (2002) at 96 <www.ird.govt.nz/resources>.

29 These statistics include only tax disputes and challenges to the substantive correctness of an assessment, or the procedure under which that dispute or challenge should be resolved. It therefore excludes all cases (even if the Commissioner is a party) dealing with liquidations, ACC, child support, bankruptcy, insolvency, unclaimed money, Local Government Act and the strike-off of companies from the Companies Register.

30 Up to 30 June 2010.

31 *Commissioner of Inland Revenue v BNZ Investments Ltd*[2002] 1 NZLR 450; (2001) 20 NZTC 17,103 (CA).

32 *Peterson v Commissioner of Inland Revenue*[2006] 3 NZLR 433; (2005) 22 NZTC 19,098 (PC).

33 For example, see *Case X1*(2005) 22 NZTC 12,001 (TRA), and *Case Z22*(2010) 24 NZTC 14,305 (TRA).

34 Those decisions are described by Elliffe and Cameron as constituting a "sea change" in the scope and application of tax avoidance in New Zealand; see Craig Elliffe and Jess Cameron "The Test for Tax Avoidance in New Zealand: A Judicial Sea Change" (2010) 16 New Zealand Business Law Quarterly 440 at 440.

35 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[2008] NZSC 115, [2009] 2 NZLR 289, (2009) 24 NZTC 23,188 at 330, 23,210, [100].

36 Up to 30 September 2010.

37 *Commissioner of Inland Revenue v Penny*[2010] NZCA 231, [2010] 3 NZLR 360, (2010) 24 NZTC 24,287.

38 For example, in the years 2005 to 2008 there were a total of 121 cases (reported in the *NZTC*) in the High Court, Court of Appeal, and Privy Council or Supreme Court dealing with procedural issues. By comparison, only 27 entirely substantive cases were decided. Over that same period, the TRA determined 232 procedural cases compared with 29 substantive cases: see Mark Keating "Comment: New Zealand's Tax Dispute Procedure – Time for a Change" (2008) 14 New Zealand Journal of Taxation Law and Policy 425.

39 See Hon Justice William Young "Tax Disputes in New Zealand" [2009] 4 Journal of the Australasian Tax Teachers Association 1; and Keating, above n 38.

40 Decided by the High Court, Court of Appeal or Supreme Court.

41 The authors would like to thank Ruth Dobbie, a MTaxS student at the University of Auckland, for her assistance with compiling these figures.

42 Decided by the Federal Court, Full Federal Court or Australian High Court.

43 *Westpac Banking Corp v Commissioner of Inland Revenue*[2009] NZCA 24, [2009] 2 NZLR 99, (2009) 24 NZTC 23,340.

44 *Commissioner of Taxation v Futuris Corp Ltd*[2008] HCA 32, [2008] 237 CLR 146, 69 ATR 41, 2008 ATC 20-039.

45 *Westpac Banking Corp v Commissioner of Inland Revenue*, above n 43, at 114, 23,351-23,352, [58].

46 *Commissioner of Inland Revenue v Abattis Properties Ltd*(2002) 20 NZTC 17,805, (2002) 16 PRNZ 440 at 17,810, 445, [24].

47 *Westpac Banking Corp v Commissioner of Inland Revenue*, above n 43, at 103, 23,343, [8]. See also 114-115, 23,352, [59]-[60].

48 *Westpac Banking Corp v Commissioner of Inland Revenue*[2009] NZSC 36, (2009) 24 NZTC 23,435, (2009) 19 PRNZ 281 at 23,436, 282, [4].

49 Reported in the *NZTC*, up to 20 April 2010. In addition to those 52 reported decisions, there have been a number of further tax decisions issued, including those involving judicial review applications, which are yet to be reported.

50 *Commissioner of Inland Revenue v Alam*[2009] NZCA 273, (2009) 24 NZTC 23,564.

51 It is impossible to know when many of those subsequent applications for judicial review were actually filed by taxpayers. Accordingly, a number of the reported decisions may relate to disputes that predate the decisions in *Westpac*.

52 See *Westpac Banking Corp v Commissioner of Inland Revenue*, above n 43, at 115, 23,352, [62] and [63]. It is noteworthy that commencing a judicial review proceeding is one of the exceptions in s 89N of the Tax Administration Act 1994 which excuses the Commissioner from having to complete the statutory disputes procedure prior to assessment. This exception was presumably included on the apprehension that judicial reviews are often commenced with the collateral purpose of delaying or preventing the correct assessment being made. See also Adrian J Sawyer "The impact of recent bank structured financing litigation on interpreting and applying New Zealand legislation" (2008) 22 Journal of International Banking Law & Regulation 627.

53 Australian Taxation Office "Submission to the Administrative Review Council", quoted in *CCH Australian Federal Tax Reporter*, Income Tax Assessment Act 1936 (Australia) at 934-100.

54 *Miller v Commissioner of Inland Revenue*[2001] 3 NZLR 316 (PC) at 326-327; also reported as *O'Neil v Commissioner of Inland Revenue*(2001) 20 NZTC 17,051 (PC) at 17,057.

55 Cases reported in the *NZTC* for the 2005 to 2009 years regarding all procedural aspects of the structured finance repo tax avoidance litigation involving. There were 21 judgments delivered by the High Court, five by the Court of Appeal and three by the Supreme Court (including leave applications).

56 The substantive decisions upholding the Commissioner's assessments based on tax avoidance are reported as *BNZ Investments Ltd v Commissioner of Inland Revenue*(2009) 24 NZTC 23,582 (HC) and *Westpac Banking Corp v Commissioner of Inland Revenue*(2009) 24 NZTC 23,834 (HC).

57 *McIlraith v Commissioner of Inland Revenue*(2007) 23 NZTC 21,456 (HC).

58 *McIlraith v Commissioner of Inland Revenue*[2009] NZCA 45, (2009) 24 NZTC 23,365.

59 *McIlraith v Commissioner of Inland Revenue*[2009] NZCA 45, (2009) 24 NZTC 23,365 at 23,368, [30].

60 Ibid, at 23,368, [30].

61 *McIlraith v Commissioner of Inland Revenue*[2009] NZCA 442, (2009) 24 NZTC 23,829.

62 *Accent Management Ltd v Commissioner of Inland Revenue*(2005) 22 NZTC 19,027 (HC); *Accent Management Ltd v Commissioner of Inland Revenue*[2007] NZCA 230, (2007) 23 NZTC 21,323; and *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[2008] NZSC 115, [2009] 2 NZLR 289, (2009) 24 NZTC 23,188.

63 *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue (No 3)*[2011] 1 NZLR 336, (2010) 24 NZTC 24,079 (HC); and *Accent Management Ltd v Commissioner of Inland Revenue*(2010) 24 NZTC 24,126 (HC).

64 See Inland Revenue's annual reports for each of the 2002 to 2010 income years at: <www.ird.govt.nz/aboutir/reports/annual-report/>.

65 Inland Revenue's *Annual Report 2009* (B-23, 2009) at 33 explains: "Discrepancies fluctuate from year to year, depending on the effect of large cases and the nature of the underlying non-compliance we have investigated."

66 See Inland Revenue "Structured finance cases settled" (media release, 23 December 2009) <www.ird.govt.nz/aboutir/media-centre/media-releases/2009>.

67 National Australia Bank "BNZ reaches settlement with Inland Revenue" (media release, 23 December 2009) <www.nabgroup.com.

68
Taxation Today, published by Thompson Reuters, only issued its first edition in 2007 and, therefore, does not provide a useful comparison for the entire period under review.

69 *O'Neil v Commissioner of Inland Revenue*(2001) 20 NZTC 17,051 (PC); also reported as *Miller v Commissioner of Inland Revenue*[2001] 3 NZLR 316 (PC).

70 Ibid, at 17,056-17,057, 326-327, [9] and [10] respectively.

71 In *Penny v Commissioner of Inland Revenue*[2010] NZSC 94, (2010) 24 NZTC 24,396, the Supreme Court granted the taxpayers' application for leave to appeal.

72 The plenary presentations at the NZICA 2010 Tax Conference were: David Patterson "Avoidance – Richardson Framework – Where are we now?"; and Rt Hon Sir Edmund Thomas "The Evolution from Form to Substance in Tax Law: The Demise of the Dysfunctional 'Metwand'". The concurrent papers were: Andy Archer and Kirsty Keating "Avoidance – Managing avoidance risk for business as usual"; Graham Tubb and Patrick McCalman "Dealing with uncertainty in the tax system"; and Craig Elliffe "Tax Avoidance and Cross-Border Transactions".

73 See John Peterson "Revenue Alert 10/01 – Taxation by Press Release?" *TalkTax* (25 June 2010) <www.talktax.co.nz>.

74 Although some tax avoidance behaviour will result in the imposition of a shortfall penalty in some instances, as discussed below.

75 The distinction between criminal tax evasion and lawful tax avoidance was explained by Lord Templeman in *Commissioner of Inland Revenue v Challenge Corp Ltd*[1986] 2 NZLR 513, (1986) 8 NZTC 5,219, (1986) 10 TRNZ 161 (PC) at 561, 5,225, 167.

76 *O'Neil v Commissioner of Inland Revenue*(2001) 20 NZTC 17,051 (PC) at 17,057, [9]; also reported as *Miller v Commissioner of Inland Revenue*[2001] 3 NZLR 316 (PC) at 326, [9].

77 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[2008] NZSC 115, [2009] 2 NZLR 289, (2009) 24 NZTC 23,188 at 330, 23,211, [102].

78 However, see the contrary views of Professor Adrian Sawyer in "Recent Evidence on (Im)morality within Taxation" (2009 UC in the City Lecture Series, Christchurch Art Gallery, 24 November 2009).

79 See s 141D of the Tax Administration Act 1994.

80 See *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 77, at 345-354, 23,222-23,229, [172]-[209], particularly the discussion regarding the rationale for imposing such a penalty for tax avoidance, at 347-348, 23,224, [177]-[178].

81 For instance, see David Snelling "Trinity investors slapped in the heat of the moment" (2009) No 4 NZ Tax Planning Reports 1.

82 *Krukziener v Commissioner of Inland Revenue (No 3)*(2010) 24 NZTC 24,563 (HC).

83 *BNZ Investments Ltd v Commissioner of Inland Revenue*(2009) 24 NZTC 23,582 (HC).

84 *Westpac Banking Corp v Commissioner of Inland Revenue*(2009) 24 NZTC 23,834 (HC).

85 *Penny v Commissioner of Inland Revenue*[2009] 3 NZLR 523, (2009) 24 NZTC 23,406 (HC), and *Commissioner of Inland Revenue v Penny*[2010] NZCA 231, (2010) 24 NZTC 24,287.

86 *White v Commissioner of Inland Revenue*(2010) 24 NZTC 24,600 (HC).

87 See the comments in *Case Z24*(2010) 24 NZTC 14,354 (TRA) at 14,370, [106], in which Judge Barber upheld the assessment on the grounds of s BG 1 but expressed satisfaction that the Commissioner did not seek to impose a shortfall penalty. The decision not to impose that penalty was indirectly vindicated by the High Court (above n 86) overturning the tax avoidance assessment on appeal.

88 See Shelley Griffiths "The 'Abusive Tax Position' in the Tax Administration Act 1994: An Unstable Standard for a 'Penal' Provision?" (2009) 15 New Zealand Journal of Taxation Law and Policy 159 at 159, where the author considers that "The abusive tax position penalty was never intended to apply to all avoidance, but the wording of the provision imposing the penalty is dense and sufficiently ambiguous that it is difficult to predict which instances of avoidance it ought to apply to."

89 *Muir v Commissioner of Inland Revenue*(2004) 21 NZTC 18,894 (CA) at 18,903, [42].

90 Ibid, at 18,903, [43].

91 Neil Russ "Reducing tax risk – a New Zealand legal perspective" (paper presented at the Inter-Pacific Bar Association Conference, Los Angeles, USA, 27-30 April 2008) at 2.5(e).

92 *Bradbury v Westpac Banking Corp*[2009] NZCA 234, [2009] 3 NZLR 400, (2009) 19 PRNZ 385. Ironically, those proceedings were improperly brought by one of the participants to the Trinity litigation, who himself had been identified as a result of the Court of Appeal's decision to lift his anonymity.

93 The substantive decision upholding the Commissioner's assessments based on tax avoidance is reported as *Westpac Banking Corp v Commissioner of Inland Revenue*, above n 84.

94 For instance, Green MP Dr Russell Norman questioned the appropriateness of appointing one of New Zealand's leading tax accounting professionals to a government advisory panel on the basis that he had provided advice and assistance to Westpac Banking Corp when it entered into the structured finance tax avoidance transactions. See (14 October 2009) 658 NZPD 7013 <www.parliament.nz>.

95 See the unsuccessful attempt to hold advisers liable in *Calvert v PricewaterhouseCoopers*(2004) 21 NZTC 18,792 (HC). But see also the comments by the Court of Appeal in *Miller v Commissioner of Inland Revenue*(1998) 18 NZTC 13,961 that the clients of a promoter of an unsuccessful tax-avoidance scheme might have a claim in respect of income which was assessed to them but which was retained by the promoter as a fee.

96 Victoria University of Wellington Tax Working Group *A Tax System for New Zealand's Future: Report of the Victoria University of Wellington Tax Working Group* (Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, 2010) at 15.

97 Ibid, at 96.

98 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[2008] NZSC 115, [2009] 2 NZLR 289, (2009) 24 NZTC 23 ,188 at 330-331, 23,211, [104] and [106], known as the "*Trinity scheme*".

99 John Prebble, Rebecca Prebble and Catherine Vidler Smith "Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation" (2006) 22 NZULR 271.

100 Article 58 of the Russian SFSR Penal Code was operative from 25 February 1927.

101 See <http://en.wikipedia.org/wiki/Article_58_(RSFSR_Penal_Code)>.

102 See Prebble, Prebble and Vidler Smith, above n 99, at 281, footnote 48, where the authors expressly disavow any moral equivalent between tax avoidance and the crimes against humanity committed by dictatorial regimes in reliance on such criminal codes.

103 *Miller v Commissioner of Inland Revenue*(1997) 18 NZTC 13,219 (HC) at 13,240.

104 *Peterson v Commissioner of Inland Revenue*[2006] 3 NZLR 433, (2005) 22 NZTC 19,098 (PC) at 451, 19,114, [60].

105 Eugen Trombitas "The Role for a General Anti-Avoidance Rule in a GST" (2007) 13 New Zealand Journal of Taxation Law and Policy 396 at 436.

106 Michael Littlewood "The Privy Council and the Australasian anti-avoidance rules" [2007] BTR 175 at 203 and 204.

107 *Commissioner of Inland Revenue v BNZ Investments Ltd*[2002] 1 NZLR 450, (2001) 20 NZTC 17,103 (CA) at 463, 17,115, [40].

108 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[2008] NZSC 115, [2009] 2 NZLR 289, (2009) 24 NZTC 23,188.

109 *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*[2008] NZSC 116, [2009] 2 NZLR 359, (2009) 24 NZTC 23,236.

110 *Accent Management Ltd v Commissioner of Inland Revenue*[2007] NZCA 230, (2007) 23 NZTC 21,323 at 21,346, [113] and [116].

111 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 108, at 332, 23,212-23,213, [112].

112 Ibid, at 332, 23,212, [111].

113 Ibid, at 333, 23,213, [112].

114 *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*, above n 109, at 381, 23,247, [48].

115 See Part VA of the Tax Administration Act 1994.

116 See *Westpac Banking Corp v Commissioner of Inland Revenue*[2009] NZCA 24, (2009) 24 NZTC 23,340 at 23,349, [42] and 23,355, [84].

117 John Prebble, Rebecca Prebble and Catherine Vidler Smith "Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation" (2006) 22 NZULR 271 at 281.

118 This approach contrasts with the requirements stipulated by the European Court of Justice in *Halifax PLC v Commissioners of Custom and Excise*[2006] ECR I-1609, [2006] BTC 5308, [2006] CEC 690, [2006] 2 CMLR 36, [2006] Ch 387, [2006] STC 919, [2006] 2 WLR 905 that "the requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequence, in order that those concerned may know precisely the extent of the obligations which they imposed on them" – as summarised in Ben Terra "The European Court of Justice and the Principle of Prohibiting Abusive Practices in VAT" (2007) 13 New Zealand Journal of Taxation Law and Policy 381 at 385.

119 "Crossing the line" is a metaphor used repeatedly by New Zealand courts: see *Commissioner of Inland Revenue v BNZ Investments Ltd*[2002] 1 NZLR 450, (2001) 20 NZTC 17,103 (CA) at 463, 17,115, [40] which talks of "[l]ine drawing and the setting of limits"; the Court of Appeal in *Accent Management Ltd v Commissioner of Inland Revenue*[2007] NZCA 230, (2007) 23 NZTC 21,323 at 21,352-21,353, [126] and 21,358, [146], which refers to tax avoidance as "an exercise in line-drawing" and the Trinity scheme as "well and truly across the line" into tax avoidance; and the Court of Appeal in *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*[2007] NZCA 346, [2008] 1 NZLR 222, (2007) 23 NZTC 21,564 at 237, 21,577-21,578, [91], which concludes that "significant temporal mismatches can indicate a crossing of the line into tax avoidance."

120 *Commissioner of Inland Revenue v Penny*[2010] 3 NZLR 360, (2010) 24 NZTC 24,287 (CA) at 394, 24,315, [162] per Hammond J.

121 For example, see the open letter sent by the NZICA to Inland Revenue dated 11 June 2010, complaining that the current law on tax avoidance "created uncertainty for many taxpayers" and that practitioners were "uncertain about the correct response to clients seeking direction and guidance in this area.": Craig Macalister and Geof Nightingale "CIR v Penny & Hooper CA201/2009 [2010] NZCA 231" <www.nzica.com>.

122 See <www.ird.govt.nz/public-consultation/expired/>.

123 The statistics recorded in this article are current up to 30 June 2010.

124 Victoria University of Wellington Tax Working Group *A Tax System for New Zealand's Future: Report of the Victoria University of Wellington Tax Working Group* (Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, 2010) <www.victoria.ac.nz/sacl/cagtr>. The report relies upon analysis provided by the New Zealand Treasury in a report *Estimating the Distortionary Costs of Income Taxation in New Zealand* (Background paper for Session 5 of the Victoria University of Wellington Tax Working Group, 2009) <www.victoria.ac.nz/sacl/cagtr/twg>.