Commissioner wins Frucor tax avoidance appeal

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The High Court judgment in Frucor Suntory New Zealand Ltd v C of IR [1] *(in November 2018) broke Inland Revenue's decade-long run of wins in tax avoidance cases.* [2] *That decision even called into question the correctness of Inland Revenue's long-standing approach to tax avoidance. The case was obviously welcomed by taxpayers and advisers who hoped the pendulum was starting to swing back in favour of taxpayers by redrawing the line between permitted tax planning and tax avoidance.*

Not surprisingly, Inland Revenue felt obliged to appeal that decision — and the Court of Appeal unanimously over-turned the High Court judgment. [3] *So it is business as usual and the needle on tax avoidance has not moved. Taxpayers and their advisers must continue to wait for a future case to redraw the line on tax avoidance.*

This article by Mark Keating, tax barrister, Auckland, discusses the implications of the Court of Appeal's decision.

The Frucor arrangement

Frucor involved the deductibility of interest paid by the New Zealand member of an international corporate group to its bank under an Optional Convertible Note (OCN) lending arrangement as follows:

- Deutsche Bank advanced Frucor $204 million for 5 years, which could be repaid in cash or by the issue of new Frucor shares.
- The bank immediately on-sold its future right to receive repayment (or shares issued by Frucor) to Frucor's Singapore parent for $149 million (meaning the bank itself had advanced only the balance of $55 million and would never be obliged to take Frucor shares in repayment).
- Frucor made cash interest payments (at market rates) of $66 million over the 5-year life of the full $204 million loan — but this sum coincidentally matched the amount of interest and principal required for full repayment of the bank's own $55 million loan.
- When the loan matured, Frucor repaid the advance by the issue of shares worth $204 million, which were immediately transferred by Deutsche Bank to Frucor's Singapore parent under the original on-sale agreement.

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Frucor claimed a deduction for the full $66 million interest it paid to the bank on the $204 million loan. But Inland Revenue alleged that the OCN and the forward sale should be netted off, meaning the true balance of the loan was not $204 million but only the $55 million advanced by the bank itself. Accordingly, Inland Revenue allowed interest deductions only for that part of the loan (being $11 million rather than the full $66 million).

Alesco revisited

Inland Revenue's approach to the Frucor arrangement, including the reconstruction to deny the interest deductions, was similar to the arguments successfully advanced in the earlier *Alesco* litigation. In that case the taxpayer was the wholly-owned subsidiary of an Australian group. The taxpayer made a genuine commercial acquisition in New Zealand for $78 million, so needed funding. It initially borrowed using a vanilla loan but, following tax advice, issued an OCN to its Australian parent, which could be repaid by the company either in cash or by the issue of additional shares in 10 years.

While no interest was actually payable under the OCN, under Financial Arrangements Determination G22 the equity and debt portions of the OCN were split, such that an interest component of $5.6 million was deemed to have been incurred on that funding. That deemed interest amount was deductible to the taxpayer under the financial arrangements rules, while (as it was not actually paid) it was also not subject to the non-resident withholding tax rules.[4] When the OCN matured, rather than repay the debt, the taxpayer converted it into additional shares, even though these did not change the parent's existing 100% ownership.

When choosing to use the OCN the taxpayer stipulated a desire for "tax efficiency" with respect to the required lending of $78 million. Unfortunately for the taxpayer, the double tax benefit (deemed interest deductions throughout the course of the OCN and no NRWT on maturity) were spelt out all-too-clearly by its advisers and the bank that funded the Australian parent's advance. The Commissioner therefore seized upon these statements to impugn the arrangement as impermissible tax avoidance.

Both the High Court[5] and Court of Appeal[6] upheld the Commissioner's reassessment and denied the taxpayer a deduction for the deemed interest deduction under s BG 1 of the Income Tax Act 2007. Furthermore, despite the taxpayer applying the tax treatment mandated under Determination G22, the courts also upheld the Commissioner's imposition of a shortfall penalty for adopting an abusive tax position.[7]

These decisions were heavily criticised by commentators on a number of grounds. It was considered that not only were the decisions incorrect but that the Commissioner had gone too far in applying s BG 1 to the funding of a genuine commercial transaction. It was hoped by taxpayers and their advisers that *Alesco* represented the high-water mark of tax avoidance.[8]

Frucor to the rescue

Inland Revenue accepted that the interest deduction claimed by Frucor complied with the black letter of the financial arrangements rules but nevertheless alleged the $204 million loan owed to the bank should be offset against the $149 million forward purchase agreement with its Singapore parent, meaning the net loan to the group was only $55 million. Accordingly, the Commissioner alleged that only $11 million of the $66 million interest paid was deductible to the taxpayer.

The Commissioner made the same arguments that had been successful in *Alesco*. These included that the arrangement should be judged on its economic substance and that the issue of additional shares within a wholly-owned group has no value. Finally, the Commissioner alleged that both the obvious tax benefits and the unusual features of the arrangement were clear indicators of tax avoidance. Nevertheless, the High Court refused to accept those long-standing arguments and ruled in favour of the taxpayer.

The High Court rejected both the proposed reassessment and the shortfall penalty for an abusive tax position imposed by the Commissioner.[9] That decision included a number of important findings in favour of both Frucor and taxpayers generally:

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1. The Commissioner's economic cost argument (that shares issued under the OCN have no economic value when issued within a wholly-owned group context) was wrong. Inland Revenue's argument ignored both the opportunity cost of any share issue as well as the relevant case law and statutory provisions that mandate a cost for issued shares. Muir J explained:

> "FHNZ's next and ultimately more compelling point is that the financial arrangements rules and the Determinations issued in respect of them all contemplate that shares may be issued in discharge of legal obligations and nowhere is a distinction drawn between a share issue to a parent (or in this case to an intermediate party which had contracted to transfer them to the parent) and one to an arm's length third party."[10]

His Honour criticised the Commissioner's argument, stating:

> "Either the issuance of shares is regarded by Parliament as sufficiently commercially and economically real to discharge debt liabilities or it is not. And all the pointers to parliamentary contemplation are that such commercial and economic reality is well recognised. Parliament's assumed intention is in that sense consistent with the common law position previously discussed."[11]

2. Just because an arrangement within a wholly-owned group is unusual or has unorthodox features does not mean it is tax avoidance. The High Court refused to impose "a straightjacket of orthodoxy" on the types of funding arrangements taxpayers could enter into with related parties.[12] The Court explained that s BG 1 denies only tax benefits that arise from unwarranted tax avoidance, and not all arrangements that contain unusual or even uncommercial terms. Muir J explained:[13]

> "I accept also that if a transaction is unusual that may be evidence of avoidance, but that is more typically so where there is no business reason for it to occur. So, for example, in *Ben Nevis* one of the reasons the arrangement was identified as unusual was that there was a real risk that it would not be profitable for subscribers. By contrast, FHNZ says the business reasons for the Note transaction are obvious."

3. Most importantly, the taxpayer was entitled to the deduction of real interest payments. The High Court repeatedly accepted that "the transaction involved real money flows".[14] Not surprisingly this factor was sufficient to distinguish the earlier *Alesco* case (which relied upon the calculation of deemed interest and so did not involve actual cash payments). Muir J explained:

> "[A]lthough the pricing may have been unorthodox in an open market context there is no suggestion that the rate was one artificially increased to maximise deductions. … [The focus] is therefore on the relationship between the arrangement and tax outcomes, not whether particular aspects of the transaction may seem unorthodox (or even contrived) in some normative sense."[15]

4. The High Court accepted it was right to compare the tax position under the alleged arrangement with what other (non-tax avoidance) options were legitimately available to the taxpayer. If the interest deductions under the arrangement were no greater than other funding options, this showed no tax had been avoided. Muir J explained:[16]

> "I accept as relevant also that other debt structures, incapable of realistic challenge under s BG 1, would have produced the same or similar tax benefits in New Zealand".

5. Reduction in tax payable overseas enjoyed by the Singapore parent under the arrangement did not become tax avoidance in New Zealand. The High Court explained: "*I accept … that avoidance of foreign tax is not 'tax avoidance' for the purposes of s BG 1* ". So avoiding tax in another jurisdiction is not relevant to the taxpayer's liability in New Zealand. This finding is in keeping with the Commissioner's own policy confirming that tax avoidance related only to New Zealand tax, and arrangements to avoid foreign tax, might inadvertently reduce tax here but might not constitute tax avoidance.[17]

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6. Accepting tax advice and recognising potential tax benefits is not proof of tax avoidance. Advisers have become paranoid that any reference to tax benefits in advice to taxpayers may give unwanted ammunition to Inland Revenue to allege tax avoidance, but the High Court rejected that argument, noting that tax is a valid business consideration. Muir J emphasised that this kind of evidence is not relevant to whether the arrangement is tax avoidance. He explained:[18]

> "As will be clear from the discussion that follows, the question of tax avoidance is objective. In *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*, the Supreme Court said that (despite the word 'purpose') the inquiry is not into the subjective intentions of the taxpayer but rather involves asking '*what objectively was the purpose of the arrangement, which in turn requires examination of the effect of the arrangement*.' " (emphasis added)

On that basis, it did not matter how the taxpayer or its advisers described the benefits of the arrangement but only whether those benefits breached the Parliamentary contemplation test established by the Supreme Court in *Ben Nevis*.

7. Most importantly for taxpayers generally, the High Court rejected any of the moral outrage normally associated with tax avoidance judgments (the so-called the "hospitals and schools" argument). In the best tax quote in many years, the High Court stated:

> "Courts have an understandable resistance to structured transactions which may be seen to cost the New Zealand tax base but intuitive subjective assessments based on any such thought processes must themselves be firmly resisted."[19]

Accordingly, the High Court ruled Frucor could deduct the full $66 million interest payments.

The result was welcomed by commentators. One leading practitioner wrote:[20]

> "Many taxpayers are aware that Inland Revenue has become more aggressive in alleging tax avoidance against arrangements that both have genuine commercial rationale and would formerly have been considered routine and uncontroversial. *Frucor* is an example of this, …"

After quoting Muir J's remark that intuitive subjective assessments of a taxpayer's liability under a structured transaction must be resisted, the practitioner concluded:

> "This judgment (at least in the short term) will provide significant comfort for many taxpayers and advisors – and an equally significant bloody nose to Inland Revenue's current approach to the investigation of corporate restructures and funding arrangements. It is hoped the *Frucor* judgment will draw a clear line against Inland Revenue's approach to tax avoidance. Alesco may become viewed as the high-water-mark of that approach, and the *Frucor* judgment may signal a rebalancing of the New Zealand courts' treatment of tax avoidance cases."

But these celebrations were perhaps too soon. Inland Revenue appealed the High Court judgment.

Court of Appeal arguments

The appeal involved a frontal attack on the whole basis of the High Court judgment — and therefore an attempt to get the Court of Appeal to accept Inland Revenue's traditional approach to tax avoidance. The Commissioner's arguments on appeal included:

1. This was a "template arrangement" so should automatically be viewed as tax avoidance. That term "template" first arose from the JG Russell tax avoidance arrangements and refers to any pre-determined plan involving multiple steps that give rise to a tax benefit,[21] but also implies a lack of commerciality and a one-size-fits-all attempt to obtain improper tax advantages. Inland Revenue's allegation that the bespoke funding arrangement of a multi-national group by an international banking institution was a "template" was therefore not only inaccurate but obviously designed to paint the arrangement in the worst possible light.

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2. There was “no-cost” for a company issuing its own shares, particularly to existing shareholders, despite black-letter case law recognising that cost. While new shares dilute the ownership interest and therefore share price of existing shareholders, where the new shares are held within the same group Inland Revenue alleged the economic cost should be nil. This has been Inland Revenue’s long-standing position, enunciated in QB 15/01 whereby debt capitalisations within a wholly-owned group may constitute tax avoidance.[22] This approach caused such alarm within the tax community that statutory reform was immediately required in 2016 to clarify the law so as to allow for such debt capitalisation.[23] But obviously Inland Revenue has not resiled from that approach.
3. The tax implications of an arrangement should be viewed “as a whole”, meaning the position of all parties should be considered (including overseas members of the group). While the New Zealand tax regime generally views taxpayers separately, and specifically excludes non-residents from consideration in many instances (eg under the thin capitalisation, transfer pricing or loss grouping rules), Inland Revenue alleged tax avoidance was the exception whereby it was entitled to consider the tax position of the whole group.
4. There was no need to compare the arrangement with other possible funding options. Inland Revenue alleged the focus was only on this particular arrangement, and any other alternatives except straight vanilla lending were not relevant.
5. The arrangement was obviously unusual and arguably artificial, so Inland Revenue alleged these unorthodox features were clear indications of tax avoidance which should not be excused.
6. Rather strangely, Inland Revenue argued shortfall penalties for an abusive tax position should also be re-imposed — despite the fact the tax position was clearly arguable, as shown by the High Court judgment in favour of the taxpayer. Nevertheless, Inland Revenue alleged the case was so clear (and therefore the High Court was so clearly wrong) that a penalty was warranted.

Court of Appeal decision — normal service resumed

The Court of Appeal decision again provides crucial guidance to both Inland Revenue and taxpayers regarding where the line between acceptable tax planning and unacceptable tax avoidance is drawn. Unfortunately, the hopes of taxpayers and their advisers that this line was to be redrawn were dashed. The Court of Appeal unanimously over-turned the High Court decision and ruled in favour of the Commissioner. So, the *Frucor* case is now added to the long list of Inland Revenue wins in tax avoidance litigation — and it seems the courts have signalled to Inland Revenue that it is business as usual.

Obviously, the facts are important in all tax avoidance disputes. But the High Court and Court of Appeal seemed to view those facts through entirely different lenses. The High Court found the arrangement contained “unorthodox and unusual features” but nevertheless was neither uncommercial nor non-market. Likewise, the tax benefits enjoyed by the taxpayer were no greater than those available under alternative funding options. By contrast, the Court of Appeal focused on the economic substance of the arrangement, and particularly upon the statements by the parties regarding the tax benefits to be obtained, which it quoted at length.

The test for tax avoidance developed by the Supreme Court in *Ben Nevis* examines whether the way the taxpayer obtained its tax benefit would have been contemplated by Parliament (the so-called Parliamentary contemplation test). Having found the OCN funding arrangement was uncommercial, the Court of Appeal did not examine the particular section/s that *Frucor* was found to have mis-applied but nevertheless concluded it was tax avoidance:

> “ … we have reached the conclusion that Frucor used the specific provisions to claim deductions for interest in an artificial and contrived manner that cannot have been within Parliament’s contemplation.”[24]

As a result, the judgment contains little reasoning of how Parliament would have contemplated the automatic interest deductibility section for companies in s DB 5 should be interpreted or applied. Instead, it now appears that tax avoidance is entirely a test of economic substance over legal form, with any uncommercial or non-market aspects automatically constituting a breach of the GAAR.

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While the High Court considered emails from Frucor's bankers extolling the tax benefits from the structure were irrelevant, the Court of Appeal was obviously swayed by that evidence — the very first sentence of the judgment describes it as "a tax-driven structured finance transaction". The writing was clearly on the wall for the taxpayer from the beginning.

Finally, when invoking the power to reconstruct that arrangement under s GA 1, the Court of Appeal refused to consider any commercial funding alternatives available to Frucor. As Frucor had received the full $204 million and used it within its business, and actually paid the bank $66 million over the 5 years, even vanilla borrowing from the bank would have resulted in the same interest deductions. But the Court of Appeal rejected those comparisons on the grounds it was only required to consider and reassess the actual arrangement, not what the taxpayer might have done.

That blinkered approach to determining the quantum of the tax benefit for the purpose of s BG 1 has been criticised:[25]

> "As a matter of logic, this reasoning is questionable. Whether the taxpayers have actually avoided tax cannot be determined in isolation but presumably only by comparing the tax outcome of the present arrangement with what the taxpayer would or could otherwise have done. If the taxpayer engages in conduct that does not reduce its tax any more than would the other legitimate options available to it, then it is difficult to see how they can be said to have 'avoided' tax within the statutory definition. … Accordingly, the New Zealand courts' determination as to whether tax has been avoided by focusing only on the impugned arrangement and ignoring any other realistic alternatives available to the taxpayer is at odds with developments in both Australia and the UK."

The only favourable aspect of the decision for the taxpayer was the Court of Appeal's cancellation of the shortfall penalty of 100% for taking an abusive tax position. It recognised that Frucor's arguments had validity and substance, even if they were not correct. The fact the High Court had ruled in Frucor's favour was sufficient to show that its position was reasonable, and therefore no penalty should be imposed. However, given the lack of any other reasoning on this point, we are left to wonder what the Court of Appeal's view might have been of that arrangement had the High Court not found in favour of the taxpayer.

Status quo ante

The High Court judgment in *Frucor* provided comfort for many taxpayers and advisers that tax avoidance involved legal arguments over the scheme and purpose of the tax regime, rather than an examination of the economic costs and benefits from the arrangement, coupled with reference to statements by taxpayers or their advisers about its tax consequences in order to impugn their motives. But the Court of Appeal has now reversed that hope. Unfortunately, it will be business as usual for Inland Revenue.

As one commentator recently complained about the frustration experienced by taxpayers and their advisers prior to the High Court decision in *Frucor*:[26]

> "Taxpayers, their advisers and academics began to worry — how far will this go? Are comparisons between the core tax the taxpayer was alleged to have avoided and what they could legitimately have paid really not even relevant? If tax avoidance occurred, was it really permissible for Inland Revenue to negate the permitted tax outcomes as well as the unwarranted tax benefits? Why was New Zealand so out-of-step with overseas jurisdictions?"

Allegations of avoidance became common. Inland Revenue seemed to believe that any black-letter uncertainty or unwelcome tax outcome could be overwhelmed with an avoidance argument. Tax avoidance was suddenly found everywhere Inland Revenue cared to look.

Many privately felt Inland Revenue had pushed its luck too far — but wary of bad publicity most taxpayers succumbed to this approach and entered settlements or conceded cases that they felt were not right. The tax community waited for a brave taxpayer to stand up and say "no" and publicly take the fight back to Inland Revenue.

Frucor had been that taxpayer, so the disappointment following the Court of Appeal judgment is palpable.

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Supreme Court to the rescue?

The Supreme Court has ruled on tax avoidance 3 times. It explained how it wants that law to apply in *Ben Nevis* [27] and *Glenharrow* (in 2008), and *Penny & Hooper* [28] (in 2012). It agreed to hear the taxpayer's appeal in *Alesco* (in 2013)[29] but that case settled before the appeal was heard.

It is understood that Frucor has now applied for leave to appeal the Court of Appeal judgment; however, it is uncertain whether the Supreme Court will agree to hear yet another case on the scope and application of the general anti-avoidance rule. Nevertheless, it is important that an appeal is heard:

- If the taxpayer wins, it will confirm that Inland Revenue has over-reached its powers, and that its long-standing approach to tax avoidance, on which it has prevailed in so many past cases, is flawed and needs to be reviewed. This does not necessarily mean that the outcome in those cases was incorrect but that those decisions cannot be extended and applied in quite the way Inland Revenue now believes. Not all tax benefits amount to tax avoidance and tax can legitimately be considered as part of a wider commercial transaction. Such a decision would give a lot of comfort and more certainty to taxpayers and advisers about what is acceptable tax planning.
- If the Commissioner wins, it will add to Inland Revenue's long winning streak in tax avoidance cases. More importantly, it will mean business-as-usual for Inland Revenue's approach to investigating and disputing tax avoidance. Any tax benefit will be vulnerable to attack, and neither comparisons with current or alternative arrangements will be relevant. And, obviously, the imposition of any shortfall penalty, despite the High Court accepting that the taxpayer was correct, would have a chilling effect on tax advisers with the job of ensuring their clients pay only the correct amount of tax rather than the most tax possible under any transaction.[30]

Conclusion

Taxpayers hoped the High Court decision in *Frucor* was a turning point in the eternal battle over where the hazy line between prohibited tax avoidance and permitted tax planning should be drawn. Every line must have two sides and that decision showed a degree of pragmatism as to the factors taxpayers and their advisers must grapple with when making commercial decisions. If the taxpayer has a genuine commercial need for funds, must it reject all tax-favourable options?

Whether any tax benefit is avoidance or merely incidental was once explained as follows:[31]

> "As a matter of construction I think the phrase 'merely incidental purpose or effect' in the context of sec 99 [now s BG 1] points to something which is necessarily linked and without contrivance to some other purpose or effect so that it can be regarded as a natural concomitant. Many taxpayers when considering a course of action are likely to appreciate and welcome an opportunity provided by the Act for achieving some tax benefit as an aspect of it. But this should not bring the transaction or transactions almost automatically within the avoidance provisions of sec 99. By itself conscious recognition and acceptance that a commercial transaction will be accompanied by a degree of tax relief is not the issue. … To put the point in another way, among the cost factors to be taken into account one of them, to a greater or lesser extent, would sensibly and properly be the tax factor. So regarded, the tax saving purpose intended as a support to the operation could in the ordinary course no more be labelled an end in itself than the purpose of avoiding or minimising any other cost likely to affect the operation. In other words, in the usual case the associated tax purpose ought not to be and in my opinion would not be regarded as more than a 'merely incidental purpose'."

By contrast with that reasoning, the Court of Appeal in *Frucor* ruled that:[32]

> "The primary purpose of the funding arrangement was the provision of tax efficient funding to Frucor. That was its stated goal."

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But that reasoning defies commercial logic. Presumably the primary purpose was the commercial need that the borrowed funds satisfied within Frucor's business; if that business need did not exist, then the funds would not have been borrowed at all. Nevertheless, the Court of Appeal somehow concluded:[33]

> "It seems to us to be reasonably plain that the funding arrangement had New Zealand tax avoidance as one of its purposes or effects and this was not merely incidental to some other purpose."

Interestingly, that was the only consideration within the judgment as to whether the tax benefits arising from the funding could have been merely incidental to the wider commercial purposes,[34] and none of the previous cases discussing that point were addressed. So, it is hoped the Supreme Court will take up that untested argument on appeal.

Last reviewed on 1 November 2020

Footnotes

1 *Frucor Suntory New Zealand Ltd* v *C of IR*[2018] NZHC 2860; (2018) 28 NZTC ¶23-078 (HC).

2 The previous taxpayer win in a tax avoidance case was in 2010 in *White* v *C of IR*(2010) 24 NZTC 24,600.

3 *C of IR* v *Frucor Suntory New Zealand Ltd*[2020] NZCA 383; (2020) 29 NZTC ¶24-075 (CA).

4 In Pt RF of the Income Tax Act.

5 *Alesco New Zealand Ltd* v *C of IR (No 2)*(2011) 25 NZTC ¶20-099 (HC).

6 *Alesco New Zealand Ltd* v *C of IR*[2013] NZCA 40; (2013) 26 NZTC ¶21-003 (CA).

7 Under s 141D of the Tax Administration Act 1994.

8 For example, see C Elliffe "Alesco NZ Ltd v CIR: Concerns over the broad definition in the application of the New Zealand GAAR", *British Tax Review* No 3, 2013.

9 Under s 141D of the Tax Administration Act.

10 *Frucor*, fn 3, at [183].

11 *Frucor,* fn 3, at [190].

12 *Frucor*, fn 1, at [141(g)].

13 *Frucor*, fn 1, at [165].

14 *Frucor,* fn 1, at [141(a)].

15 *Frucor,* fn 1, at [141(g)].

16 *Frucor*, fn 1, at [198].

17 IS 13/01 at [542]–[545].

18 *Frucor*, fn 1, at [84].

19 *Frucor*, fn 1, at [194].

20 Tori Sullivan, "It's the year of the taxpayer – Frucor wins tax avoidance case!", Linkedin.com, 8 November 2018.

21 *O'Neil* v *C of IR*(2001) 20 NZTC 17,051 (PC).

22 See QB 15/01 in *Tax Information Bulletin* ¶273-108 Vol 27, No 3, April 2015.

23 Explained in the IR Policy and Strategy paper *Technical analysis of certain related parties debt remission*, September 2015; and reform enacted by the Taxation (Annual Rates for 2016–17, Closely Held Companies, and Remedial Matters) Act 2016.

24 *Frucor*, fn 3, at [59].

25 C Elliffe "Alesco NZ Ltd v CIR: Concerns over the broad definition in the application of the New Zealand GAAR", *British Tax Review* No 3, 2013.

26 T Sullivan "The evolution of tax avoidance and the perils of hindsight", CCH *New Zealand Tax Planning Report* ¶19-501 No 5, December 2019.

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27 *Ben Nevis Forestry Ventures Ltd* v *C of IR*[2008] NZSC 115; (2009) 24 NZTC 23,188 (SC); along with the companion judgment regarding GST tax avoidance in *Glenharrow Holdings Ltd* v *C of IR*[2008] NZSC 116; (2009) 24 NZTC 23,236 (SC).

28 See *Penny & Hooper* v *C of IR*[2011] NZSC 95; (2011) 25 NZTC ¶20-073 (SC).

29 *Alesco NZ Ltd* v *C of IR*[2013] NZSC 66; (2013) 26 NZTC ¶21-022 (SC)

30 As an aside, the Commissioner's policy in QB 12/12, "Abusive tax position penalty and the anti-avoidance provision" (25 September 2012) confirmed that the tests for tax avoidance and shortfall penalties contain different criteria that are not consistent. It concluded that an arrangement must have a dominant purpose of avoiding tax for s 141D of the Tax Administration Act to apply, whereas s BG 1 turns on a purpose or effect of tax avoidance that is more than merely incidental. But if those tests are not the same, then is it mere coincidence that the shortfall penalty for adopting an abusive tax position somehow seems to be imposed on the taxpayer in every tax avoidance dispute?

31 Per Woodhouse P in *C of IR* v *Challenge Corporation Ltd*(1986) 8 NZTC 5,001 (CA).

32 *Frucor*, fn 3, at [82].

33 *Frucor*, fn 3, at [82].

34 Within the definition of "tax avoidance arrangement" in s YA 1.

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