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TAX INFORMATION
Bulletin

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Inland Revenue
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YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents. Because we are keen to produce items that accurately and fairly reflect taxation legislation and are useful in practical situations, your input into the process, as a user of that legislation, is highly valued.

A list of the items we are currently inviting submissions on can be found at **www.ird.govt.nz**. On the homepage, click on "Public consultation" in the right-hand navigation. Here you will find drafts we are currently consulting on as well as a list of expired items. You can email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

Public Consultation
Office of the Chief Tax Counsel
Inland Revenue
PO Box 2198
Wellington 6140

You can also subscribe to receive regular email updates when we publish new draft items for comment.

Below is a selection of items we are working on as at the time of publication. If you would like a copy of an item please contact us as soon as possible to ensure your views are taken into account. You can get a copy of the draft from **www.ird.govt.nz/public-consultation/** or call the Team Manager, Technical Services Unit on 04 890 6143.

Ref	Draft type/title	Description/background information	Comment deadline
ED0145	Draft QWBA: Income tax – Treatment of quad bikes for depreciation purposes	The draft QWBA clarifies the treatment of quad bikes for depreciation purposes. It reaches the conclusion that quad bikes are "motor vehicles" for the purposes of the depreciation regime and are subject to the rates of depreciation set by section EE 29(3) of the Income Tax Act 2007.	2 March 2012
INS0121	Interpretation of sections BG 1 & GA 1 of the Income Tax Act 2007 – anti-avoidance	This draft interpretation statement sets out the Commissioner's view of the correct approach when considering the application of the general anti-avoidance provision (s BG 1 of the Income Tax Act 2007) and the adjustment power in s GA 1. The statement discusses issues relating to "arrangement", the statutory definitions relating to tax avoidance, the Parliamentary contemplation test from *Ben Nevis*, factual features that might indicate tax avoidance, the "merely incidental" test, and the adjustment power in s GA 1, and also comments on some previous judicial approaches and other related avoidance issues.	31 March 2012

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This survey is to gauge how well the TIB meets your needs as a source of tax technical information. Please complete it and send it back to us by 1 March 2012. The survey is also available online at **www.ird.govt.nz/tib**

STANDARD PRACTICE STATEMENTS

These statements describe how the Commissioner will, in practice, exercise a discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

SPS 11/07: APPLICATION OF DISCRETION IN SECTION 81(1B) OF THE TAX ADMINISTRATION ACT 1994 – THE SECRECY PROVISIONS

This statement may be cited as "Standard Practice Statement 11/07: *Application of discretion in section 81(1B) of the Tax Administration Act 1994 – the secrecy provisions*".

All statutory references are to the Tax Administration Act 1994, unless otherwise specified.

Introduction

1. Section 81 of the Tax Administration Act 1994 (the "TAA") protects from disclosure by Inland Revenue ("IR") by requiring that all matters which come to the knowledge of any Inland Revenue officer are to be kept secret. The section has recently been amended to provide IR with a broader discretion to communicate information relating to the Commissioner's various duties and functions, after a number of factors have been considered. This Statement outlines the factors that IR must take into account and the process it will follow to ensure there is a consistent approach taken by IR staff when exercising the discretion and before making those disclosures.
2. Section 6 of the TAA confirms that all IR employees have an on-going duty to protect the integrity of New Zealand's tax system. An important way in which the tax system's integrity is protected is by IR not disclosing tax secret information it has received about a taxpayer to someone else. There are criminal sanctions that can be imposed if an IR employee fails to comply with those secrecy obligations.[1] The TAA goes so far as to protect all information, including that which does not identify specific taxpayer affairs, unless the disclosure is for reasons clearly relating to administration of the Inland Revenue Acts.
3. It is also recognised that in order to protect the integrity of the tax system IR will in some circumstances be required to disclose tax secret information to third parties such as the courts, other government agencies and other third parties (sometimes including the general public). The TAA has always contained a number of exceptions that specifically allowed IR to disclose certain information. Those exceptions are mainly contained in section 81(4) of the TAA.
4. Those provisions remain in force. However, recent amendments to section 81[2] have expanded the circumstances in which IR can disclose tax secret information. The new provision, section 81(1B), is intended to give IR more flexibility to make disclosures when administering the tax system. Broadly, it is a discretionary power which allows for disclosure where that communication:
   a) is for executing or performing a duty of the Commissioner or supporting the execution or performance of such a duty; and
   b) is reasonable, having regard to five specific factors contained in section 81(1B)(b).
5. This Statement will provide guidance to IR staff as to when this new provision might result in IR disclosing such information, and outline the steps IR will take before making that disclosure to ensure maximum consistency. Before that it briefly examines how the new exception interacts with the other exceptions to the secrecy provisions. The contents are as follows:
   - Paragraphs 6 and 7 outline the relevant statutory provisions;
   - Paragraphs 8 to 14 note the general structure and exceptions to the secrecy rules that still apply and how they interact with the new rules;
   - Paragraphs 15 to 18 provide guidance on the new definition of "duty of the Commissioner";
   - Paragraphs 19 to 33 discuss the five factors that must be weighed up in determining whether a disclosure is reasonable;
   - Paragraphs 34 to 36 summarise how IR sees the application of section 81(1B) operating in practice; and
   - An appendix contains a number of examples that may assist in understanding the secrecy provisions.

[1] See section 143C of the TAA.

[2] Introduced in the Taxation (Tax Administration Remedial Matters) Act 2011. A further provision allows for certain information to be shared with other government agencies. We do not deal with those provisions here.

The legislative provisions

6. The revised framework governing tax secrecy and enabling IR to disclose taxpayer specific information is contained in subsections 81(1), (1B), (1C) and (8) which respectively state:

> **81 Officers to maintain secrecy**
>
> (1) An Inland Revenue officer must maintain, and must assist in maintaining, the secrecy of all matters relating to the legislation described in subsection (1C), and the officer must not communicate any such matter, except for the purpose of carrying into effect that legislation or under subsection (1B).
>
> (1B) Despite subsection (1), an Inland Revenue officer may communicate a matter if—
>
> (a) the communication is for the purpose of executing or performing a duty of the Commissioner, or for the purpose of supporting the execution or performance of such a duty; and
>
> (b) the Commissioner considers that such communication is reasonable with regard to the relevant purpose described in paragraph (a), and with regard to the following:
>
> (i) the Commissioner's obligation at all times to use best endeavours to protect the integrity of the tax system; and
>
> (ii) the importance of promoting compliance by taxpayers, especially voluntary compliance; and
>
> (iii) any personal or commercial impact of the communication; and
>
> (iv) the resources available to the Commissioner; and
>
> (v) the public availability of the information.
>
> (1C) For the purposes of subsection (1), the legislation is—
>
> (a) the Inland Revenue Acts, or another Act that is or was administered by or in Inland Revenue:
>
> (b) the Accident Compensation Act 2001, the Injury Prevention, Rehabilitation and Compensation Act 2001, the Accident Insurance Act 1998, the Accident Rehabilitation and Compensation Insurance Act 1992, or the Accident Compensation Act 1982:
>
> (c) the New Zealand Superannuation Act 1974:
>
> (d) any Act that imposes taxes or duties payable to the Crown.
>
> …
>
> (8) In this section,—
>
> (a) **Inland Revenue officer**,—
>
> (i) means a person who is employed in the service of Inland Revenue; and
>
> (ii) includes—
>
> (A) a person employed in the service of the Government of an overseas country or territory who is for the time being attached or seconded to Inland Revenue:
>
> (B) a person formerly employed in the service of Inland Revenue:
>
> (b) **duty of the Commissioner** includes a power of the Commissioner and also a function of the Commissioner, as well as anything done within the law to—
>
> (i) administer the tax system:
>
> (ii) implement the tax system:
>
> (iii) improve, research, or reform the tax system.

7. As noted below, nothing in the operation of section 81(1B) impacts on other secrecy exceptions contained in the TAA. Accordingly, the particular exceptions contained in sections 81(3) and (4) and 81BA remain relevant and applicable whether or not section 81(1B) is engaged. Sometimes a disclosure might be made under either subsections (1B) or (4), for example.

The general secrecy rule and its exceptions

8. Section 81(1) still provides the important general rule that IR employees must maintain the secrecy of all matters relating to the Inland Revenue Acts obtained from customers or any other sources. However, as with its prior version, section 81(1) also contains a general exception to that secrecy requirement. This allows disclosure where it is for the purpose of "carrying into effect" the revenue Acts. Case law on the earlier version is likely to remain relevant.

9. In this regard, the Supreme Court considered the former version of section 81(1) in *Westpac Banking Corporation Ltd v CIR* (2008) 23 NZTC 21,896. There the Supreme Court noted at paragraph [69] that:

> Disclosure is not permitted unless, and to the extent that, it is reasonably necessary for the performance of the Commissioner's statutory functions.

10. Although the case itself dealt with a relatively unusual situation involving disclosure of third-party tax secret information in a complex litigation, the Supreme Court noted that this test was a straightforward legal standard. The test of "reasonable necessity" does however create a measure of uncertainty.

11. The general rule in section 81(1) is now however also subject to the new discretion contained in section 81(1B), which takes on a central role. It is intended to enable disclosures which are reasonable (as opposed to reasonably necessary) in terms of the discretion enacted.

12. This raises the issue of the relationship between the exception contained in section 81(1B) and the exception contained in section 81(1)—or indeed the exceptions specified in 81(3) or (4). IR considers that while some disclosure may only be made on the authority of subsection (1B), there will be many circumstances where a disclosure that falls within the new provision would equally be authorised under the other exceptions allowing disclosure. In those circumstances, IR might rely on another applicable exception without regard to the balancing act required by section 81(1B).
13. Similarly, the fact that a general subject area might be dealt with in subsection (4) will not affect or constrain the use of subsection (1B). If a closely related communication was not specifically covered by subsection (4), it might still be reasonably made if it satisfies the requirements of subsection (1B). In this regard, subsection (4) cannot be read as an exhaustive code.
14. One purpose behind the introduction of section 81(1B) was to expand the circumstances in which IR can disclose information (whether of a taxpayer specific or of a general nature) where disclosure is not necessarily linked to the direct administration of the Inland Revenue Acts. A decision to disclose under section 81(1B) may be made in response to a request from a third party for information, but it also enables IR to proactively disclose information to third parties (including the media) where it considers that the exception applies.

STANDARD PRACTICE AND ANALYSIS

The discretion – a duty of the Commissioner

15. As noted above, in order to exercise the discretion contained in section 81(1B), IR must be satisfied that the proposed disclosure or communication will comply with two statutory tests. The first is (subsection (1B)(a)) that the communication's purpose is either to execute or perform "a duty of the Commissioner", or it is to support such an act—whether or not it provides a benefit to the recipient. IR considers this means that the communication will be authorised for instance where it assists an IR employee perform the duties and functions described in section 81(8).
16. The new definition of "duty of the Commissioner" is inclusive and also extends the concept to "anything done within the law to": "administer", "implement", "improve, research or reform" the tax system. In relation to this extended definition, the duty (eg, researching or reforming the tax system) must be itself "within the law". This merely means that the Commissioner must act within his own powers, and consistently with any constraints or prohibitions imposed by law (other than under section 81(1)) when undertaking any of the actions listed.
17. Subsection (1B) not only applies in relation to such actions but it also extends to anything done to "support" the carrying out of any such actions. This allows disclosure where there is not a direct execution or performance of a duty as such but the disclosure is supporting the execution or performance. For instance, supporting work being conducted by third parties to research aspects of the tax system might in some cases warrant the disclosure of otherwise tax secret information.
18. There must be a nexus between the communication and the Commissioner's duties. So, where the communication will only serve the purpose of assisting another party perform its functions and cannot reasonably be linked to performing or supporting the performance of any of the Commissioner's duties (as defined), the test in subsection (1B)(a) will not be met. In those circumstances, the communication cannot be supported by subsection (1B). However, where the communication will assist a third party and at the same time support, perform or execute a relevant duty of the Commissioner, the communication may potentially be made, after consideration of the relevant discretionary criteria in subsection (1B)(b).

The discretion – the factors which must be balanced

19. Once the first test is satisfied, IR still needs to objectively satisfy itself that the proposed disclosure is "reasonable" (in performing or supporting the execution or performance of a Commissioner's duty) having regard to five listed factors. Those factors are:
    i) the Commissioner's "best endeavours" obligation to protect the integrity of the tax system;
    ii) the importance of promoting compliance by taxpayers, especially voluntary compliance;
    iii) any personal or commercial impact of the communication;
    iv) the resources available to the Commissioner; and
    v) the public availability of the information.
20. Before considering each factor a number of general preliminary comments can be made:

a) The test for determining whether the communication can be made is one of reasonableness. This is an objective standard. The threshold is less onerous than the "reasonably necessary" test stated in *Westpac* above, meaning that greater disclosure is potentially permissible.

b) The test requires that all five of the specified factors are taken into account in any decision to disclose. There may be circumstances where one or two of the factors appear immaterial but they still need to be taken into account and given appropriate weight.

c) Often, there will be tension between (and within) the various factors with some factors favouring disclosure while others suggesting non-disclosure. IR cannot pre-determine particular weightings for each of the factors.

d) That said, there will be circumstances where a particular factor is so relevant that it effectively determines whether the communication should be made or not. An example is where the information is already publicly available elsewhere. In most of these instances (even if it was secret when it came into IR's hands) there would be little risk in releasing it (refer to the fifth factor above) to the recipient particularly if it is of a general and non-taxpayer-specific nature. However, that factor still needs to be weighed in each decision. For example IR will not be likely to confirm or deny the tax status of a particular person about whom public statements have been made by others. For another example, where there is a public debate about an industry's entitlement to deduct say research and development costs, and IR is asked to assist in the debate by providing to the industry details of a particular taxpayer's research and development approach (which was deductible). Such a step, which might slightly assist the promotion of voluntary compliance by the taxpayer's competitors, could well prejudice the taxpayer's business. The adverse commercial impact of the communication far outweighs its benefits, and this factor would preclude disclosure, notwithstanding the other factors.

Factor 1 – Protecting the tax system's integrity

21. The first matter considered is whether the disclosure is consistent with the Commissioner's obligation to use best endeavours at all times to protect the "integrity of the tax system". That term is defined in section 6(2) of the TAA to include:

> (a) taxpayer perceptions of that integrity; and
>
> (b) the rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
>
> (c) the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
>
> (d) the responsibilities of taxpayers to comply with the law; and
>
> (e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and
>
> (f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

22. It is clear that, particularly in relation to IR's secrecy requirements, there are different drivers that impact on the integrity of the tax system. The right of the taxpayer and the responsibility of IR to keep information confidential are only two of the factors mentioned in section 6. These may clash with the obligation of a taxpayer to comply with the law and IR's obligation to administer the law fairly. Other taxpayers' perceptions of the tax system's integrity are also relevant.

23. For example, misleading public statements made by a taxpayer that he or she has been trying to settle a tax dispute with the Department for years to no avail, or making untrue statements of fact about the conduct of an investigation. The general body of taxpayers may think negatively of IR and the tax system if they assumed that IR was acting improperly. Therefore, IR may potentially issue a statement that the taxpayer had not provided all relevant facts, and that had contributed materially to IR's not having concluded the dispute, which would allow taxpayers to take a more informed view of the situation.

Factor 2 – Promoting voluntary compliance

24. The second factor considered is promoting voluntary compliance in New Zealand. This factor is referred to in the Commissioner's care and management responsibilities contained in section 6A of the TAA (in general, refer to Interpretation Statement IS 10/07). This includes collecting the highest net revenue having regard to:[3]

> the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts ...

[3] See section 6A(3)(b).

25. The promotion of voluntary compliance is a cornerstone of the New Zealand tax system. As such, it will be an important factor to consider in any decision as to the reasonableness of disclosure as opposed to non-disclosure. However, as with protecting the tax system's integrity, tensions may arise in considering the voluntary compliance of the individual taxpayer as against taxpayers more generally. Communicating information about a specific taxpayer may adversely affect that taxpayer's commitment to voluntary compliance, but it may enhance the compliance behaviour of others. In this regard, it is important to note that IR's responsibility is to promote compliance amongst all taxpayers. As such, an adverse impact on an individual taxpayer may still be justifiable in some cases, if IR considers the disclosure will promote voluntary compliance more generally. For example, IR already makes media statements about taxpayers convicted in the courts for serious tax offending.

Factor 3 – The communication's personal or commercial impact

26. The third factor to be considered in determining whether a communication is reasonable is the potential impact that communication may have personally or commercially. This requires looking at the communication more specifically from the perspective of an affected taxpayer or potentially a group of taxpayers. This may in some cases justify discussion with the taxpayers potentially affected. For example, a statement by IR that a particular taxpayer is the subject of an IR investigation or dispute may negatively impact on that taxpayer's reputation or business, or share price perhaps. In such circumstances, the question becomes whether the other factors reasonably favour disclosing the information notwithstanding that consequence.

27. However, it is not necessarily the case that all IR communications under section 81(1B) will have an adverse commercial impact on a taxpayer. There may be circumstances where the affected taxpayer would like the tax secret information to be disclosed. So where a taxpayer has requested that IR make the disclosure, this factor will carry significant weight in assessing the personal or commercial impact of the disclosure. Consent is therefore a significant factor, but not necessarily an overriding one. IR may, for instance, consider on balance that public comment on a taxpayer's personal affairs could have an adverse effect on voluntary compliance in the circumstances. IR would normally release information directly to the taxpayer concerned rather than to a third party on their behalf.

28. This factor may carry much less weight where the communication deals with anonymous, aggregated data, perhaps relating to a large industry or area. In those circumstances, where the potential commercial impact on a particular member of the industry is much less, it is unlikely that this factor would be given much weight. On the other hand, this factor would be more significant if the taxpayer is more readily identifiable and the information relates to a smaller industry or locality.

Factor 4 – IR's resources

29. The use of IR's resources is another factor also referred to in the care and management responsibilities of the Commissioner in section 6A of the TAA. In terms of section 81(1B), this factor enables IR to have proper regard to the impact that a communication may have on its own resources. Such an impact could be either positive or negative.

30. For example, a communication may be an effective way to improve the compliance behaviour of a group of taxpayers. The communication may reduce the need for audit, amendment of assessments and possible penalties. Further, IR's investigative resources may be freed up in the future to do other work.

31. The use of resources factor may also be relevant in terms of determining the level of internal (and sometimes external) resource required to obtain the information requested. This can be extremely expensive, and the resources may well be better used elsewhere.

Factor 5 – The information is otherwise publicly available

32. This factor may be given a significant weighting in favour of disclosure if the information is publicly available. However, there may be circumstances where the information is theoretically publicly available but would involve the use of considerable cost or time to obtain. In such cases, the public availability factor may carry less weight in favour of disclosure. Arguably, the publication of industry income benchmarks, or other aggregated statistical data, sourced from public sources, could still be otherwise restricted by the normal secrecy requirements. However, subsection (1B) allows for such disclosure provided that the disclosure is reasonable having regard to all five factors in section 81(1B)(b).

33. It may also be the case that the tax secret information has been made available to the public by someone other than IR in circumstances where the information has been improperly obtained. In those circumstances,

IR may decide not to disclose the tax secret information even though it is otherwise publicly available, when it considers the other four factors above.

How the provisions will work in practice

34. The expanded secrecy rules are intended to allow IR a greater ability to disclose tax secret information in appropriate circumstances, broadly where disclosure will assist the integrity of the tax system. With the greater flexibility of the secrecy rules, IR recognises that the decision to make disclosures under section 81(1B) needs to be made by senior staff. The process will be as follows:
    a) The decision-maker must be satisfied that the communication satisfies the criteria;
    b) The decision to communicate tax secret information should be the subject of legal advice.
35. Although a proposed communication is related to the duty of the Commissioner within the new discretion, IR can still decide not to make the communication after balancing the various factors. For example, IR may decline to use its discretion where it was thought that making a public statement about inaccurate information made public by a taxpayer would merely lead to a public debate about that taxpayer's tax affairs, without leading to any material benefit to the tax system. As such, the more sensitive or wide-reaching any potential communication from IR is, the more likely more senior management will be involved in the decision to communicate—particularly if the disclosure would tend to identify a taxpayer or small group of taxpayers.
36. A decision-maker required to determine whether a communication can or should be made must note the following:
    a) The general rule and starting point is that an officer must maintain secrecy in all tax secret matters relating to the Inland Revenue Acts unless an exception is identified.
    b) Is there a specific exception in section 81(4) that may apply? If there is, disclosure may occur.
    c) Does the exception relating to courts or tribunals in section 81(3) or that in the new section 81BA (relating to inter-governmental disclosures) apply? If either applies, the disclosure may occur.
    d) If there is no specific exception, does the general exception of "carrying into effect that legislation" in section 81(1) apply?
    e) The final step is to consider if section 81(1B) applies. This requires a conclusion that both statutory tests are satisfied in relation to the relevant communication. In this regard, the above commentary will be required to be considered in accordance with the policies outlined here before concluding that the disclosure is:
        i) for the purpose of executing or performing a duty of the Commissioner or supporting the execution or performance of such a duty;
        ii) reasonable in relation to that duty;
        iii) reasonable having taken into account each of the five relevant factors.

This Standard Practice Statement is signed on 23 December 2011.

Graham Tubb
Group Tax Counsel – Assurance

APPENDIX – EXAMPLES

The Appendix contains examples that are intended to assist IR employees and taxpayers understand how the new secrecy exception might operate in practice. They are not intended to provide general statements as to when IR will and will not disclose taxpayer information under section 81(1B). The circumstances and content of each potential disclosure will dictate whether IR can and will rely on section 81(1B) to communicate. Therefore, IR employees should still consider the guidance discussed above before deciding whether section 81(1B) applies even where they consider the communication is consistent with one of these examples.

Example 1: Disclosure to the New Zealand Police

IR is approached by New Zealand Police with a request for information on an individual who is suspected of dealing in drugs. The information sought is specific in terms of income returned by the individual for tax purposes. The Police intend to use this information to conduct further investigations to determine if the individual has sufficient income to support his standard of living and advise that they will report the results of their investigation to IR to enable it to assess the correct amount of tax.

Does the request satisfy the provisions of section 81 to release the information to the Police?

Section 81(1): Information may be released for the purpose of carrying into effect legislation described in subsection (1C)

Does the disclosure meet the criteria in relation to subsection (1) legislation?	No, it is not reasonably necessary for the purpose of carrying into effect the tax legislation.

Section 81(4): Information may be released in specific cases

Does the disclosure fall within one of the exceptions in paragraphs (a)–(u)?	No, none of the specific exceptions apply in this case.

Section 81(1B): Information may be released if it relates to a duty of the Commissioner having regard to five factors

Section 81(1B)(a) – Step One

Whether the communication is for the purpose of:

- executing or performing a duty (defined in section 81(8)(b)) of the Commissioner, or
- the supporting of such a duty?

Is it for the purpose of executing or performing a duty, power or function of the Commissioner?	No. The duty, power or function in question is that of the Police, not IR.
• Administer the tax system:	No. While the Police may eventually provide IR with information that impacts on the taxpayer's tax obligations, the primary purpose is to enable the Police to investigate the taxpayer's affairs.
• Implement the tax system:	No—as above.
• Improve, research, or reform the tax system:	No
Does it support the execution or performance of any of the above?	No. It does not seem to "support" any of those matters—again the nexus between the communication and IR's duties appears too tenuous to justify the conclusion that it would "support" those duties.

Accordingly, the inquiry would stop here—the information cannot be disclosed.

The same conclusion is likely to be reached where requests for information are received from other government agencies or third parties in circumstances where the information would not be covered by a specific exception and does not also assist IR in administering or implementing the tax system (see example 3 below). Because subsection (1B)(a) will never be satisfied, there is no need to consider Step Two of the section 81(1B) test, ie, the balancing exercise in paragraph (b).

Example 2: Media statements

A promoter of an innovative financial product has made statements in the product's prospectus and other promotional material that suggests the product is the subject of a binding ruling from IR. However, while the promoter applied for a binding ruling, this was not granted by IR as it did not comply with the relevant tax law. IR is considering issuing a statement to the media that it has not issued a binding ruling on the financial product.

Can that information be released under section 81?

Section 81(1): Information may be released for the purpose of carrying into effect legislation described in subsection (1C)

Does the disclosure meet the criteria in relation to subsection (1) legislation?	This is uncertain. It is arguably not reasonably necessary for the purpose of carrying into effect any of the legislation.

Section 81(4): Information may be released in specific cases

Does the disclosure fall within one of the exceptions in paragraphs (a)–(u)?	No, none of the specific exceptions apply in this case.

Section 81(1B): Information may be released if it relates to a duty of the Commissioner having regard to five factors

Section 81(1B)(a) – Step One

Whether the communication is for the purpose of:

- executing or performing of a duty (defined in section 81(8)(b)) of the Commissioner, or
- supporting of such a duty?

Is it for the purpose of executing or performing a duty, power or function of the Commissioner?	No. Confirming that a ruling has not been issued is arguably a step removed from the ruling process, which might be considered part of administering the tax system.
• Administer the tax system:	No—for the same reason above.
• Implement the tax system:	No—for the same reason above.
• Improve, research, or reform the tax system:	No.
Does it support the execution or performance of the above?	Yes. The administration and implementation of the tax system requires a robust binding ruling system. If IR does not correct the misinformation currently in the public domain, the binding ruling regime's reputation may be diminished.

Section 81(1B)(b) – Step Two

The Commissioner considers that such communication is reasonable with regard to the relevant purpose described in subsection (a) and with regard to the following factors.

Is the request reasonable when considered on balance under the factors under section 81(1B)(b)?	
The integrity of the tax system; and	Yes. The integrity of the tax system requires a robust binding ruling system. This will be undermined if IR does not challenge a statement about obtaining a ruling that is untrue.
The importance of promoting compliance by taxpayers, especially voluntary compliance; and	Yes for taxpayers more generally. The communication will protect the reputation of the ruling system—so encourages more taxpayers to use it. The communication may adversely impact on the promoter's voluntary compliance.
Any personal or commercial impact of the communication; and	The product is likely to be adversely affected by the communication. Conversely, each potential investor may be better off by not investing in the product as a result of IR's intervention.
The resources available to the Commissioner; and	Minimal resource will be required to make the disclosure.
The public availability of the information.	The information is not currently publicly available.

The communication would seem reasonable in relation to supporting administration of the tax system—it is merely stating that as a matter of fact there is no binding ruling on the product. The proposed communication does not, for example, outline why IR thinks the tax laws relied on by the promoter do not apply to the financial product.

The communication by IR to the media is reasonable having regard to the factors set out in section 81(1B) and the information should be released.

Example 3: Sharing data with Treasury

Treasury is working jointly with IR on tax policy development. It is considered that it would be worthwhile to share with Treasury tax information for such purposes in the GST area. Specifically, they have asked for information on the number of GST investigations relating to the sale of real property.

Can that information be released under section 81?

Section 81(1): Information may be released for the purpose of carrying into effect legislation described in subsection (1C)

Does the disclosure meet the criteria under subsection (1) legislation?	No, it is not reasonably necessary for the purpose of carrying into effect the GST Act. The information relates to the future amendments of the Act rather than the present carrying into effect of the Act.

Section 81(4): Information may be released in specific cases

Does the disclosure fall within one of the exceptions in paragraphs (a)–(u)	No. Section 81(4)(e) only allows the release of information to Treasury for revenue forecasting but not for developing tax policy.

Section 81(1B): Information may be released if it relates to a duty of the Commissioner having regard to five factors

Section 81(1B)(a) – Step One

Whether the communication is for the purpose of:

- executing or performing a duty (defined in section 81(8)(b)) of the Commissioner, or
- the supporting of such a duty?

Is it for the purpose of executing or performing a duty, power or function of the Commissioner?	No. The duty, power or function in question is arguably that of the Treasury, not IR.
• Administer the tax system:	No. It might impact on the future administration of the tax system but not the current tax system.
• Implement the tax system:	No—as above.
• Improve, research, or reform the tax system:	Yes. The development of tax policy by IR jointly with Treasury is done to improve research and reform the tax system.
Does it support the execution or performance of any of the above?	To the extent there was any doubt, the disclosure to Treasury could also be seen as "supporting" IR's duty to improve, research or reform the tax system.

Section 81(1B)(b) – Step Two

The Commissioner considers that such communication is reasonable with regard to the relevant purpose described in subsection (a) and with regard to the following factors.

Is the request reasonable when considered on balance under the factors under section 81(1B)(b)?	
The integrity of the tax system; and	Yes. In order to maintain the integrity of the tax system, it is necessary to review current tax policy and research and develop new policy on an ongoing basis to keep up with best practices in tax administration.
The importance of promoting compliance by taxpayers, especially voluntary compliance; and	Yes. The information will lead to more robust GST legislation in the area of land transactions and encourage greater compliance.
Any personal or commercial impact of the communication; and	This is likely to be a neutral factor as Treasury is only at the stage of developing tax policy and the impact may not necessarily be adverse.
The resources available to the Commissioner; and	Minimal resource will be required to make the disclosure.
The public availability of the information.	The information may not be publicly available.

The request by Treasury is reasonable having regard to the factors set out in section 81(1B) and the information should be released.

Example 4: Discussions with tax pooling intermediary

There are a number of criteria that must be satisfied before IR can accept a transfer of funds from a tax pooling intermediary on behalf of a tax agent or its advisor. Where IR considers that one or more of the criteria are not satisfied, can IR communicate the reasons for rejecting the transfer with the tax pooling intermediary? What if during the course of that conversation, the tax pooling intermediary asked for details of the taxpayer's tax payments over the course of a year?

Section 81(1): Information may be released for the purpose of carrying into effect legislation described in subsection (1C)

Does the disclosure meet the criteria in relation to subsection (1) legislation?	No, it is not reasonably necessary for the purpose of carrying into effect the Income Tax Act. The communication could be made with either the taxpayer or tax agent directly, so it is not reasonably necessary.

Section 81(4): Information may be released in specific cases

Does the disclosure fall within one of the exceptions in paragraphs (a)–(u)?	No. Section 81(4)(lb) allows for communication regarding the details of a deposit but does not extend further. In addition, it is generally unlikely, that any other specific exception will apply.

Section 81(1B): Information may be released if it relates to a duty of the Commissioner having regard to five factors

Section 81(1B)(a) – Step One

Whether the communication is for the purpose of:

- executing or performing of a duty (defined in section 81(8)(b)) of the Commissioner, or
- the supporting of such a duty?

Is it for the purpose of executing or performing a duty, power or function of the Commissioner?	Possibly. It has some connection with the Commissioner's duty in the collection of taxes.
• Administer the tax system:	Possibly for communicating the reason for rejecting a transfer. Not for providing taxpayer tax payment details more generally.
• Implement the tax system:	As above.
• Improve, research, or reform the tax system:	No.
Does it support the execution or performance of any of the above?	To the extent that there is an argument that the communications do not enable IR to perform or execute its duty to collect tax payments via the tax pooling arrangement, the communication regarding the reasons for rejection would "support" that duty. However, the same conclusion would not be drawn for communicating any more general details about the taxpayer's tax payment history. The latter communication would not fall within section 81(1B)(a).

Section 81(1B)(b) – Step Two

The Commissioner considers that such communication is reasonable with regard to the relevant purpose described in subsection (a) and with regard to the following factors.

Is the request reasonable when considered on balance under the factors under section 81(1B)(b)?	
The integrity of the tax system; and	The tax pooling system is an important way in which tax payments are made. Any communication that makes that process run efficiently bolsters the tax system's integrity.
The importance of promoting compliance by taxpayers, especially voluntary compliance; and	Similar to the above—voluntary compliance involves ensuring tax is paid on time. The tax pooling system supports this and the communication enables those transfers to occur more efficiently.
Any personal or commercial impact of the communication; and	This is likely to be a neutral factor as both parties are already aware of what the taxpayer wants to achieve (ie, a transfer). The communication is essentially trying to ascertain whether this can occur.
The resources available to the Commissioner; and	Minimal resource will be required to make the disclosure.
The public availability of the information.	The information will not be publicly available.

The communication of the reasons for rejecting the transfer is reasonable having regard to the factors set out in section 81(1B)(b) and can therefore occur. However, as previously noted, the exception would not extend to the disclosure of the taxpayer's history of tax payments.

Example 5: Disclosing competitor's information

IR is investigating an industry to determine whether participants in the industry are properly returning all of their income. A number of taxpayers are arguing that IR has no basis for determining what amount of income their business is generating and what their net profits are. It is proposed to disclose the tax return and accounts of a fully compliant competitor to those taxpayers.

Is IR entitled to disclose that information?

Section 81(1): Information may be released for the purpose of carrying into effect legislation described in subsection (1C)

Does the disclosure meet the criteria in relation to subsection (1) legislation?	No. While there may be circumstances where third-party information will be disclosed it is not reasonably necessary for the purpose of carrying into effect the Income Tax Act. The non-compliant taxpayer's position can be determined through investigating its affairs and through the use of general industry information in any case.

Section 81(4): Information may be released in specific cases

Does the disclosure fall within one of the exceptions in paragraphs (a)–(u)?	No, none of the specific exceptions apply in this case.

Section 81(1B): Information may be released if it relates to a duty of the Commissioner having regard to five factors

Section 81(1B)(a) – Step One

Whether the communication is for the purpose of:

- executing or performing a duty (defined in section 81(8)(b)) of the Commissioner, or
- the supporting of such a duty?

Is it for the purpose of executing or performing a duty, power or function of the Commissioner?	Possibly. It has some connection with the collection of the correct amount of taxes.
Administer the tax system:	Arguably. IR is more likely to get a non-compliant taxpayer to agree to return the proper tax if it can show actual evidence of a compliant taxpayer's tax affairs.
Implement the tax system:	No.
Improve, research, or reform the tax system:	No.
Does it support the execution or performance of any of the above?	To the extent that there is an argument that the communications do not allow IR to perform or execute its duty to collect tax, the communication would seem to "support" that duty.

Section 81(1B)(b) – Step Two

The Commissioner considers that such communication is reasonable with regard to the relevant purpose described in subsection (a) and with regard to the following factors.

Is the request reasonable after having considered on balance the factors under section 81(1B)(b)?	
The integrity of the tax system; and	It could be argued that the tax system's integrity is improved by attempting to bring non-compliant taxpayers within the tax system. However, it is harmed by disclosing information about a taxpayer's tax affairs to a direct competitor.
The importance of promoting compliance by taxpayers, especially voluntary compliance; and	As above—compliance might be improved in relation to the non-compliant taxpayers. However, it will not be improved in relation to the taxpayer whose information is disclosed—nor will the general body of taxpayers be encouraged to comply if the information is going to end up in the hands of their competitors.
Any personal or commercial impact of the communication; and	The taxpayer whose information is disclosed is likely to be adversely affected by the disclosure.
The resources available to the Commissioner; and	Minimal resource will be required to make the disclosure.
The public availability of the information.	The information will not be publicly available.

After balancing the above factors, it is concluded that the communication is not reasonable having regard to the factors set out in section 81(1B)(b). In particular, a disclosure of such specific information about a taxpayer's tax affairs will have an adverse commercial impact on it. Competitors will discover sensitive information about them and there is no guarantee it will influence those competitors' attitude to compliance or not. In addition, the possible negative impact this will have on how taxpayers generally feel about the confidentiality of the information held by IR bolsters the conclusion that the communication should not occur.

LEGAL DECISIONS – CASE NOTES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, Court of Appeal, Privy Council and the Supreme Court.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

APPLICATION FOR LEAVE TO APPEAL TO SUPREME COURT BY ADMINISTRATOR DISMISSED

Case	Damien Grant & Steven Khov v Commissioner of Inland Revenue
Decision date	30 November 2011
Act(s)	Companies Act 1993
Keywords	Voluntary administration, insolvency, casting vote

Summary

The Supreme Court confirmed that a casting vote in voluntary administrations can only be used to break a deadlock in number.

Impact of decision

The ruling confirms the Commissioner's interpretation of when a casting vote can be used in a watershed meeting.

Facts

On 5 December 2008, the appellants were appointed voluntary administrators for three publishing companies. There was common ownership and directorship of the three companies (with a minor exception). The one of particular relevance to this matter is Jones Publishing.

Jones Publishing went into voluntary administration. At the watershed meeting, a Deed of Company Arrangement (DOCA) was proposed. The Commissioner voted against and the seven other creditors voted for the resolution. The Commissioner was owed roughly 30% of the total debt and therefore the seven other creditors did not get the required 75% super-majority. The appellants argued at the watershed meeting, and continued to argue in the Courts, that they were entitled to exercise a casting vote in this situation.

The Commissioner argued at the watershed meeting, and subsequently through the Courts, that the casting vote can only be exercised when there is a requirement to break a deadlock in number (for example, five creditors for and five votes against) but not use the casting vote to break a deadlock between the number of creditors and the required super-majority of 75% of the total debt.

The High Court agreed with the Commissioner's view and this was confirmed by the Court of Appeal.

Decision

The application for leave to appeal was dismissed with costs. The Supreme Court found that the Commissioner's interpretation of the casting vote issue is correct:

> While the second issue may be arguable, we are not persuaded that the applicant has any prospect of succeeding on the casting vote issue. We are in full agreement with the Court of Appeal's reasoning that the chairman was not empowered to exercise a casting vote in the circumstances.

CLAIM SIMPLY UNTENABLE

Case	The Harsono Family Trust v Commissioner of Inland Revenue
Decision date	10 November 2011
Act(s)	Goods and Services Act 1985, Tax Administration Act 1994, Judicature Act 1908
Keywords	Strike-out, abuse of court process, discretion

Summary

The Court had no jurisdiction to consider the Harsono Family Trust's ("HFT") claim, nor was it tenable. Furthermore, the claim brought by HFT against the Commissioner of Inland Revenue was found to be an abuse of process because HFT deliberately attempted to misconstrue the true nature of the payment.

Impact of decision

This decision confirms the well-settled principles relating to strike-out and abuse of process.

Facts

Company F acquired a property at 45 Anzac Ave, Auckland, on 17 January 2001. On 15 July 2002 HFT purported to enter into a sale and purchase agreement to purchase the property for $1,100,000 plus goods and services tax (GST) ($137,500) while the property was already the subject of an existing sale and purchase agreement to another potential purchaser. On 2 August 2002, HFT paid $137,500 to the Commissioner of Inland Revenue ("Commissioner") as output tax on the sale.

The Commissioner paid a GST input credit of $137,500 to HFT on 28 January 2004. On 27 October 2005 the High Court found, inter alia, that the purported sale of the property to HFT was invalid. The Court also found that HFT had wrongly induced and procured the vendor to breach its previous sale contract with the potential purchaser and HFT was involved in an unlawful means conspiracy causing loss to that earlier potential purchaser. On 19 July 2006 the Court of Appeal dismissed HFT's appeal against these findings.

Because the initial sale was invalid and was overturned, on 5 March 2007 the Commissioner issued a GST assessment which reversed the input tax credit issued in 2004. HFT then entered into the disputes and challenge proceedings as provided by Parts 4A and 8A of the Tax Administration Act 1994 ("TAA") to contest the reversal of the GST input tax credit.

On 14 May 2009, the Taxation Review Authority (TRA) confirmed the correctness of the assessment and found in favour of the Commissioner (case *Z16*). HFT then applied to have the TRA judgment recalled. On 5 August 2009 the TRA dismissed HFT's application for recall. The TRA held, inter alia, that HFT's recall application was "inconsistent with the objective of finality and certainty in litigation and is an abuse of process".

HFT then appealed the TRA's dismissal of the recall application in the High Court. On 15 September 2009, Venning J dismissed the appeal on the basis that there was no jurisdiction.

HFT persisted in its dissatisfaction with the Commissioner's assessment which reversed the $137,500 of input tax paid. On 16 March 2010, HFT issued civil proceedings against the Commissioner based on unjust enrichment, relief under section 94A of the Judicature Act 1908, money had and received, and restitution.

The Commissioner applied to strike out HFT's claim. The application was granted and HFT's claim was struck out on 21 March 2011 by virtue of the non-appearance of HFT or its legal representatives. HFT made an application to set aside that decision on the basis that the non-appearance was inadvertent. The Commissioner by consent agreed to set aside that decision. The strike-out application was then reheard by the District Court on 26 October 2011.

Decision

Whether HFT's claim should be struck out

Judge Wiltens first canvassed the requirements in the District Court Rules relating to strike-out, particularly Rule 2.50. A claim may be struck out if the pleading discloses no reasonable cause of action; or is likely to cause prejudice, embarrassment or delay; or is otherwise an abuse of process of the Court. Judge Wiltens also noted the well-settled criteria to be applied when deciding to strike out a cause of action, from *A-G v Prince and Gardner* [1998] 1 NZLR 262 (CA).

The Commissioner submitted that by virtue of section 109 of the TAA, the Court had no jurisdiction to deal with the assessments being challenged by HFT. The Commissioner also submitted that the claim was untenable and could not succeed as there were no valid grounds for HFT to dispute the assessment.

Whether the claim was tenable

Judge Wiltens noted that section 165 of the TAA provides that any person who pays tax for, or on behalf of, any other person is entitled to recover that amount from that other person as a debt. HFT paid the output tax on 2 August 2002 on behalf of the then-registered proprietor. Therefore, HFT could claim this amount against the then-registered proprietor, not against the Commissioner.

Judge Wiltens concluded that HFT's claim was simply untenable.

Whether the claim was an abuse of process

Judge Wiltens considered the law relating to abuse of process, particularly the decision of the Court of Appeal in *Felton v Johnson* [1998] 1 NZLR 262 (CA). The Court considered carefully the submissions by HFT. HFT had tried to re-characterise its payment of GST output tax as "money" rather than "tax". Judge Wiltens found that this was "simplistic" and deliberately attempted to misconstrue the true nature of the payment.

ABUSE OF COURT PROCESS TO RE-LITIGATE MISCONCEIVED CASES

Case	Clarence John Faloon v Commissioner of Inland Revenue
Decision date	8 November 2011
Act(s)	Tax Administration Act 1994
Keywords	Mischievous, frivolous, vexatious, strike-out

Summary

Since the taxpayer's proceeding was of the same nature as others that have been unsuccessful it was found to be abuse of court process.

Impact of decision

The fact pattern involved in this case is fairly unique. Nevertheless it does re-affirm the fact that the Courts are reluctant to allow the re-litigation of misconceived cases.

Facts

By the Commissioner's counsel's submission this is the twenty-eighth proceeding filed in connection with events which first occurred over 40 years ago regarding land owned by the taxpayer's family company (then controlled by his father).

Mr Faloon previously endeavoured to return income which he considered was compensation for land compulsorily acquired. While the reason for this was unclear, the Judge surmised that his purpose seemed to be that if this was accepted by the Commissioner then this may form the basis upon which Mr Falloon can pursue a new claim for further compensation.

The claim in this proceeding concerns a Notice of Proposed Adjustment (NOPA) filed by Mr Faloon, which was rejected by a Notice of Response (NOR). In 2009 Mr Faloon filed proceedings challenging the NOR, which were struck out.

After this previous unsuccessful proceeding, Mr Faloon wrote to the Commissioner inquiring whether he would be issuing a disclosure notice related to the same taxpayer's NOPA that gave rise to the earlier strike-out proceedings.

The Commissioner responded in the negative in a letter ("the letter").

Decision

Mr Faloon's claim was struck out and generally dismissed on the basis that the proceeding prosecuted by Mr Faloon was mischievous, frivolous, vexatious and an abuse of Court process. Furthermore, the letter was not a disputable decision and could not be used by Mr Falloon as an attempt at re-litigation of earlier decisions.

Associate Judge Christiansen states [35]:

> ... Mr Faloon is conscientiously rejecting each and every decision which is not in his favour by steadfastly clinging to the slightest glimmer of hope which might be in his favour.

He continued [at 36]:

> Mr Faloon is confused in his belief that he or the trusts he represents are related parties or retain a right of suit in connection with any right of claim his family companies may have had in the outcome of the taking of certain land in which process compensation was ordered to be paid.

JUDICIAL REVIEW OF COMMISSIONER'S REFUSAL TO ACCEPT AMENDED GST RETURNS

Case	FB Duvall Limited & Ors v Commissioner of Inland Revenue
Decision date	15 December 2011
Act(s)	Goods and Services Act 1985, Income Tax Act 1976
Keywords	Judicial review, JG Russell

Summary

The Court ordered the Commissioner of Inland Revenue to reconsider his decision to not allow the taxpayers to amend their GST returns to exclude previously returned output tax and therefore obtain a GST refund.

Impact of decision

The Court indicated that the Commissioner was entitled to address both sides of the GST position (both inputs and outputs) when considering objections.

Facts

This is a JG Russell-related matter.

FB Duvall Limited ("FBD") and others made late objections to their GST treatment. These objections were based upon the outcome in the *Miller & O'Neil* income tax litigation. In the *Miller* litigation, the Courts found that no actual services were being supplied by any Russell entities involved in his template.

In response, FBD sought to amend its GST returns to exclude output tax but to continue to claim input taxes. This had the effect of creating refunds for the company.

This was allowed by the Court of Appeal (*FB Duval v CIR* (2000) 19 NZTC 15,658). The Commissioner took the view this case was decided on procedural grounds and not on its merits.

FBD and other companies then filed more GST returns on a similar basis—seeking to exclude outputs but to continue to claim inputs. However, these were never accepted by the Commissioner and the judicial review was about this failure to accept (or reject) the amended returns. It was not about the correctness or otherwise of those amended returns.

Decision

The High Court allowed the judicial review regarding the GST issue and ordered the Commissioner to accept or reject the late returns (and if accepting them to make a decision on their merits).

The High Court considered the Commissioner had erred in not determining these objections, which had been unaddressed since the 1990s.

The distinction drawn between GST and income tax was correct but on the facts of the Russell template, not supported. The template litigation had determined that no services had been supplied under the template. The earlier FBD decision was confined to a procedural point.

OPTIONAL CONVERTIBLE NOTES CAN BE TAX AVOIDANCE ARRANGEMENTS

Case	Alesco New Zealand Ltd and Ors v Commissioner of Inland Revenue
Decision date	12 December 2011
Act(s)	Tax Administration Act 1994
Keywords	Optional convertible notes, determination G22, tax avoidance, reconstruction, abusive tax position

Summary

The Court held that the use of particular optional convertible notes (OCNs) was a tax avoidance arrangement because the arrangement was an artificial device and it was not within Parliamentary contemplation.

Impact of decision

This is an important judgment for the Commissioner. The final result of this case will most probably influence the outcome of other, similar cases. The total amount of tax across all similar OCN cases is approximately $226 million plus use-of-money interest.

Facts

Alesco New Zealand Ltd ("Alesco NZ") and certain subsidiaries challenged the Commissioner's assessments were made as a result of him declaring an arrangement void as a tax avoidance arrangement. The assessments disallowed interest deductions and loss offset elections and imposed abusive tax position shortfall penalties.

Alesco NZ is a wholly owned subsidiary of Alesco Corporation ("Corporation"), an Australian company. The arrangement involved the use of OCNs in an intra-group situation to finance the acquisition of two businesses in New Zealand.

Alesco NZ issued OCNs to Corporation in return for advances totalling $78 million for a term of 10 years. At maturity, Corporation had the option of being repaid the $78 million or converting the OCNs into shares in Alesco NZ. No interest was payable on the OCNs.

At the relevant times the Commissioner's Determination G22 was applicable. The application of Determination G22 to the terms of the OCN resulted in deemed interest expenses for Alesco NZ in the 2003 to 2008 years.

Decision

Following *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, Heath J held that the test of whether the tax advantages obtained were permissible is whether Parliament could have contemplated that the financial arrangement rules would be used to obtain the interest deductions claimed.

The High Court held that the OCNs were tax avoidance arrangements. There were three reasons for this. First, the OCNs were designed to enable Alesco NZ to claim interest deductions without any corresponding return of taxable income. Secondly, the arrangement was an artificial device designed only to secure a tax advantage in New Zealand that could not otherwise have been obtained. Thirdly, the Court found that the deductions claimed were not within Parliamentary contemplation because no real interest expense was incurred and the notional interest claimed did not represent a real economic cost.

On the issue of reconstruction, the Court accepted the Commissioner's contention that he had the discretion to counteract the tax advantage as he thought fit. He was not obliged to apply what Alesco NZ said would have occurred if the avoidance arrangement had not been entered into.

On the issue of shortfall penalties, the Court found that Alesco NZ entered into the arrangement with a dominant purpose of avoiding tax. It was therefore liable for an abusive tax position shortfall penalty.

APPROPRIATE COURSE FOR DEALING WITH AN ALLEGATION THAT THE HIGH COURT WAS FUNCTUS OFFICIO

Case	Redcliffe Forestry Venture Limited & Ors v Commissioner of Inland Revenue
Decision date	14 December 2011
Act(s)	High Court Rules
Keywords	Protest to jurisdiction, strike-out

Summary

This decision concerned the appropriate course to take when the High Court is confronted with an allegation that the High Court was *functus officio* and thus lacked the jurisdiction to hear and determine the proceedings.

Impact of decision

Although this is a procedural decision it concerns the Trinity scheme. The Commissioner is yet to decide whether to appeal to the Supreme Court or continue with the setting aside application in the High Court, following repleading by the taxpayers.

Facts

In September 2009 the taxpayers filed a proceeding in the High Court seeking an order to set aside a December 2004 High Court judgment *Accent Management Ltd v Commissioner of Inland Revenue* (2004) 22 NZTC 19,027 (HC). This was the original High Court judgment (upheld by the Court of Appeal and the Supreme Court) finding that the Trinity scheme was a tax avoidance arrangement. The Commissioner responded to this setting-aside proceeding by filing a protest to jurisdiction and an application under rule 5.49 of the High Court Rules ("HCRs") for an order dismissing the proceeding.

The Commissioner asserted that the High Court was *functus officio* and thus lacked jurisdiction to hear and determine the proceedings and that any application to set aside the 2004 judgment must be made to the Supreme Court.

The taxpayers conversely asserted that the High Court had jurisdiction to entertain their setting-aside proceeding and that there was no restraint on their bringing that proceeding to the High Court.

The setting-aside proceeding pleaded that the Commissioner presented a false case to the High Court in 2004 which resulted in the High Court making an order which it could not legally make and would not otherwise have made.

The High Court (Venning J) concluded that fraud had not been alleged which is a requirement for the High Court to exercise its jurisdiction to set aside the 2004 judgment. The Commissioner's assessments and the High Court's findings of tax avoidance, as confirmed by the Court of Appeal and the Supreme Court, remained valid. The High Court was *functus officio* and the setting-aside proceeding was dismissed (*Redcliffe Forestry Venture Limited v Commissioner of Inland Revenue* [2011] 1 NZLR 336 (HC)).

The taxpayers submitted in the Court of Appeal that arguments as to the meaning and scope of the pleadings are to be decided in a strike-out application should the Commissioner make such an application under rule 15.1 of the HCRs. In the High Court, the taxpayers were deprived of any opportunity to re-plead and or present evidence of their claim of fraud.

The Commissioner responded by submitting that (inter alia) the Commissioner was correct to use a protest to jurisdiction as the means of bringing the setting-aside proceeding to an end. The taxpayers had abandoned three Trinity scheme appeals which rendered this setting-aside proceeding moot and an abuse of process which should be struck out. The taxpayers were wrong to submit that the High Court had general jurisdiction to set aside one of its own judgments that had been confirmed on appeal. The High Court did have jurisdiction to entertain an application to set aside the 2004 judgment that it had been obtained by fraud but the taxpayers were alleging error of law on the part of the Supreme Court and not fraud by the Commissioner.

Decision

The Court stated that had the Commissioner applied to strike out the proceeding it would have been made under rule 15.1 of the HCRs. Such an application proceeds on the assumption that the facts pleaded in the claim are true except where a proceeding alleges fraud. In that case there is an obligation on the plaintiff to produce probative evidence to support the claim of fraud.

The protest to jurisdiction application was made under rule 5.49 of the HCRs. The Court stated that this procedure only concerns the Court's jurisdiction to hear and determine the application or proceeding, not the Court's jurisdiction to grant relief in a proceeding within its jurisdiction.

The Court held that rule 5.49 of the HCRs was not the appropriate vehicle for the Commissioner's challenge to the setting-aside proceeding [58].

The Court went on to state that:

> The question whether the High Court's jurisdiction to set aside its own judgments that have been appealed is limited

> to cases where fraud is alleged and proved, or is wider in scope, goes to the High Court's jurisdiction to grant the remedy sought by the appellants. But, as we have said, that is not what the rule 5.49 procedure is designed to address [65].

Having found for the taxpayers, the Court affirmed that the taxpayers should now be able to amend their pleadings, put forward what they allege as probative evidence of fraud and argue their repleaded case contending that the evidence brings the case within the fraud exception or that the fraud exception should be broadened to encompass their case.

FREEZING ORDERS AGAINST THIRD PARTY

Case	Commissioner of Inland Revenue v Giovanni Holdings Ltd and Ors
Decision date	16 November 2011
Act(s)	Public Finance Act 1989, High Court Rules, Land Transfer Act 2007
Keywords	Undertaking, freezing orders

Summary

The Court considered that the freezing order could not be upheld without more evidence and an undertaking by the Commissioner.

Impact of decision

Where the Commissioner has issued assessments and an enforcement action to freeze assets to assist in the collection of the debt from a property owned by a third party, the Commissioner should indicate that relief sought against the third party in his statement of claim.

Facts

Mr Petroulias and Ms Clark have been assessed by the Commissioner for promoter penalties amounting to over $6 million. Ms Clark has also been assessed for income tax.

On 6 September 2010 the Commissioner sought and obtained a freezing order without notice over a property owned by Giovanni Holdings Ltd ("Giovanni"). The freezing order was obtained on the basis that Mr Petroulias and Ms Clark were/are the beneficial owners of the property.

Proceedings

On 18 August 2011 the Commissioner applied for a recall of a discovery order made on 28 July 2011. McKenzie J convened a telephone conference for 5 October 2011 and during that conference ordered a hearing to determine whether the freezing order should continue.

Decision

The Court noted that the freezing order applies to land of which Giovanni is the registered proprietor and the Commissioner's claim is that Mr Petroulias and Ms Clark are/were the beneficial owners of the property. McKenzie J stated that the statement of claim filed by the Commissioner does not seek relief against Giovanni. His Honour acknowledged, however, that this fact does not bar the Commissioner from seeking a freezing order against Giovanni, on the basis the assets are in truth the assets of Mr Petroulias and Ms Clark.

The Court considered that while the Commissioner could establish he had a good arguable case for a freezing order on the basis of the assessments against Mr Petroulias and Ms Clark, the Commissioner is required to show the property is that of Mr Petroulias and Ms Clark to establish a case for a freezing order.

The Court considered that an undertaking as to damages is a pre-requisite for the grant of a freezing order. Accordingly, the Commissioner was ordered to file an undertaking as to damages to compensate all or any damage sustained as a consequence of the freezing order.

JUDICIAL REVIEW STRUCK OUT

Case	Tannadyce Investments Limited v Commissioner of Inland Revenue
Decision date	20 December 2011
Act(s)	Tax Administration Act 1994, Inland Revenue Act 1974, Income Tax Act 1976
Keywords	Judicial review, section 109 of the Tax Administration Act 1994

Summary

The Supreme Court held that only in exceptional cases can a judicial review be permitted to reverse tax assessments.

Impact of decision

This is an important judgment for the Commissioner. It defines and narrows the circumstances in which judicial review of disputable decisions may be available to taxpayers.

Facts

Tannadyce Investments Limited ("T") appealed against a Court of Appeal judgment striking out, as an abuse of process, its judicial review proceeding seeking review of certain of its income tax assessments.

T alleged that it could not file various returns (and follow the disputes procedure) because the Commissioner was

in possession of, and withheld from it, the documents necessary for it to do so.

T alleged that as a result of the aforesaid, the Commissioner's assessments were invalid.

At issue was whether the Court of Appeal was correct to strike out T's application for judicial review as an abuse of process.

Decision

1. The Court was unanimous in concluding that the Court of Appeal had been correct to strike out T's judicial review proceeding. T was obliged to establish a sufficient factual foundation for its contention that it was practically not possible to follow the statutory procedures. It failed to do that.
2. However, the Court was split (3:2) on the issue of when a taxpayer may use judicial review to challenge assessments and other disputable decisions.
3. For the majority, the crucial question was whether, and if so how, the remedy of judicial review can stand with section 109 of the Tax Administration Act 1994. The majority held that disputable decisions may not be challenged by judicial review unless the taxpayer cannot practically invoke the relevant statutory procedure. Cases of that kind are likely to be extremely rare.
4. The majority narrowed the circumstances in which judicial review of disputable decisions may be available and in doing so overruled the Court of Appeal in *Westpac Banking Corp v CIR* [2009] NZCA 24. It held that assessments that are challenged as legal nullities fall within section 109 and therefore cannot be subject to judicial review. Section 109 clearly states that, except in a challenge proceeding, "no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever". It should not be construed so as to create an exception for where the circumstances are "exceptional".
5. The minority preferred not to frame a definitive rule as to when judicial review is available. It preferred to recognise that in general the right to challenge a disputable decision in a court or Review Authority (ie, the TRA), that is required to act judicially, is able to provide superior remedies to judicial review, while also recognising that there will be exceptional cases where judicial review should be permitted.

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- ☐ Operational statements
- ☐ Opportunity to comment

3. How useful is other information in the TIB? Please rate each of the following as 1 = extremely useful, 2 = sometimes useful, 3 = not useful.

- ☐ Foreign currency exchange tables
- ☐ Livestock national standard costs
- ☐ Livestock national average market values
- ☐ International tax disclosure exemptions
- ☐ Revenue alerts
- ☐ Reviews of vehicle mileage rates
- ☐ Orders in council

4. How often do you use/refer to the TIB?

- ☐ Monthly
- ☐ Quarterly
- ☐ Once or twice a year
- ☐ Hardly ever

5. The TIB is available as hardcopy, as a PDF and static content on our website, and by subscription from third-parties. Which is most useful to you? (Tick one only.)

- ☐ Hardcopy
- ☐ PDF
- ☐ Static content on our website
- ☐ From a third-party provider, eg CCH

6. If you need a *printed* copy, why is that?

_____

_____

7. If the hardcopy of the TIB wasn't available, would you:

- ☐ print the whole of the electronic version?
- ☐ print certain items only?
- ☐ email us and request a hard copy?
- ☐ phone us and request a hard copy?
- ☐ source it from somewhere else?

8. How often should the TIB be published?

- ☐ Monthly
- ☐ Quarterly
- ☐ As material becomes available

9. Do you use the TIB index on our website?

- ☐ Yes
- ☐ No

10. What would make the index more useful to you?

_____

_____

RESET form

11. If you've never accessed the TIB or the index on our website, why is that?

_____

_____

12. What sort of internet connection do you have?

- ☐ Broadband
- ☐ Dial up
- ☐ None

13. Have you subscribed to the TIB email alert?

- ☐ Yes
- ☐ No

14. If you've already subscribed, what would make the email more useful to you?

_____

_____

15. We may do redevelopment as a result of this survey. Would you like to be part of a consultation group?

- ☐ Yes, please enter your email below

_____

- ☐ No

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REGULAR CONTRIBUTORS TO THE TIB

Office of the Chief Tax Counsel

The Office of the Chief Tax Counsel (OCTC) produces a number of statements and rulings, such as interpretation statements, binding public rulings and determinations, aimed at explaining how tax law affects taxpayers and their agents. The OCTC also contributes to the "Questions we've been asked" and "Your opportunity to comment" sections where taxpayers and their agents can comment on proposed statements and rulings.

Legal and Technical Services

Legal and Technical Services contribute the standard practice statements which describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical operational issues arising out of the administration of the Inland Revenue Acts. They also produce determinations on standard costs and amortisation or depreciation rates for fixed life property used to produce income, as well as other statements on operational practice related to topical tax matters.

Legal and Technical Services also contribute to the "Your opportunity to comment" section.

Policy Advice Division

The Policy Advice Division advises the government on all aspects of tax policy and on social policy measures that interact with the tax system. They contribute information about new legislation and policy issues as well as Orders in Council.

Litigation Management

Litigation Management manages all disputed tax litigation and associated challenges to Inland Revenue's investigative and assessment process including declaratory judgment and judicial review litigation. They contribute the legal decisions and case notes on recent tax decisions made by the Taxation Review Authority and the courts.

GET YOUR TIB SOONER ON THE INTERNET

This *Tax Information Bulletin (TIB)* is also available on the internet in PDF at **www.ird.govt.nz**

The TIB index is also available online at **www.ird.govt.nz/aboutir/newsletters/tib/** (scroll down to the bottom of the page). The website has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

If you would prefer to get the TIB from our website, please email us at **tibdatabase@ird.govt.nz** and we will take you off our mailing list.

You can also email us to advise a change of address or to request a paper copy of the TIB.