

The Evolution of Construing  
"Tax Avoidance Arrangement"

Lola Kalolaine Hua Fusitu'a

A dissertation submitted to  
Auckland University of Technology  
in partial fulfillment of the requirements for the  
degree of  
Master of Business (MBus)

2008

School of Business

Primary Supervisor: Nigel Smith

## Page of Contents

<b>1</b>	<b>INTRODUCTION</b> .....	<b>2</b>
<b>2</b>	<b>LITERATURE REVIEW</b> .....	<b>4</b>
<b>3</b>	<b>DISCUSSION</b> .....	<b>5</b>
<b>4</b>	<b>PART 1: TAX PLANNING</b> .....	<b>5</b>
4.1	TAX PLANNING CONSIDERED.....	5
4.2	TAX AVOIDANCE AND TAX EVASION.....	5
4.3	THE BASIC ISSUE — "SUBSTANCE" OR "FORM".....	7
<b>5</b>	<b>PART 2: TRADITIONAL APPROACH OF THE COURT</b> .....	<b>8</b>
5.1	TRADITIONAL APPROACH.....	8
5.2	DUKE OF WESTMINSTER CASE.....	11
5.3	DETERMINING THE FORM OF THE TRANSACTION.....	16
5.4	SHAM.....	19
<b>6</b>	<b>PART 3: CONTEMPORARY APPROACH</b> .....	<b>25</b>
6.1	DISCUSSION OF CONTEMPORARY APPROACH.....	25
6.2	UNITED KINGDOM COURTS APPROACH.....	27
6.3	MACNIVEN.....	28
6.4	CITIBANK INVESTMENTS LTD V GRIFFIN.....	31
6.5	THE DEVELOPMENT OF THE FISCAL NULLITY DOCTRINE.....	33
6.6	CRAVEN (HMIT) V WHITE.....	39
6.7	IR COMMRS V MCGUCKIAN.....	41
6.8	THE VIEW OF FISCAL NULLITY DOCTRINE IN NEW ZEALAND.....	43
6.9	THE VIEW OF FISCAL NULLITY DOCTRINE IN AUSTRALIA.....	48
6.10	CASE DIGESTS.....	50
<b>7</b>	<b>PART 4: INTRODUCTION TO PART IVA</b> .....	<b>51</b>
7.1	FISCAL NULLITY DOCTRINE.....	52
7.2	CRIMINAL SANCTIONS FOR TAX FRAUD OR EVASION.....	53
7.3	TAX HAVENS.....	53
7.4	OFFSHORE SCHEMES.....	54
7.5	SCOPE OF PART IVA.....	55
7.6	IS THERE A SCHEME?.....	56
7.7	WAS A TAX BENEFIT OBTAINED?.....	57
7.8	EXCLUSION OF TAX BENEFITS ARISING FROM MAKING AGREEMENTS, CHOICES, ETC.....	62
7.9	TAX BENEFIT AMENDMENTS PROPOSAL.....	63
7.10	WHAT IS THE DOMINANT PURPOSE?.....	63
<b>8</b>	<b>PART 5: INTRODUCTION OF GST</b> .....	<b>66</b>
8.1	HISTORY.....	66
8.2	KEY FEATURES OF THE GST REGIME.....	68
8.2.1	<i>Charging GST</i> .....	68
8.2.2	<i>Registration</i> .....	68
8.2.3	<i>Registration is compulsory</i> .....	68
8.2.4	<i>The Practice</i> .....	69
8.2.5	<i>Accounting for GST</i> .....	69
8.3	ANTI-AVOIDANCE PROVISION.....	70
8.4	TAX AVOIDANCE ARRANGEMENT.....	70
<b>9</b>	<b>PART 6: ANTI-AVOIDANCE PROVISIONS</b> .....	<b>74</b>
9.1	GENERAL ANTI-AVOIDANCE PROVISION.....	74
9.2	SPECIFIC ANTI-AVOIDANCE PROVISION.....	76
<b>10</b>	<b>PART 7: SECTIONS BG 1, GB 1, AND GZ 1</b> .....	<b>77</b>
10.1	SECTIONS BG 1, GB 1, AND GZ 1.....	77
10.2	HISTORY.....	80

10.3	FUNCTION OF S BG 1 .....	82
10.4	THE STRUCTURE OF SS BG 1 AND GB 1 .....	84
10.5	THE CRITERIA OF S BG 1 .....	85
10.6	DEFINITION OF ARRANGEMENT .....	85
10.7	APPLICATION OF S BG 1 .....	101
10.8	MEANING OF "PURPOSE OR EFFECT" .....	101
10.9	PURPOSES WITHIN S BG 1 .....	102
10.10	ARRANGEMENTS CONTAIN ONLY ONE PURPOSE OR EFFECT .....	103
10.11	ARRANGEMENTS CONTAIN MORE THAN ONE PURPOSE OR EFFECT .....	105
10.12	TAX AVOIDANCE DEFINED .....	108
10.13	DIVIDEND STRIPPING .....	108
10.14	SECTIONS BG 1 AND GB 1 (POST-CHALLENGE) CASE LAWS IN NEW ZEALAND .....	110
10.15	CASES ON SS BG 1, GB 1 AND GZ 1 .....	112
<b>11</b>	<b>PART 8: CHOICE PRINCIPLE.....</b>	<b>113</b>
11.1	THE CHOICE PRINCIPLE CONSIDERED .....	113
11.2	AUSTRALIAN DECISIONS .....	114
11.3	NEW ZEALAND APPROACH TO THE CHOICE PRINCIPLE .....	115
<b>12</b>	<b>PART 9: THE COMMISSIONER'S POWER .....</b>	<b>117</b>
12.1	THE COMMISSIONER'S POLICY ON S BG 1 .....	117
12.2	SCHEME AND PURPOSE .....	119
12.3	FRUSTRATION .....	120
<b>13</b>	<b>PART 10: BINDING RULING .....</b>	<b>121</b>
13.1	RULINGS AS A WHOLE .....	121
13.2	THE TAXATION LAWS WERE BINDING RULINGS MAY BE CARRIED OUT .....	122
<b>14</b>	<b>CONCLUSION.....</b>	<b>126</b>
<b>15</b>	<b>AREAS IDENTIFIED FOR FURTHER RESEARCH.....</b>	<b>127</b>

## **Attestation of Authorship**

"I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person, nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning."

*Lola K. H. Fusitu'a*

Signed: Lola K. H. Fusitu'a

## **Abstract**

Tax avoidance is a problem in every modern tax system, specifically when businesses and personal transactions are overwhelmed by the impact of high tax rates. In the case of *Duke of Westminster* (1936), the courts had traditionally permitted taxpayers to diminish their tax liabilities. There are two ways to escape paying taxable liability: one is tax avoidance, which is legal and the other is tax evasion, which is illegal. The form approach, instead of the substance approach, was traditionally applied by the courts in tax cases and an arrangement was allowed, whether tax avoidance was or was not the purpose of the arrangement. When an arrangement involves an "anti-avoidance" section, the courts usually disregard the condition of tax avoidance arrangement. Tax mitigation is one example of this rule. There are two "anti-avoidance" sections in the Income Tax Act 1994: specific anti-avoidance provision and general anti-avoidance provision. Tax avoidance arrangement is affirmed in the case of *McGukian and the Commissioner*. Part IVA is the current anti-avoidance provision of Australia income tax legislation. It is applicable when a tax advantage is gained from the arrangement by the taxpayer. There are a few federal taxes (e.g. FBT, superannuation guarantee charge and income tax etc.) that have been falsely avoided from being paid and have been found as crimes under the Crimes Act 1980. Trying to avoid tax on a tax haven income is a crime. A general anti-avoidance provision is applicable when a taxpayer has received an advantage in association with the arrangement that was committed. It is important to examine all corners of a tax planning

scheme for possible tax benefits. Tax benefits have amendments propositions and the reasonable test will be amended. The Income Tax Assessment Act 1891 was the first income tax act in New Zealand and during the 20th century, there were other acts that followed at different times: the Land and Income Tax Act 1923, the Land and Income Tax Act 1954, the Income Tax Act 1976, and the Income Tax Act 1994. Goods and Services Tax Act was first introduced on 1 October 1986. Both sections 76 of the Goods and Services Tax Act 1985 and BG 1 of the Income Tax Act 2004 contain the same wordings. Section OB 1 of the Income Tax Act defines tax avoidance arrangement. Section 76(8) defines "tax avoidance". Section BG 1 is designed to counteract the tax avoidance arrangement. The definition of arrangement contains three elements: agreement, contract and plan or understanding. The definition of tax avoidance raises doubts in the case of BNZI where tax avoidance existed in downstream transactions. Tax mitigation and tax avoidance are distinguished but may not solve all problems globally. Case K52 (1988) 10 NZTC 426 is another example of a tax avoidance arrangement. The interpretation problems of the Act (s 99) can be ameliorated by a succinct analysis of the scheme of the legislation and the purpose of the legislation.

## **1 Introduction**

The courts of New Zealand, Australia and the United Kingdom are working together to interpret "tax avoidance arrangement" to apply in different cases in order to defeat the gurus in taxation who attempt to avoid taxable liabilities. One example of this interpretation is in the case of CIR v BNZ