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Abstract
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Keywords
anti-avoidance, double tax agreements, tax arbitrage, tax planning

GENERAL ANTI-AVOIDANCE RULES AND DOUBLE TAX AGREEMENTS: A NEW ZEALAND PERSPECTIVE

CRAIG ELLIFFE[1] AND JOHN PREBBLE[2]

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INTRODUCTION

Different countries often treat a transaction in quite an inconsistent way for tax purposes. This inconsistency can give rise to tax planning and also tax avoidance opportunities. An example is found in the New Zealand High Court decision *Westpac Banking Corporation v Commissioner of Inland Revenue*, where Harrison J, having analysed the international tax consequences of a structured finance transaction, concluded, 'This process, known as tax arbitrage, is a settled feature of international financing arrangements.'[3]

Countries need to attract foreign investment and to facilitate cross-border business. Increasing the network of treaties and reducing the barriers to trade is a key focus of most governments. This is true of New Zealand as the recent press release on the signing of the new Australia/New Zealand double tax agreement indicates.[4]

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3 *Westpac Banking Corporation v Commissioner of Inland Revenue* HC AK CIV 2005-404-2843, at 5. The 'process' referred to was a 'cross-border differential' creating tax asymmetry, where various 'repo' transactions were treated as loans, with deductible interest coupons, by overseas jurisdictions in accordance with economic substance, whilst the New Zealand characterisation of a dividend (tax exempt in this situation) was based on legal form.

4 Media statement dated 29 June 2009 by Hon Peter Dunne, Minister of Revenue, and Hon Tim Grosser, Minister of Trade, 'The new DTA will help to reduce barriers to trade and investment even further, and improve certainty for trans-Tasman businesses. It will help to

When these two features of the international tax landscape are considered it follows that cross-border tax planning is already a major focus of multinational corporations and consequentially a major focus for revenue authorities.

This article looks at the effectiveness, in the New Zealand context, of the application of a general anti-avoidance rule (GAAR) when the impugned transaction or arrangement is cross-border. The important issue is how the provisions of a double tax agreement have application to the transaction or arrangement when the GAAR is invoked by the revenue authorities.

Brian Arnold, commenting on the revisions to the *Commentary* to the OECD model that occurred in 2003 said:[5]

> In most countries, generally speaking, tax treaties prevail over domestic tax laws in the event of a conflict. Taxpayers often rely on the provisions of the tax treaty to reduce or eliminate domestic taxes.

The question is whether this is true for New Zealand, and whether there is anything peculiar in the New Zealand statutory scheme that gives guidance on whether tax treaties preclude or limit the application of the GAAR.

New Zealand's tax treaties are based upon the OECD Model Tax Convention. There is no general anti-avoidance provision in the Model. Some provisions of New Zealand treaties have an anti-avoidance focus, such as the use of the concept of 'beneficial ownership' in determining whether treaty benefits should be extended to various forms of passive income. New Zealand treaties with the United States and Chile have limitation of benefits clauses. But in no New Zealand treaty is there a general anti-avoidance provision.

Significant changes were made to the *Commentary* to the OECD Model in 2003. The OECD intended that this revision would clarify the relationship between tax treaties and domestic anti-avoidance rules. Central to this change was the clear statement that 'it is also a purpose of tax conventions to prevent tax avoidance and evasion'.[6]

This article analyses the current position of the law after these changes in 2003 and the clear statement that one of the purposes of tax treaties is to prevent tax avoidance.

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accelerate progress towards the full realisation of the goal of the 'Single Economic Market' to which the New Zealand and Australian Prime Ministers have committed. One of the main features of the new double tax agreement will be lower withholding taxes on dividend and royalty payments between Australia and New Zealand.'

5 Brian J Arnold, 'Tax Treaties and Tax Avoidance; The 2003 Revisions to the Commentary to the OECD Model' (2004) 58(6) *Bulletin for International Fiscal Documentation – Amsterdam* 244, 251.

6 OECD Model Tax Convention, *Commentary* on Article 1, para 7.

Whether this declaration was 'created out of thin air' as Brian Arnold noted,[7] is not as important as the fact that the Commentary, since 2003, clearly states it as a purpose.

Before analysing the current position it is important to note that taxpayers who deal with a treaty that was concluded prior to the 2003 *Commentary* changes may take the view that only the version of the *Commentary* which applied at the time the treaty was concluded should be considered in interpreting that treaty. There is considerable academic support for this view,[8] but it is not the view of the Committee of Fiscal Affairs who state:[9]

> Accordingly, the Committee on Fiscal Affairs considers that taxpayers may also find it useful to consult later versions of the *Commentaries* in interpreting earlier treaties.

Nevertheless, the reader should note that a potential difference exists for treaties concluded prior to 2003.[10]

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7 Arnold, above n 5, 249.

8 See for example Klaus Vogel, 'Double Tax Treaties and their Interpretation' (1986) 4(1) *International Tax and Business* 41 and the numerous academic writers referred to by Philip Baker in his book *Double Tax Conventions* (2001) [E-16] n 1.

9 OECD Model Tax Convention, Introduction to the Model Convention, para 33-36.1.

10 For a summary of the arguments that general anti-avoidance rules can only be applied to treaties effective as of 28 January 2003 see Rene Matteotti, 'Interpretation of Tax Treaties and Domestic General Ant-Avoidance Rules - A Sceptical Look at the 2003 Update to the OECD Commentary' (2005) 33(8-9) *INTERTAX* 336. Also it may be important to note that Switzerland made a lonely Observation to the *Commentary* when the changes were made in 2003 recording at paragraph 27.9:

> *Switzerland* does not share the view expressed in paragraph 7 according to which the purpose of double taxation conventions is to prevent tax avoidance and evasion. Also, this view seems to contradict the footnote to the Title of the Model Tax Convention. With respect to paragraph 22.1, Switzerland believes that domestic tax rules on abuse of tax conventions must conform to the general provisions of tax conventions, especially where the convention itself includes provisions intended to prevent its abuse.

Taxpayers who are relying on a treaty with Switzerland may argue that if the Swiss tax authorities cannot be expected to apply Switzerland's tax treaties to prevent tax avoidance, then on a reciprocal basis, neither should the country having a treaty with Switzerland. This is an argument that Brian Arnold rejects in his discussion in the article referred to in Arnold, above n 5, 249. His view is:

> Although Switzerland will not apply its treaties to prevent tax avoidance, its treaty partners should apply their treaty with Switzerland to prevent tax avoidance.

It appears the Swiss courts do not seem to have been always influenced by this Observation. In *A Holding ApS v Federal Tax Administration* (2005) 8 ITLR 536, the Swiss court allowed the abuse of the law rule to prevail over treaty rights in circumstances where a Danish company

GENERAL OVERVIEW OF THE NEW ZEALAND GAAR

New Zealand has a general anti-avoidance provision,[11] and numerous specific anti-avoidance provisions,[12] some of which are specifically targeted at international or cross-border transactions.

The general anti-avoidance provision is very long-standing, having been introduced in 1878[13] and extended to income tax in 1891.[14] As a result, there is a good deal of complex jurisprudence as to its scope and role.

In December 2008 the Supreme Court released its decisions in two important cases dealing with the application of the general anti-avoidance rules, *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[15] and *Glenharrow Holdings Ltd v Commissioner of Inland Revenue,*[16] which dealt respectively with income tax and goods and services tax (the New Zealand value added tax). The general anti-avoidance rules that apply to the two taxes are not materially different from one another.

These were the first decisions by the new Supreme Court on the vexed question of when proper tax planning crosses the line into impermissible tax avoidance. Although the Court found the taxpayers correctly applied the black letter law in each case, their arrangements were void on the grounds the taxpayers had not truly suffered the economic burden required under the particular provisions to warrant the considerable tax benefits obtained.[17]

Every case on a GAAR starts from the position that the taxpayer's transactions satisfy the black letter requirements of relevant tax legislation. If that were not so, any attempted avoidance would be ineffective and charging rules of relevant tax legislation would bite. That is, there is no need for revenue authorities to invoke an anti-avoidance rule if the taxpayer's transactions fail in their purpose of avoiding tax.

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had been interposed solely for the purposes of obtaining the benefits of the Switzerland-Denmark double tax convention.

11 Contained in section BG 1 of the *Income Tax Act 2007* (NZ), and it reads as follows:
'BG 1 (1) AVOIDANCE ARRANGEMENTS VOID
A tax avoidance arrangement is void as against the Commissioner for income tax purposes'.

12 Most of these are contained in Subpart GB of the *Income Tax Act 2007* (NZ), although the recharacterisation of certain transactions provided for in Part F of the *Income Tax Act 2007* (NZ) can also be viewed in a similar way. All references to sections, unless otherwise stated, refer to sections in *the Income Tax Act 2007* (NZ).

13 Section 62 of the *Land Tax Act 1878* (NZ).

14 Section 40 of the *Land and Income Tax Assessment Act 1891* (NZ).

15 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 (SC).

16 *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 539 (SC).

17 Ibid 52 per Blanchard J and above n 15, 142 per Tipping and McGrath JJ.

A corollary of this consideration is that all GAAR cases require the court to consider the relationship between relevant charging provisions or exempting provisions on one hand, and a GAAR on the other hand. In principle, this exercise is a question of statutory construction. Modern courts ordinarily regard it as a question of purposive construction. There are two themes in particular in the Ben Nevis court's contribution to this jurisprudence: the tandem approach and the Parliamentary contemplation approach.

The tandem approach purports to treat charging provisions and the GAAR as of equal force, or of potentially equal force. That is, rather than treating the GAAR as a deus ex machina that descends from above and overrides a specific charging or exempting provision, the court should attempt to reconcile the provisions, though recognizing that one or the other must prevail. The majority[18] put it this way:[19]

> We consider Parliament's overall purpose is best served by construing specific tax provisions and the general anti-avoidance provision so as to give appropriate effect to each. They are meant to work in tandem. Each provides a context which assists in determining the meaning and, in particular, the scope of the other. Neither should be regarded as overriding. Rather they work together. The presence in the New Zealand legislation of a general anti-avoidance provision suggests that our Parliament meant it to be the principal vehicle by means of which tax avoidance is addressed.

The art of statutory interpretation and the canons and presumptions that it employs underwent considerable development during the 20th Century. Interpretation was formerly based on a number of rules and principles: less precise and more free-flowing in practice than they appeared in principle, but nevertheless generally formalistic in approach. One began with the literal rule, moved to the golden rule, and thence to the mischief rule. Progressively, there was increasing focus on the purpose of Parliament, but even then the processes of reasoning that were acceptable to the courts followed certain conventions. For instance, there was limited reference to extra-statutory materials. By 2001, Lord Hoffman could say:[20]

> There is ultimately only one principle of construction, namely to ascertain what Parliament meant by using the language of the statute. All other 'principles of construction' can be no more than guides which past judges have put forward, some more helpful or insightful than others.

Nevertheless, rarely, if ever, did a court faced with, say, a tax arrangement where the effect was to generate tax losses that were not economic losses, cut to the chase and

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18 Tipping, McGrath, and Gault JJ.

19 Above n 15, 103.

20 *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* (2001) 73 TC 1; [2001] 2 WLR 377 [29] (HL).

conclude with words to the effect of, 'Whatever Parliament intended they cannot have contemplated this result and would not have done so had they turned their minds to it'. A notable development in the *Ben Nevis* case is that the learned judges did indeed proceed some distance down this road and asked themselves what Parliament might have contemplated. Their Honours said:[21]

> When, as here, a case involves reliance by the taxpayer on specific provisions, the first inquiry concerns the application of those provisions. The taxpayer must satisfy the Court [c23, 212] that the use made of the specific provision is within its intended scope. If that is shown, a further question arises based on the taxpayer's use of the specific provision viewed in the light of the arrangement as a whole. If, when viewed in that light, it is apparent that the taxpayer has used the specific provision, and thereby altered the incidence of income tax, in a way which cannot have been within the contemplation and purpose of Parliament when it enacted the provision, the arrangement will be a tax avoidance arrangement. For example the licence premium was payable for a 'right to use land', according to the ordinary meaning of those words, which of course includes their purpose. But because of additional features, to which we will come, associated primarily with the method and timing of payment, it represented and was part of a tax avoidance arrangement.
>
> …. A classic indicator of a use that is outside Parliamentary contemplation is the structuring of an arrangement so that the taxpayer gains the benefit of the specific provision in an artificial or contrived way. It is not within Parliament's purpose for specific provisions to be used in that manner.

The Supreme Court provides guidance on features which illustrate the abuse of a specific provision and consequently to which the general anti-avoidance provision should apply.[22] There is also a continued development of the concept of commercial reality and economic burden, clearly articulating that in order to sustain deductions for income tax or claims for input tax for GST, the taxpayer must establish the payments were made in a commercially and economically realistic way.[23]

In summary, in addition to meeting the requirements of 'black letter' legislation, a taxpayer will need to ensure that the use of the provisions is within Parliament's contemplation. Otherwise the Commissioner will be empowered under the general anti-avoidance rules to void the transaction for tax purposes.

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21 Above n 15, 107, 108.

22 These features include: (a) the manner the arrangement is carried out; (b) the role of the relevant parties and the association they may have with one another; (c) the economic and commercial effects of documents and transactions;
(d) the duration of the arrangement; (e) the nature and extent of financial and fiscal consequences, see above n 15, 108.

23 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23,188, 109.

THE GAAR APPLIES TO INTERNATIONAL TRANSACTIONS

The New Zealand general anti-avoidance provision[24] applies to avoid tax avoidance arrangements for 'income tax purposes'. It is clear that arrangements that affect income tax charged under the New Zealand Income Tax Act are potentially subject to being avoided by the Commissioner even in circumstances where the New Zealand income tax consequences arise from a cross-border or international transaction.[25]

THE RELATIONSHIP BETWEEN GAARS AND TAX TREATIES GENERALLY

How domestic anti-avoidance rules interact with and complement treaties:

Two views regarding the application of judicial and statutory general anti-avoidance rules

Brian Arnold, writing in respect of the 2003 revisions to the Commentary on the OECD model,[26] identified the two views on the relationship between anti-avoidance rules and double tax agreements. He described them as the 'factual approach' and the 'interpretive approach'. Under the factual approach, domestic anti-avoidance rules will establish the facts to which both the provisions of the domestic tax law and the rules in the relevant treaty are applied.

An example may demonstrate the approach. Take a case of dividend stripping, similar to the circumstances that occurred in the Canadian case RMM Canadian Enterprises Inc,[27] where an overseas parent company may decide to sell its New Zealand subsidiary (which had only cash in its balance sheet) in order to crystallise a gain, rather than receiving a dividend that would be subject to non-resident withholding tax (of say 15% under a treaty limitation contained in a dividend article). New Zealand has no general capital gains tax, and such disposition (in this case of company shares) is ordinarily free of income tax provided the share is held on capital account.

The factual approach looks to determine the facts to which the domestic law or of the treaty applies after the dividend is determined using the domestic law, including anti-avoidance provisions. Consequently, the application of the New Zealand dividend stripping rules,[28] will, under this approach, results in both the New Zealand domestic

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24 Above, n 11 for the wording of section BG 1.

25 Leaving aside the interrelationship of New Zealand's GAAR to tax treaties, it is clear from section BB 3(1), that section BG 1 is to have an overriding effect to enable the Commissioner to counteract a tax advantage from a 'tax avoidance arrangement' (defined in section YA 1).

26 Arnold, above n 5.

27 *RMM Canadian Enterprises Inc. v R.* 97 DTC 302.

28 Contained in section GB 1 (1) which states: *'This section applies when-*

law treating the sale as a dividend, and the treaty being applied similarly. Under this analysis New Zealand would be limited in its attempt to tax the 'dividend' at a higher rate than 15%.

The following paragraphs attempt to reconcile this factual (and 'interpretive') approach to the options provided in the Commentary in respect of Article 1 of the OECD Model. Paragraph 9.1 asks two fundamental questions:[29]

> -Whether the benefits of tax conventions must be granted when transactions that constitute an abuse of the provisions of these conventions are entered into; and
>
> -Whether specific provisions and jurisprudential rules of the domestic law of a Contracting State that are intended to prevent tax abuse conflict with tax conventions.

Paragraph 9.2 goes on to note that the answer to the first question above is based on the answer to the second question. If the answer to the second question is yes, there is the possibility of conflict. However the *Commentary* notes that as a general rule there will be no conflict between the domestic rules and the treaty because the domestic tax laws will determine the facts that will give rise to a tax liability.[30]

A country that applies the factual approach therefore has the possibility of conflict between domestic anti-avoidance provisions and a treaty, but in practice, because the domestic law will ordinarily determine the facts giving rise to tax liability (or recharacterise the transaction), no such conflict will usually occur.

In contrast, countries that apply the 'interpretive' approach will, as set out in paragraph 9.3 of the *Commentary*, view the abuses as being abuses of the convention itself, as opposed to an abuse of domestic law. These states will consider that a proper construction of tax conventions allows them to disregard abusive transactions.

The interpretive approach takes the view that tax legislation, in its domestic and treaty form, will not be interpreted to apply to transactions that lack economic substance or a bone fide business purpose. No recharacterisation takes place but the statute simply does not apply to the transactions as they were carried out. Arnold describes this as a court substituting another transaction for the abusive transaction, in order to

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(a) the person disposes of shares in a company in an income year; and
(b) the disposal is part of a tax avoidance arrangement; and
(c) some or all of the consideration that the person derives from the disposal is in substitution for a dividend in income year.'

29 OECD Model Tax Convention, *Commentary* on Article 1.

30 See para 22 of the *Commentary.*

determine the tax consequences, or at least assuming that no transaction occurred.[31] Consequently, he says:[32]

> The same interpretive approach would apply to both treaties and domestic law and, as a result, tax treaties would not prevent the application of domestic anti-avoidance rules.

Arnold notes:[33]

> For countries following this approach, only the first issue mentioned in paragraph 9.1, i.e. the proper interpretation of tax treaties to deny treaty benefits with respect to abuse of transactions, would be relevant.

The dividend stripping transaction referred to above would be viewed as abusive of domestic law, and because the New Zealand statute would apply only to transactions with economic substance or a bona fide commercial purpose, neither the domestic law nor the treaty would regard the dividend stripping transaction as a sale or the alienation of personal property. Instead both the treaty and the domestic law would be interpreted in a way which removed the positive tax effect of the sale, and the court would substitute another transaction, presumably that of the dividend, for the sale.

Contracting States do not have to grant the benefits of a double tax convention under either approach where agreements that constitute abuses of the provisions of the convention have been entered into.[34]

Which approach does New Zealand take?

In the absence of any New Zealand case that has specifically addressed the interaction between the general anti-avoidance rule and double tax agreements, it is the writers' view that New Zealand would follow the factual approach for the following three reasons.

First, the overriding nature of double tax agreements in New Zealand legislation strongly suggests that there may be times when a different 'interpretive' approach would apply to a double tax agreement from that applied to domestic law. This will be the case when, for instance, a definition in the treaty clearly indicates the particular treatment of a particular tax outcome which is at variance to domestic law. In other words New Zealand will answer yes to the second question in paragraph 9.1 of the *Commentary* to Article 1.

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31 Arnold, above n 5, footnote 39.

32 Ibid 251.

33 Ibid.

34 Paragraph 9.4, see FN29.

Secondly, the New Zealand courts have a clear history of paying significant regard to the *Commentary* of the OECD model. The discussion in the *Commentary* on Article 1 is fundamentally based upon a factual approach.[35]

Lastly, when looking at the application of the general anti-avoidance rule under domestic legislation, the Commissioner, having identified an 'arrangement' that constitutes a 'tax avoidance arrangement',[36] has a power of reconstruction under section GA 1 of the Income Tax Act 2007, under which the amount of income, deductions and losses 'included in calculating the taxable income of any person affected by that arrangement' may be adjusted so as 'to counteract any tax advantage obtained by that person from or under that arrangement'. This power of reconstruction in domestic law is quite broad and would clearly contemplate a recharacterisation to the effect that, for instance, the sale of shares would be regarded as a dividend.

The New Zealand statute

Part B constitutes the core provisions of the New Zealand Income Tax Act. Section BA 1(d) provides that the purposes of the Part are 'generally to set up the scheme of the Act and the main links between its Parts'.

Section BB 3 provides that the subparts BG (tax avoidance arrangements) and BH (double tax agreements) have an overriding effect in respect of any other matters in the Income Tax Act. A problem exists in section BB 3 in that the Act does not go further to explain the relationship between subparts BG and BH. The two subparts may well override the rest of the Act but which is to be given primacy against the other?

Further legislative guidance to that question is provided under the heading 'Overriding Effect', in section BH 1(4), which states;

> **Despite anything in this Act**, except subsection (5), or in any other Inland Revenue Act or the Official Information Act 1982 or the Privacy Act 1993, a double tax agreement has effect in relation to-
>
> (a) income tax:
>
> (b) any other tax imposed by this Act:
>
> (c) the exchange of information that relates to a tax, ... [37]

[35] Arnold, above n 5.

[36] See the analysis of the Supreme Court above n 15, 160-162.

[37] Emphasis added.

The authors of this article differ as to the extent to which New Zealand double taxation agreements override section BG 1 of the Income Tax Act, New Zealand's general anti-avoidance rule. Section BH 1(4)(a) is crucial in this context. It provides that a double tax agreement 'has effect in relation to–(a) income tax'. Section BH 1(4)(a) is the starting point of analysis that leads to the conclusion that New Zealand treaties override not only domestic charging legislation, but also in some limited cases the general anti-avoidance rule. A literal reading of section BH 1(4)(a) suggests that if a taxpayer exploits a treaty in contriving a tax avoidance arrangement, that is an arrangement in the sense in which section BG 1 uses 'tax avoidance arrangement', then the treaty ousts section BG 1 and the taxpayer can take advantage of the arrangement. However this literal reading goes too far for the following reasons.

First, the override only arises in circumstances where the treaty prescribes a clear outcome and domestic law differs, and importantly, the treaty is not being used in an abusive manner.[38] This gives effect to possible Parliamentary intention that New Zealand would not wish to enshrine a domestic law treaty override which would be in breach of the public international law obligations it owes to treaty partners.

This will be rare as in most situations by taking a factual approach to reconstruction the treaty and the domestic law will be perfectly aligned.[39]In other words section BG 1 will be effective in the vast majority of cases where the treaty provisions simply adopt the factual reconstruction of the New Zealand Inland Revenue under domestic law.

Secondly, in the rare cases where the treaty and domestic law conflict, the treaty must be interpreted in a way that would not frustrate its object and purpose. The *Commentary* supports this view.[40] In interpreting the treaty to ensure the object and purpose of the relevant provisions are adhered to, the test is different under the treaty from domestic law. This is because the focus is upon 'whether a main purpose' for the transaction was to secure a more favourable tax treatment inconsistent with the object and purpose of the treaty provisions. The domestic test has a lower threshold being a 'more than merely incidental purpose' of tax avoidance. This difference could be important in situations where the treaty provisions conflict with domestic law.

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38 A hypothetical example is shown under the paragraphs with follow the heading: *Disputes where there is a conflict between the treaty and domestic law.*

39 See the paragraphs following the heading: *Disputes where there is no conflict between the treaty and domestic law*

40 Refer to the OECD Model Convention *Commentary* in respect of Article 1 (paragraph 9.5).

Comparing New Zealand law with the law in other Commonwealth countries reinforces this conclusion. The United Kingdom's rule[41] is in terms similar to New Zealand's, whereas Canada[42] and Australia[43] provide that their general anti-avoidance rules override treaties. A possible inference is that, having taken no steps comparable to those in Canada and Australia, the New Zealand Parliament is content to allow New Zealand taxpayers to use structures that employ the provisions of tax treaties to avoid New Zealand income tax.[44]

The opposite argument, that section BG 1 avoids tax avoidance arrangements that exploit treaties, has several foundations. The first is that New Zealand courts of construction nowadays consider whether in enacting a particular statutory rule Parliament can have contemplated that it would be legitimate for a taxpayer to use the provision in question to achieve the reduction in tax that the taxpayer argues for.[45] The argument is that Parliament cannot have intended section BH 1(4)(a) to oust the general anti-avoidance rule in any circumstance whatever. The second foundation is the familiar argument that tax treaties are diplomatic, substantive documents which are never intended to be interpreted in a strict fashion that leads to results contrary to the substantive intentions of their authors. The third reinforces the second, in that, through the Commentary, we know a great deal of what the intention of the authors

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41 Section 788(3) of the *Income and Corporation Taxes Act 1988* (UK) uses the locution 'notwithstanding anything in any enactment'. See generally, Philip Baker, *Double Tax Conventions* (2001) part F-7.

42 In Canada there was a retroactive change to the general anti-avoidance rule, introduced following the 2004 Federal Budget, s 245(4) of the Canadian *Income Tax Act*. See also the *Income Tax Conventions Interpretation Act*, RSC 1985, c I-4. And see also Patrick J McCay, *Canada: Treaty Shopping: An Update* (2009) McCarthy Tetrault LLP <http://www.mccarthy.ca/article_detail.aspx?id=4628>.

43 *International Tax Agreements Act 1953* (Cth), s 4(2), as amended in 1995.

44 The position in New Zealand may be similar to that in the UK which uses the words 'notwithstanding anything in any enactment' in s 788(3) of the *Income and Corporation Taxes Act 1988* (UK). See Philip Baker, *Double Tax Conventions* (2001) part F.07. This is in sharp contrast to the position of Australia, which enacted legislation in 1995 (amending s 4(2) of the *International Tax Agreements Act 1953*) to provide that its general anti-avoidance provisions take precedence over treaty provisions, and Canada where there was a retroactive change to the general anti-avoidance rule introduced following the 2004 Federal Budget (sub-s 245(4) of the Canadian *Income Tax Act 1985* and the *Income Tax Conventions Interpretation Act 1985* R.S.C. 1985, c. I-4. The effect of these amendments was to make it clear that the general anti-avoidance provision will override the double tax agreement (see Patrick J McCay, *Canada: Treaty Shopping: An Update* (2009) McCarthy Tetrault LLP <http://www.mccarthy.ca/article_detail.aspx?id=4628>).

45 Above, n 15; *BNZ Investments Ltd v Commissioner of Inland Revenue* to be reported in (2009) 24 NZTC (Wild J).

was. The most significant of these intentions is spelled out in the Commentary: taxpayers should not be enabled to use treaties improperly to obtain favourable tax treatment that is contrary to the object and purpose of relevant provisions of the treaty.[46] In view of this expressed purpose, it would be curious if taxpayers could use treaties to override a general anti-avoidance rule, the purpose of which is precisely the same, viz, to prevent taxpayers from exploiting literal rules of tax legislation to obtain unintended benefits.

Fourthly, bearing in mind that New Zealand courts now appear to be disposed to grant considerable scope to the general anti-avoidance rule, we reach this result whichever of the factual and 'interpretive' approaches New Zealand follows. The factual approach leads a New Zealand court to recharacterise facts according to their economic substance, by means of sections BG 1 and GB 1, so that when the facts of a case are, as it were, presented to a double tax agreement, the agreement applies on the basis of substantive, economic facts, not of legal form. The 'interpretive' approach gives full weight to the terms of the Commentary.

New Zealand courts have several times considered the relationship between treaties and domestic law and that between the Commentary and domestic law, but never from a perspective that enables the writers to be certain whether treaties in fact oust section BG 1. The Court of Appeal addressed the former relationship in Commissioner of Inland Revenue v ER Squibb and Sons (NZ) Ltd,[47] which considered whether information exchanged under the Australian/New Zealand double tax agreement could remain secret from the taxpayer, or whether it was in the public interest to require that the identity of both an informant and other taxpayers should be disclosed to litigant taxpayers.

The Commissioner was successful in his application to strike out the plaintiff's statement of claim, which was based on alleged rights of the taxpayer in pre-trial discovery to inspect material taken into account by the Commissioner in making assessments of income tax. The Court of Appeal held there was no justification in the language, scheme, and purpose of the double taxation agreement[48] for diluting the confidentiality obligations under Article 20 (2). To do so would contravene the understanding reached with the Commonwealth of Australia and would be contrary to the well grounded express objection of the Australian Tax Office.

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46 OECD Model Convention *Commentary* (paragraph 9.5).

47 (1992) 14 NZTC 9,146.

48 *The Double Taxation Relief (Australia) Order 1972*.

Richardson J delivered the majority judgement of the full Court of Appeal. The relationship between the domestic law and the double tax agreement was clear in the view of the majority: [49]

> Double tax agreements embodied in Orders in Council have effect in relation to income taxes notwithstanding anything in the Income Tax Act or any other enactment (sec 294). In short, wherever and to the extent that there is any difference between the domestic legislation and the double tax agreement provision, the agreement has overriding effect.

This issue has more recently been considered by the High Court in *Avowal Administrative Attorneys Ltd & Ors v District Court at North Shore & Anor*.[50] Baragwanath J held that he had no choice but to follow the approach laid out by Richardson J in the *Squibb* decision. It had been argued that there had been a major shift in the courts' attitudes to discovery against the Crown.[51] Even if on appeal, these issues are to be given more emphasis, and the taxpayer's request upheld, it will be, in the writers' view, a balancing of these public interest matters rather than an overruling of the statutory priority set out in the quotation immediately above.

New Zealand's approach to the interpretation of treaties and the use of the OECD Model Commentary

The interpretation of double tax conventions in New Zealand was considered in the Court of Appeal decision in the *Commissioner of Inland Revenue v United Dominions Trust Ltd*.[52] In the course of the decision, the President of the Court of Appeal, McCarthy P, discussed the interrelationship between the principles to be applied in an interpretation of international agreements and the position under New Zealand domestic law. He concluded that having regard to the provisions of the Acts Interpretation Act 1924;[53]

> Counsel were in concert that New Zealand Courts should take this broad approach and that this was really not in any material sense different from that enjoined on us, when interpreting domestic law, by the provisions of the Acts Interpretation Act 1924. So I shall proceed from that agreed starting point: we are not to adopt a narrow interpretation but to interpret having regard to the broad intentions of the framers as they emerge from the text.[54]

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49 Above, n 46, 9148, the reference to s 294 is to the *Income Tax Act 1976* (NZ), the predecessor provision to section BH 1 (4).

50 *Avowal Administrative Attorneys Ltd v District Court at North Shore (No 2)* (2007) 23 NZTC 21, 616.

51 Ibid 30.

52 *Commissioner of Inland Revenue v United Dominions Trust Ltd* (1973) 1 NZTC 61,028.

53 Now the *Interpretation Act 1999* (NZ).

54 Above n 51, 61,031 per McCarthy P.

The New Zealand Courts will therefore construe the language in a double tax convention upon 'broad principles of general acceptation'.[55] As the Court of Appeal recognised in the *United Dominions Trust* case, this approach is consistent with the rules of public international law on interpretation of treaties and specifically with the Vienna Convention on the Law of Treaties.[56]

This connection between the domestic New Zealand position and the Vienna Convention was drawn in the Court of Appeal decision *Commissioner of Inland Revenue v JFP Energy Inc*.[57] In this decision the Court of Appeal was asked to consider the meaning of the words 'borne by a permanent establishment' in the context of Article 15 of the New Zealand/United States Double Taxation Relief Order 1983. Richardson J noted that a double tax convention uses part of a network of international agreements and international language, and that its purpose is to promote the exchange of goods and services and the movement of capital and persons in international trade by eliminating double taxation. He referred to the *United Dominions Trust* case,[58] and the High Court of Australia decision in *Thiel v FC of T*,[59] and the earlier English decisions *Stag Line Ltd v Foscolo, Mango and Co Ltd*[60] and *Fothergill v Monarch Airlines*,[61] as authority for the proposition that OECD Convention rules have an international currency and should be construed on broad principles of general acceptation, having appropriate regard to the *Commentary* and any *travaux preparatoires*.[62]

He went on to conclude:[63]

> But it is not necessary to go any further into international interpretation questions because it was not suggested that in this case the standard New Zealand interpretation approach to such questions would differ in any essentials from an approach grounded in Articles 31 and 32 of the Vienna Convention on treaties.

In his Honour's view, the emphasis on considering words in their context, as required under Article 3, paragraph 3 of the New Zealand/United States Double tax convention[64] '... goes without saying under New Zealand law ...'

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55 Ibid.

56 To which New Zealand is a signatory (signed 29 April 1970 with effect from 4 August 1971).

57 *Commissioner of Inland Revenue v JFP Energy Inc (CA)* (1990) 12 NZTC 7,176.

58 Above n 57, 179.

59 *Thiel v FC of T* 90 ATC 4717.

60 *Stag line Ltd v Foscolo, Mango and Co Ltd* [1932] AC 328.

61 *Fothergill v Monarch Airlines* [1981] AC 251.

62 The preparatory or 'working papers' created in negotiating the particular convention.

63 Above n 57, 179, per Richardson J.

64 Article 3 (3) of the New Zealand/United States DTC provides:

> As regards the application of the Convention by a Contracting State to any term not defined therein shall, unless the context otherwise requires and subject to the

This approach was not complicated by the need to consider any special meaning attaching to particular terms under New Zealand tax law and accordingly he cited with approval the observations of the Chief Justice (Eichelbaum CJ) in the High Court:[65]

> The starting point then is the ordinary meaning of the expression 'borne by' in the context, having regard to the 'broad intentions' of the framers as they emerged from the text.

Reliance upon the Vienna Convention and the use of the OECD Commentaries

The approach of the New Zealand courts is not materially different from the principles established in Articles 31 and 32 of the Vienna Convention. As noted above in the *JFP Energy* case, Richardson J[66] also expressly referred to the High Court of Australia decision in *Thiel v FC of T*.[67]

In the *Thiel* decision the High Court was confronted with how to interpret the word 'enterprise', which, like the concept of beneficial owner, is not expressly defined in the OECD model convention. Although Dawson J referred to the problems as a matter of interpretation in reconciling the use of the Commentaries to the language prescribed in Articles 31 and 32,[68] he turned to Article 32 to authorise the use of the model convention and *Commentaries* as a 'supplementary means of interpretation':[69]

> I turned, therefore, to Art. 32 of the Vienna convention which allows recourse to be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

This was also the approach McHugh J[70] which was supported and endorsed by the majority judgment of Mason CJ and Brennan and Gaudron JJ.[71]

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provisions of Article 24 (Mutual Agreement Procedure), that the meaning which it has under the law of that State concerning the taxes to which the Convention applies.

65 *Commissioner of Inland Revenue v JFP Energy Inc (HC)* (1989) 11 NZ TC 6, 282.

66 Above n 57,180.

67 Above n 59.

68 He refers to the article John F Avery Jones et al, 'The Interpretation of Tax Treaties With Particular Reference to Article 3 (2) of the OECD Model-II' (1984) *British Tax Review* 90, 92, and this topic is also discussed in some length in the text by Philip Baker, *Double Tax Conventions* (2001) part E-12.

69 Above n 59, 4723.

70 Above n 59, 4727.

71 Above n 59, 4720.

The approach to the interpretation of double tax conventions in New Zealand is therefore based on a broad interpretation, consistent with the terms of the Vienna Convention, and the ordinary meaning of words as they emerge from the text.[72]

With this prelude we now analyse the New Zealand position. Two distinct cases arise.

Disputes where there is no conflict between the treaty and domestic law

In New Zealand it is likely, in the vast majority of disputes, that there will be no conflict between the treaty and the domestic law outcomes. This is consistent with the observation in paragraph 9.2 of the Commentary to Article 1.[73] Return to the dividend stripping case referred to earlier and assume that the parent company was an Australian company, and analyse the Australian/New Zealand double tax agreement of 2009.[74] New Zealand revenue authorities decide that the transaction is subject to the general anti-avoidance rule and assess the sale proceeds as a dividend under section GB 1 (3).[75]

Under the domestic law of New Zealand, which includes this anti-avoidance provision, a dividend is deemed to be derived by the Australian parent and will be subject to New Zealand non-resident withholding tax unless relief is available under the double tax agreement.[76] Article 10 of the Australian/New Zealand double tax

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[72] There is debate as to whether reference should be made to the latest *Commentary* when the treaty is concluded prior to the adoption of the latest version. This is particularly relevant in the case of the amendments made in Article 1 in 2003. In his book *Double Tax Conventions*, Philip Baker notes at part E-16 that generally academic writers are of the view the reference to later *Commentaries* are not possible, but the courts have been willing to refer to later *Commentaries*, and indeed, the instruction from the Committee for Fiscal Affairs instructs the reader of the *Commentary* to do exactly that.

[73] And paragraph 22.1 of the *Commentary* to Article 1 which states:

> 'Thus, as a general rule and having regard to paragraph 9.5, there will be no conflict. For example, the extent that the application of the rules referred to in paragraph 22 results in a recharacterisation of income or in a redetermination of the taxpayer who is considered to derives such income, the provisions of the Convention will be applied taking into account these changes.'

[74] *The Australian and New Zealand Double Taxation Convention 2009*, open for signature 29 June 2009 (not yet in force when this article went to press).

[75] Section GB 1 (3) reads as follows: 'The amount derived in substitution for a dividend is treated as a dividend derived by the person in the income year in which the disposal occurs'.

[76] Section RF 8 provides that such a dividend would be subject to non-resident withholding tax of 30% unless the dividend is fully imputed. In such circumstances (recharacterisation) it is unlikely that the dividend would be fully imputed (the process of attaching tax credits to a dividend which can be utilised as a tax credit against shareholder tax liabilities).

agreement has a limited definition of the term 'dividends' in Article 10 (5). This definition is as follows:

> The term 'dividends' as used in this Article means income from shares or other rights participating in profits, as well as other amounts which are subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident for the purposes of its tax.

The force of this definition is very similar to the meaning reached by relying on Article 3 (3), namely the standard 'interpretive' default to the meaning in the domestic laws of the Contracting State for any term that is not defined in the double tax agreement.[77] In the case of New Zealand's domestic laws, the term dividend will include payments made under various hybrid instruments, such as certain instruments that are in form debentures but that are in substance more akin to shares,[78] distributions from unit trusts, and importantly, payments from dividend stripping transactions recharacterised by the application of section GB 1. In applying section GB 1, the Commissioner needs to consider whether the disposal is part of a 'tax avoidance arrangement', defined[79] to mean an arrangement which; directly or indirectly, has tax avoidance as its purpose or effect, or, has tax avoidance as one of its purposes or effects, if the tax avoidance purpose or effect is not merely incidental.[80]

As New Zealand would therefore regard section GB 1 as reclassifying the transaction using the factual approach, with the result that the proceeds of the sale are viewed as a dividend, then Article 10(5) will ensure that the other provisions of Article 10 will

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77 Article 3 (3) of the agreement reads: 'as regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the laws of that State concerning the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over meaning given to the term under the laws of that State.' It is noted that many terms are not defined in the treaty and that the application of the equivalent to Article 3(3) will be a very common outcome in treaty interpretation, as was the outcome in the *JFP Energy case* and *Thiel's case* (see above n 57 and 59 respectively).

78 Section FA 2 debentures.

79 By section YA 1.

80 It is not intended, for the purposes of this report, to go into any detail on the meaning of 'merely incidental' tax avoidance purposes. There is little guidance on this term in the recent Supreme Court decision of *Ben Nevis* (see above n 15, ¶114) and one must return to earlier cases to get definitive statements as to its meaning. It is perhaps sufficient to refer to the often cited minority judgement of the President of the Court of Appeal in the decision in *Commissioner of Inland Revenue v Challenge Corporation Limited* (1986) 8 NZTC 5,001 where Woodhouse P said; 'As a matter of construction I think the phrase "merely incidental purpose or effect" in the context of sec 99 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.'

also be invoked. This being the case, assuming that the Australian parent company owns 80 per cent or more of the voting power of the New Zealand subsidiary, then this company may look to Article 10 (3) for the conclusion that New Zealand is not entitled to tax the dividend. The Australian parent company could be surprised to find that Article 10 may not provide the expected treaty protection, but in the writers' view the denial of the relief provided for in Article 10 (9) is aimed at transactions that have the main purpose of structuring an entity or dividend flow to take advantage of the Article, which is not the case here.[81]

In this situation, the intended outcome under both domestic law and under the treaty is that a dividend is deemed to be paid to the Australian parent company. Where the ownership of the New Zealand subsidiary is equal to or greater than 80 per cent, and there have been none of the features present in the transaction to which paragraph 9 of Article 10 applies, then it appears the treaty relieves the dividend from taxation in New Zealand.

Disputes where there is a conflict between the treaty and domestic law

Take the same example of an Australian parent company owning shares in a cashed up New Zealand subsidiary, the sale of those shares taking place, and the subsequent application by the Commissioner of Inland Revenue of section GB 1, so that from a domestic law perspective the sale proceeds are recharacterised as dividends. In the Australian/New Zealand double tax agreement, Article 13 (5) reads:

> Gains of a capital nature from the alienation of any property, other than that referred to in the preceding paragraphs, should be taxable only in the Contracting State of which the alienator is a resident.

In this situation, 'gains of a capital nature', and 'alienation' are not defined terms, whereas 'dividends' is defined in Article 10. The consequence is that receipts from dividend stripping transactions are likely to be regarded as a dividend under Article 10, rather than as an alienation to which Article 13 would apply. Consider however, the position if (hypothetically) Article 13 (5) read in addition to the above:

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[81] However, Article 10 (3) (c) may be the only appropriate qualifying provision (if the Australian parent is not listed on the Australian Stock Exchange or the Austrian parent is not owned by such a listed company or another listed company resident in a state which has a similar tax treaty provision to Article 10 (3)). If this would be the case then it is possible that New Zealand may conclude that no relief should be available under the dividend article (Article 10 (3) (c)) in accordance with Article 10 (9), but the requirements of paragraph 9 seem to focus on the assignment dividends, creation of new shares, or the insertion of a conduit company none of which are taking place here.

> For the avoidance of doubt, 'alienation' includes the sale of personal property including shares in a company. This Article is intended to have precedence over Article 10.

In such a situation it would be clear that the treaty would be in conflict with the domestic law, and that, given the overriding manner in which a treaty should be interpreted, the Commissioner of Inland Revenue could not successfully assert that the sale of shares by the Australian parent company should be recharacterised as a dividend.

This outcome comes about from a statutory priority given to the treaty under section BH 1 (4), referred to above. Although the *Commentary*[82] correctly states that as a general rule there will be no conflict between domestic avoidance rules and provisions of tax conventions, there will be possible situations where there is a clear intended outcome under the treaty that conflicts with the anti-avoidance provisions.[83]

ABUSE OF THE TAX TREATY ITSELF: DOMESTIC LAW PRINCIPLES OR INTERPRETATION OF THE TREATY?

Disputes where there is an abuse of the treaty

The situation is a little more complicated where the treaty results in a different outcome from that contemplated under the domestic anti-avoidance rules but the taxpayer's transaction takes advantage of, or abuses, the treaty. Take an example similar to that used above. A New Zealand resident individual holds 100% of the shares of a New Zealand resident company. The New Zealand company is fully cashed up but has lost any available imputation credits through a change in continuity.[84] In order to extract the profits only two options are immediately available, namely the payment of a dividend that will be fully taxed in the hands of the individual (without any imputation credits being available to reduce the shareholder's tax liability), or the sale of the shares of the company, to which section GB 1 could be applied by the New Zealand Inland Revenue (which would have the same tax result).

Assume that the New Zealand resident individual is aware of a country that does not tax its resident individuals on the receipt of foreign dividends under its domestic law. New Zealand has a double tax agreement with that country. The New Zealand resident individual decides to become a resident of that country, receive the dividend

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82 See para 9.2 of the *Commentary* to Article 1.

83 It is noted that in this situation there does not appear to be an abuse of the provisions of the convention and so the principle which is referred to in paragraph 9.5 is not applicable.

84 Under the New Zealand *Income Tax Act* there is a requirement that imputation credits will only be retained by the company in circumstances where there is a continuity of shareholding interests greater than or equal to 66% (section 0A 8 and section OB 41).

paid by the New Zealand company, and then eventually return to New Zealand. Assume also that this individual becomes a resident of a country that has a treaty similar to the recent Australian New Zealand double tax agreement signed in 2009.

Under the double tax agreement, the individual will become a resident of the other Contracting State. The dividend, when it is paid, will be received by a resident of that other contracting state and since the individual owns 80% or more of the voting power of the company he or she would seek to apply Article 10 (3) in order to reduce the New Zealand withholding tax to zero. It is difficult to see that paragraph 9[85] of Article 10 would apply as none of the types of transactions contemplated in paragraph 9 are occurring in this situation because the ownership of the shares continues in the hands of the individual.

Even though the provisions of the treaty have been complied with, the Commentary acknowledges that States do not have to grant the benefits of a Double Tax Convention where arrangements that constitute an abuse of the provisions of the convention had been entered into. The Commentary to Article 1 has as its subheading 'Improper use of the Convention'. Paragraph 9.5 goes on to spell out the test as follows:[86]

> A guiding principle was that the benefits of a double taxation conventions should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in the circumstances would be contrary to the object and purpose of the relevant provisions.

In the New Zealand context there are several points to be made. First, based on previous case law,[87] New Zealand courts are likely to refer to and be influenced by the *Commentary* on Article 1.[88] Consequently, there would be some abusive arrangements

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85 The full text of Article 10 (9) of the New Zealand/Australia double tax agreement:

> 9. No relief should be available under this Article if it is the main purpose or one of the main purposes of any person concerned with an assignment of the dividends, or with the creation or assignment of the shares or other rights in respect of which the dividend is paid, or the establishment, acquisition or maintenance of the company that is the beneficial owner of the dividends in the conduct of its operations, to take advantage of this Article. In any case where a Contracting State intends to apply this paragraph, the competent authority of that State shall consult with the competent authority of the other Contracting State.

86 Para 9.5 of the *Commentary* to Article 1.

87 See the description of the approach of the New Zealand courts in the paragraph above entitled '*New Zealand's approach to the interpretation of treaties and the use of the OECD Model Commentary*'.

88 It is noted that New Zealand does not have an observation or reservation expressed in respect of the *Commentary* on Article 1.

where a New Zealand court would decide that the favourable treatment pursued by the taxpayer would be contrary to the object and purpose of the relevant treaty provisions.

Notwithstanding the basic principle of international law of *pacta sunt servanda,*[89] which is based on good faith, it is the writers' view that in a New Zealand court the *Commentary* in paragraph 9.5 would be followed in situations where an abuse would frustrate the object and purpose of the treaty.

Secondly, paragraph 9.5 is prefaced with a caveat. This is the request that it should not be 'lightly assumed' that the taxpayer is entering into abusive transactions. Arnold indicates that the test in paragraph 9.5 'may be tantamount to establishing a treaty anti-avoidance rule'.[90]

This is therefore a request for tax administrators and the courts to exercise caution and prudence before exercising their powers to categorise a transaction as being abusive of the object and purpose of the treaty. This establishes some balance towards taxpayers' legitimate tax planning and gives a little more certainty to the way in which they can interpret expected tax outcomes.

Thirdly, the test is one that requires:

- that 'a main purpose' was to secure a more favourable tax position, and
- obtaining that more favourable tax position will be contrary to the object and purpose of the relevant provisions.

The test of 'a main purpose' is of course different from the general anti-avoidance tests provided for in section BG 1. The domestic law test has a lower threshold, so that if tax avoidance is one of the purpose or effects of a transaction it can be voided, if the tax avoidance purpose or effect present is not merely incidental.[91] It is thus possible to have a situation where the test under the domestic anti-avoidance provisions would be met, but where the threshold under the treaty *Commentary* at paragraph 9.5 is not reached.

Examination of whether the favourable tax position is contrary to the object and purpose of the relevant provisions will involve consideration of the reasons for those provisions and whether the transaction frustrates or abuses the treaty.

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89 Latin for 'agreements must be kept', *Black's Law Dictionary* (8th ed, 2004).

90 Ibid.

91 Above n 79.

CONCLUSION

In the authors' view there is no doubt that the GAAR applies to transactions involving New Zealand's double taxation agreements.

One author argues that section BH 1 (4) (a) gives effect to a Parliamentary intention to preserve its public international law obligations in circumstances of clear conflict not involving an abuse of the treaty. If the GAAR is intended to override treaties then let Parliament say so, like the Australian and Canadian legislatures have done.

The other author argues that the application of the GAAR is completely unfettered. Parliament cannot have intended section BH 1(4)(a) to oust the general anti-avoidance rule in any circumstance whatsoever.

In summary, both authors agree, under the factual approach to interpretation, that the general anti-avoidance provisions will recharacterise the transaction in circumstances where there is no conflict with a double tax agreement. In such a situation the domestic anti-avoidance test, which extends to whether the tax avoidance purpose or effect is more than merely incidental, will be applied.

However, in circumstances where there is conflict between the treaty and domestic law, the first author argues that the treaty will prevail, unless the transaction is an abusive one, in which case the test under the *Commentary* will be whether 'a main purpose' is to obtain a favourable tax position that is contrary to the object and purpose of the relevant provisions.[92]

[92] The first author acknowledges that such a conflict will arise infrequently. But it may still arise.