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GST Tax Avoidance: A New Zealand Perspective on the Application of Div 165

Mark Keating

Abstract

The GST regime has now been operating in Australia for a decade.[1] During that period there has been only one reported case on GST tax avoidance. The absence of other cases indicates either the GST regime is working as intended, and there is no avoidance of GST, or the ingenuity of taxpayers seeking GST benefits has simply not been detected by ATO.

A New Tax System (Goods and Services Tax) Act 1999 ("GST Act") contains a number of measures to combat avoidance of GST. There are a range of specific anti-avoidance provisions to counter particular instances of tax avoidance. These specific rules are narrowly targeted provisions to prevent foreseeable instances where taxpayers may otherwise attempt to defeat the normal or expected operation of the relevant statute[2].

More importantly, Div 165 GST Act contains a broad-ranging general anti-avoidance provision ("GAAR") to prevent abuse of the GST regime.[3] Unlike the specific anti-avoidance rules, Div 165 is widely-worded with open-ended application. Such provisions[4] are designed to apply to the unanticipated and unforeseen behaviour by taxpayers that, although contrary to neither the substantive provisions of the Act nor any applicable specific anti-avoidance provisions, nevertheless breach the scheme and purpose of the relevant statute.

Despite the lack of case law, it can be presumed that tax avoidance is as much a part of the landscape of GST as it is for income tax. But while there have been many income tax avoidance cases litigated over the past decade, there is an understandable dearth of GST cases.

The Australian Administration Appeals Tribunal heard the sole GST avoidance case under Div 165 in 2006. Following the enactment of a GST regime in New Zealand in 1986, it took 15 years for the first case to be considered by the courts under s 76 *New Zealand Goods and Services Tax Act 1985* (NZGSTA). Those initial cases, involving fairly blatant schemes to obtain unwarranted tax benefits, were decided in favour of the Commissioners in both jurisdictions.

It was not until 2007 that New Zealand's Court of Appeal heard two GST avoidance cases, upholding the Commissioner's assessment of tax avoidance in both instances. The decision in one of those cases was subsequently appealed to New Zealand's newly formed Supreme Court,[5] which eventually upheld the assessment of tax avoidance.

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[1] GST is imposed under *A New Tax System (Goods and Services Tax) Act 1999*, which came into effect on 1 July 2000.

[2] Commonly specific anti-avoidance provisions stipulate taxpayers must act at market value on normal commercial terms in a timely manner. Examples are found throughout the GST Act, such as s 29-25 (timing for particular taxable supplies and creditable acquisitions), s 9-75 (value of supplies not expressed in money) and s 66-10 (purchases of second-hand goods) and s 72-70 (supplies between associated persons).

[3] Division 165 *A New Tax System (GST) Act 1999*.

[4] See Part IVA *Income Tax & Assessment Act 1937*. The equivalent provisions in New Zealand for income tax is s BG1 *Income Tax Act 2007* and for GST is s 76 *Goods & Services Tax Act 1985*.

[5] As a reflection of its British colonial history, from 1840 – 2005 New Zealand's highest court of appeal was the Privy Council in London. The right of appeal to the Privy Council was finally abandoned in

These New Zealand cases, involving very different schemes, are the first consideration of GST avoidance by higher courts in either jurisdiction.[6] Accordingly the reasoning of those decisions provides a useful guide to the potential application of Div 165 in Australia. The cases demonstrate that, like the equivalent GAARs for income tax, Courts are willing to apply anti-avoidance provisions wherever they believe taxpayers' conduct abuses the GST regime. The decisions give the anti-avoidance provisions teeth and provided the Commissioner in both countries with a strong weapon against abusive conduct by taxpayers.

This article examines the GST tax avoidance cases decided in both Australia and New Zealand. It compares them with the application of the income tax general anti-avoidance provisions. Finally the paper provides some guidance on when Div 165

for a general avoidance provision" and criticised the taxpayers' arguments as "sometimes coming close to maintaining that general anti-avoidance provisions have no role at all".

In the *Trinity* case, the taxpayers argued they were entitled to make commercial choices to take advantage of the tax benefits available, and the income tax GAAR should be interpreted as narrowly as possible to give taxpayers reasonable certainty in tax planning. In *Glenharrow* the taxpayer argued the GST GAAR ought not be permitted to interfere with a bargain honestly reached by arms-length parties, as to do so would create unwelcome uncertainty for taxpayers.

The New Zealand Supreme Court dismissed both arguments. The Court noted the wording used in the GAARs was deliberately imprecise and the judiciary should not create greater certainty than Parliament has chosen to provide. It reasoned a GAAR must remain deliberately vague because, no matter how carefully such a provision is drafted, the ingenuity of taxpayers cannot be predicted, making it impossible for Parliament to enact a more specifically-worded provision with the flexibility to anticipate future arrangements. Therefore the use of wide and imprecise language is required for a GAAR to regain the flexibility to be applied to novel arrangements.

With regard to the GST GAAR, in *Glenharrow* the Court explained:[20]

> "Uncertainty is inherent where transactions have artificial features combined with advantageous tax consequences not contemplated by the scheme and purpose of the Act. There will also inevitably be uncertainty whenever a taxing statute contains a general anti-avoidance provision intended to deal with and counteract such artificial arrangements. It is simply not possible to meet the objectives of a general anti-avoidance provision by the use, for example, of precise definitions".

With a notable lack of sympathy for taxpayers, the Court acknowledged that, while there may be difficult cases on the margins, generally an examination of the facts and the economic substance of each arrangement "will make it possible to decide on which side of the line a particular arrangement falls."[21]

Finally, for taxpayers seeking certainty, the Supreme Court recommended that they utilise the statutory Binding Ruling process[22] to test the Commissioner's view as to the tax effectiveness of their arrangements, prior to entering into them. That may be unwelcome advice to taxpayers who have experienced the increasing cost and extended delays typical of the Binding Ruling regimes in both Australia and New Zealand.[23] This somewhat harsh attitude was justified by a leading commentator:[24]

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[20] *Glenharrow Holdings Ltd v CIR* [2007] NZSC 116, at [48]

[21] *Ben Nevis Forestry Ventures Ltd & Ors v CIR* [2008] NZSC 115, at [112]

[22] A procedure contained in New Zealand's *Tax Administration Act* whereby taxpayers may apply to have a proposed transaction approved by the Commissioner. Once issued, the Ruling is binding upon the Commissioner. However, the process has been widely criticised for its delay and expense.

[23] See Div 359 Australian *Taxation Administration Act 1953* and Part V New Zealand *Tax Administration Act 1994*.

[24] "Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation", Prebble et al, *NZULR*, Vol 22, Dec 2006, at 281.

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

The result of this muscular interpretation of the GAAR is to deliberately create uncertainty for taxpayers so as to give them pause before embarking on possibly abusive tax arrangements. The uncertainty over the precise scope of the GAAR may therefore serve a second purpose of discouraging such abusive behaviour.

This approach contrasts with the requirements stipulated by the European Court of Justice in *Halifax plc v Commissioners of Custom and Excise*.[25] that "the requirement of legal certainty must be observed strictly in cases of rules liable to entail financial consequence, in order that those concerned may know precisely the extent of the obligations which they imposed on them."[26] As such it appears the wide Australasian application of GAARs would be contrary to the European Community Sixth Directive restricting the use of anti-avoidance powers in the UK VAT legislation.

2. STATUTORY TESTS FOR

This approach is mirrored in the New Zealand definition of "tax avoidance" that stipulates it can include arrangements involving "ordinary business or family dealings"[28] if the tax benefits of the scheme are more than merely incidental. As a result, it is apparent that both GAARs catch schemes regardless of any underlying commercial rationale. A tax-driven transaction may therefore constitute tax avoidance under the GAAR in both jurisdictions even if it also has a genuine business purpose.

Interestingly, this result clearly conflicts with the ECJ requirement that only arrangements with the sole purpose of obtaining tax advantages with no normal commercial operation may be struck down for VAT purposes.[29]

Div 165 requires four factors to be satisfied before the Commissioner can negate a tax avoidance scheme. These are:

1. One or more of the steps in the arrangement is a "scheme",[30]
2. A "GST benefit"[31] arises under the scheme,
3. An entity gets a benefit from the scheme, and
4. It is reasonable to conclude, taking into account the statutory factors, that the dominant purpose or principal effect of entering the scheme was to get the GST benefit.

To determine whether the scheme has a dominant purpose or principal effect of tax avoidance, s 165-15 contains a list of factors against which the scheme must be measured. These factors are:

The manner in which the scheme was entered into,

The form and substance of the scheme,

The purpose and object of the GST Act and any relevant provisions,

The timing of the scheme,

The period over which the scheme was carried out,

The effect of the scheme,

Any change in the participants' financial position,

Any other consequences on the participants,

The nature of the connection between the participants,

The circumstances surrounding the scheme, and

Any other relevant considerations.

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[28] See s 76(2) NZ GSTA.
[29] See *Halifax* and *Cadbury Schweppes plc v IRC* [2007] STC 980.
[30] As defined in s 165-10(2).
[31] As defined in s 165-10(1).

These factors mirror the explicit criteria in Part IVA of the *Income Tax Assessment Act* and therefore cases decided under that Part can provide direct guidance on the scope and application of the GST GAAR. As noted

Courts have identified a range of factors that will be relevant to whether the GAAR should apply.[36] These factors are:

the relationship between the parties, whether arms-length or associated,

the amount of GST at issue and the degree to which any supposed commercial transaction to which it relates is dependent upon that GST treatment,

the normal commerciality of the arrangement,

the perceived purpose of the particular section being exploited (i.e., the scheme and application of that provision of the Act),

the experience and substance of the parties in fulfilling the transactions.

These factors are similar to those identified by the ECJ in VAT tax abuse cases such as *Ermsland Starke*.[37] VAT avoidance requires a two-step test.[38] First there must be an examination of the scheme according to objective factors to determine whether the tax advantage obtained was contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. This "essential aim" must be determined by considering "the real substance and significance of the transactions concerned" taking account of "the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden".[39]

As with Div 165, the "essential aim" is not a sole purpose test. There can be a finding of an abusive practice when obtaining a tax advantage constitutes the principal aim of the transaction or transactions at issue.[40] Furthermore, that aim is determined from the objective facts of the case rather than the subjective aim or intention of the parties engaged in those transactions.

2.1 Role of Scheme and Purpose in Tax Avoidance

It is trite law that not all tax benefits enjoyed by taxpayers constitute tax avoidance. This position is made explicit in the Australian GST Act, which identifies a number of specific choices provided to taxpayers that are protected from the application of Div 165.[41] Taking advantage of these choices therefore cannot constitute tax avoidance, on the grounds the exercise of those choices all conform to the intended operation of the Act. By contrast attempts to take advantage of other supposed choices or incentives beyond those provided in the Act would remain vulnerable to Div 165.

While the corresponding NZ legislation doesn't specifically identify similar protected choices, the courts have confirmed it will examine whether an arrangement

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[36] These factors were first identified by the TRA in *Case W22* (2003) 21 NZTC 11,211 and were endorsed by the High Court on appeal in *Ch'elle Property (NZ) Ltd v CIR* (2004) 21 NZTC 18,618.
[37] *Ermsland-Starke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECR I-11569.
[38] See *Halifax* at para 86, and UK Revenue and Customs Brief 56/09 at para 4: see http://www.hmrc.gov.uk/briefs/vat/brief5609.htm, as 15 Feb 2010.
[39] See *Halifax* at para 81.
[40] See *Parts Services* Case, at para 45 and 62.
[41] See s 165-5(1)(b).

contravenes the intent and application of the Act before finding the resulting tax benefit constitutes avoidance. For instance, in *Glenharrow* the Supreme Court acknowledged:[42]

> "The intention of the Act will be defeated if an arrangement has been structured to enable the avoidance of output tax, or the obtaining of an input deduction in circumstances where that consequence is outside the purpose and contemplation of the relevant statutory provisions. ... An arrangement of this kind is not in accordance with the overall purpose of the Act because it produces a "tax advantage" not within the contemplation of the statute."

Later the Court confirmed:[43]

> "That is of course consistent with the neutrality and efficiency of the revenue collection rationales that underlie the Act. The corollary is that registered persons should, by the same token, not obtain unacceptable windfall gains from the regime."

Therefore, only after reviewing the proper ope

> an assumption that there will be some correlation between payment of GST and input tax credit. ... An input tax credit does not represent some sort of bounty that the Commissioner bestows upon a person. It is more appropriately regarded as an alleviation of the burden that person has borne in paying the price of the goods or services. In this case the burden and its alleviation have not fallen as the GST Act intended."[51]

Only at the conclusion of its decision, when dealing with penalties, does the AAT acknowledge the similarity in both the facts and principles between *Re VCE* and the New Zealand decision in *Ch'elle Properties Ltd v CIR*.[52] Nevertheless, the approach of the courts to this type of deferred settlement arrangement is clearly consistent. The fact no appeal was ever heard from *Re VCE*, and no similar arrangements have come before the Australian courts, may indicate that Australian taxpayers have recognised the strong stance likely to be taken by the ATO against this type of GST abuse.

4. New Zealand Cases Applying the GST GAAR

Given the lack of Australian case law, cases decided under the equivalent New Zealand legislation may provide some guidance to the application of Div 165. In 2008 the New Zealand Court of Appeal and finally the Supreme Court considered the vexed question of when proper GST tax planning crosses the line into impermissible tax avoidance. Although the Courts found the taxpayers correctly applied the black letter GST law in each case, their arrangements nevertheless constituted ta

The mining license was issued in 1990 but had not been operated by its original holder. In 1994 the license was sold to local prospectors for $100. In 1996 it was on-sold for $10,000. In 1997 Glenharrow Holdings Ltd, a $100 shelf company, purchase the license for $45million. The purchase price was satisfied in two ways:

$80,000 was paid in cash by Glenharrow; and

the remaining $44,920,000 was provided as vendor finance, which was secured by a mortgage over the shares in Glenharrow and the mining license.

The parties agreed that interest and principle repayments would be funded out of profits derived from the successful exploitation of the license. No additional security or guarantee was given for the outstanding purchase price.

Glenharrow began to exploit the license but, due to both legal and practical difficulties, conducted only minimal mining. From that limited operation Glenharrow made further payments of only $210,000.

The vendor was not registered for GST while Glenharrow was registered. Glenharrow therefore claimed a second-hand input tax credit of $5million on the purchase of the mining license.[68] The Commissioner disallowed the input tax claim on the ground the arrangement breached the GAAR. The taxpayers challenged the assessment in the High Court.[69]

Although the Commissioner contested the taxpayer's entitlement to an input tax credit under the black letter law, the High Court found that the arrangement was (putting aside the GAAR) effective for GST. The agreement to purchase the license was genuine and the parties intended to implement it according to its terms. Although the purchase price of $45million was "grossly inflated" it was a genuinely agreed price based on the parties' extremely optimistic valuation.

On the question of whether the arrangement had any real business purpose, the Court found Glenharrow had acquired the license for the principle purpose of making

interpretation would almost certainly render the section virtually useless and destroy its anti-avoidance purpose."

4.2.1 Court of Appeal decision in Glenharrow

From the wording of the Court of Appeal judgment, it is apparent that the members of the Court of Appeal were somewhat uneasy with the High Court's findings regarding the taxpayers' credibility, especially as the license had previously been sold for only $100 and $10,000. The Court found that the price of $45million was "artificial" and "totally unrealistic".

Both *Ch'elle* and *Glenharrow* considered the former wording of the GST GAAR. That old version applied to arrangements that "defeat the intent and application" of the GST Act. The GAAR was rewritten in 2000 to now apply to arrangements that "have a purpose or effect of tax avoidance", thus bringing it into line with the wording of the income tax GAAR.[72]

Despite the different wording the Court of Appeal applied the same reasoning as that applicable for income tax and adopted an objective test of whether the arrangement defeated the Act, therefore ignoring the taxpayer's honest purpose.

"We are satisfied that [GAAR] does not incorporate a subjective test. To give such an interpretation would render the section, which is intended to operate as a 'backstop' provision, virtually inoperative."[73]

Glenharrow had argued that, once the parties agreed the license was worth $45million, it should preclude the application of the GAAR, regardless of whether that price was mistakenly excessive. This argument relied upon the venerable decisions of *Europa Oil*[74]and *Cecil Bros*[75] that neither the Commissioner nor the Court may tell taxpayers how to run their business or how much to pay for their assets. The requirement that transactions be undertaken at market value for GST purposes applies only between persons who are "associated" for tax purposes under the NZGSTA and therefore prices set at arms-length should not be disturbed by the GAAR.

The Court of Appeal rejected this argument on the grounds the scheme of the GST regime required transactions to be undertaken at (approximately) market value and that "a grossly inflated" transaction therefore defeated the intent and application of the Act. While only associated persons are explicitly required to transact at market value,[76] that specific rule reflects the general policy of GST that transactions be conducted at realistic prices, which is normally self-policing between non-associated parties. Thus transactions at non-market value were likely to frustrate the scheme of the NZGSTA.

The Court also found the GST regime generally requires neutrality between supplier and recipient. While mismatches between the timing of input and output tax will occasionally arise, particularly between taxpayers who account for GST on different

[72] See s BG1 *Income Tax Act 2007*.
[73] *Glenharrow v CIR* (2007) 23 NZTC 21,564 at [79].
[74] *Europa Oil (NZ) Ltd v CIR* (No 2) (1976) 2 NZTC 61,066.
[75] *Cecil Bros Pty Ltd v FCT* (1964) 11 CLR 430.
[76] S 10 GST Act 1985.

The Supreme Court ruled that the unusual wording of former s 76 did not alter its scope and application as a general anti-avoidance provision, because "the current version of the section merely states expressly what was implicit in the former version."[84]

Applying that reasoning to the facts, the Supreme Court asked whether "the intention of the Act will be defeated if the arrangement has been structured to enable the avoidance of output tax or the obtaining of an input deduction in circumstances where that consequence is outside of the purpose and contemplation of the relevant statutory provisions."

After reviewing the history and role of GST in New Zealand, the Court concluded:

> there will usually be, over time, some balancing of inputs and outputs by a supplier;
>
> taxpayers should not obtain unacceptable windfalls in their dealings with unregistered persons;
>
> parties should generally be dealing with each other at approximately market value; and
>
> timing differences between input and output tax ought not to be exploited.

The Supreme Court stated:[85]

> "GST was intended to be broad-based, efficient and neutral. Nevertheless … tax avoidance opportunities notably remain at the boundaries between taxable and non-taxable transactions and between registered and unregistered persons. Accordingly, the general anti-avoidance provision was considered necessary."

Considering the facts in *Glenharrow*:[86]

> "there is potential for registered taxpayers knowingly or otherwise to create distortions at the boundary between themselves and unregistered persons. The same can occur where transactions are between those registered on a payments basis and those registered on an invoice basis (as in *Ch'elle* and *Nicholls)*. The general anti-avoidance provision is available to stop or counteract both these distortions."

Given the clearly inflated purchase price and the unusual method of payment by way of vendor-finance, the Court confirmed the arrangement constituted tax avoidance in breach of the GAAR.

5. SHOUILD DIV 165 OVERRIDE OTHER PROVISIONS OF THE GST ACT?

A common complaint and regular difficulty with the application of Div 165 is how it should operate beside the other provisions of the GST Act. Tension arises as to whether it should be applied widely in such a way as to potentially make all tax

[84] *Glenharrow*, at [36]
[85] Ibid, at [42]
[86] Ibid, at [46]

advantages vulnerable to attack as tax avoidance, even if the relevant Act's specific provisions have been complied with, and even when no specific anti-avoidance rule embedded in the relevant tax concessions has been contravened.

This problem arises most commonly in rela

> overriding. Rather they work together. The presence in New Zealand legislation of a GAAR suggests that our Parliament meant it to be the principal vehicle by means of which tax avoidance is addressed."

On that reasoning it is apparent not everything that comes within the literal wording of Div 165 will properly constitute "tax avoidance". So when will a taxpayer's conduct "cross the line"[96] between legitimate tax planning (based on the use of specific provisions) and become tax avoidance?

6. New Zealand Emphasis on Economic Reality

In its two recent decisions the New Zealand Supreme Court ruled that the single most important indicia of tax avoidance is whether the tax consequences of the transaction are at odds with its economic effect. Although the

and indirect taxation could require a different approach.[106] Likewise, the New Zealand Inland Revenue Department's own Policy Advice Division noted:

> "There are conceptual differences between GST and income tax, and differences in the avoidance tests in the GST Act and the Income Tax Act (which will continue to exist in the reworded section 76). For example, as the Court of Appeal stated in CIR v New Zealand Refining Co Ltd:
>
> 'It is fundamental to the GST Act that the tax is levied on or in respect of supplies. It is not a tax on receipts or on turnover; it is a tax on transactions...'"[107]

In *Ch'elle* the TRA acknowledged the "fundamentally different philosophy of the GST legislation compared with that of the Income Tax Acts":[108]

> "It points to a significant difference in the way in which the GST avoidance provision is intended to operate. Uniquely, any GST avoidance provision must deal both with escaping from a liability to pay output tax and the right to claim an input deduction. The amended s 76 attempts to meet this requirement."

Nevertheless, the Courts have subsequently given little thought to whether there are unique features of the GST regime that would impact upon the application of the GAAR. As a result, New Zealand Inland Revenue has now recommended that the two GAARs be interpreted consistently in order to "allow a similar analysis and application of case law when determining avoidance has occurred."[109]

Despite that view there are a number of different features between GST and income tax that ought to impact how and when Div 165 will apply.

First, the intent and application of the GST Act must be gleaned from the scheme and purpose of the relevant legislative provisions the taxpayer has sought to exploit. There are many cases concerned with how tax legislation should be interpreted and what it is intended to achieve.[110] The basis of statutory interpretation is determining what Parliament intends in relation to the specific provision. In effect, the Courts must determine whether Parliament intended particular sections to be used by the taxpayers in that way. This analysis is always a difficult.

A number of cases have examined the scheme and purpose of the NZ GST Act.[111] Interestingly, the cases that have devoted most attention to the intended operation of

the GST regime as a whole have been those concerning tax avoidance in order to determine whether the taxpayer's conduct h

The broad nature of GST was also explained in the leading New Zealand text, *GST– A Practical Guide*.[118] In the Introduction, the author recognises:[119]

> "The comprehensiveness of the tax complements its underlying simplicity, virtually all commodities and transactions are subject to GST principles. Also, GST is generally charged at a single standard rate."

McKenzie then goes on to describe how the entire framework of the Act is intended to support this broad application.

> "Despite the underlying simplicity of the tax and its comprehensiveness, the implementation and maintenance of the GST regime has necessitated detailed legislation. The GST Act embodies the basic principles discussed above. It also provides both for supporting concepts, which are required to ensure that the tax works in practice, and for an administrative framework for the tax."[120]

This view was confirmed by the Supreme Court in *Glenharrow*:[121]

> "GST was intended to be broad-based, efficient and neutral. Nevertheless, compliance and administration costs preclude perfect neutrality ever being achieved. Tax avoidance opportunities notably remain at the boundaries between taxable and non-taxable transactions and between registered and unregistered persons. Accordingly, a general anti-avoidance provision was considered necessary."

In short, a GST regime is intended to establish the frame-work and give effect to a broad-based consumption tax. While the Australian legislation contains a limited number of concessions and exemptions,[122] the over-all scheme of the GST Act is coherent, in that it neither favours nor adversely affects any particular type of supply. The intention of the regime is to be virtually non-distortionary to individual taxpayers and the economy as a whole. In theory then, GST should not have any impact on the spending or investment decisions of taxpayers. If a taxpayer receives any supply, it will pay GST based on the value of that consumption, and taxpayers should generally not take GST into account when making business or consumption decisions. Thus, any time GST does become a motive for action, the taxpayer may have breached the principle of tax neutrality underlying the Act.

Unfortunately, taxpayers are ingenious in their methods of seeking to exploit or misapply the Act in order to obtain tax benefits. In the cases that have come before the Courts, the taxpayers have arranged their affairs so as to ensure they qualify for some GST benefit.

But by taking those steps the taxpayers obviously gave GST too great a consideration in their decision-making. In light of the broad scope of GST, taking those steps in order to obtain a tax benefit should contravene the theoretically neutral nature of the

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[118] *GST - A Practical Guide*, A McKenzie, CCH (NZ) Ltd, Ed 5, 2007.

[119] Ibid, at p IX.

[120] Ibid, at X

[121] At [42]

[122] Mainly for supplies of food, health or education which are classified as "GST-free" and get the same GST treatment as zero-rated exports.

tax. As such, any scheme that requires additional or unusual steps in order to obtain a GST benefit may indicate it breaches the intent and application of the Act. The Commissioner may then negate any tax benefit achieved under such a scheme.

An additional feature is the nature of GST as a transaction tax. Income tax incorporates a number of different treatments for income, deductions, and timing. It creates a range of different regimes for various entities or transactions. In doing so, there are many provisions that either seek to encourage or discourage particular behaviour. These are the incentive regimes Courts are careful not to permit a GAAR to negate.

By contrast, the GST regime is almost entirely homogenous in its application. It contains few express choices, and these are all expressly identified and protected from the application of Div 165.[123] Attempting to take advantage of other supposed choices or incentives beyond those provided in the Act would remain vulnerable to Div 165.

The broad based and flat rate of GST show it is intended to neither favour nor adversely affect any particular type of supply. The GST regime does not contain the type of incentive provisions that make the Income Tax GAAR so difficult to apply. So taxpayers generally cannot claim to have structured their affairs so as take advantage of any type of GST concession. For instance, in *Re VCE* the AAT ruled that the taxpayer's choice of GST accounting basis did not constitute a choice or election under the GST Act so as to exclude Div 165.

9. SHOULD FEATURES OF TAX AVOIDANCE REQUIRE DISCLOSURE?

The factors listed in s 165-15 provide tools to determine the purpose of the taxpayer and/or the effect of the scheme. However, schemes that obviously have a tax avoidance purpose or effect under those factors are not automatically void. It requires the intervention of the ATO to invoke Div 165. Accordingly, schemes that are not detected remain in place and the relevant tax benefits are wrongfully retained by participants.

To assist with the detection of such schemes, in 2004 the UK revenue authority introduced a disclosure regime[124] in relation to arrangements that are intended to give any person a VAT advantage. The main obligation for disclosure rests with those taxable persons who are party to the scheme, whether or not they obtain the tax advantage. If disclosure is not made, then any benefits otherwise available under the scheme (whether otherwise permissible or not) are automatically withheld. In effect, disclosure of the scheme to the authorities is a pre-requirement for the tax benefit to be claimed, whether or not that scheme ultimately constitutes tax avoidance.

Disclosure is required in two broad categories:

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[123] See s 165-5(1)(b).

[124] Her Majesty's Revenue and Customs Notice 700/8 (August 2004), superseded by Notice 700/8 (February 2006).

Listed VAT avoidance schemes: these are schemes that are described in the relevant legislation. Currently, ten schemes have been listed.

Hallmarked schemes: these are schemes that include or are associated with a hallmark of avoidance prescribed in the relevant legislation. Currently, there are eight hallmarks of avoidance.

The listed schemes are certain arrangements that have previously been identified by the revenue as constituting tax avoidance or, at best, tax aggressive behaviour. Such schemes involve lengthy settlement periods, particular types of supplies and certain cross-border transactions. All similar schemes are therefore presumed to be suspect by Her Majesty's Revenue and Customs (HMRC), which requires all taxpayers involved in those schemes to declare their involvement.

In addition to the particular schemes, another category requiring disclosure are any transactions of whatever kind involving one or more of a number of "hallmarks" of tax avoidance. So any supply of any kind of goods or services that involve such a hallmark immediately becomes subject to disclosure to HMRC. The hallmarks are:

confidentiality agreements;

agreements to share a tax advantage;

contingent fee agreements;

prepayments between connected parties;

funding by loans, share subscriptions or subscriptions in securities;

off-shore loops;

property transactions between connected persons; and

issue of face-value vouchers.

Disclosure of participation in any relevant scheme is required to be made either by the promoter (if one exists) or the taxpayer within 30 days of the due date of the affected VAT return. Disclosure must be made to a designated "Anti-Avoidance Group". It effectively requires taxpayers conducting these types of schemes to identify themselves to HMRC. Presumably the effect is to make participation in this type of tax aggressive scheme less desirable on the grounds the attention of authorities is virtually guaranteed.

New Zealand flirted with the introduction of a similar scheme for income tax arrangements in 2002.[125] The proposal would have required registration with Inland Revenue (IRD) of certain schemes and notification of that registration to investors.

[125] Inland Revenue Department Officials Paper : Mass-marketed Tax Schemes, 14 January 2002.

Unless the scheme was registered, no tax benefits flowing under that scheme could be claimed by participants.

Ultimately the proposal requiring registration of schemes with IRD was abandoned and any GST benefits obtained under such schemes must be countered using the GAAR. Interestingly, the tax benefit obtained in *Re VCE* exhibits one of the hall-marks of tax avoidance identified by the UK revenue, namely a property transaction between connected persons, which would have required the taxpayer to bring its scheme to the notification of the ATO.

10. CONCLUSION

Both the *Ch'elle* and *Glenharrow* decisions support the broad interpretation and application of a GAAR for GST. They stipulate that artificial arrangements involving inflated valuations devised in order to take advantage of a mismatch between different categories of taxpayer will not be permitted. Furthermore, the GST Act is premised on actual payments made at (approximately) market value in a timely manner. So arrangements that involve deferred settlements (as in *Ch'elle*) or that are funded by money-go-rounds (as in *Glenharrow*) will not be allowed for GST purposes.

These unanimous decisions clearly put New Zealand and Australian taxpayers on notice that, if their schemes lack con