Introduction

In the first ten years since it was established, the Supreme Court decided seventeen tax cases (not counting leave applications). Ten were about income tax,2 five were about GST,3 one was about excise duty4 and one was about the Unclaimed Money Act 1971.5 Some of the cases were trivial but most were not and the cumulative effect has been immense. Four developments stand out. First, in Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue6 the Court laid down a new test – the “parliamentary contemplation” test – for addressing the age-old conundrum of distinguishing between tax avoidance (which the law proscribes) and acceptable tax planning (which it permits). That test was then applied and refined by the Supreme Court itself in Glenharrow Holdings Ltd v Commissioner of Inland Revenue7 and Penny v Commissioner of Inland Revenue.8 Secondly, in Stiassny v Commissioner of Inland Revenue9 Blanchard J explained in general terms how the courts should go about interpreting tax statutes and in Terminals (NZ) Ltd v Comptroller of Customs10 Glazebrook J did the same. Both statements are likely to prove influential.11 Thirdly, in Re Greenpeace of New Zealand Inc12 the Court abolished the rule, previously regarded as settled, that a political purpose cannot be counted as charitable. And

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1 University of Auckland Law School. I am grateful to Daniel Herring and Conor Tinker for helping with the research on which this paper is based and to the University of Auckland for funding their assistance.


4 Terminals (NZ) Ltd v Comptroller of Customs [2013] NZSC 139.


7 [2008] NZSC 116 at [40] and [46]-[48].

8 [2011] NZSC 95 at eg [23], [47] and [49].

9 [2012] NZSC 106 at [23].

10 [2013] NZSC 139 at [39]-[41].

11 See eg Diamond v Commissioner of Inland Revenue [2014] NZHC 1935 at [51].

fourthly, in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* the Court formulated a new and more restrictive approach to judicial review, with consequent opportunities for the drafting of privative clauses.

The Court has also settled important questions relating to, among other things, GST input credits and refunds, GST on disposals of land, the liability of receivers for GST, the GST consequences of a taxpayer’s insolvency, the recovery of GST paid by mistake, the income tax consequences of forfeitures, and the balancing of the Commissioner’s powers against the taxpayer’s right to confidentiality. It is notable that four of the five GST cases concerned the scope of the tax. Only one of the income tax cases, in contrast, concerned the scope of the tax (the others raising mainly procedural issues). The explanation is perhaps that income tax is a relatively old tax and its scope is more or less settled, whereas GST is a relatively new tax and some basic issues remain unresolved.

Several of the cases, although clearly classifiable as tax cases, raised matters of broader significance. The most important of these are the theory of judicial review formulated in *Tannadyce* and the definition of charity promulgated in *Greenpeace* but there have been several others – notably two cases dealing with the recall of judgments and one with the procuring of judgments by fraud.

Before proceeding, two further points require mention. First, the cases confirm that the principal driver of tax litigation is taxpayers’ attempts to escape liability: more than half of them – nine of the seventeen – were about avoidance or evasion. Some of these cases are notorious and attracted extensive media attention – in particular *Ben Nevis* (which concerned the “Trinity” tax avoidance scheme) and *Penny* (the case of the Christchurch surgeons). What is less well-known is that several of the cases that might at first appear to be about other aspects of the tax system – for example, the mechanics of the disputes procedures and the rules relating to GST deregistration – are also, in fact, about avoidance.

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16 *Stiassny* [2012] NZSC 106.
17 *Stiassny* [2012] NZSC 106.
18 *Stiassny* [2012] NZSC 106.
19 *Saha* [2010] NZSC 89.
21 All but *Gilchrist v R* [2006] NZSC 109. See n 3.
22 *Saha* [2010] NZSC 89.
26 *Redcliffe No 1* [2012] NZSC 94.
29 *Penny* [2011] NZSC 95.
Secondly, an extraordinarily large proportion of the cases (seven of the seventeen) involved tax advisors – not merely as advisors, but as parties. Moreover, in several of those cases the argument advanced by the tax advisor on his own behalf was manifestly implausible. For example, in Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd the taxpayer alleged that the Commissioner had procured a judgment by fraud – the alleged fraud consisting of not disclosing to the taxpayer the terms of the Income Tax Act. One might wonder why the Supreme Court gave leave in such cases. The reason seems to be that the Court is required to grant leave in cases raising matters “of general or public importance” – and weak cases sometimes satisfy that criterion. In other words, bad cases sometimes enable the courts to make good law.

This paper comprises six parts. Part I provides a brief overview of the seventeen cases. Part II examines the cases of tax avoidance and tax evasion and Part III those on the scope of GST. Two of the cases were applications for judicial review; they are considered in Part IV. Part V looks at the cases in which the taxpayer was a tax advisor. Part VI deals with three cases in classes of their own: one on charities, one on the Unclaimed Money Act 1971, and one about excise duties.

I. OVERVIEW

The Supreme Court’s seventeen cases, in the order in which they were decided, are as follows.

1. Allen v Commissioner of Inland Revenue: judicial review.
2. Gilchrist v R: evasion.
3. Westpac Banking Corp v Commissioner of Inland Revenue (Westpac No 1): a taxpayer’s application regarding discovery, being a collateral attack on the Commissioner’s allegation of tax avoidance.
4. Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue (Ben Nevis No 1): tax avoidance; the “Trinity” scheme.

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31 Gilchrist [2006] NZSC 109; Ben Nevis No 1 [2008] NZSC 115; Ben Nevis No 2 [2009] NZSC 40; Redcliffe No 1 [2012] NZSC 94; Redcliffe No 2 [2013] NZSC 128; Saha [2010] NZSC 89; and Stiassny [2012] NZSC 106. Whether the taxpayers in Saha and Stiassny would count themselves as tax advisors is unclear, but the taxpayers in Stiassny were partners in KordaMentha (a firm specialising in corporate restructuring) and the taxpayer in Saha was a partner in Ernst & Young’s consultancy business.

32 It is necessary to emphasise that the arguments advanced in Saha and Stiassny were not of that kind. That is, they were not implausible (though they were unsuccessful).

33 [2011] NZSC 158.
34 Redcliffe No 1 [2012] NZSC 94.
35 [2008] NZSC 89; and Stiassny [2012] NZSC 106. Whether the taxpayers in Saha and Stiassny would count themselves as tax advisors is unclear, but the taxpayers in Stiassny were partners in KordaMentha (a firm specialising in corporate restructuring) and the taxpayer in Saha was a partner in Ernst & Young’s consultancy business.

36 See n 27.
37 See n 3.
39 See n 31.
42 Terminal [2013] NZSC 139.
5. Glenharrow Holdings Ltd v Commissioner of Inland Revenue: the avoidance of GST.
7. Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue (Ben Nevis No 2): application for the recall of the judgment in Ben Nevis No 1.
10. Penny v Commissioner of Inland Revenue: tax avoidance; the case of the Christchurch surgeons.
11. Tannadyce Investments Ltd v Commissioner of Inland Revenue: judicial review.
12. Thompson v Commissioner of Inland Revenue: GST; land transactions; avoidance.
13. Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd (Redcliffe No 1): taxpayers seeking to persuade the Court to set aside its judgment in Ben Nevis No 1 on the ground that the Commissioner had procured it by fraud.
14. Stiassny v Commissioner of Inland Revenue: GST; receivers; priorities of Commissioner and secured creditors.
15. Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue (Redcliffe No 2): another application for the recall of the judgment in Ben Nevis No 1.
16. Terminals (NZ) Ltd v Comptroller of Customs: excise duty; whether mixing petrol with butane constitutes “manufacture”.
17. Re Greenpeace of New Zealand Inc: whether a political purpose can count as charitable.

II. AVOIDANCE AND EVASION

The nine cases about avoidance or evasion are Ben Nevis No 1, Ben Nevis No 2, Redcliffe No 1, Redcliffe No 2, Glenharrow, Penny, Westpac No 1, Thompson and Gilchrist. Of these, by far the most important are Ben Nevis No 1, Glenharrow and Penny, which must be read together and which amount to a comprehensive overhaul of the law relating to tax avoidance.
Ben Nevis No 1

Ben Nevis Forestry v Commissioner of Inland Revenue\(^{61}\) (Ben Nevis No 1) concerned a tax avoidance scheme – referred to as the “Trinity” scheme – attached to a forestry venture. The taxpayers’ aim was not to minimise the tax payable on the profits produced by the forestry venture. Indeed, they were indifferent as to whether the venture produced any profits. Rather, their aim was to use the forestry venture as a device to reduce their liability to tax on their other income.

A company called Trinity 3 granted the taxpayers a licence to occupy land for 50 years and to grow a forest on it. In exchange for the licence the taxpayers agreed to pay fees of about $24,000 per year plus a one-off premium of $992 million payable in 50 years. They purported to discharge their liability for the premium by executing a promissory note for $992 million payable in 50 years and then claimed that that entitled them to deductions of about $20 million per year for 50 years. If the scheme worked, the first $20 million of the taxpayers’ other income would be in effect exempt from tax, every year for 50 years. The Commissioner maintained that what the taxpayers had done was tax avoidance and therefore caught by the general anti-avoidance rule (GAAR), which provides that every “tax avoidance arrangement” is void against the Commissioner.\(^{62}\)

Both the majority (Tipping, McGrath and Gault JJ) and the minority (Elias CJ and Anderson J) confirmed the orthodox view that, if the Commissioner invokes the GAAR, a two-stage approach is required. First, it is necessary to determine, leaving the GAAR aside, whether the arrangement in question produces the tax consequences claimed by the taxpayer.\(^{63}\) If not, the taxpayer loses.\(^{64}\) But if, but for the GAAR, the arrangement produces the tax consequences claimed by the taxpayer, it is necessary to determine whether it is caught by the GAAR. That in turn will require the court to determine whether what the taxpayer has done is tax avoidance (in which case the GAAR will apply) or merely an arrangement producing a “permissible tax advantage” (in which case the GAAR will not apply).\(^{65}\)

The majority held that the taxpayers passed the first stage (that is, but for the GAAR they would have been entitled to the deductions they claimed) but failed at the second (that is, what they had done was tax avoidance and therefore caught by the GAAR, so they were not entitled to the deductions). The minority declined to accept that the taxpayers passed the first stage. That is, they declined to accept that, under the rules relating to deductions, the taxpayers were entitled to the deductions they claimed. But they agreed with the majority that what the taxpayers had done was tax avoidance and accordingly caught by the GAAR.

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\(^{63}\) [2008] NZSC 115 at [107] and [2].

\(^{64}\) See eg Inland Revenue Commissioner v Europa Oil (NZ) Ltd [1971] AC 760 (PC).

\(^{65}\) [2008] NZSC 115 at [106].
The difficulty in determining the scope of the GAAR lies in distinguishing between tax avoidance (which the rule catches) and permissible tax advantages (which it leaves alone). As to how the line is to be drawn, the majority explained:

The ultimate question is whether the impugned arrangement, viewed in a commercially and economically realistic way, makes use of the specific provision [that is, the provision under which the taxpayer claims to be entitled to a tax advantage – specifically, in the case before the court, deductions of $20 million per year for 50 years] in a manner that is consistent with Parliament’s purpose. If that is so, the arrangement will not, by reason of that use, be a tax avoidance arrangement. If the use of the specific provision is beyond Parliamentary contemplation, its use in that way will result in the arrangement being a tax avoidance arrangement.

This has come to be called the “Parliamentary contemplation” test. Exactly how it works has been much debated but the idea seems to be that if what the taxpayer has done is the sort of thing Parliament had in mind when it enacted the rules on which the taxpayer relies, it is permissible tax planning and not caught by the GAAR. But if what the taxpayer has done is not the sort of thing Parliament had in mind when it enacted those rules, it is tax avoidance and caught by the GAAR. Ben Nevis is the most important of the cases discussed in this paper. The reason is that analysis in tax avoidance cases now generally begins with the Ben Nevis “Parliamentary contemplation” test, rather than with the very extensive earlier case law. It appears, too, that the decision has shifted the goalposts in favour of the Commissioner.

The Glenharrow Case

Glenharrow Holdings Ltd v Commissioner of Inland Revenue concerned a mining licence that was issued in 1990, had a term of ten years, and permitted the extraction of greenstone from a block of land in the South Island. The licence changed hands in 1993 (for $5,000), again in 1994 (for $100) and again in 1996 (for $10,000). In 1997, the then licensee, one Michael Meates, sold the licence to the taxpayer, Glenharrow Ltd, for $45 million. Glenharrow maintained that that was what the licence was worth, because (a) “it had formed the view that there was at least half a million tonnes of [greenstone] within the licence area”, (b) this greenstone was worth from $1,000 per tonne to $10,000 per tonne, and (c) it thought (wrongly, as it turned out) that it would be able to obtain an extension to the ten-year term of the licence.

Glenharrow had a share capital of $100 and no assets. The purchase of the licence was effected on the basis that Glenharrow would pay $80,000 and the vendor would lend it $44,920,000, repayable within three years, with which to pay the balance. Glenharrow’s owner advanced it $80,000, which it paid to Meates. Glenharrow also gave Meates a cheque for $44,920,000. Meates gave Glenharrow a cheque for the same amount ($44,920,000), supposedly by way of a loan. Whether these cheques were presented is unclear. But neither party actually had $45 million, or anything like it. Indeed, Glenharrow, as has been mentioned, had no assets at all.

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66 [2008] NZSC 115 at [109], emphasis added.
67 See eg Alesco New Zealand Ltd v Commissioner of Inland Revenue [2013] NZCA 40 at [21].
70 [2008] NZSC 116 at [9].
71 See Glenharrow Holdings Ltd v Attorney General [2004] UKPC 42.
Meates was not registered for GST. Nor was he obliged to register, because under the Goods and Services Tax Act 1985 a person is required to register only if he is carrying on a “taxable activity”72 (meaning a business or something resembling a business) and Meates was not carrying on a taxable activity. He was therefore not obliged to pay any GST on the proceeds of sale of the licence. Glenharrow, however, was registered. The GST Act provides that a registered person who buys second-hand goods from an unregistered person is entitled to an input tax credit for the “tax fraction” (then one-ninth) of the price.73 The licence came within the definition of second-hand goods (which, although semantically odd, is clearly sound as a matter of tax-system design) and Glenharrow claimed an input tax credit of one-ninth of $80,000 ($8,888). Since it was not liable for any output tax, it also claimed a “refund” of that amount. The Inland Revenue paid this refund. Glenharrow then claimed a further refund of one-ninth of the other $44,920,000 — that is, $4,991,111. This the Revenue declined to pay. They maintained that the GAAR (s 76 of the GST Act) applied, and that Glenharrow was therefore not entitled to any further refund.

Section 76 provided as follows:74

Notwithstanding anything in this Act, where the Commissioner is satisfied that an arrangement has been entered into between persons to defeat the intent and application of this Act, or of any provision of this Act, the Commissioner shall treat the arrangement as void for the purposes of this Act….

Glenharrow objected. The Supreme Court, in a unanimous judgment given by Blanchard J, held that s 76 applied and that the Commissioner’s refusal to make the payment should stand. The case is important because it is the leading case on GST avoidance and because it shows how the problem is not merely that taxpayers might seek to escape liability; they sometimes attempt to use the GST system as a means of extracting money from the government.75

The Penny Case

The taxpayers in Penny v Commissioner of Inland Revenue76 were two surgeons. Their cases were unrelated but similar and so were heard together, concluding in a single judgment. Each of the taxpayers transferred his practice to a company owned by a trust. Each continued to provide surgical services to patients as before, except that the patients paid the company rather than the taxpayer. The taxpayer was employed by the company, which paid him a salary of less than 20 per cent of the profits generated by the practice. Thus the other 80 per cent or so of what would have been the taxpayer’s personal income was converted into the profits of the company. The main reason the taxpayers did this was that their personal incomes were taxable at a marginal rate of 39 per cent, whereas companies were taxed at a flat 33 per cent.

In each case, the company distributed its profits as dividends to its shareholder (the trust); and because the company had paid tax on the profits, no further tax was

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72 GST Act 1985, s 51.
73 At the relevant time, GST was charged at 12.5 per cent, so the “tax fraction” was 1/9. For example, $100 + 12.5% = $112.50; 12.50/112.50 = 1/9. When the rate of GST was raised to 15 per cent, the tax fraction rose to 3/23. See GST Act 1985, s 2, definition of “tax fraction”.
74 Emphasis added. The wording of s 76 has since been refined.
75 See also Contact Pacific [2010] NZSC 136 (discussed below); Ch’elle Properties (NZ) Ltd v Commissioner of Inland Revenue [2007] NZCA 256; and Ch’elle Properties (NZ) Ltd v Commissioner of Inland Revenue [2007] NZCA 299.
76 [2011] NZSC 95. See Littlewood n 61; Ebersohn, n 61.
payable by the trust. The trust then expended the funds for the benefit of the taxpayer, again giving rise to no further liability to tax. Thus, according to the taxpayers, the larger part of the profits produced by their practices was taxable at 33 per cent, not 39 per cent. In other words, arranging their practices in this way saved them six per cent. The Commissioner acknowledged that, but for the GAAR, the arrangements would have had the effect contended for by the taxpayers; he also asserted, however, that what they had done was tax avoidance and therefore caught by the GAAR.

As was to be expected, Blanchard J, giving the judgment of the Supreme Court, followed the reasoning of the majority in *Ben Nevis*. That is, he sought to determine whether the arrangements adopted by the taxpayers were of a kind that was within Parliament’s contemplation when it had enacted the provisions upon which the taxpayers had relied (meaning, presumably, the provisions imposing tax on companies and trusts at 33 per cent). For each of the surgeons to have transferred his practice to a company owned by a trust was not, in itself, said Blanchard J, tax avoidance: “It was a choice the taxpayers were entitled to make.” For each taxpayer to have caused the company under his control to have employed him on a salary was likewise unobjectionable. However, Blanchard J continued, the use of the trust/company structure in conjunction with the payment of an “artificially” low salary for the purpose of obtaining a tax advantage was “beyond parliamentary contemplation”. In other words, the arrangements adopted by the taxpayers were simply not the sort of thing Parliament had had in mind when it enacted a lower rate of tax for companies and trusts than for natural persons (or, to be precise, when it left the corporate and trust rates unchanged when enacting a higher rate for individuals). What the taxpayers had done therefore amounted to a tax avoidance arrangement, so the GAAR applied with the result that the arrangements were void.

*Ben Nevis* is generally regarded as the leading case on the GAAR, and this is so in that it was in *Ben Nevis* that the Supreme Court established the “Parliamentary contemplation” test. But in another sense, *Penny* is the more important case. In particular, the arrangements in *Ben Nevis* were more abusive than those in *Penny*. *Penny* was therefore closer to the line between tax avoidance and legitimate tax planning, and so is a better indicator as to where the line lies.

**Westpac No 1**

*Westpac No 1* entailed a collateral attack on the Commissioner’s allegations of tax avoidance. A number of banks, including Westpac, BNZ, ANZ and ASB, entered into arrangements with various foreign counter-parties. These arrangements were all essentially the same and they were described by the Commissioner as having been structured in accordance with a template. The arrangements were complex and have been described in detail elsewhere so there is no need to explain them here. It is

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77 [2011] NZSC 95 at [33].
78 [2011] NZSC 95 at [23], [27] and [33].
79 [2011] NZSC 95 at [33].
80 [2011] NZSC 95 at [33].
81 *Ben Nevis No 1* [2008] NZSC 115 at [109].
worth noting however that the amount of tax at stake was large – about $2 billion in total.\(^{85}\)

According to the Commissioner, the arrangements served no genuine commercial purpose and were intended merely to produce a tax advantage.\(^{86}\) He therefore invoked the GAAR.\(^{87}\) The banks all denied that what they had done was tax avoidance and litigation ensued. In each case, the Commissioner sought to produce in evidence documents obtained from the other banks, in order to demonstrate that the transactions in question were all based on a common template. But each of the banks opposed the disclosure of its documents to the other banks.

In the BNZ litigation,\(^{88}\) the Commissioner provided a list of documents that included documents obtained from Westpac, ASB and ANZ. BNZ objected to the discovery of those documents and Westpac, ANZ and ASB joined the proceedings and objected also. The Inland Revenue Department’s obligation of secrecy was provided for by s 81(1) of the Tax Administration Act 1994, which provided that the Department was obliged not to disclose taxpayers’ private affairs to any person “except for the purpose of carrying into effect” the Inland Revenue Acts.\(^{89}\) The Commissioner maintained that it was necessary for him to produce the documents in evidence and that s 81(1) permitted him to do so.

The taxpayers argued, first, that the Commissioner’s right to disclose other taxpayers’ confidential information in the course of litigation pursuant to s 81(1) was subject to s 6 of the Tax Administration Act, which provided that the Commissioner and his Department were obliged to use “their best endeavours to protect the integrity of the tax system” and that the “integrity of the tax system” included among other things “[t]he rights of taxpayers to have their individual affairs kept confidential” and “[t]he responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers”.\(^{90}\) Secondly, they maintained that s 81(1) was subject to a common law public interest qualification, according to which the Commissioner could not disclose confidential information if doing so was contrary to the public interest. And, thirdly, they asserted that if the law permitted the Commissioner to produce in evidence the information in question, he should at least be required to produce it in a form that would not permit the identification of the taxpayers from whom it had been obtained.

The judgment of the Court was delivered by McGrath J, who held that it was necessary to balance the interests of justice (in particular, ensuring that taxpayers paid all the tax they were obliged to pay) with the taxpayers’ right to confidentiality,\(^{91}\) that s 6 of the Tax Administration Act meant that “the right of taxpayers to have their affairs treated as confidential” had become “a fundamental principle in tax law”; that s 81 “must now be interpreted in that context”;\(^{92}\) and that the Commissioner’s right to use confidential information in the discharge of his functions was not unrestricted.\(^{93}\)

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\(^{85}\) Sawyer, n 84, at 6-7.

\(^{86}\) [2008] NZSC 24 at [16].


\(^{88}\) **BNZ Investments Ltd v Commissioner of Inland Revenue (2009) 24 NZTC 23,582 (HC).**

\(^{89}\) Tax Administration Act 1994, s 81(1), as in force at the relevant time (the early 2000s). Section 81 has since been extensively amended.

\(^{90}\) [2008] NZSC 24 at [22] and [63].

\(^{91}\) [2008] NZSC 24 at [52] and [71].

\(^{92}\) [2008] NZSC 24 at [33].

\(^{93}\) [2008] NZSC 24 at [68]-[71].
Having got that far, however, the taxpayers got no farther. McGrath J held, first, that s 81(1) permitted the Commissioner to disclose confidential information in the course of litigation so long as it was “reasonably necessary” for him to do so.94 In the first instance, it would fall to the Commissioner to determine what was “reasonably necessary”, though his decisions would be reviewable by the courts.95 Secondly, McGrath J held that the Act itself “comprehensively” addressed “the conflicting principles of taxpayer secrecy and the interests of justice” and that there was no scope for importing into the interpretation of s 81(1) any common law public interest qualification because “resort is not to be had to the common law when the statute covers the ground.”96 And, thirdly, whilst “[t]echniques of editing and redaction…should be pursued” so as to protect taxpayers’ privacy “where that does not impair the utility of the material concerned”,97 it would be inappropriate to use such techniques in the case before the Court because “if the identity of the other banks” was withheld, the documents would have “no utility as evidence.”98 In summary, tax secrecy was “an important value which should be accommodated”, but not if the result would be that “the Commissioner’s case would be prejudiced.”99

The case is important because the need to balance the Commissioner’s powers and taxpayers’ rights arises in various contexts and because similar balancing exercises might be required also in respect of other public officials.

Ben Nevis No 2

In Ben Nevis No 2100 the Commissioner asked the Supreme Court to recall and amend the judgment it had given six months previously in Ben Nevis No 1.101 His concern was that in Ben Nevis No 1102 the Court had cited the decision of the Court of Appeal in Commissioner of Inland Revenue v VH Farnsworth Ltd103 but without referring to that Court’s more recent decision in Commissioner of Inland Revenue v Zentrum Holdings Limited,104 neither case having been alluded to in argument. The Court acknowledged that it had “[i]nadvertently…created uncertainty as whether Zentrum is a correct statement of the law” and stated that its judgment “should not be regarded as representing this Court’s view of the correctness or otherwise of either the Farnsworth or the Zentrum cases” 105. But it declined to recall the judgment, observing that “this clarification of the position is all that is necessary”.106 The case is a curious and potentially instructive example of how a court might deal with a problem of this sort.

94 [2008] NZSC 24 at [69].
95 [2008] NZSC 24 at [70].
96 [2008] NZSC 24 at [71].
97 [2008] NZSC 24 at [71].
98 [2008] NZSC 24 at [72].
99 [2008] NZSC 24 at [69].
102 [2008] NZSC 115 at [153].
103 [1984] 1 NZLR 428 (CA).
104 [2007] 1 NZLR 145 (CA).
106 [2009] NZSC 40 at [3].
Redcliffe No 1

Redcliffe No 1\(^{107}\) concerned a collateral attack on a finding of tax avoidance. The taxpayers were some of those involved in Ben Nevis No 1.\(^{108}\) As is recounted above, the Supreme Court concluded that what Ben Nevis and the other taxpayers had done was tax avoidance. Now some of the taxpayers sought to have the judgment set aside on the basis that the Commissioner had procured it by fraud. Specifically, they maintained that (a) in Ben Nevis No 1 the Commissioner should have assessed the taxpayers under subpart EH of the Income Tax Act, rather than subpart EG; (b) he had “dishonestly concealed” subpart EH from the taxpayers and the High Court; and (c) he had thus procured the judgment of the High Court by fraud.\(^{109}\)

As one would expect, the Court unanimously rejected the taxpayer’s application. The judgment of the Court was given by McGrath J, who confirmed that a court can set aside a judgment procured by fraud.\(^{110}\) But, he said, “only fraud in the strict legal sense will suffice”.\(^{111}\) There must be “dishonesty, usually involving perjury, in the evidence given at trial which has deceived the trial court into making erroneous determinations of fact.”\(^{112}\) Thus “the fraud exception to the finality of judgments does not apply to legal errors allegedly made in the reasons for judgment, even if a party’s conduct is said to contribute to the making of the alleged error.”\(^{113}\) As McGrath J pointed out, subpart EH “was there to be seen in the legislation and was thus inherently incapable of concealment.”\(^{114}\)

One might wonder why the Court gave leave for such a weak argument to be advanced. The reason is perhaps that the Court thought that, notwithstanding the hopelessness of the taxpayers’ case, it might be helpful to explain some less obvious aspects of the law relating to the procuring of judgments by fraud.\(^{115}\) In particular, “the appropriate procedural course, where a party against whom a judgment has been entered, alleges that it has been obtained by fraud, is to commence a separate proceeding seeking to have the judgment set aside.”\(^{116}\) Thus, the issue is to be determined in the trial court rather than in an appellate court, “even where the impugned judgment has already been subject of appeal.”\(^{117}\)

Redcliffe No 2

The taxpayer in Redcliffe No 2\(^{118}\) was one of the taxpayers in Ben Nevis No 1\(^{119}\) and it applied for the recall of the judgment of the Supreme Court in that case. The passage in the judgment to which it objected was as follows:\(^{120}\)

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\(^{109}\) [2012] NZSC 94 at [40].


\(^{111}\) [2012] NZSC 94 at [29].

\(^{112}\) [2012] NZSC 94 at [31].

\(^{113}\) [2012] NZSC 94 at [39].

\(^{114}\) [2012] NZSC 94 at [42].

\(^{115}\) The case also raised issues as to the interpretation of the High Court Rules: [2012] NZSC 94 at [6], [10]-[26], [34] and [46].

\(^{116}\) [2012] NZSC 94 at [31].

\(^{117}\) [2012] NZSC 94 at [31].

\(^{118}\) [2013] NZSC 128.

\(^{119}\) [2008] NZSC 115.

\(^{120}\) [2008] NZSC 115 at [118], emphasis added; cited in Redcliffe No 2 [2013] NZSC 128 at [1].
Redcliffe’s return involved taking a tax position...which resulted in too little tax being paid by Redcliffe’s shareholders.

The taxpayer objected to this on behalf of its shareholders. They, the shareholders, were engaged in a related dispute with the Inland Revenue; they had not been parties to Ben Nevis No I; and they maintained that it was therefore inappropriate for the Supreme Court in that case to have gratuitously offered a conclusion as to their liability to tax.

The Court (Elias CJ, McGrath and Arnold JJ) unanimously dismissed the taxpayer’s application. The reasoning was as follows:121

There can of course be argument in different proceedings about what a judgment of this Court has decided, and what the legal consequences of that judgment are for those later proceedings. Argument over legal consequences may include whether an issue is res judicata in relation to the parties to those proceedings. But the exceptions to the general rule of finality and conclusiveness of judgments do not allow for parties to seek clarification of precise meaning of what is said whether for application in subsequent proceedings or for some other purposes.

Presumably this meant that the shareholders could at least argue that their liability was not res judicata. How often problems of this kind arise is unclear.

The Thompson Case

If a person who is registered under the GST Act ceases to be registered, he is treated as if he has sold the assets he was using in his “taxable activity”.122 That generally triggers a liability for GST. Without such a rule it would be possible to escape GST by deregistering. For the purpose of the rule, assets are generally accorded their market value as at the time of deregistration.123 Assets acquired before GST was introduced on 1 October 1986, however, are valued at the price paid by the taxpayer when he acquired them.124

The taxpayer in Thompson v Commissioner of Inland Revenue125 bought a farm in 1979. When the GST Act 1985 was enacted, he registered under it. The consequences of registration included that, if he sold the farm, he would have to pay GST on the proceeds.126 In 1999, he sought to escape that liability by deregistering first and then selling the farm. When he deregistered he would have to pay GST,127 but his liability would be based on the price he had paid for the farm when he bought it (rather than its much higher market value).128 Then, once he was deregistered, he could sell the farm (at its market value) without giving rise to any further liability to GST (because by then he would no longer be registered). Whoever he sold it to would be entitled to an input tax credit of 3/23 of the price, whether Thompson was registered or not.129

121 [2013] NZSC 128 at [4].
122 GST Act 1985, s 5(3).
123 GST Act 1985, s 10(7A).
124 GST Act 1985, s 10(8)(a). Or at market value if that is less than cost: s 10(8)(b).
125 [2012] NZSC 36. I am grateful to Graeme Olding for his thoughts on this case.
126 GST Act 1985, s 8. See also s2 (“goods” includes “real property”).
127 GST Act 1985, s 5(3).
128 GST Act 1985, s 10(8).
129 GST Act 1985, ss 3A and 20. This assumes that the purchaser would be registered but that condition would almost certainly be fulfilled.
In order to deregister, he had to satisfy the Commissioner (under s 52 of the Act) that his “taxable supplies” for the next 12 months would not exceed the GST threshold (then $30,000; now $60,000). He therefore applied to be deregistered, on the basis that he planned to let the farm and that it would produce rental income of less than $30,000 per year. This was accepted by the Commissioner and he was accordingly deregistered, apparently paying GST on the basis of the price he had paid for the farm when he bought it. He then sold the farm in three parcels. The first sale was to an unrelated buyer at a price of $461,259; the second was to a company called Armagh, which was controlled by Thompson, at a price of $810,000; and the third was also to Armagh, at a price of $2 million. He maintained that since he was neither registered nor obliged to be registered, the sales entailed no liability for GST.

The Commissioner retrospectively cancelled Thompson’s deregistration and assessed him for GST on the three sales. He did that on the basis that in determining whether the value of a taxpayer’s taxable supplies would exceed $30,000 under s 52 it was necessary to include any sales of capital assets – such as, in this case, the farm.

Thompson objected on the basis that as at the date of his proposed deregistration he had neither entered into a contract to sell the farm nor even formed any definite plan to sell it. Thus, according to Thompson, the Commissioner should have determined the likely value of his supplies without reference to the possible sale of the farm. He based his argument on Lopas v Commissioner of Inland Revenue, which, he said, established that the Commissioner, in assessing the likely value of a taxpayer’s supplies for the following 12 months under s 52, should take into account transactions that the taxpayer has “planned” but not transactions that are merely “likely”.

The Supreme Court unanimously rejected Thompson’s argument. William Young J, delivering the judgment of the Court, held that (1) s 52 only entitled Thompson to be deregistered if he could satisfy the Commissioner that his turnover for the 12 months following deregistration, including “the possible proceeds” of the sale of the farm, would be less than the threshold; (2) on the evidence “it could not be predicated…that there would not be a sale” of the farm; and therefore (3) Thompson was not entitled to be deregistered prior to the sale of the farm; with the result that (4) his liability for GST was to be assessed by reference to the proceeds of sale, not the cost of the farm.

Young J concluded his judgment with some observations as to its likely consequences:

We appreciate that as a result of Lopas and this judgment, de-registering taxpayers will usually take good care that retained assets are not disposed of until 12 months have elapsed from de-registration. For this reason, there normally will be, at the date of de-registration, a settled intention that there will be no relevant asset disposals for at least 12 months…. [T]he test will

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130 GST Act 1985, ss 52(1) and (2) and 51(1)(a), as amended.
131 [2012] NZSC 36 at [7].
134 [2012] NZSC 36 at [48].
135 [2012] NZSC 36 at [50].
136 [2012] NZSC 36 at [50].
137 [2012] NZSC 36 at [51]; emphasis added.
probably be satisfied only where the taxpayer can show a settled intention that such transactions will not take place.

The case is important because it appears to establish the 12-month period as a safe harbour; so long as the taxpayer is prepared to wait that long, he can get the benefit of paying GST on the basis of the cost of the farm (or other asset), rather than the sale price or market value (assuming, of course, that he acquired it before 1 October 1986 and that he derives no more than $60,000 from it during the 12-month period required by s 52). But to be sure of this, he should document a “settled intention” not to sell the asset until the 12 months have gone by.

Notwithstanding Young J’s comments, it is necessary to note that the Commissioner did not assert that what Thompson had done was tax avoidance and therefore caught by the GAAR set out in s 76 of the GST Act; and that the Court therefore expressed no opinion on that question. It seems likely, however, that some will read the case as meaning that any taxpayer who complies with Young J’s observations will be safe from s 76—in which case we are likely to discover in due course whether the Court accepts that that was what it meant. The likelihood that such arrangements are caught by the GAAR might be greater where, as in Thompson, the taxpayer sells the asset to an associate.

The Gilchrist Case

The taxpayer in Gilchrist v R\textsuperscript{138} controlled a trust that ran a tax consultancy business. It should have paid GST but did not. The Commissioner served on it a notice under s 17 of the Tax Administration Act 1994, requiring it to supply a list of its debtors. His intention was to require the debtors (under s 157 of the Act) to pay to him the monies they would otherwise have been obliged to pay to the trust. The taxpayer declined to comply with the notice. Instead, he arranged for the trust to assign the debts for no consideration to a company controlled by himself and he instructed the debtors to pay the company rather than the trust. He was prosecuted for failing to provide information with the intention of evading “the assessment or payment of tax”.\textsuperscript{139}

He admitted that he had attempted to escape payment of the tax, but maintained that that did not constitute evasion. Rather, he said, a taxpayer is guilty of evasion only if he has sought to escape assessment (as opposed to payment); he had not sought to escape assessment; and he had, he claimed, assessed himself to tax. He conceded that he had not submitted his assessments to the Revenue; instead, he had left them on his desk. But his assessments were in order; ergo, he had had no intention of evading tax. As one would expect, the Supreme Court rejected this nonsense and upheld the conviction. The case is a compelling example of a tax advisor advancing a manifestly spurious argument on his own behalf, but otherwise unimportant.

III. The Scope of GST

The five cases GST cases are Gilchrist,\textsuperscript{140} Glenharrow,\textsuperscript{141} Contract Pacific,\textsuperscript{142} Thompson\textsuperscript{143} and Staissny.\textsuperscript{144} Gilchrist, Glenharrow and Thompson are discussed in

\textsuperscript{139} Tax Administration Act 1994, s 143B; [2006] NZSC 109 at [3].
\textsuperscript{140}[2006] NZSC 109.
\textsuperscript{141}[2008] NZSC 116.
\textsuperscript{142}[2010] NZSC 136.
the preceding Part of this paper; Contract Pacific and Staissny are discussed in this Part.

The Contract Pacific Case

The taxpayer in Contract Pacific Ltd v Commissioner of Inland Revenue\textsuperscript{145} carried on business in New Zealand selling New Zealand holiday packages to foreign companies that on-sold them to tourists. The taxpayer charged GST on its supplies to its customers and accounted for it to the Commissioner. It then claimed that that had been a mistake, that the supplies should have been zero-rated, and that it was entitled to a refund of the $7.5 million it had paid in GST.

Section 46 of the GST Act provides that the Commissioner is generally obliged to pay a refund within 15 working days of receiving the return claiming it.\textsuperscript{146} It also provides that he is not obliged to pay a refund if he is “not satisfied” with the taxpayer’s return and within the 15 days he either (a) gives notice that he intends to investigate or (b) requests further information from the taxpayer. Once the Commissioner has either given notice of an intention to investigate or requested further information, he is not obliged to make the refund claimed by the taxpayer until (a) he has determined that the amount is refundable and (b) he is satisfied that the taxpayer has complied with its tax obligations.\textsuperscript{147}

The Commissioner duly notified the taxpayer, within the 15 day time-limit, that he intended to investigate and to withhold payment of the refund pending the completion of his investigation. He then, after the 15 days had passed, requested further information. The taxpayer maintained that the Commissioner, by requesting information in a manner that did not comply with the Act (because out of time), had lost his authority to withhold the refund; and that he was consequently obliged to make the refund.

The Supreme Court rejected the taxpayer’s argument. The judgment of Elias CJ and Tipping, McGrath and William Young JJ was delivered by Young J. Blanchard J concurred with both the result and the reasons, but delivered a judgment of his own, elaborating on the reasons given by Young J. Young J decided the case on the basis that once the Commissioner had notified the taxpayer within the stipulated 15 days that he intended to investigate, he was not obliged to pay the refund until (a) he had determined that the amount was refundable and (b) he was satisfied that the taxpayer has complied with its tax obligations. Since he had never determined that the amount was refundable, he was not obliged to pay the refund. The fact that the Commissioner had made a request for information outside the 15 day period did not negate his right to withhold payment (that right resulting from his notifying the taxpayer, within time, of his intention to investigate).

Young J also declined to accept that there was anything untoward in the Commissioner’s having requested information outside the 15 day period. The Act specifically authorised him to request information within the 15 day period, but requesting information was also one of the steps the Commissioner could take in the course of an investigation. Thus, having given notice of an intention to investigate, the

\textsuperscript{143}[2012] NZSC 36.
\textsuperscript{144}[2012] NZSC 106.
\textsuperscript{145}[2010] NZSC 136.
\textsuperscript{146}GST Act 1985, s 46(1)(a).
\textsuperscript{147}GST Act 1985, s 46(1)(b), (2), (4) and (5).
Commissioner was entitled to request further information as part of his investigation. The taxpayer’s argument necessarily entailed that the Commissioner’s power to investigate did not authorise him to request information from the taxpayer – a position Young J described as “untenable”. Rather, he said, when the Commissioner investigates a return, that “naturally encompasses” asking the taxpayer about it.

As Young J observed, the case is important. The rules relating to supplies of holiday packages to foreigners are a special case and in any event they have been amended. But the rules relating to refunds are central to any value-added tax such as GST and must balance important conflicting values, as Young J observed:

Confidence in the GST system would be lost and great inconvenience potentially caused to businesses if the Department were routinely to delay making refunds of [GST]….But although there are good policy reasons why the Commissioner should refund GST promptly, the tax system would be subject to abuse if the Commissioner were required in all cases to pay first and investigate later.

He explained also that s 46 balances these two conflicting policy considerations by setting a 15 day time limit. If the Commissioner, within the 15 days, either requests information or notifies the taxpayer that he intends to investigate, then he is not obliged to make the refund claimed by the taxpayer. But if he fails to take either of those steps within the 15 days, he must make the refund – even if he does not accept that the taxpayer is entitled to it.

The Staissny Case

Stiassny v Commissioner of Inland Revenue concerned a partnership called the Central North Island Forest Partnership (CNIFP). The partners were two companies, Forestry Corp and CITIC. CNIFP carried on a forestry business and owned what were referred to as “forestry assets”. A bank, BNZ, held securities over the assets of the partnership and over the separate assets of each partner. The business encountered difficulties and the bank appointed the appellants, Staissny and Graham, as receivers of both Forestry Corp and CITIC. CNIFP itself, however, was not placed in receivership. Instead, Staissny and Graham, as receivers of the partners, took control of CNIFP. They then arranged for CNIFP to sell the forestry assets to a partnership of Cayman Islands companies for US$621 million plus GST.

The receivers were unsure of whether they were obliged to account to the Commissioner for GST on the sale. They were concerned, however, that they might be personally liable for the GST and also for penalties and interest if they failed to pay or paid late. They therefore paid the GST and then sought to recover it (for the benefit of BNZ). The Commissioner declined to refund the tax; the receivers, the

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148 [2010] NZSC 136 at [27].
149 [2010] NZSC 136 at [28].
150 [2010] NZSC 136 at [21].
152 [2010] NZSC 136 at [22].
partnership and BNZ all sued; and the Commissioner applied to have their proceeding struck out.

The judgment of the Court was given by Blanchard J (who had retired from the Court but was called upon to sit because the Chief Justice had a conflict). He held that whilst the partnership was liable for the GST, the receivers were not. He also emphasised, however, that as a matter of policy the law should have required the receivers to pay. The reason was that the receivers had arranged for the partnership to issue a GST invoice to the purchaser of the assets (the partnership of Cayman Islands companies); and the purchaser had presumably claimed and been allowed an input tax credit on the purchase price. As Blanchard J put it, the “ultimate result” of not requiring the receivers to pay GST on the sale would be that BNZ, as the first-ranking secured creditor, “would benefit, at public expense, by receiving more than the value of the asset”.

The reason that the GST Act did not require the receivers to pay was not that that was the outcome Parliament intended; rather, the reason would seem to be that Parliament did not envisage the rather unusual facts of the case. Specifically, whilst the GST Act contained rules protecting the revenue where a partnership was placed in receivership, Parliament had not foreseen the possibility that the members of a partnership might all find themselves in receivership without the partnership itself being placed in receivership. In other words, although Blanchard J refrained from saying so, this is a gap in the legislation that Parliament ought to fix.

In any event Blanchard J, although holding that the receivers had not been obliged to pay the GST, nonetheless held that neither they nor the partnership nor BNZ was entitled to recover it. BNZ’s claim was based on its security over the partnership’s assets and the monies derived from selling them. That claim failed, Blanchard J said, because of ss 25 and 95 of the Personal Property Securities Act 1999 (which provide that a “debtor-initiated payment” has priority over a “security interest” so long as the recipient has acted “in good faith”). As for the partnership, its claim was in restitution: it claimed that the receivers had paid the funds to the Commissioner in the belief that they were obliged to do so; that that belief was mistaken; and that the partnership was therefore entitled to recover the funds. But Blanchard J rejected that argument also, on the ground that “the Commissioner gave good consideration.” Specifically, whilst the receivers were not liable for the tax, the partnership was liable; and the payment by the receivers had discharged the partnership’s debt. In a nutshell, “[t]here was no unjust enrichment of the Crown at the expense of the partnership.” Finally, Blanchard J rejected the claim made by the receivers themselves on the ground that they had no claim “independent” of the claims of the partnership and its creditors.

156 [2012] NZSC 106 at [35], [38]-[42].
158 [2012] NZSC 106 at [21].
160 [2012] NZSC 106 at [46]-[60].
161 [2012] NZSC 106 at [70].
162 [2012] NZSC 106 at [61]-[70].
163 [2012] NZSC 106 at [67].
164 [2012] NZSC 106 at [70].
Two further points about the case warrant mention. First, Blanchard J’s judgment included a statement on the interpretation of taxing statutes generally:

In this country, the general approach to the interpretation of a revenue statute is much the same as for other statutes. The purpose of a taxing provision may be a guide to its meaning and intended application. But, as Burrows and Carter point out, in most cases the only evidence of that purpose is the detailed wording of the provision and the safest method is to read the words in their most natural sense. In construing and applying a taxing provision, a court leans neither for nor against the taxpayer, but should require that before the provision is effectual to make the taxpayer amenable to the tax, it uses words which, on a fair construction, must be taken to impose that tax in the circumstances of the case.

Secondly, it might be thought that the course of action followed by BNZ and the receivers constituted tax avoidance and so would have been caught by the GAAR set out in s 76 of the GST Act. But the Commissioner did not advance that argument, so the Court did not consider it.

IV. JUDICIAL REVIEW

Two of the seventeen cases concerned applications for judicial review – one (Allen) in which the applicant was the Commissioner and the other (Tannadyce) in which the applicant was the taxpayer.

The Allen Case

The taxpayer in Allen v Commissioner of Inland Revenue filed proceedings in the Taxation Review Authority. The Commissioner applied to the Authority to have them struck out on the basis that they were out of time. The Authority declined to strike out the proceedings. The Commissioner applied to the High Court for judicial review, and won: the Court set aside the Authority’s decision and struck out the proceedings commenced by the taxpayer. The taxpayer appealed to the Court of Appeal and lost. He appealed to the Supreme Court and lost again. The case is unimportant because the judgment of the Court (which was given by Anderson J) contains no general discussion of the principles relating to the availability of judicial review.

The Tannadyce Case

The taxpayer in Tannadyce Investments Ltd v Commissioner of Inland Revenue was a company controlled by a Christchurch property developer called David Henderson, who engaged in a long-running feud with the Inland Revenue Department. He wrote a book about it called Be Very Afraid: One Man’s Stand Against the IRD, which was made into a movie called We’re Here to Help, starring Erik Thomson as Henderson.

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166 [2012] NZSC 106 at n 22.
and Michael Hurst as the then ACT Party leader Rodney Hide (who joined in Henderson’s crusade against the Department). The Tannadyce litigation was one phase of this feud. The taxpayer company filed an income tax return claiming that it had suffered losses of $1,539,733. The Commissioner maintained that it had lost only $209,373 and assessed it to tax accordingly. The taxpayer applied for judicial review on the grounds that the Commissioner held documents relating to the affairs of the taxpayer which it refused to make available to the taxpayer. The Commissioner applied to have the taxpayer’s application struck out on the basis that it contravened s 109 of the Tax Administration Act 1994, which provided:

Except in a challenge under Part 8A [of the Act]…no disputable decision [such as an assessment] may be disputed in a court or in any proceedings on any ground whatsoever….

The Supreme Court held unanimously that the taxpayer was not entitled to judicial review but disagreed as to the reasons, the majority (Blanchard, Tipping and Gault JJ) giving a narrower theory of the circumstances in which judicial review might be available than the minority (Elias CJ and McGrath J).

The judgment of the majority was given by Tipping J, who began by explaining the scope of the challenge procedure provided for by Part 8A. A taxpayer, he said, could challenge an assessment by filing proceedings in a “hearing authority”, meaning either a Taxation Review Authority (TRA) or the High Court. When hearing such a challenge, the TRA or the High Court was not confined to considering the merits of the assessment; it could also consider its legality. In other words, it could also consider its legality. In other words, it could consider, in proceedings brought under Part 8A, anything the High Court could consider on an application for judicial review; and, at the same time, it could consider the merits. Moreover, if the taxpayer chose to bring his case in the TRA and lost, he could appeal to the High Court. In other words, as Tipping J put it:

[T]he challenge procedure has a built-in right for the taxpayer to take the matter to the High Court…There cannot therefore be any question of s 109 preventing access by taxpayers to the High Court.

The advantage of the approach taken by Parliament, Tipping J explained, was that there was “no potential for separation of matters of legality from matters of correctness”… This was “much more efficient” and reduced the scope for “gaming the system”… He did not, however, go so far as to say that s 109 excluded the possibility of judicial review altogether. First, if for some reason it was “not practically possible” for the taxpayer to challenge an assessment under Part 8A, he might be able to apply for judicial review because he would otherwise be deprived of access to the courts. Secondly, if the statutory process was for some reason flawed

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169 Tax Administration Act 1994, s 109(a) (emphasis added); see also s 3, definition of “disputable decision”.

170 Tax Administration Act 1994, s 3, definition of “hearing authority”.


172 Tax Administration Act 1994, s 138P(1); [2011] NZSC 158 at [50]-[54].

173 [2011] NZSC 158 at [57].


175 [2011] NZSC 158 at [55].

176 [2011] NZSC 158 at [71].

177 [2011] NZSC 158 at [58]-[61].
(for example, because of bias on the part of the TRA), then again the taxpayer might be able to apply for judicial review.\textsuperscript{178}

Tipping J also discussed \textit{Commissioner of Taxation of the Commonwealth v Futuris Corp Ltd},\textsuperscript{179} in which the High Court of Australia held that judicial review was available, despite the privative clause in the Australian income tax legislation, where either (a) what the Commissioner claimed was an assessment was not really an assessment at all or (b) the Commissioner was guilty of “conscious maladministration”.\textsuperscript{180} The New Zealand Court of Appeal had followed \textit{Futuris} both in \textit{Westpac Banking Corp v Commissioner of Inland Revenue}\textsuperscript{181} and also in the \textit{Tannadyce} case;\textsuperscript{182} but Tipping J held that because of the differences in the statutory wording, \textit{Futuris} did not apply in New Zealand. Rather, s 109 precluded judicial review even where what the Commissioner claimed was an assessment was not really an assessment at all and even where the Commissioner was guilty of “conscious maladministration” – the reason being that, in such cases, the taxpayer could challenge the assessment (or purported assessment) under Part 8A.

Applying the law to the facts, Tipping J held that the taxpayer was not entitled to judicial review. The reason was that it had not shown that it was unable to commence challenge proceedings under Part 8A. In particular, the taxpayer had not explained why it was not itself in possession of whatever documents it required to show how much or how little tax it owed. Nor had it explained what documents were held by the Department or why it needed them to commence a challenge. Nor had it explained how, if it lacked adequate records of its own affairs, it had calculated its alleged losses so precisely (the figure being, as indicated above, $1,539,733). Moreover, by filing the return claiming losses of that amount, the taxpayer \textit{had} engaged in the statutory process.\textsuperscript{183}

The minority judgment was given by McGrath J on behalf of himself and Elias CJ. He took a more conventional view of s 109.\textsuperscript{184} The Commissioner’s powers were “highly intrusive” and judicial review would in some circumstances be “the better means of providing the necessary judicial scrutiny of departmental actions”.\textsuperscript{185} As to what those circumstances were, McGrath J left the question open, the possible problems being “too diverse” to allow the courts “to frame a definitive rule”.\textsuperscript{186} McGrath J also observed that it was “unfortunate” that the majority had departed from the orthodox approach “in a case in which that question was not argued” – for the Commissioner had presented his case on the basis of the \textit{Westpac} decision, and the majority had formulated a rule “even more restrictive of the availability of judicial review” than that proposed by the Commissioner.\textsuperscript{187}

\textsuperscript{178} [2011] NZSC 158 at [59].
\textsuperscript{180} [2008] HCA 32 at [25] and [52].
\textsuperscript{181} [2009] NZCA 24 (CA) at [52] and [59].
\textsuperscript{182} \textit{Tannadyce Investments Ltd v Commissioner of Inland Revenue} [2010] NZCA 233 at [26].
\textsuperscript{183} [2011] NZSC 158 at [81]-[87].
\textsuperscript{185} [2011] NZSC 158 at [35].
\textsuperscript{186} [2011] NZSC 158 at [36]-[38].
\textsuperscript{187} [2011] NZSC 158 at [39].
The *Tannadyce* case is important, first, because it significantly narrowed the circumstances in which judicial review is available against the Commissioner.\(^ {188}\) Secondly, it confirmed that a challenge brought under Part 8A can be based “on any ground whatsoever” and in particular that the High Court and the TRA can consider, in a challenge brought under Part 8A, any argument that the High Court could consider in an application for judicial review.\(^ {189}\)

Thirdly, the case is instructive as to the drafting of privative clauses: if Parliament wants to exclude the possibility of judicial review, Part 8A and s 109 suggest how it might be done. The price to be paid is that persons affected by decisions of the kind in question must be given an unrestricted right of access to the High Court. In some circumstances, that is exactly what Parliament wants to preclude – in which case it will enact an orthodox privative clause, which the courts will interpret on the orthodox basis.\(^ {190}\) In other circumstances, however, as in the case of tax disputes, Parliament might calculate that giving unrestricted access to the High Court is a price worth paying for the resultant streamlining of procedure.

Fourthly, McGrath J is surely right that it is unfortunate that the law, as represented by the majority judgment in *Tannadyce*, has been determined without the benefit of considered argument. There seems, however, to be no shortage of taxpayers willing to pursue hopeless applications for judicial review, so the Court will likely be able to answer the question again, if it wishes to do so.

**V. CASES WITH ADVISORS AS PARTIES**

The seven cases in which the taxpayer was a tax advisor, or the taxpayers included tax advisors, were *Ben Nevis No 1*, *Ben Nevis No 2*, *Redcliffe No 1*, *Redcliffe No 2*, *Saha*, *Stiassny* and *Gilchrist*. They are all discussed above in Parts II (avoidance and evasion) or III (GST) except *Saha*, an account of which follows.

**The *Saha* Case**

The taxpayer in *Saha v Commissioner of Inland Revenue*\(^ {191}\) was a member of a partnership (Ernst and Young). The partnership sold its consultancy business to a French company called Cap Gemini. In consideration of the sale, shares in Cap Gemini were allotted to the members of the partnership. The number of shares allotted to the taxpayer was 7,566. The terms of the sale included that (a) the taxpayer would become an employee of a subsidiary of Cap Gemini; (b) he would continue in that employment for at least five years; (c) the 7,566 shares allotted to him would be “released” to him progressively over the five years; and (d) if he resigned within the five years, the shares then unreleased would be forfeited as liquidated damages. In other words, if the taxpayer continued in the employment for the whole of the five years he would receive the whole of the price that Cap Gemini had agreed to pay for his share in the business; but if he resigned at any time during the five years, the price he received would be in effect reduced.\(^ {192}\)

\(^ {188}\) See eg *Mawhinney v Commissioner of Inland Revenue* [2014] NZCA 450.

\(^ {189}\) But see Tax Administration Act 1994, s 138E (which limits access to the challenge procedure) and Coleman, n 168.

\(^ {190}\) See in particular *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

\(^ {191}\) [2010] NZSC 89.

\(^ {192}\) [2010] NZSC 89 at [1]-[4].
A year later, the taxpayer and the subsidiary fell out. At that point, 4,190 of the 7,566 shares were unreleased. The taxpayer and the subsidiary agreed that (a) he would resign; (b) the subsidiary would pay him a specified sum of money; and (c) he would forfeit only half of the unreleased shares (2,095 of 4,190), rather than all of them (as provided for by the sale agreement).\textsuperscript{193}

The taxpayer was subject to the Foreign Investment Fund rules (the FIF rules) contained in the income tax legislation in respect of the shares that he held in Cap Gemini.\textsuperscript{194} The function of those rules is to impose tax on New Zealand residents where (a) they hold an interest in a foreign company (or other entity) and (b) the foreign company accumulates its income (that is, does not pay dividends). In the absence of such rules it would be easy to escape tax by accumulating offshore income in a non-resident entity. The rules work by treating a proportionate share of the undistributed income of the entity as the income of the New Zealand-resident shareholder, who is obliged to pay tax on the income attributed to him. They provided that, in the taxpayer’s circumstances, any increase in the value of the shares would be treated as income, and any decrease would be allowed as a deduction.

The 2,095 shares that the taxpayer had forfeited had at that point been worth $602,938; and he claimed that since he had forfeited them for no consideration, he had suffered a loss of $602,938 and was entitled to a deduction of that amount.\textsuperscript{195} The Commissioner disallowed the claim, maintaining that the taxpayer had received consideration for the forfeited shares – namely the other 2,095 shares, that he would also have forfeited but for the agreement pursuant to which he had resigned (that agreement allowing him to keep 2,095 of the 4,190 unreleased shares).\textsuperscript{196} Thus, according to the Commissioner, he had gained 2,095 shares worth $602,938; that gain exactly offset the loss he had suffered in forfeiting the other 2,095 shares; his net loss was therefore zero; and he was accordingly not entitled to any deduction.

The Supreme Court accepted that argument and so concluded that the taxpayer was not entitled to any deduction in connection with the forfeiture of the shares. The decision seems sound as a matter of law, though perhaps harsh in the result. The case is of wider application than might be thought because the principle upon which it was decided will not necessarily be confined to the obscure world of the FIF rules. Rather, as the Court itself observed, it might apply wherever an asset is forfeited.\textsuperscript{197}

\section*{VI. MISCELLANEOUS CASES}

\textbf{The Greenpeace Case}

Greenpeace – the appellant in \textit{Re Greenpeace of New Zealand Inc}\textsuperscript{198} – applied to the Charities Commission for registration under the Charities Act 2005, so as to obtain the tax advantages that go with such registration. The Commission accepted that most

\begin{itemize}
  \item \textsuperscript{193} [2010] NZSC 89 at [5].
  \item \textsuperscript{194} Then Income Tax Act 1994, ss CG 14 – CG 25; see now Income Tax Act 2007, ss CQ 4 – CQ 7; DN 5 – DN 8; EX 28 – EX 73.
  \item \textsuperscript{195} [2010] NZSC 89 at [6]-[9].
  \item \textsuperscript{196} [2010] NZSC 89 at [21]-[26].
  \item \textsuperscript{197} [2010] NZSC 89 at [1]. The Court observed that the issue could arise “whenever an asset which is subject to a trading stock regime is forfeited” (emphasis added); but it is not clear why the principle’s scope should be confined in the way indicated by the words italicised.
  \item \textsuperscript{198} [2014] NZSC 105.
\end{itemize}
of Greenpeace’s objects (promoting the protection of the environment and so on) were charitable, but determined that two of them were not, namely (a) “the promotion of disarmament and peace” and (b) advocating legal and political reforms that would further the organisation’s other objects. Promoting disarmament, according to the Commission, was a political objective and therefore not charitable. And advocacy, it said, might be charitable if it were “ancillary” to some other charitable purpose, but not otherwise. The Supreme Court split three to two. The majority (Elias CJ, McGrath and Glazebrook JJ), in a joint judgment delivered by the Chief Justice, held that there is no absolute rule that a political object cannot be charitable. William Young and Arnold JJ dissented, adhering to the orthodox view that a political purpose cannot be counted as charitable.

As is well known, the law relating to charities is arcane. Accounts of it (both in a tax context and in the context of trust law) traditionally begin by referring to the Preamble to the Charitable Uses Act 1601 (known as the Statute of Elizabeth) and Pemsel’s case, in which Lord Macnaghten summarised the Preamble as establishing that there are four main kinds of charity:

“Charity” in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

The law reports contain many cases in which the courts have considered this fourfold classification and one of the principles the cases had established is that political activities such as advocacy are not charitable. The leading New Zealand case was Molloy v Commissioner of Inland Revenue, which concerned an organisation whose objects included opposing the liberalisation of the law relating to abortion; and the Court of Appeal held that that was not a charitable purpose.

The Chief Justice reviewed the cases and concluded that the authority for the orthodox view – that a political purpose cannot be counted as charitable – is curiously light. The better view, she said, is that a political purpose does not necessarily disqualify an organisation from being counted as a charity. This was also the approach recently taken by the High Court of Australia in Aid/Watch Inc v Commissioner of Taxation. Moreover, she said, any enquiry into whether a particular purpose was political was likely to distract attention from what should be the central question: namely, whether the purpose under consideration is charitable in the sense required by the Preamble to the Statute of Elizabeth and the subsequent cases. Often, she explained, the result would be the same. For instance, in Molloy the Court of Appeal had probably reached the correct result. The reason, however, was not that opposing the reform of the law relating to abortion was political and therefore not charitable; rather, the reason was that opposing the reform of the law relating to abortion was not

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199 [2014] NZSC 105 at [4].
200 [2014] NZSC 105 at [4].
201 [2014] NZSC 105 at [4].
202 [2014] NZSC 105 at [114].
203 Commissioners for Special Purposes of the Income Tax v Pemsel [1891] AC 531 (HL) at 583.
204 [1981] 1 NZLR 688 (CA).
205 [2014] NZSC 105 at [35] and [59].
206 [2010] HCA 42; discussed by Elias CJ at [9], [66]-[68] and [73]-[74].
charitable because it could not be shown to be for the public benefit in the sense regarded as charitable under the Preamble and the cases.\textsuperscript{207}

Although the Chief Justice accepted Greenpeace’s central argument (that a political purpose does not disqualify an organisation from being counted as charitable), the decision was far from a total victory for Greenpeace – for she declined to accept that Greenpeace was entitled to recognition as a charity. Instead, she referred the matter to the Charities Board (which had succeeded the Commission) so that it could reconsider it.

The majority judgment may well come to be regarded as a tour de force. It is indisputably the leading New Zealand decision on charities and, although an opening of the floodgates seems unlikely,\textsuperscript{208} it will require a different approach to determining whether politically oriented organisations should be recognised as charities.

\textbf{Westpac No 2}

\textit{Westpac No 2}\textsuperscript{209} concerned the scope of the Unclaimed Money Act 1971, which provides that in some circumstances a person holding “unclaimed money” is obliged to pay it to the Commissioner.\textsuperscript{210} Westpac’s business included issuing foreign currency drafts and bank cheques, which were generally presented shortly after issue. Occasionally, however, they were never presented.\textsuperscript{211} The Commissioner claimed that after six years the funds that they represented constituted “unclaimed money” and that Westpac was therefore obliged to pay them to him. The Supreme Court upheld the Commissioner’s position. The decision is presumably significant to the banking industry (though the amount of money at stake is not disclosed by the judgment), but of no broader relevance.

\textbf{The Terminals Case}

The taxpayer in \textit{Terminals (NZ) Ltd v Comptroller of Customs}\textsuperscript{212} dealt in petrol and other fuels. It blended butane with petrol. The Comptroller of Customs maintained that that constituted the “manufacture” of petrol under the Customs and Excise Act 1996 and that duty was therefore payable at a certain rate. The taxpayer maintained that it did not constitute manufacturing and that duty was therefore payable at a lower rate. The Supreme Court held unanimously that the Comptroller’s analysis was correct. The decision itself affects only a very small number of taxpayers, but Glazebrook J (who gave the judgment of the Court) based her decision on some general observations on the interpretation of taxing statutes and these are important because she is the only tax specialist so far to have become a judge of the Supreme Court and \textit{Terminals} is her first real tax judgment (she sat on \textit{Greenpeace}, but that did not require the analysis of a taxing statute).

Glazebrook J began by confirming that tax statutes are to be construed in the same manner as other statutes – that is, purposively as required by s 5(1) of the Interpretation Act 1999.\textsuperscript{213} She explained too that the “fair construction” principle

\textsuperscript{207} [2014] NZSC 105 at [73].
\textsuperscript{208} [2014] NZSC 105 at [114].
\textsuperscript{209} [2011] NZSC 36.
\textsuperscript{210} Unclaimed Money Act 1971, ss 5-8.
\textsuperscript{211} [2011] NZSC 36 at [7].
\textsuperscript{212} [2013] NZSC 139.
\textsuperscript{213} [2013] NZSC 139 at [39].
advanced by Blanchard J in Stiassny214 entails simply that there is no presumption in favour of either the taxpayer or the tax authority.215

Next, she confirmed the orthodox view (as represented by Ben Nevis No 1)216 that if a taxing statute contains a GAAR and the tax authority invokes it, a two-stage inquiry will be required. First, it is necessary “to assess whether the legal substance of the relevant arrangement comes within the specific provisions of the statute construed purposively.”217 That is, it is necessary to consider whether the specific provisions relied upon by the taxpayer produce the consequences claimed by the taxpayer; and in answering that question, the specific provisions must be construed purposively. In other words, but for the GAAR, would the taxpayer’s scheme have worked? Secondly, if the arrangement is “held to come within the specific provisions construed purposively”, it is necessary to consider whether it “contravenes the general anti-avoidance provision”.218 That is, if, but for the GAAR, the taxpayer’s scheme would succeed, it will be necessary to determine whether it is caught by the GAAR. Glazebrook J explained also that the approach taken by the minority in Ben Nevis No 1 would “if anything” lead to “a greater, rather than lesser, role for the specific provisions than is accorded in the majority judgment.”219 In other words, the more robust the interpretation of the specific provisions, the less need there will be to rely on the GAAR.

Finally, Glazebrook J explained that the fact that there was “no general anti-avoidance provision in the Customs and Excise Act” did not “change the principles of interpretation that are to be applied”.220 Rather, it merely meant that “the analysis stops at the first stage of Ben Nevis with a purposive interpretation of the specific provision in question; in this case with a purposive interpretation of the definition of manufacture”.221

**CONCLUSION**

What, then, might be concluded from the Supreme Court’s tax cases? First, it seems clear that the establishment of the Court has made an enormous difference. It is impossible to prove that the Privy Council would not have produced the same body of law, but it seems most unlikely that (to take only the three most important instances) it would have rewritten the law relating to tax avoidance, charities and judicial review.222

Secondly, it seems probable that the principal driver of tax litigation will continue to be taxpayers’ attempts to avoid paying. The spate of recent avoidance cases has to some extent been the result of the Supreme Court’s having taken a harder line on avoidance than did the Privy Council; once taxpayers and their advisors have adjusted to the “parliamentary contemplation” test, the rate of litigation might decline. But it would seem unduly optimistic to expect taxpayers to meet their liabilities with any

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215 [2013] NZSC 139 at [39].
217 [2013] NZSC 139 at [40].
218 [2013] NZSC 139 at [40].
219 [2013] NZSC 139 at n 59.
220 [2013] NZSC 139 at [40].
221 [2013] NZSC 139 at [41].
more enthusiasm than before. It seems likely too that taxpayers’ collateral attacks on the Commissioner’s allegations of avoidance will continue to generate useful decisions in other areas of the law (as in Westpac No 1,\textsuperscript{223} for example).

Thirdly, it seems likely that new issues will arise as to the scope of GST and likely also that the courts, including the Supreme Court, will be called upon to resolve them.\textsuperscript{224}

Finally, it seems likely that from time to time a tax advisor will find himself embroiled in a feud with the Commissioner; and that he will advance arguments that are not merely weak but spectacularly so. The schemes designed by such advisors have sometimes generated an extraordinary volume of litigation. The “Trinity” scheme generated four separate Supreme Court decisions\textsuperscript{225} and they were only the tip of the iceberg.\textsuperscript{226} Notable, too, in this respect is New Zealand’s most famous tax litigant, John Russell, whose “Russell template” (a method designed to allow his clients to use losses suffered by unrelated companies)\textsuperscript{227} has produced an even larger number of cases (none of which, however, has so far reached the Supreme Court).\textsuperscript{228} What these cases suggest is that there is something about tax law that leads some of those who specialise in it to lose sight of what the rest of the legal profession and the courts, let alone the broader community, regard as the limits of reasonable analysis. That some tax lawyers and accountants live in a world of their own is hardly news, but the cases are a useful reminder that the price paid for this detachment can be considerable.

3 November 2014

\textsuperscript{223} [2008] NZSC 24.

\textsuperscript{224} Perhaps the most striking instance of this phenomenon is the decision of the High Court of Australia in \textit{Commissioner of Taxation v Qantas Airways Ltd} [2012] HCA 41, the ramifications of which remain to be seen. See M Consedine “Commissioner of Taxation v Qantas Airways Ltd” (2013) 19 Auck ULR 252.


\textsuperscript{226} For a list of some of the others, see \textit{Bradbury v Judicial Conduct Commissioner} [2014] NZCA 441 at [11] and Appendix 1.

\textsuperscript{227} See \textit{O’Neil v Commissioner of Inland Revenue} [2001] UKPC 17; [2001] STC 742, also reported as \textit{Miller v Commissioner of Inland Revenue} [2001] 3 NZLR 316 (PC).

\textsuperscript{228} In \textit{Russell v Commissioner of Inland Revenue} [2012] NZSC 73 the Supreme Court declined leave to appeal. The most recent episode in the saga is \textit{Russell v Commissioner of Inland Revenue} [2014] NZHC 2034. Alistair Hodson, an academic at the University of Canterbury, has recently completed a thesis on Russell’s contribution to the law and plans to publish a redacted version in 2015.