A Case Analysis for Anti-Avoidance Provision of New Zealand's Tax Laws

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Abstract: This is a legal case analysis focusing on an appeal case from the Court of Appeal of New Zealand's decision by the taxpayer against the Commissioner of Inland Revenue of New Zealand. The paper demonstrates the contemplation, application, and implication of the anti-avoidance provision under the case laws and the Income Tax Act (1994) of New Zealand.

1. Judgement of the Supreme Court of New Zealand

1) The appeal is allowed.
2) The arrangement was not the one which had the purpose of effect of tax avoidance and the arrangement was consistent with Parliament's Contemplation.
3) The application of the general anti-avoidance provision in this case is contrary to its purpose.
4) The assessments of the tax paper were not correct.
5) The expert evidence of the Commissioner is rejected due to its irrelevance to this case.

2. Ms. Jones' Case

This is an appeal from the Court of Appeal of New Zealand's decision by the taxpayer against the Commissioner of Inland Revenue [1].

Ms Jones moved to New Zealand in 2000 and established a company Surgery Limited (SL) to conduct her heart surgeon business. Income of the company is derived from private patients of the company and earned through the SL as company income. Taxable income is subject to the corporate tax rate of 33% (30% from 2008/2009). Shares of the company are owned by a family trust in which Ms Jones is the trustee. Ms Jones herself and her sister's children are the beneficiaries of the trust. Ms Jones is single and has no children of her own. Ms Jones and her accountant are the director of the SL and the trustee of the family trust.

Ms Jones works for her own company as an employee and receives and annual salary of $120,000 New Zealand dollars (NZD) in 2000, $200,000 in 2001 and $200,000 for the subsequent income years.

Table 1: Ms Jones' salaries from the SL ($NZD)

Income Year	Amount
Year 2000	$120,000
Year 2001	$200,000
Year 2002	$200,000
Year 2003	$200,000
Year 2004	$200,000
Year 2005	$200,000
Year 2006	$200,000
Year 2007	$200,000
Year 2008	$200,000
Year 2009	$200,000

The company made a loss of $60,000 in 2000 in the first year of trading. In year two, it broke even in 2001. Then, the company began to make a profit of $400,000 in 2002 and $600,000 thereafter. The

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profit of the company is retained in the company and subjected to the company tax rate. Profits of the 2002 and 2003 years were invested in real estate and shares. The company had declared a dividend to the family trust in 2004, at the same time, the family trust purchased a holiday home in which Ms Jones spends considerable time. The whole amount of the retained earnings of the company in the 2004 are paid out as dividend and used to purchase the holiday house. In order to declare the dividend, the company sold the real state which the company had acquired and so the shares. The sale of the property yielded a capital gain of $100,000.

Table 2: The SL's Performance Statement ($NZD)

Tax Year	Subject to tax	Profit/Loss	Notes
Year 2000	($60,000)	A loss	
Year 2001	$0	Break even	
Year 2002	$400,000	Re-invested	Real estate & shares
Year 2003	$600,000	Re-invested	Real estate & shares
Year 2004	$600,000	Retained	Dividend to family trust
Year 2005	$600,000	Retained	
Year 2006	$600,000	Retained	
Year 2007	$600,000	Retained	
Year 2008	$600,000	Retained	
Year 2009	$600,000	Retained	

3. Arguments

The Inland Revenue Department (IRD) of New Zealand carried out an investigation and concluded that the establishment of the company and the payment of the salary of $120,000 and that of the $200,000 is a tax avoidance arrangement in terms of S BG1 and GB1 of the Income Tax Act 1994 and its equivalent successors. The IRD considered that Ms Jones should be assessed on the basis of what a market salary is for a surgeon. IRD's investigation revealed that a market salary is $560,000 a year. Assessments were raised to Ms Jones to income tax as if her salary was $560,000 with respect to the 2000 income tax year and the following years through to 2009. No adjustments are made, and time bar is informed in this case.

4. The Law

Section BG1 of the Income Tax Act 1994 (the 1994 Act) stipulates the general anti-avoidance provision.

Section BG1 Avoidance

Arrangement voids.

(1) A tax avoidance arrangement is voided as against the Commissioner for income tax purposes.

Enforcement

(2) The Commissioner, in accordance with Pt G (Avoidance and Non-Market Transactions), may counteract a tax advantage obtained by a person from or under a tax avoidance arrangement.

The key legal elements of the general anti-avoidance are defined as:

Section OB1 of "arrangement", "tax avoidance" and "tax avoidance arrangement":

Arrangement means any contract, agreement, plan, or understanding (whether enforceable or unenforceable), including all steps and transactions by which it is carried into effect:

Tax avoidance, in ss BG1, EH1, GB1, and GC12, includes –

(a) Directly or indirectly altering the incidence of any income tax.

(b) Directly or indirectly relieving any person from liability to pay income tax:

(c) Directly or indirectly avowing, reducing, or postponing any liability to income tax.

Tax avoidance arrangement means an arraignment, whether entered into by the person affected by the arrangement or by another person, that directly or indirectly –

(a) has tax avoidance as its purpose or effect; or

(b) has tax avoidance as one of the purposes or effects, whether or not another purpose or effect is preferable to ordinary business or family dealings, if the purpose or effect is not merely incidental [2].

5. The Ben Nevis Case (Elias CJ and Anderson J)

We write separately to express reservations on aspects of the reasoning adopted by Tipping, McGrath and Gault JJ, not essential to their conclusions on the application of s G1 and the consequences. We differ from them in being of the view that the specific statutory allowances under the Income Tax Act are not in potential conflict with the general anti-avoidance provision and that the two do not need reconciliation. Rather, both are to be purposively and contextually interpreted, as is required by s 5 of the Interpretation Act 1999 and s A of the Income Tax Act. Recourse to the general anti-avoidance provision is not necessary "to prevent uses of the specific provisions which fall outside their intended scope in the overall scheme of the Act." If the use of a specific provision falls outside its intended scope in the scheme of the Act, the use is not authorised within the meaning of the specific provision. This approach is in our view required by settled principles of statutory construction. It avoids the distortion of overuse and unnecessary expansiveness in application of the general anti-avoidance provision. On this view, we do not think that there are stark differences between the general approach to statutory interpretation of specific tax provisions in New Zealand and in the United Kingdom, at least since W T Ramsay Ltd v Inland revenue Commissioners and Furniss (Inspector of Taxes) v Dawson. The rejection of literal interpretation described by Lord Steyn and Lord Cooke in Inland Revenue Commissioners v McGuckian applies equally in construing the New Zealand specific tax provisions.

The first question is whether the claimed allowance or deduction falls within the meaning of the specific provision, purposively construed. If it does not, the Commissioner can disallow the claim and, if of the view that it is itself a tax avoidance arrangement (because its purpose or effect is to alter the incidence of tax), can treat it as void under s BG1. If the claim is within the meaning of the specific tax provision, purposively interpreted, an arrangement on which it is based may nevertheless constitute tax avo8idance if it has the purpose or effect of altering the incidence of tax. If, however the basis of claim is not, in itself or as part of a wider scheme, an arrangement with the purpose or effect of altering the incidence of tax, it is not tax avoidance under s BG1.

In a fiscal statute the terms and concepts used may, depending on purpose and context, be used in a business or accounting sense. It would be wrong to start with any preconception that "ordinary meaning" or "legal meaning" is to be preferred to the meaning a term has in business or accounting. Similarly, where the substance of an arrangement needs to be gauged in application of the provision of a tax statute, a purposive construction of the provision may indicate that it is legal substance which is in issue, or it may indicate that the statute is concerned with business substance. The provisions of a tax statute apply to many different financial structures. It may use, according to the context, legal, commercial, or accounting terminology. There is no general rule. Lord Millett, writing extra-judicially, thought that the purposive approach to the interpretation of tax statutes, affirmed in Ramsay and the cases which followed it, had destroyed two "allied and dangerous myths". The first was "that in tax cases to an extent unknown in other areas of law, form prevails over substance". The second was that "the substance of a transaction, and the only thing to be regarded, is its legal effect". When interpreting the specific provisions of tax legislation, care should be taken not to resurrect either myth.

The meaning of any terms used by the statute in a particular provision must be contextually accurate. We do not therefore accept that when considering the application of a specific tax provision, and before considering the question of avoidance, the Court is concerned primarily with the legal structures and obligations created by the parties, and not with the economic substance of what they do. It depends on the context. The critical question is whether "the relevant provision of the statute, upon its true construction, applies to the facts as found". Those facts must be viewed "realistically" because, as Lord Wilberforce put it in Ramsay, tax is "created to operate in a real world, not that of make-believe". In Barclays, the House of Lords quoted with approval the explanation of Ribeiro PJ that the ultimate question is whether the statutory provision "construed purposively, were intended to apply to the transaction, viewed realistically". To similar effect, Lord Cooke in McGuckian

considered the "ultimate question" to be "the true bearing of a particular taxing provision on a particular set of facts."

…

As already indicated, we do not see the specific tax provisions and the general anti-avoidance provision as potentially conflicting. In McGuckian, Lord Cooke described a purposive approach to the construction of specific tax provisions as being "antecedent to or collateral with … general anti-avoidance provisions such as are found in Australasia". We agree with that view of the relationship between the specific tax provisions and the general anti-avoidance provision. The specific provision is antecedent in application to the general anti-avoidance provision if the arrangement is not within the purpose of the specific provision. It is collateral if, in addition, it is entered into with the purpose or effect of altering the incidence of tax. This sequencing and co-operation between the provision does not seem to us to place less emphasis on the application of the general anti-avoidance provision than in the past.

6. The Arrangement

The term "arrangement" is defined in Section OB1 of the Income Tax Act 1994:

Arrangement means any contract, agreement, plan, or undertaking (whether enforceable or unenforceable), including all steps and transactions by which it is carried into effect.

The definition assumes a temporal connection that a plan will be thought out and implemented in contrast to a situation where there are a series or sequential events that were not planned or coordinated at the outset but just occurred as a result of developing circumstance. The scope of an arrangement is determined objectively, Peterson v CIR. In Newtown v FC of T, Lord Denning described in the following terms:

The whole complicated series of transactions must have been the result of a concerted plan: and the nature of the plan is to be ascertained by the overt acts done in pursuance of it.

… The whole of the transactions shows that there was a concerted action to an end …

In the current case, an overt series of concerted acts, beginning from the establishment of company and the shareholding of the family trust to the fixing of annual salary and the distribution of dividend plus the purchase of a holiday dwelling under the trust, if looking objectively as a whole constituted an arrangement as defined in the section OB 1 of the Income Tax Act 1994. However, the existence of an arraignment does not of itself indicate tax avoidance and its purpose or effect need to be ascertained.

7. Is there a purpose or effect of tax avoidance?

Tax avoidance arraignment is defined in s OB1 of the Income Tax Act 1994 as follows:

Tax avoidance arrangement means an arrangement, whether entered into by the person affected by the arrangement or by another person, that directly or indirectly –

(a) has tax avoidance as its purpose or effect; or

(b) has tax avoidance as one of its purposes or effects, whether or not any other purpose or effect is preferable to ordinary business or family dealings, if the purpose or effect is not merely incidental [3].

It is clear from the definition of tax avoidance arrangement that tax avoidance can be either the only purpose or effect of the arrangement or one of the purposes or effects of the arrangement. If it is the second case, the tax avoidance purpose or effect must be more than merely incidental.

The composite phrase "purpose or effect" has been judicially construed as meaning the end I view, Newton v FC of T. The two words do not have independent meanings, Ashton v CIR: Glenharrow V CIR. The motive of the people who enter into the arrangements are irrelevant because the test if objective, Glenharrow v CIR.

In this case, the purpose and effect of the impugned arrangement the taxpayer had entered into was merely an ordinarily arranged business structure as a result of a careful tax planning in advance. The "end in view" of the plan was to produce a tax effective structure for the benefits of taxpayer's

financial affairs. I find insufficient evidence providing that the beneficial tax effect produced by the arrangement is inconsistent with the contemplation of Parliament. Therefore, the purpose or effect of the arrangement entered into by the taxpayer was not tax avoidance as it does not fall outside of what could had been contemplated by Parliament. Consequently, it was not correct to apply the section BG1 to the current case.

In order to apply the general anti-avoidance provision, the purpose or effect of the arrangement must meet the definition of tax avoidance as defined in s OB1 as follow:

Tax avoidance … includes –

(a) directly or indirectly altering the incidence of any income tax.

(b) directly or indirectly relieving any person from liability to pay income tax.

(c) directly or indirectly avoiding, reducing, or postponing any liability to income tax.

This definition is inclusive, not exhaustive. Therefore, tax avoidance can exist even if the definition is not explicitly complied with, Miller v CIR. At this point, the obvious problem concerning the application of the general anti-avoidance provision arises.

The definition of tax avoidance is exceedingly broad. It will literally catch any transaction that has a beneficial tax effect or tax advantage which, in fact, does not necessarily amount to tax avoidance.

The vast majority of tax planning would produce at least one beneficial tax effect or tax advantage. However, not all tax planning amounts to tax avoidance arrangement. For example, the definition will catch a permissible deduction because that will directly or indirectly reduce the taxpayer's liability to pay tax to the extent of the tax effect of the deduction claimed.

In the above example, the arrangement, will comply with the particular specific provision of the Income Tax Act it engages with. This is because an arrangement which produces a deduction would as a matter of legal form have met the requirement for deductibility. Thus, the situation arises whereby a transaction is potentially caught by both the terms of the specific provision and the terms of the general anti-avoidance at the same time.

The tension between the fact of compliance with the specific provisions of the Act and with the literal terms of the avoidance provision was dealt with in Ben Nevis.

The ultimate question is whether the impugned arrangement, viewed in a commercially and economically realistic way, makes use of the specific provision in a manner that is consistent with Parliament's purpose.

Parliament's contemplation of a specific provision is firmly grounded in the statutory language of the provision itself. As it immediately apparent form the language used by this court before, it is necessary to analyse the specific provision concerned and discern its relevant purpose in the statutory scheme. This is important because it is when the arrangement produces a tax benefit in a manner that is contrary to how the specific provision was intended to operate then tax avoidance will be found to be present.

In broad terms, the purpose of a specific provision can be discerned from the text of the provision, the regime in which it operates, any explicit provisions in the Income Tax Act, commentary form officials when the relevant Bill was introduced, academic articles and case law summaries. The reasoning in Glenharrow provided a useful indication of what sources are relevant to the inquiry and also how to conduct the analysis.

The analysis at this point is looking for broad themes or assumptions as to how the specific provision is intended to operate. One is not concerned with a narrow analysis at this state. If the tax benefit has been generated, viewed in a commercially and economically realistic way, outside of the purpose of the specific provision then there will be tax avoidance present.

From the very beginning of the business, Mrs. Jones had made a decision to set up a limited liability company (SL Ltd.) to conduct her surgical business. The decision of having a company rather than other forms of legal entities, for example a sole trader, was purely a usual business decision and it is the freedom of the taxpayer which are permitted by the general commercial laws.

In terms of tax laws, the company is taxed as an individual person and its taxable income earned by the company is taxed at a corporate rate of 33% (30% from 2008-2009 income year) pursuant to the specific provisions of income Tax Act.

The Income Tax Act permits different tax rates under companies (33%), individuals (39%) and partnerships (39%). The specific provisions of the Act in respect of those legal entities recognise their differences and tax them differently. Th specific provisions of the Act provide a choice for taxpayers to structure their individual businesses and tax affairs in a manner that is the most tax effective solution for the taxpayers. It is important to emphasise the repeat that not all arrangement with an effect of producing a tax advantage will constitute tax avoidance. Taxpayers have the freedom choice of structuring their businesses and tax affairs and making use of the specific provisions within the scope of Parliament contemplation. I find nothing written in the tax legislation to preclude such freedom of choice. In Penny & Hooper case, the selection by the taxpayers of a company as the vehicle through which they would conduct their respective business was a choice that the Income Act permitted and was not tax avoidance. As a result, Mrs. Jones did not make use of the specific provisions of the tax outside what could had been contemplated by Parliament, hence, the arrangement by no means amount to tax avoidance.

Company's shares were owned by the taxpayer's family trust. In 2004, a dividend declared by the company and paid out to the trust to acquire a holiday house. The shareholding, the payment through dividend and the purchase of a holiday house were normal and valid business transactions in terms of general commercial laws and normal business practices. The taxpayer spends considerable time in the trust's house. The source of the funds of the house came from the dividend declared by the company. This may form an indication that Mrs. Jones enjoyed the ultimate benefits of company's net profits. However, this indication was not sufficient to put Mrs. Jones into a position which falls outside of the scheme and purpose of the Act. Consequently, I find no sufficient evidence proving that the purpose or effect of the transactions falls outside of the contemplation of Parliament rather than structuring taxpayer's own financial and tax affairs.

I hold a view that in law there are clear structural choices provided in the tax legislations. The selection of one or another does not of itself constitute tax avoidance. Examples of clear structural choices are tax considerations regarding the choice of legal entities, registration of GST or electing of LAQC status. Exercising such a choice will not be in breach of the specific provision in respect of Parliament contemplation therefore does not amount to tax avoidance.

Richardson J of the Court of Appeal considered that the choice principle had already received support by New Zealand judiciary in Mckay v C of IR. The choice principle was not mentioned in Ben Nevis by this court. However, the approach adopted by this court had been largely subsumes the underlying premise behind the rules, therefore, it remains part of New Zealand law in a limited form in which where is a real structural choice provided.

In Ben Nevis, this court had articulated that if the provision is used within the intended scope of parliament's purpose, thus, it will not amount to tax avoidance. This leaves open the possibility that some specific provisions or series of those provisions are intended by Parliament to offer a choice. If that choice is used in a manner that is within the scope of parliament's purpose, it does not constitute tax avoidance. In this sense, the choice principle remains.

There may be two ways in which something can be achieved commercially, but where Parliament has provided for different tax consequences for the differing commercial treatments. As long as the particular transaction is within the scope of the specific provision as the phrase is within the scope of the specific provision as the phrase is contemplated by this court in Ben Nevis, the mere use of that provision as opposed to another does not constitute tax avoidance.

In the current case, Mrs. Jones' choices of selecting accompany being liable for a company tax rather a sole trader being liable for personal tax, issuing of dividend instead of paying salary, purchasing property through the family trust, viewed in a commercially and economically realistic way, were part of a plan of her business and tax affairs. Mrs. Jones had simply exercised her choices or freedom to structure her business to the best tax effective way. If this was not the case, Parliament would have said so specifically. Unlike the Penny case, Mrs. Jones started with the company from the outset of her business in New Zealand and there was no tax rate change as a background. I find no sufficient evidence suggesting that the purpose or effect of the whole arrangement falls outside of Parliament's contemplation or principles discussed by this court in Ben Nevis.

This court listed several factors that is said were relevant when considering whether the general anti-avoidance provision applied. Those factors are very similar to the factors listed as relevant in s 117D of the income Tax Assessment Act 1936 of Australia. Emphasis is put on the words "artificial or contrived". The context suggests that where an arrangement is artificial or contrived that will be highly relevant to whether the provisions it engages which have been used in a manner that is outside of parliament's contemplation.

The facts of Ben Nevis were described at points by the court as being artificial. The court nonetheless articulated how the artificiality led to the conclusion that the specific provisions were used outside of their purpose. The implication that arises is that in each case where the facts permit the label "artificial or contrived" to be applied, it is probably still necessary to articulate how the artificiality translates into the particular provision being used other than what Parliament contemplated.

What constitutes artifice or contrivance will be a matter of fact and degree. They are not words that have statutory underpinning in the sense of forming part of the definition of tax avoidance or tax avoidance arrangement. In broad terms, the following might constitute artificial or contrived situations:

- ✓ Arrangements with no business purpose.
- ✓ Arrangements with circular flows of money and self-cancelling obligations.
- ✓ Arrangements where the investor has no risk associated with the investments.
- ✓ Arrangements between related parties, or tax asymmetrical parties, at non-commercial prices or terms.

In the current, I see no sufficient evidence suggesting that the whole arrangement, viewed objectively, commercially, and economically, fits the meaning of artifice or contrivance discussed above.

Through examining the financial performance of the company for period between 2000-2009, the whole arrangement, viewed in a commercially and economically realistic way, has real business purpose. The whole arraignment looking objectively was real and genuine. The company had steadily made an annual profit of $600,000 from 2003 to 2009.

The Commissioner argued that the taxpayer should be assessed on the basis of what a market salary is for a surgeon. Their investigation reveals that a market salary is $560,000 a year. Assessments are raised assessing Mrs. Jones to income tax as if her salary was $560,000 with respect to the 2000 income tax year and the following years through to 2009.

The concept of a commercially realistic salary or a market salary is not known to the income Tax Act which does not dictate the level of income which a particular taxpayer must earn. I find no overriding requirement of a commercially realistic salary in the Income Tax Act. Neither I see no statutory power conferred on the Commissioner to suggest that how much the salary Mrs Jones just earn as a surgeon.

At the High Court level, Mackenzie J in Penny stated:

For these reasons, I find nothing in the scheme and purpose of the Act which supports the proposition that payment of a commercially realistic salary in non-arm's length transactions is a general and overriding requirement of the Income Tax Act. I do not consider that the basis upon which Mr Lyne's calculation of a commercially realistic salary has been made demonstrates that the fixing of the salary is part of a tax avoidance arrangement …

Mrs. Jones works for the company through an employment contract. Under the general commercial laws, the consideration of the employment contract is to be freely determined by both parties to the contract. The amount of annual salary to be paid is totally the decision between Mrs. Jones and the company (it is represented by Mrs. Jones herself) according to her individual circumstances and company's financial position. I see no evidence suggesting that the fixing of the annual salary falls outside of the intended scope of either the Income Tax Act or the general commercial laws or the contemplation of Parliament, consequently, did not indicate tax avoidance and assessments issued based on ss BG1 and GB1 were invalid.

There was an argument that the Commissioner acknowledges that the company did not earn

sufficient to pay the market salary, but they concluded that Mrs. Jones could have got work as submitted expert evidence to support this claim. The evidence showing that there were plenty of jobs in Mrs. Jones' field, in the city she lives in and paying $560,000. The Commissioner made this argument for every year up to 2004.

Mrs. Jones' business was in its very early stage of development in 2000. I considered that there is nothing unusual that the company made a loss in its first year of trading. Consequently, if was justifiable that the company was not financially sufficient to pay out any salary at all to Mrs. Jones in the year in which the loss occurred and the breakeven year in 2001. There was nothing wrong that Mrs. Jones had chosen to be self-employed and work for her own company rather than seeking a position from another employer. She has the freedom to choose between minding her own business or entering into an employment contract with other businesses. This was true even she received a lower salary comparing with how much she would get if working for others. A shareholder and director of the company may be employed by the company which does not constitute tax avoidance, Penny v C of IR; Hooper v C of IR (2009) 245 NZTC 23,406.

Importantly, the company had earned a healthy and steady before tax profits of $600,000 per year from 2003 to 2009. This good financial performance of the company provides a good base for company income tax in the future.

I find no sufficient evidence to suggest that the purpose and effect of Mrs. Jones' decision of setting up the company and working for her own rather than working for someone else amount to tax avoidance.

I have had no doubt in respect of the expert evidence submitted by the Commissioner. However, I must reject it due to its irrelevance to this case. I concluded that the evidence does not suggest tax avoidance in this situation.

8. The Purpose of General Anti-Avoidance Provision

The Commissioner invoked the general anti-avoidance provision against the taxpayer in terms of s BG1 of the Income Tax Act 1994 and its equivalent successors in this case.

It would be wrong to construe and apply the provision literally without considering its purpose. Therefore, I shall carry out an investigation for the purpose of the general anti-avoidance provision to exam the correctness of its application in the current case.

Richardson J articulated in the Challenge case and later repeated in the BNZ case that the purpose of the general anti-avoidance provision is of protective of the tax liability established under other provisions of the act:

… The section is perceived legislatively as an essential pillar of the tax system designed to protect the tax base and the general body of taxpayers from what are unacceptable tax avoidance devices.

Section 99 is not an independent charging provision. It does not itself create a liability for income tax. Its function is to protect the liability for income tax established under other provisions of the legislation …

… It is not the function of sec 99 to defeat other provisions of the Act or to achieve a result which is inconsistent with them.

The previous judgement of this court in Ben Nevis considered the purpose of the general anti-avoidance provision is to prevent unacceptable applications of the specific provisions which fall outside of their intended scope in the overall scheme of the act:

… The presence in New Zealand legislation of a general anti-avoidance provision suggests that our Parliament meant it to be the principal vehicle by means of which tax is addressed. The general anti-avoidance regime is designed for that purpose, whereas individual specific provisions have a focus which is determined primarily by their ordinary meaning, as established through their text in the light of their specific purpose.

… The general provision is designed to avoid the fiscal effect of tax avoidance arrangements having a more than merely incidental purpose or effect of tax avoidance. Its function is to prevent uses of the specific provisions which fall outside their intended scope in the overall scheme of the Act. Such uses give rise to an impermissible tax advantage which the Commissioner may counteract.

The general anti-avoidance provision is not an independent charging provision. It is not the function of the general anti-avoidance provision to defeat other specific provisions of the Income Tax Act.

Its true purpose is to protect and support the liability established under the specific provisions of the Income Tax Act. Its true purpose is to prevent impermissible applications of other provisions in a manner that falls outside of their intended scope of the Act and obtaining undeserved tax advantage or tax avoidance.

The general anti-avoidance provision never intended those transactions should be avoided merely because it was influenced by the prospect of obtaining a tax advantage. The purpose and effect of the whole arrangement the taxpayer entered, viewing objectively, commercially and economically, is consistent with the scheme and purpose of the Income Tax Act or Parliament's contemplation.

As such I concluded that the application of the general anti-avoidance provision in this case is contrary to its purpose as the arrangement under investigation does not fall outside of Parliament's contemplation and such contrary must not be tolerate by this court.

9. Result

The other specific provision of the Income Tax Act relied on by the taxpayer, based on its true construction and application, did not fall outside of their intended scope and purpose or Parliament's contemplation. The choice principle applies to the use of company and trust structure and fixing of salary in this case. The whole arrangement, when looking in an objectively, commercially, and economically realistic way, had no tax avoidance purpose or effect, therefore the whole arrangement did not constitute tax avoidance. The appeal should be allowed. The assessments issued by the Commissioner were not correct.

References

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