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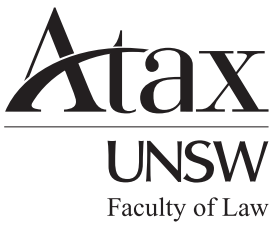
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Editorial Announcements

It is my sad duty to inform you that Professor Michael Walpole has resigned from his position as joint editor of the *eJournal of Tax Research* to take up the joint editorship of *Australian Tax Review*, a leading tax law journal in Australia. Michael felt there could be a perceived conflict of interest if he were to be an editor on both journals simultaneously. Michael became a joint editor of the *eJournal* in August 2004 and has made invaluable contributions to the *eJournal*, especially during the recent ARC journal ranking exercise. On behalf of the *eJournal*, I wish to take this opportunity to acknowledge our thanks to Michael and wish him all the best in his new venture.

As you know, the composition of the Editorial Board of the *eJournal* has remained basically unchanged since its inception in 2003. Over the years the Board lost Justice Graham Hill as a result of his premature passing. In reviewing the future directions of the *eJournal*, it is felt that there is a need to expand the membership of the Editorial Board. I am thus very pleased to announce that Dr Dale Pinto, Professor of Taxation Law at Curtin University, Australia, has accepted an invitation to join the Editorial Board of the *eJournal*. Please join me in congratulating Dale and I look forward to Dale's contributions to the *eJournal* in the near future.

Binh Tran-Nam
Joint editor of the *eJournal of Tax Research*
June 2010

Future work within the umbrella of the larger project intends to examine the implications of the settlement agreement reached between the banks and Inland Revenue. This is intended to be followed by critical analysis of the impact of the structured finance litigation from economic and jurisprudential perspectives.

The remainder of this paper is organised as follows. Section 2 discusses the disclosures by banks outlining the general issues involved. This is followed in section 3 by a brief overview of the key areas of tax disclosures in financial statements. Section 4 outlines the limited prior literature and details the methodology followed in this paper. Section 5 briefly outlines the banks included in the analysis, namely: ANZ National Bank (part of ANZ Australia), BNZ (owned by National Australia Bank, NAB), ASB Bank (owned by the Commonwealth Bank of Australia, CBA), Rabobank (Netherlands) & Westpac (owned by Westpac Banking Corporation, Australia). Section 6 outlines the essence of the structured finance transactions that were the subject of the disputes with the IRD. This is followed by the focus of the study in section 7, the tax dispute disclosures and discourse of the New Zealand banks. Section 8 provides a brief overview of the surprise settlements reached between the banks and the IRD in late December 2009. Section 9 provides further discussion and analysis, and asks what can we learn from the disclosures and discourse concerning tax disputes? This is followed in section 10 with the conclusions, limitations and areas for future research.

2.0 DISCLOSURES BY BANKS IN FINANCIAL STATEMENTS

Registered banks in New Zealand must report, for financial purposes, in a similar manner to other issuers, but they have a number of different characteristics, including high levels of debt to equity (a result of a small capital base), along with other financial reporting disclosure obligations. In addition to producing financial statements, banks are required to produce general (and specific) disclosure statements as required by the central bank (in New Zealand this is the Reserve Bank of New Zealand, RBNZ).

In the notes to their financial statements, contingent liabilities need to be disclosed as required by applicable reporting standards. In New Zealand the requirements were set out in Financial Reporting Standard (FRS) 15 (*Provisions, Contingent Liabilities and Contingent Assets*). In Australia this was governed by Australian Accounting Standards Board (AASB) Statement 1044 (*Provisions, Contingent Liabilities and Contingent Assets*). With the advent of International Financial Reporting Standards (IFRS), for New Zealand disclosure is now governed by NZ IAS 37 (*Provisions, Contingent Liabilities and Contingent Assets*) and for Australia disclosure is governed by AASB 137 (*Provisions, Contingent Liabilities and Contingent Assets*).

Of particular interest to this study is the level and nature of disclosure, including the position taken by banks with respect to the likelihood of their contingent liabilities from their disputes with the IRD materialising. The study also examines whether the flavour of the disclosures changes with time and new developments.

3.0 TAX DISCLOSURES IN FINANCIAL STATEMENTS

The key disclosures in relation to taxation in financial statements for the purposes of this study (for the banks under review) include:

- Significant accounting policies (including consolidation, income tax, and goods and services tax (GST));
- Income tax expense (including current tax, deferred tax, reconciliation of tax expense to pre-tax accounting profit);
- Deferred tax balances & movements (recognized & unrecognized);
- Imputation Credit Account (Franking Credit Account) balances & movements.

In addition to the Profit & Loss (Income) Statement, Balance Sheet (Statement of Financial Position), and Statement of Cash Flows, tax disclosures may also appear in various notes to the financial statements, such as Provisions, Contingent Liabilities & Contingent Assets. Also in New Zealand FRS 19 (*Accounting for Goods and Services Tax*) applies for financial reporting purposes.

It is important to note that the purpose of this paper is not to relate the disclosures in financial statements of a number of major New Zealand banks to the relevant accounting standards to ascertain the extent to which the banks have complied with the disclosure requirements. Such an exercise would require a study of compliance with reporting disclosure obligations and would need to be wider than merely disclosures with respect to the structured finance disputes. Such a study is also likely to make observations concerning whether the disclosures requirements are sufficient to achieve their purpose, and hence beyond the scope of this paper. With respect to disclosures in financial statements this paper seeks to examine what may be gleaned from the disclosures in financial statements prepared in accordance with the current reporting frameworks of Australia and New Zealand. It does not seek to examine the adequacy of the requirements and suggest whether further obligations or guidance with respect to disclosures is warranted. Neither does this paper intend to analyse the methodology relating to financial statement disclosures other than to examine financial statement disclosures utilising the lens of discourse analysis, which is introduced in the latter parts of the next section.

4.0 PRIOR STUDIES AND METHODOLOGY

Outside of financial reporting studies generally, there is scant prior research on the tax disclosures of banks in Australasia, and unsurprisingly little on the structured finance disputes between the New Zealand banks and the IRD. One important contribution is that of Newberry (2005), who reviews the BNZ's and Westpac's financial statements. She notes that for the BNZ, had it included the additional tax of $NZ416 million (in dispute with the IRD) for the 1999 to 2005 years, its effective tax rate (ETR), measured as tax expense over net profit, would be on average 33 percent (the applicable statutory rate) for this period. Table 1 from Newberry's (2005) study is reproduced below setting out the BNZ's actual ETRs:

OMPARED WITH OPERATING PROFIT BEFORE

2003	2002	2001	2000	1999
$mill	$mill	$mill	$mill	$mill
752	750	587	513	438

discourse in financial statements, a defensive approach that does not impartially incorporate all of the evidence can come 'unstuck', and in itself lead to another discourse, namely downplaying the major back down of the banks in agreeing to settle with the IRD.

It is acknowledged that there is support for, and criticism of, discourse analysis as a theoretical paradigm. It is not the intention of this paper to contribute to that debate other than offer another instance of where discourse analysis assists in understanding the message conveyed in financial statements with respect to tax disclosures.

5.0 BANKS INCLUDED IN THE ANALYSIS

5.1 ANZ National Bank

This bank was formerly two banks: ANZ Bank and the National Bank of New Zealand (NBNZ – this was formerly owned by Lloyds TSB – United Kingdom - until late 2003). The tax dispute with the IRD commenced while the banks were separate entities, but the disputes (and associated assessments) have been amalgamated to represent the new banking arrangements. Financial information is now only available for the merged banking operations in New Zealand. The estimated tax in dispute is $NZ365 million plus $NZ203 interest and potentially shortfall penalties (ranging from 20 percent to 100 percent).[1] ANZ-National Bank is owned by the ANZ Bank (Australia).

5.2 ASB Bank

There are no separate financial statements prepared for the ASB Bank with all information obtained from the Commonwealth Bank of Australia's (CBA's) financial statements, drawing primarily upon the ASB Bank segmental reporting. The ASB Bank is reported to have $NZ280 million in dispute (including interest) and potentially penalties (of 20 percent up to 100 percent). CBA is an Australian-owned bank.

5.3 BNZ

Separate financial statements are produced for the BNZ which is wholly owned by National Australia Bank (NAB) – an Australian-owned bank. The BNZ was the first to have its substantive tax avoidance case heard in the High Court in Wellington. It was unsuccessful in defending the Commissioner's allegations of tax avoidance with $NZ416 million due in additional tax plus $NZ238 million interest.[2] This total sum ($NZ654 million) may go as high as $NZ830 million with inclusion of the 100 percent abusive tax position shortfall penalty,[3] or increase to $NZ737 million with a 20 percent shortfall penalty (such as for an unacceptable interpretation/unacceptable tax position[4]). This decision was appealed to the Court of Appeal with judgment originally expected in 2010.

[1] Shortfall penalties are provided for in Part IX of the Tax Administration Act 1994 (TAA 1994).
[2] *BNZ Investments Ltd v CIR*, (2009) 24 NZTC 23,582.
[3] This penalty is provided by s 141D of the TAA 1994.
[4] This penalty is provided for by s 141B of the

interest rate swap arrangement between the parties included in the transaction, the guarantee fee expense, and the borrowing costs of the taxpayer's subsidiary.

7.1 ANZ National Bank

The first disclosure for the ANZ National Bank appears in its 2004 financial statements in the Notes section: *Contingent Liabilities*. This Note refers to Notices of Proposed Adjustment (NOPAs) received from IRD for one transaction in the 2000 year.[8] It explains the nature of NOPAs, such that they are not an assessment and do not establish a tax liability. The estimated effect if the IRD took the same position on other transactions is given ($NZ348 million including interest), with $NZ116 million of indemnity from Lloyds TSB for the NBNZ as part of the acquisition arrangements). The bank states it has sufficient provisions and downplays the issue through using neutral language.

In the 2005 financial statements, the Notes refer to the Australian Tax Office's (ATO's) risk reviews and other settlements. The Note also refers to NOPAs, with an estimated effect given ($NZ432 million (including interest), with $NZ124 million of indemnity from Lloyds TSB). The bank notes other normal audits are underway in the United Kingdom, United States and other jurisdictions. The bank also states that it holds sufficient provisions and downplays the issue again through using neutral language.

There is no separate disclosure available for the 2006 year in the financial statements, which is surprising given the publicity over the ongoing disputes between the bank and the IRD. However, in 2007 the financial statements include similar comments to that which appeared in the 2005 financial statements. The Notes refer to normal audits occurring in New Zealand and other jurisdictions. The Notes also refer to NOPAs, with estimated effect ($NZ506 million (including interest), with $NZ142 million of indemnity from Lloyds TSB). The bank states that it holds sufficient provisions and once again it uses neutral language.

7.2 ASB Bank

All information is contained in the parent bank's financial statement (CBA) since there are no separate financial statements prepared for the ASB Bank that are publicly available. The first mention is in the 2004 financial statements in the Note on *Income Tax Expense*. Reference is made to

Government introduced legislation effective 1 July 2005[9] to address the concerns it had with such transactions entered into by banks. The BNZ also notes that all such transactions subject to the investigation *were terminated* by 30 June 2005. The BNZ also advised that it had now commenced legal proceedings to challenge the IRD's assessments. Throughout strong and defensive language is used.

In the 2007 financial statements, once again similar statements were included to the previous year, noting that the IRD had now completed its review of structured finance transactions in the banking industry. The maximum tax assessed is expected to be $NZ416 million plus $NZ183 million interest for all structured finance transactions. The BNZ persists with using defensive language in its approach.

In the 2008 financial statements, similar statements are made to those made in 2007, although in 2008 these statements are somewhat briefer in their content. The maximum tax assessed is likely to be $NZ416 million plus $NZ217 million interest. Defensive language continues to be used.

In a media release on 28 April the CEO was upbeat, reporting a solid net profit. However, the 2009 financial statements make reference to a number of significant events during the financial year. The bank makes the following comment, using strong language regarding the litigation; see *Pending Proceedings or Arbitration* (emphasis added):

> "Certain members of the Banking Group have received amended tax assessments from the Inland Revenue Department (the "IRD") in respect of certain structured finance transactions. These amended assessments were challenged in the High Court and a judgment was delivered on 15 July 2009, finding against the Banking Group. *The Banking Group considers that elements of the judgment are wrong in fact and law and has lodged an appeal with the Court of Appeal. Penalties, which could possibly be up to 100% of the tax shortfall, have not yet been imposed by the IRD. …*"

Furthermore, in Note 42, similar comments to those included in the 2008 financial statements are included with respect to the IRD assessments, and to the above statement regarding the court proceedings (a further detail provided is that the appeal lodgement date is 11 August 2009). More importantly, the bank has made a provision of $NZ661 million (tax $NZ416 million, and interest and associated costs of $NZ245 million (net of tax)) in its Income Statement for this period, leaving a loss for the year of $NZ181 million. At last the defensive approach has given way to "acceptance" and quantification of the impact of the ongoing dispute with the IRD. That said the BNZ remained committed to pursuing its appeal until the settlement reached on 23 December 2009.

Similar disclosures regarding the BNZ's tax dispute over the period of review have been included in the NAB's financial statements. The NAB has made a provision for $A524 million should the BNZ fail in its appeal. However, in setting up various subsidiaries to issue shares to the public in 2008, no disclosures of the BNZ parent company's disputes and litigation over the structured financing transactions were made in the prospectus or subsequent financial statements. Potential investors would

[9] See note 2 above.

need to investigate BNZ's financial statements to be appraised of the situation and determine how this may impact upon their decision to invest.

7.4 Rabobank

This bank has provided minimal disclosure, w

> *We sought a binding ruling from the NZIRD on an initial transaction in 1999 which, following extensive review by the NZIRD, was confirmed in early 2001. The principles underlying that ruling are applicable to, and have been followed in, all subsequent transactions.*
>
> *At the time of entering the transactions, we received independent tax and legal opinions which confirmed that the transactions complied with New Zealand law. Legal counsel has confirmed that the relevant parts of these opinions remain consistent with New Zealand law.*
>
> *As previously disclosed, we are confident that the original tax treatment applied by us in all cases is correct. We remain of the view that the transactions are legitimate and do not constitute tax avoidance. Accordingly, no tax provision has been raised in respect of these matters.*
>
> *We do not consider that the outcome of any other proceeding, either individually or in aggregate, is likely to have a material effect on our financial position*."

In the 2006 financial statements the level of detail has been reduced compared to that of 2005, although the impact has been

Both the Minister of Revenue and the Commissioner have publicly announced that they are pleased with the outcome, with the Solicitor General also reported to be satisfied. Each of the four banks has made their own press release in response to the settlement, and these press releases in themselves offer another interesting insight, providing a further example of a discourse intended to provide closure to the series of events. Before I analyse their responses, a brief comment is warranted in terms of early observations from various experts with respect to the impact that the settlement will have on the cost of the disputes and whether it is a 'good deal'.

David Tripe, director of Massey University's Centre for Banking Studies, is reported

Collectively, these payments fall within the provision of $NZ661 million raised by BNZ in August 2009 to reflect the High Court decision in which it lost its challenge against the Commissioner. The BNZ also indicated that the interest component of the settlement will be tax deductible.

Westpac announced on 24 December 2009 that it will pay the amount agreed in the settlement (that is, 80 percent of the full tax and interest), with its New Zealand CEO George Frazis stating (Scoop, 2009d):

> "We entered these transactions relying upon expert advice and a ruling issued by the IRD in relation to a similar transaction, but we accept the court has ruled and that, on balance, it is best that we accept this industry settlement and move on."

Westpac fully provided for the value of income tax and interest claimed by the Commissioner as part of its 2009 result, and as a result there will be a write back in 2010 of approximately $NZ190 million.

Thus the remaining matter of interest will be how each of the four banks makes its disclosures with respect to their settlement in their 2010 financial statements due out in the latter half of 2010. In terms of financial statement disclosures this should bring 'closure' to the matter. That said the situation with Rabobank remains unclear.

9.0 Discussion and Analysis – What can we Learn from the Disclosures and Discourse Concerning Tax Disputes?

It would come as a surprise if the IRD, as part of its regular review of large corporates' financial and tax positions, undertook financial analysis including that of calculating ETRs for the banks. Assuming such analysis, the IRD would discover that the ETRs were considerably lower than the statutory rate, justifying further investigation to establish the cause. The reason for such low ETRs could not be attributed to declining profits or bringing previous years' losses to account (indeed over the period of the structured finance transactions (1998-2005) the banks were reporting increased profits), so there would need to be other explanations. As Newberry (2005) observes, the use of structured finance transactions largely explains the ETRs being lower than the statutory rate for the BNZ and Westpac. Similar analysis would naturally have led the IRD to investigate these transactions, and made indeed have lent support to the New Zealand Government to introduce (and subsequently enact) remedial legislation to remove the effectiveness of such transactions for the banks going forward from 1 July 2005.

The IRD (2008) has included a note in its financial statements for the year ending 30 June 2008 concerning the structured finance transactions, in which it takes a conservative approach:

> **"Note 8: Structured finance transactions**
>
> The Crown is currently in dispute with a number of financial institutions regarding the tax treatment of certain structured finance transactions. Taxation revenue from these transactions has not been recognised as revenue or a contingent asset. At this stage, revenue of $1,589 million has been assessed. This includes use of money interest in some cases."

A more extensive disclosure is offered by the IRD (2009a) in its 2009 financial statements (which were issued prior to the settlement agreements):[13]

> **"Note 8: Structured finance transactions**
>
> The Crown is currently in dispute with a number of financial institutions about the tax treatment of certain structured finance transactions. Due to a favourable High Court ruling for one structured finance case, all structured finance assessments have been recognised as revenue, $1,423 million in the 2008–09 financial year. However, as legal proceedings are still ongoing for other structured finance cases and there is the likelihood of appeal, we have also recognised the assessed tax as a contingent liability of $1,423 million.
>
> A contingent asset of $1,191 million has also been recognised in relation to the structured finance transactions. This relates to use-of money-interest due on all structured finance cases as at 30 June 2009. The interest has been calculated based on the maximum amount which the taxpayers are due to pay to Inland Revenue at that date. However, some of these taxpayers may have money in the tax pooling account which they could transfer at an earlier date. As this is at the taxpayers' discretion, the exact amount of use-of-money-interest is not quantifiable until all cases are resolved and taxpayers have made final payment to Inland Revenue.
>
> Shortfall penalties that Inland Revenue may impose have not been quantified because it is too uncertain at this stage. These penalties would not meet the asset definition or recognition cri5.2 the Io exacfund.5(m)6.8(on9 to ay)rtai5(m)6.r

this loss over the next few years, and perhaps reduce their level of competition with one another.

Overall this analysis would suggest that the approach to disclosure by the banks is to provide as little information as possible in the early stages, and then provide more information that supports their position, including that their approach is supported by expert legal and tax opinions. Furthermore, the approach taken with respect to the additional assessments is far from conservative. None of the banks (with the exception of Westpac) indicated (prior to the 23 December 2009 settlements) that they have paid up to half of the disputed tax (an approach no longer mandated by legislation but one that minimise the potential future impact while not being an admission of the correctness of the Commissioner's position), an approach which would limit their exposure to interest should they ultimately be unsuccessful. As events unfolded the banks were unsuccessful to the extent that they have agreed to pay 80 percent of the tax and use of money interest, but have been 'successful' through saving 20 percent (of the tax and use of money interest) and will not face the risk of shortfall penalties being imposed. In contrast the IRD's approach is conservative through not recognising any revenue in its financial statements. This is appropriate given that in preparing its 2008 financial statements there had not been any court decisions on the substantive issue. Nevertheless, this situation has changed in 2009 with the BNZ and Westpac High Court decisions, with the IRD recognising an asset of $NZ1.43 billion of tax revenue for the 2009 financial year, counterbalanced by a contingent liability of the same amount.

When something adverse occurs (such as an unfavourable court decision) the banks are quick to indicate they will be challenging and appealing the outcomes. Overall a defensive style is adopted. This is typical of 'repo' d.9945-(p)5-gh nd.usul h

Reference to penalties in the financial statement disclosures is limited although the BNZ and Westpac both indicate in their 2009 financial statements that penalties may be up to 100 percent (this would result if the abusive tax position shortfall penalty[16] were to be imposed). A penalty of this magnitude is unlikely (and indeed no penalties will be imposed following the 23 December 2009 settlement). Indeed I would suggest that this statement reflects the approach of taking the maximum "hit" (or "Big Bath"[17]), and "painting a gloomy outcome" with the intention of allowing more

interest and costs). Westpac's approach to its High Court decision eventually led it to take (reluctantly) a similar position to the

Future research in this area needs to incorporate the remaining parts of the wider investigation, namely at least two further studies: the first an examination of the impact of the 23 December 2009 settlement; and the second a critical analysis of the impact of the structured finance litigation from economic and jurisprudential perspectives.

REFERENCES

ANZ-National Bank, *Financial Statements for the year ending 30 September* (2004 to 2008) and 9 months to 30 June (2009); available at: http://www.anz.co.nz.

Amernic, J. and Craig, R. (2009), Understanding accounting through conceptual metaphor: Accounting is an Instrument?", *Critical Perspectives on Accounting*, 20(7): 875-883.

ASB Bank; refer to Commonwealth Bank of Australia, *Financial Statements for the year ending 30 June* (2004 to 2009); available at: http://www.cba.com.au.

Black, J. (2002), "Regulatory Conversations", *Journal of Law and Society*, 29(1): 163-196.

BNZ,

http://www.ird.govt.nz/resources/4/d/4d9dd2004e687633aa24ae4bfdc4072d/compliance-focus-2009-10.pdf.

Jordan, C.E. and Clark, S.J. (2004), "Big Bath Earnings Management: The Case of Goodwill Impairment under SFAS No. 142", *Journal of Applied Business Research*, 20(2): 63-69.

Llewellyn, S. and Milne, M. (2007), "Accounting as codified discourse", *Accounting, Auditing and Accountability Journal*, 20(6): 805-824.

Newberry, S., *Financial Analysis: BNZ and Westpac*, (2005); available at: http://www.converge.org.nz/watchdog/11/04.htm (visited 31 August 2009).

NZPA, "Bank ratings unaffected by tax case", (2009a) *Business Day* (17 July) available at: http://www.stuff.co.nz (visited 7 September 2009).

NZPA, "Agency says bank ratings unaffected", (2009b) NZ Herald (22 July) available at: http://www.nzhearald.co.nz (visited 7 September 2009).

NZPA, "Bank tax settlement 'good for both sides'", (2009c) TVNZ (24 December) available at: http://tvnz.co.nz/business-news/bank-tax-settlement-good-both-sides-3318038 (visited 11/01/10).

Parker, T. "Settlement on $2.2b tax case hits banks hard", (2009) New Zealand Herald (26 December) available at: http://www.nzherald.co.nz/taxation/news/article.cfm?c_id=335&objectid=10617445&pnum=1 (visited 11/01/10).

Rabobank, *Financial Statements for the year ending 31 December* (2007 to 2008); available at: http://www.rabobank.co.nz.

Sawyer, A.J., (2008), "The Impact of Recent Bank Structured Financing Litigation on Interpreting and Applying New Zealand Legislation", *Journal of International Banking Law & Regulation*, 22(12): 627-635.

Scoop, "Settlement with New Zealand Inland Revenue", (2009a) (24 December) available at: http://www.scoop.co.nz/stories/BU0912/S00595.htm (viewed 11/01/10).

Scoop, "ASB Resolves Tax Dispute" (2009b) (24 December) available at: http://www.scoop.co.nz/stories/BU0912/S00600.htm (viewed 11/01/10).

Scoop, "BNZ reaches a settlement with Inland Revenue", (2009c) (24 December) available at: http://www.scoop.co.nz/stories/BU0912/S00596.htm (viewed 11/01/10).

Scoop, "Resolution to New Zealand Structured Finance Litigation", (2009d) (24 December) available at: http://www.scoop.co.nz/stories/BU0912/S00597.htm (viewed 11/01/10).

Smellie, P., "NZ tax case will barely dent Aussie Banks, UBS analysts say", (2009) *Businesswire* (17 July); available at: http://businessscoop.co.nz (visited 7 September 2009).

Van den Bergh, R., "IRD spends $38m chasing banks", (2009) *The Dominion Post* (12 August); available at: http://www.stuff.co.nz (visited 31 August 2009).

Westpac, *Financial Statements for the year ending 30 September* (2004 to 2008) and 9 months to 30 June (2009); available at: http://www.westpac.co.nz.

Westpac, *Media Releases* (2004); available at: http://www.westpac.co.nz.

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Fairness Perceptions and Compliance Behaviour: The Case of Salaried Taxpayers in Malaysia after Implementation of the Self-Assessment System

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Abstract
This study investigates the role of fairness in tax compliance decisions among taxpayers in Malaysia. The impacts of tax knowledge and tax complexity on fairness perceptions are also examined employing the Theory of Planned Behaviour. To test the model, a questionnaire was administered among a sample of salaried taxpayers across Malaysia. The findings revealed that taxpayers perceived the current income tax system as fair but there was no conclusive evidence that such a perception had an influence on compliance behaviour. Instead, attitudes and subjective norm were found to be most influential. Furthermore, tax knowledge and tax complexity were shown to affect fairness perceptions.

1. INTRODUCTION

The shift from the official assessment system (OAS) to self-assessment system (SAS)

fairness; how tax knowledge and complexity influence fairness perceptions; and how these elements subsequently affect taxpayers' compliance behaviour.

I believe this study contributes to the literature in several ways. First, from a theoretical perspective, this study adds to the limited literature available in the Asian region. To date, there have been two major studies on fairness perceptions undertaken in Malaysia (Azmi & Perumal, 2008; Mustafa, 1996). Even though these two studies are quite recent, Mustafa (1996) for example, only focused on the tax rate structure as the element of tax fairness. He does not comment on the determinants of such judgments. The other study, on the other hand, attempted to identify the fairness dimensions among Malaysian taxpayers by replicating the Gerbing's (1988) developed questionnaire.

Second, this study extends the well-established Theory of Planned Behaviour (TPB) in compliance behaviour studies. While TPB appears to be the dominant model in explaining an individual's behaviour, the inclusion of fairness perceptions in tax settings has strengthened the model to a certain extent.

Third, from a practical perspective, the information on taxpayers' fairness perceptions and compliance behaviour can assist policy makers, particularly tax authorities in reviewing and modifying current tax systems, where necessary. In addition to this, the findings on the impact of tax knowledge and tax complexity on fairness perceptions and compliance behaviour are also useful for policy makers to tailor tax education and simplification programs.

The remainder of this paper is organized as follows. Section 2 provides an overview of the income tax system and compliance environment in Malaysia while Section 3 reviews the relevant literature and develops the research hypotheses. In Section 4, the conceptual model is proposed, while Section 5 describes the methods used in this study. The results are presented in Section 6, followed by a discussion in Section 7.

2. OVERVIEW OF THE INCOME TAX SYSTEM AND COMPLIANCE LEVELS IN MALAYSIA

The income tax system in Malaysia commenced in 1948 under British colonization. It was introduced to legitimise the collection of taxes from individuals and corporations. Since its inception, Malaysia has adopted OAS which requires taxpayers to furnish relevant information pertaining to their incomes and expenses to the IRB. Under the system, the duty to compute the tax payable lies with the IRB as taxpayers are assumed to have limited knowledge on taxation.

However, with effect from 2001,[1] SAS was implemented. Under the new system, the responsibility to compute the tax payable shifted from the IRB officers to the taxpayers. Unlike OAS, SAS requires taxpayers to be well-versed with the existing tax laws and provisions since they are answerable to the tax authorities in the case of a tax audit. Another prominent attribute of SAS is voluntary compliance, as the tax return submitted by taxpayers is deemed to be their notice of assessment. In other words, penalty mechanisms will be applied if taxpayers do not submit a correct tax return within the stipulated period.

[1] SAS was implemented in stages, beginning with companies in 2001, followed by non-companies in 2004, and was fully put into practice in 2005.

General fairness simply measures individuals' judgments whether the (income) tax system is generally fair or not. While exchange fairness is concerned with a reciprocal exchange between taxpayers and the government, horizontal fairness considers equal tax treatment among taxpayers in similar economic positions. Vertical fairness is assessed based on the ability to pay and preference for tax rate structure, either flat rate or progressive. Retributive fairness deals with the fairness of punishments imposed. Personal fairness concerns individual's self interest while administrative fairness, on the other hand, relates to the content of the tax law (policy fairness) and procedures employed by the tax authority (procedural fairness). Thus, based on the

3.3 Tax Knowledge

Tax knowledge is an essential element in a voluntary compliance tax system (Kasipillai, 2000), particularly in determining an accurate tax liability (Palil, 2005). Without tax knowledge, there is a tendency for taxpayers not to comply with the tax law either intentionally or unintentionally. This was postulated by McKerchar (1995) who studied small business taxpayers. She suggested that small business taxpayers were not even aware of their tax knowledge shortfall and this might lead to unintentional non-compliance behaviour.

The influence of tax knowledge on fairness perceptions was documented by Schisler (1995), who carried out a study comparing tax preparers and taxpayers. Schisler found that taxpayers had significantly lower fairness perceptions compared to tax preparers. The result might be due to the absence of tax knowledge among taxpayers compared to tax preparers. Fallan (1999) later confirmed Schisler's (1995) findings that tax knowledge significantly changed attitudes towards the fairness of the tax system. In that experimental study, the author measured tax knowledge through an additive index of 12 questions concerning tax allowances and tax liabilities.

Unlike Fallan (1999), who simply focused on technical knowledge of tax, an earlier study by Harris (1989) separated tax knowledge into fiscal awareness and technical knowledge, in order to observe the impact of each type of knowledge on fairness perceptions. The findings revealed that types of tax knowledge impacted fairness perceptions and consequently compliance behaviour. This study was supported by White et al. (1990), who suggested that a formal class in taxation would enhance the knowledge about the law and appreciation of fiscal policy goals, thus increasing perceived fairness.

Despite the evidence that fairness is a multi-dimensional construct, these prior studies tend to focus on the effect of tax knowledge on the overall fairness of the tax system rather than on each dimension of fairness. To critically assess the role of tax knowledge on fairness perceptions of the tax system, I believe it is essential not only to distinguish the types of knowledge, but also the dimensions of fairness that the type of knowledge has affected. Having said that, this study examines the impact of tax knowledge on seven dimensions of fairness as discussed earlier. Thus, it is hypothesised that:

H_3: Tax knowledge$_{1\ to\ k}$ positively influences the dimensions of fairness perception$_{1\ to\ k}$ of Malaysian taxpayers.

3.4 Tax Complexity

Tax complexity arises due to the increased sophisticatication in the tax law (Richardson & Sawyer, 2001). Some researchers agree that a certain degree of

hand are in favour of tax complexity that gives rise to a higher probability that the taxpayers will win the case. Similarly, tax accountants' preferences are also towards a high level of tax complexity as it will increase the demand for their tax services. In his critique and extension of White's study, Sawyer (1996) suggests that the tax authority prefers a lower level of tax complexity than indicated in White (1990), and the tax authority may benefit most when the level of complexity is close to zero in some circumstances.

Notwithstanding preferences by the tax authority and tax professionals, tax complexity actually causes negative perceptions of fairness among taxpayers (Cialdini, 1989;

the antecedent of a positive attitude. Thus, it is anticipated in this study, that taxpayers with positive perceptions on the fairness of the tax system are more likely to have positive attitudes towards the tax system and consequently encourage them to comply.

3.5.2 Subjective norm

Subjective norm reflects motivation to conform with significant referents either to comply or not comply with tax obligations. A review of factors affecting compliance from 1986 to 1997 reveals compliance with peers as significantly related to compliance behaviour (Richardson & Sawyer, 2001). This view is consistent with Bobek (1997) who found that subjective norm significantly affected compliance behaviour in a business deduction scenario. A comparative study in Australia, Singapore and the US by Bobek et al. (2007) also found subjective norm as an influential factor in explaining tax compliance behaviour. Based on the literature, I expect subjective norm would positively influence taxpayers in their compliance decisions.

3.5.3 Perceived behavioural control

Perceived behavioural control reflects an individual's perception on the ease or difficulty in performing a particular behaviour. Ajzen (1991) stipulates that a behaviour that is easy to perform is high in perceived behavioural control, while one that is difficult to perform is low in perceived behavioural control. Furthermore, the author suggests that an individual with high perceived behavioural control will be more likely to perform the behaviour in context than an individual with lower perceived behavioural control. For instance, individuals who have high perceived behavioural control over performing a daily physical exercise are more likely to do the exercise than those with lower perceived behaviourefl ecthtrol over pe, 205.4(t06w isis lo75 TD.001497

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As indicated earlier, perceived behavioural control deals with how taxpayers perceive relative easiness and difficulty in non-complying with tax obligations. As taxation is inherently a complicated matter, it is more likely that taxpayer's control over non-complying with tax obligations is influenced by resources and obstacles. Based on this argument, it is appropriate to investigate the impact of tax knowledge (resources) and tax complexity (obstacles) on perceived behavioural 36on-c6TJ26.6y3432 elfores

5. METHODOLOGY

This section outlines the data collection and sampling characteristics, measurement techniques, demographic information, descriptive analysis and data analysis.

5.1 Data Collection and Sampling

Data was collected through survey questionnaires which were distributed to a sample of 2,267 persons with the help of Human Resource Personnel or Head of Department in the respective organizations.[8] A total of 85 items were asked in the questionnaire. However, some of those items were not included in the analysis within this study. As

Nine items to measure tax knowledge were developed based on various definitions available in previous studies. These item

TABLE 1: SUMMARY OF DEMOGRAPHIC DATA (N = 852)

Variable	Frequency	Percent	Variable	Frequency	Percent
Age (years)			**Annual income (MYR)**		
Under 30	125	14.7	Less than 40,000	396	46.5
30-39	271	31.8	40,000-50,000	190	22.3
40-49	292	34.3	50,001-60,000	91	10.7
50-59	159	18.6	60,001-70,000	63	7.4
60 or over	1	0.1	70,001 or more	86	10.1
Missing	4	0.5	Missing	26	3.0
Gender			**Working sector**		
Male	422	49.5	Public	565	66.3
Female	426	50.0	Private	273	32.0
Missing	4	0.5	Missing	14	1.7
Ethnicity			**Filing experience**		
Malay	794	93.2	Never	133	15.6
Chinese	28	3.3	Once	63	7.4
Indian	22	2.6	2-5 times	147	17.3
Others	6	0.7	More than 5 times	463	54.3
Missing	2	0.2	Missing	46	5.4
Education level					
SPM/MCE	207	24.3			
STPM/MHCE	89	10.5			
Diploma or degree	422	49.5			
Masters or PhD	128	15.0			
Missing	6	0.7			

5.4 Descriptive analyses

Descriptive analyses are normally used to describe the basic features of the data, as set out in Table 2, Table 3 and Table 4, respectively. Table 2 describes respondents' perceptions on the fairness of the income tax system. The mean values of each item suggested that taxpayers generally had positive perceptions on vertical fairness, personal fairness and administrative fairness. In other words, taxpayers believed that the current tax system has treated individuals with different economic positions in a fair manner. In addition, taxpayers were of the opinion that they were paying a

TABLE 2: DESCRIPTIVE STATISTICS ON FAIRNESS PERCEPTIONS (N = 852)

Measures	Code	Min	Max	Mean	Std. Dev.
General fairness	**GF**	1	7	4.23	0.968
I believe the government utilizes a reasonable amount of tax revenue to achieve social goals, such as the provision of benefits for low-income families.	GF1	1	7	4.34	1.460
I believe everyone pays their fair share of income tax under the current income tax system	GF2	1	7	4.66	1.394
I think the government spends too much tax revenue on unnecessary welfare assistance.	GF3R	1	7	3.73	1.572
Exchange fairness	**EF**	1	7	4.42	0.849
I receive fair value from the government in return for my income tax paid (e.g. benefits).	EF1	1	7	4.34	1.361
It is fair that low-income earners receive more benefits from the government compared to high-income earners.	EF2	1	7	5.63	1.412
The income taxes that I have to pay are high considering the benefits I receive from the government.	EF3R	1	7	3.33	1.373
Horizontal fairness	**HF**	1	7	4.03	1.450
It is fair for individuals with similar amounts of income to pay a similar amount of income tax.	HF1	1	7	3.85	1.993
I believe it is fair for me to pay a similar share of income tax compared with other taxpayers earning an equivalent amount of income.	HF2	1	7	4.21	1.737
It is fair that 'equals before tax are equals after tax'. For example, if a person earning MYR100,000 before tax pays MYR20,000 tax, everyone earning MYR100,000 income before tax should be left with MYR80,000 after tax.	HF3	1	7	4.12	1.611
Vertical fairness	**VF**	1	7	5.16	0.965
It is fair that high-income earners are subject to tax at progressively higher tax rates than middle-income earners.	VF1	1	7	5.62	1.318
It is fair that middle-income earners are taxed at a lower rate than high-income earners.	VF2	1	7	5.80	1.291
The share of the total income taxes paid by high-income earners is much too high.	VF3R	1	7	4.11	1.492
Retributive fairness	**RF**	1	7	4.60	0.920
It is fair that individuals who deliberately evade paying their taxes should be penalised with the same amount of penalty regardless of the amount of tax evaded.	RF1R	1	7	3.86	1.876
To be fair, the degree of punishment for evading tax should depend on the degree of non-compliance.	RF2	1	7	5.41	1.330
I believe the initial late payment penalty on the unpaid tax,					

in dealing with tax matters.					
Compliance complexity	**CM**	1	7	4.25	1.124
I do not have a problem with completing and filing the tax return form(s).	CM1	1	7	4.84	1.487
I find it tedious to maintain all my relevant records for the whole year for tax purposes.	CM2R	1	7	3.42	1.614
I do not have to make a lot of effort to understand the explanations given in Inland Revenue Board guide books and other similar explanatory material.	CM3	1	7	4.53	1.448

Table 4 exhibits a higher mean for intention (except for one item, INS3R) and affective attitude, indicating respondents' likelihood to greater compliance behaviour. Meanwhile, a lower mean for instrumental attitude and subjective norm suggests a lower degree of compliance in Malaysia. Other than that, the perceived behavioural control of slightly above 4.0 also reflects that Malaysian taxpayers have less difficulty to avoid tax, thus resulting in low compliance.

TABLE 4: DESCRIPTIVE STATISTICS ON THEORY OF PLANNED BEHAVIOUR ITEMS (N = 852)

Measures	**Code**	**Min**	**Max**	**Mean**	**Std. Dev.**
Intention	**INS**	1	7	4.23	1.342
I would report my income fully, including the amount of MYR10,500 from the sales of handicrafts.	INS1	1	7	4.17	1.701
I would not attempt to cheat by omitting to report the extra amount of MYR10,500 in my tax return form.	INS2	1	7	4.63	1.481
I would not declare the MYR10,500 because that amount arises from trading goods with friends and neighbours.	INS3R	1	7	3.91	1.700
Affective Attitude	**AFS**	1	7	4.23	1.362
I would be upset if I did not declare the extra amount of MYR10,500.	AFS1	1	7	4.29	1.636
I would feel guilty if I did not declare that extra amount of MYR10,500.	AFS2	1	7	4.30	1.644
I would feel pleased if I did not declare the extra amount of MYR10,500.	AFS3R	1	7	4.12	1.585

is hard for me to omit the MYR10,500 in my tax return form successfully.	PBS1R	1	7	4.02	1.474
With my tax knowledge, skills and resources, it would be definitely easy for me to not declare the extra amount of MYR10,500 in my tax return form successfully.	PBS2	1	7	4.13	1.482
I would successfully omit the extra amount of MYR10,500 in my tax return form if I wanted to.	PBS3	1	7	4.36	1.560
With my tax knowledge, skills and resources, I would have no difficulty to omit the extra MYR10,500 in my tax return form successfully.	PBS4	1	7	4.23	1.518
There are no barriers that would prevent me from understating my income by MYR10,500 successfully.	PBS5	1	7	4.20	1.521

5.5 Data Analysis

The hypothesised model was analysed using the Partial Least Square (PLS) approach. This approach is suitable for models with latent variables which cannot be measured directly. The model was tested by performing a bootstrap procedure in PLS.[10]

This model consists of six exogenous variables (subjective norm, three dimensions of tax knowledge and two dimensions of tax complexity) and 11 endogenous variables (seven dimensions of fairness, intention to comply, perceived behavioural control and two dimensions of attitudes). Of these variables, six are formative constructs (with 18 items) and 11 are reflective constructs (with 35 items). While formative constructs do not measure the same underlying phenomenon and do not expect to correlate, reflective constructs are latent variables that measure "the same underlying phenomenon" (Chin, 1998, p. 305). It is vital to distinguish these two types of constructs because they require different methods in evaluating the measurement model.

5.5.1 Validity of formative constructs

To assess the validity of the formative constructs, indicator weights and the t-values were obtained from the bootstrapping procedure in Partial Least Square (PLS). A review on the results in Table 5 reveals that one item measuring retributive fairness (RF1R), two items of technical knowledge (TK3 and TK4R), and three items of content complexity were insignificant. While Diamontopolous and Winklhofer (2001) suggest that it is proper to eliminate any non-significant items to achieve all significant paths, other researchers (Bollen & Lennox, 1991; and Roberts & Thatcher, 2009) advise to retain them so as to preserve content validity. Thus, a compromise was made between these two views, where only three insignificant items (that is, RF1R, TK3 and CT1), measuring retributive fairness, technical knowledge and content complexity, respectively, were deleted. This cautious decision was made after a thorough review on those items to ensure that the construct is still measuring the entire domain and content validity is preserved (Petter et al., 2007).

[10] The software used for the analysis was PLSGraph Version 3.0 developed by Professor Wynne Chin of the University of Houston.

TABLE 5: FORMATIVE CONSTRUCTS, INDICATORS AND WEIGHTS

In terms of AVE, four constructs (exchange fairness, vertical fairness, personal fairness and legal knowledge) had values below the threshold of 0.5, providing support to remove several items in the construct, as suggested by the item loadings.

TABLE 6: REFLECTIVE CONSTRUCTS, INDICATORS AND LOADINGS

Construct and Items	PLS Loadings	T-Statistics	Significance Level

SNS2	0.7896	40.3286	0.005
SNS3R	0.7866	31.5517	0.005
Perceived control		AVE = 0.676	
PBS2	0.7843	37.1882	0.005
PBS3	0.7756	33.2751	0.005
PBS4	0.8898	77.4915	0.005
PBS5	0.8336	42.2967	0.005

Discriminant validity demands a strong correlation between an indicator and its associated construct but weak correlation with all other constructs (Gefen & Straub, 2005). The two procedures used to assess discriminant validity were (1) item cross-loadings; and (2) the ratio of the square root of the AVE of each construct to the correlations of this construct to all other constructs (Gefen & Straub, 2005). The results revealed that all item cross-loadings load higher on their corresponding constructs than any other construct and every construct had a square root of AVE bigger than its correlations with other constructs. This suggested that each measure did not tap the Sns as328ross-

TABLE 9: CORRELATION OF LATENT CONSTRUCTS AND THE SQUARE ROOT OF AVE

	INS	AFS	ISS	SNS	PBS	GF	EF	HF	VF	RF	PF	AF	GK	LK	TK	CT
INS	**0.819***															
AFS	0.680	**0.843**														
ISS	0.518	0.474	**0.755**													
SNS	0.657	0.541	0.508	**0.809**												
PBS	-0.339	-0.283	-0.348	-0.433	**0.822**											
GF	0.204	0.153	0.154	0.086	-0.074	**0.654**										
EF	0.168	0.120	0.061	0.034	-0.045	0.440	**0.727**									
HF	0.037	0.076	0.191	0.042	-0.011	0.238	0.177	**0.813**								
VF	0.041	0.029	-0.008	-0.033	0.099	0.107	0.329	0.121	**0.821**							
[redacted]	0.105	0.089	0.008	0.066	0.138	0.122	0.213	0.068	0.292	**0.773**						
0.1349[redacted]1403 0 Tr [redacted] 0097.6 29.46 13.68.98 0 T1 g44960 e64 53676 cm 0.403 2497.90.l20.1(23.53 rel 0.9224 lf(0.378 50.495.29.1403 Tm0 Tc[(VF)3740 g[(0.)5.7(3.98 T1 g4491085.6																
AF	0.149	0.115	0.053	-0.007	0.020	0.424										

For reflective constructs, the figures in Table 11 suggest that all constructs met the minimum value of 0.7 (Chin, 1998; Igbaria et al, 1997; Suraweera et al., 2005), except for exchange fairness with a slightly lower value, at 0.69. Other than that, most constructs had an internal consistency of above 0.8.

TABLE 11: INTERNAL CONSISTENCY OF THE CONSTRUCTS

Construct	Composite Reliability
Exchange fairness (EF)	0.689
Horizontal fairness (HF)	0.854
Vertical fairness (VF)	0.805
Personal fairness (PF)	0.762
Legal knowledge (LK)	0.829
Compliance complexity (CM)	0.888
Intention (IND/INS)	0.859
Affective attitude (AFD/AFS)	0.879
Instrumental attitude (ISD/ISS)	0.717
Subjective norm (SND/SNS)	0.850
Perceived behavioural control (PBD/PBS)	0.893

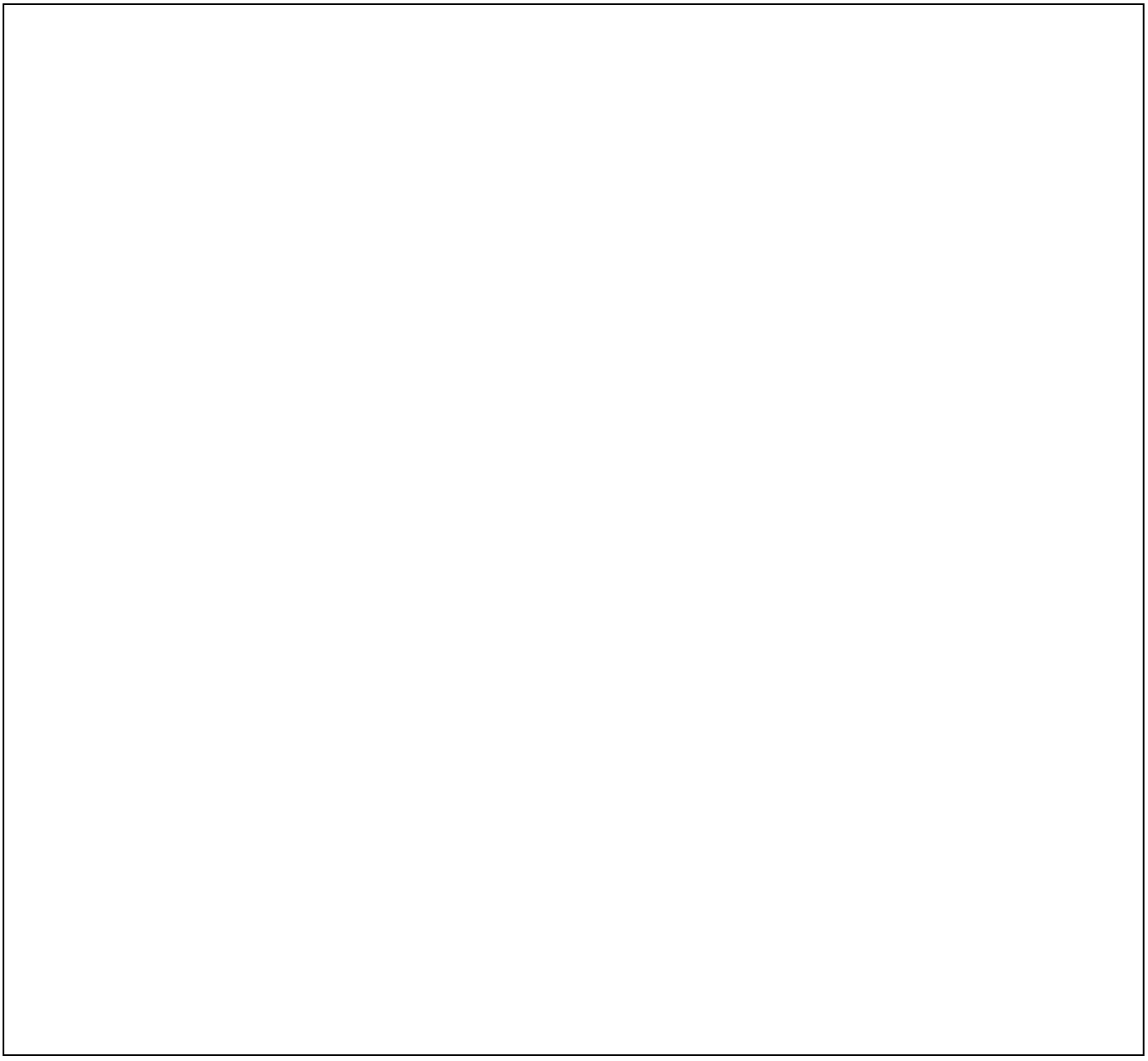
In addition to composite reliability, the AVE scales used to determine reliability of the measures also indicated that all the scales performed acceptably on this standard (exceed 0.5) and thus confirmed the reliability of the measures (refer Table 12).

TABLE 12: AVERAGE VARIANCE EXTRACTED OF THE CONSTRUCTS

	AVE
Exchange fairness (EF)	0.528
Horizontal fairness (HF)	0.661
Vertical fairness (VF)	0.674
Personal fairness (PF)	0.617
Legal knowledge (LK)	0.710
Compliance complexity (CM)	0.798
Intention (INS)	0.670
Affective attitude (AFS)	0.711
Instrumental attitude (ISS)	0.570
Subjective norm (SNS)	0.654
Perceived behavioural control (PBS)	0.676

The evaluation on measurement model implies that the measures used in this study work appropriately. Thus, the next step is to test the explanatory power of the entire model in explaining tax compliance behaviour.

FIGURE 2: PATH COEFFICIENTS



7. DISCUSSION

The purpose of this study was to examine the fairness perceptions of Malaysian taxpayers on the income tax system and how their perceptions influence their compliance behaviour. In so doing, I used a well-established model of TPB. The TPB model provides a theoretical framework of behavioural determinants consisting of attitudes, subjective norm and perceived behavioural control. For the purpose of this study, fairness perceptions were included to extend the existing TPB model, particularly in the tax compliance environment. Overall, the results suggest that the TPB model fits the data well.

This study reveals that taxpayers view fairness of the income tax system from various perspectives, namely general fairness, exchange fairness, horizontal fairness, vertical fairness, retributive fairness, personal fairness and administrative fairness. This is consistent with previous studies which contend that fairness perceptions are multidimensional (Gilligan & Richardson, 2005; and Gerbing, 1988). Also, the results extend the three fairness dimensions[11] documented by Azmi and Perumal (2008). Thus, the findings provide support for Hypothesis 1 that fairness perceptions are multidimensional.

Hypothesis 2 predicts that fairness perceptions will positively influence compliance behaviour. Specifically, the hypothesis suggests that the fairer taxpayers perceive the tax system, the more likely they will comply with their tax obligations. However, the findings provide no support to this contention. The possible explanation for such findings is the fact that taxation lies within a highly legalised environment. In such environment, whether a system is perceived fair or not, taxpayers have no choice but to comply. Otherwise, they will be subject to penalties. In other words, despite their resentment with the income tax system, they .028so(iur.ts ftio5.7(cinst.7(p,ve norm)ceptions ar404)TJ

control. The findings on these variables, however, showed insignificant results, thus suggesting rejecting hypotheses 6a and 6b.

8. CONCLUSION, LIMITATIONS AND FUTURE RESEARCH

The study provides evidence that Malaysian taxpayers perceive fairness of the income tax system in several dimensions. However, such dimensions, with the exception of horizontal fairness, seem to have no significant influence on their compliance behaviour. On the contrary, attitudes and subjective norm as highlighted in TPB have been significantly influential. This empirical evidence should add to the literature on compliance behaviour. In Malaysia particularly, the findings would provide an important update on the existing evidence documented by Mustafa (1996) and Azmi and Perumal (2008). Furthermore, the findings should be beneficial to policy makers and the tax authority as they highlight the fairness dimensions and relevant factors that need attention.

This study should also help tax researchers generally to understand the role of tax knowledge and tax complexity in fairness perceptions. For policy makers, the empirical evidence offers guidance in developing tax education and simplification programmes. Last, but by no means least, this study provides clear evidence that the TPB model has significant potential to contribute to the tax compliance literature. The extension to the TPB model in a tax environment seems to be a fruitful area for future research.

This study, however, is not without limitations. The convergent validity analysis on the constructs indicates lower item loadings than the recommended threshold of 0.7 for some of the items. Notwithstanding the low loadings, the items are still acceptable for further analysis (Chin, 1998). Future research should continue to extend the theoretical model of TPB in the tax literature as it offers a good explanation of compliance behaviour. Possibly researchers could decompose the TPB variables to gain a better insight into the determining factors. In addition, a survey on fairness perceptions among tax professionals would also be an interesting area for research.

REFERENCES

Ajzen, I. (1991), "The Theory of Planned Behavior", *Organizational Behavior Tm*

Diamantopolous, A., and H. M. Winklhofer (2001), "Index Construction with Formative Indicators: An Alternative to Scale Development", *Journal of Marketing Research*, 38: 259-277.

Dibbern, J. and W. Chin (2005), "Multi-group Comparison: Testing a PLS Model on the Sourcing of Application Software Services Across Germany and the USA Using a Permutation Based Algorithm" in F. Bliemel, A. Eggert, G. Fassott and J. Henseler (eds), *Handbuch PLS Pfadmodellierung*, Schaffer-Poeschel Verlag, Stuttgart, pp. 135-160.

Dillman, Don (2007), *Mail and Internet Surveys: The Tailored Design Method,* John Wiley & Sons, Inc, New Jersey.

Dwyer, T. and L. M. Williams (2002), "Nurses' Behavior Regarding CPR and the Theories of Reasoned Action and Planned Behavior", *Resuscitation*, 52: 85-90.

Erich, K., A. Niemirowski and A. Wearing (2006), "Shared Subjective Views, Intent to Cooperate and Tax Compliance: Similarities between Australian Taxpayers and Tax Officers", *Journal of Economic Psychology*, 27(4): 502-517.

Etzioni, A. (1986), "Tax Evasion and Perceptions of Tax Fairness: A Research Note", *The Journal of Applied Behavioural Science*, 22(2): 177-185.

Fallan, L. (1999), "Gender, Exposure to Tax Knowledge and Attitudes towards Taxation: An Experimental Approach", *Journal of Business Ethics*, 18(2): 173-184.

Forest, A., and S. M. Sheffrin (2002), "Complexity and Compliance: An Empirical Investigation", *National Tax Journal*, LV(1): 75-88.

Fornell, C., and D. Larcker (1981), "Evaluating Structural Equation Models with Unobservable Variables and Measurement Error", *Journal of Marketing Research*, 19: 440-452.

Gefen, D, and D. W. Straub (2005), "A Practical Guide to Factorial Validity using PLS-Graph: Tutorial and Anotated Example", *Communications of the Association for Information Systems*, 16(5): 91-109.

Gefen, D., D. W. Straub and M. C. Boudreau (2000), "Structural Equation Modelling and Regression: Guidelines for Research Practice", *Communications of the Association for Information Systems*, 4(7): 1-77.

Gerbing, M. D. (1988), "An Empirical Study of Taxpayer Perceptions of Fairness", *Unpublished PhD thesis*, University of Texas, Austin.

Gilligan, G. and G. Richardson (2005), "Perceptions of Tax Fairness and Tax Compliance in Australia and Hong Kong: A Preliminary Study", *Journal of Financial Crime*, 12(4): 331-343.

Guo, Q., C. A. Johnson, J. B. Unger, et al. (2007), "Utility of the Theory of Reasoned Action and Theory of Planned Behavior for Predicting Chinese Adolescent Smoking", *Addictive Behaviors*, 32(5): 1066-1081.

Harris, T. D. (1989), "The Effect of Tax Knowledge on Individuals' Perceptions of Fairness and Compliance with the Federal Income Tax System: An Empirical Study", *Unpublished PhD thesis*, University of South Carolina, South Carolina.

Hite, A. and M. L. Roberts (1992), "An Experimental Investigation of Tax Judgment on Rate Structure in the Individual Income Tax System", *Journal of the American Taxation Association*, 13: 7-63.

Igbaria, M., N. Zinatelli, P. Cragg and A. L. M. Cavaye (1997), "Personal Computing Acceptance Factors in Small Firms: A Structural Equation Model", *MIS Quarterly*, 21(3): 279-305.

Inland Revenue Board of Malaysia (2004), "Annual Report", Retrieved on 15 July 2007, from http://www.hasil.org.my.

Petter, S., D. Straub and A. Rai (2007), "Specifying Formative Constructs in Information Systems Research", *MIS Quarterly*, 31(4): 623-656.

Porcano, T. M. and C. E. Price (1992), "Some Evidence on the Association between Judgment Criteria and Fairness Perceptions", *Advances in Taxation*, 4: 183-210.

Richardson, G. (2005a), "A Preliminary Study of the Impact of Tax Fairness Perception Dimensions on Tax Compliance Behaviour in Australia", *Australian Tax Forum*, 20(3): 407-434.

Richardson, G. (2005b), "An Exploratory Cross-cultural Study of Tax Fairness Perceptions and Tax Compliance Behaviour in Australia and Hong Kong", *International Tax Journal*, Winter: 11-67.

Richardson, M. and A. J. Sawyer (2001), "A Taxonomy of the Tax Compliance

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

Mark Keating

Abstract

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The manner in which the scheme was entered into,

The form and substance of the scheme,

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

The timing of the scheme,

The period over which the scheme was carried out,

The effect of the scheme,

Any change in the participants' financial position,

Any other consequences on the participants,

The nature of the connection between the participants,

The circumstances surrounding the scheme, and

Any other relevant considerations.

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

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

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

> the relationship between the parties, whether arms-length or associated,
>
> the amount of GST at issue and the degree to which any supposed commercial transaction to which it relates is dependent upon that GST treatment,
>
> the normal commerciality of the arrangement,
>
> the perceived purpose of the particular section being exploited (i.e., the scheme and application of that provision of the Act),
>
> the experience and substance of the parties in fulfilling the transactions.

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

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

2.1 Role of Scheme and Purpose in Tax Avoidance

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

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

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

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

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

Later the Court confirmed:[43]

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

Therefore, only after reviewing the proper ope

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

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

4. NEW ZEALAND CASES APPLYING THE GST GAAR

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

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

> $80,000 was paid in cash by Glenharrow; and
>
> the remaining $44,920,000 was provided as vendor finance, which was secured by a mortgage over the shares in Glenharrow and the mining license.

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

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

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

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

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

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

4.2.1 Court of Appeal decision in Glenharrow

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

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

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

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

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

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

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

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

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

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

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

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

The Supreme Court stated:[85]

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

Considering the facts in *Glenharrow*:[86]

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

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

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

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

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

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

This problem arises most commonly in rela

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

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

6. NEW ZEALAND EMPHASIS ON ECONOMIC REALITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[118] *GST - A Practical Guide*, A McKenzie, CCH (NZ) Ltd, Ed 5, 2007.
[119] Ibid, at p IX.
[120] Ibid, at X
[121] At [42]
[122] Mainly for supplies of food, health or education which are classified as "GST-free" and get the same GST treatment as zero-rated exports.

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

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

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

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

9. SHOULD FEATURES OF TAX AVOIDANCE REQUIRE DISCLOSURE?

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

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

Disclosure is required in two broad categories:

[123] See s 165-5(1)(b).
[124] Her Majesty's Revenue and Customs Notice 700/8 (August 2004), superseded by Notice 700/8 (February 2006).

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

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

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

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

confidentiality agreements;

agreements to share a tax advantage;

contingent fee agreements;

prepayments between connected parties;

funding by loans, share subscriptions or subscriptions in securities;

off-shore loops;

property transactions between connected persons; and

issue of face-value vouchers.

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

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

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

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

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

10. CONCLUSION

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

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