TAX AVOIDANCE, INTERNATIONAL TAX ARBITRAGE, AND NEW ZEALAND AS A HAVEN FOR FOREIGN CAPITAL AND INCOME

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New Zealand is not a promising jurisdiction to serve as a tax haven. The country has relatively high rates of taxation for residents and New Zealand sourced income. Further, 2008 and 2009 saw several major anti-avoidance cases against New Zealand taxpayers. The cases included not only the usual domestic tax shelters but also a sustained attack on tax avoidance by banks that engage in international tax arbitrage. The tax planning of the banks involved exploiting differential treatments of a stream of revenue that flowed from one jurisdiction to another.

La Nouvelle-Zélande ne peut certainement pas être considérée comme un paradis fiscal. En effet, ce pays applique un taux d'imposition relativement élevé sur ses résidents fiscaux et sur les sources de revenus qu'ils tirent de ce pays. De plus, plusieurs décisions de justice, prises en 2008 et 2009, à l'encontre de contribuables néo-zélandais, ont eu pour conséquence de condamner nombre de mesures destinées à éluder le payement de l'impôt.

Comme nous l'explique l'auteur, ces décisions de justice portent tout autant sur les avantages fiscaux traditionnellement utilisés en droit interne, mais révèlent aussi une remise en cause quasi-systématique de la technique bancaire qui consistait, par le truchement de l'obtention de sentences arbitrales internationales en matière fiscale, à tirer avantage des différents régimes fiscaux applicables aux flux financiers internationaux.

I INTRODUCTION

On the face of it, New Zealand is not a promising jurisdiction to serve as a tax haven. The country has relatively high rates of taxation in respect of domestic residents and of New Zealand-sourced income. Further, 2008 and 2009 saw several major anti-avoidance cases against New Zealand taxpayers, cases that included not only the usual domestic tax shelters, but also sustained revenue attacks on avoidance by banks engaging in international tax arbitrage. As this article will explain, the banks' tax planning involved exploiting differential treatments (taxed

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or not taxed) of a single stream of revenue that flowed from one jurisdiction to another. Nevertheless, as the present author has explained,[1] New Zealand is an attractive jurisdiction from the perspective of non-residents. Perhaps counter-intuitively, the recent anti-avoidance litigation has, if anything, reinforced New Zealand's appeal to non-residents. In a world where appearances are often more important than reality a tax haven that seems to be hard on avoidance does not give the appearance of a haven. Three features of the landscape of the New Zealand legal system are of particular significance here.

The first is section BG 1 of the Income Tax Act 2007, known as the "general anti-avoidance rule" or "GAAR". The first New Zealand GAAR was section 29 of the Property Assessment Act 1879. When income tax was introduced in 1891, that provision was modified and carried over as section 40 of the Land and Income Assessment Act 1891. With the addition of definitions to amplify its text, the current GAAR, section BG 1, reads:

> (1) A tax avoidance arrangement is void against the Commissioner for income tax purposes.
>
> (2) Under Part G [of the Act] the Commissioner may counteract a tax advantage that a person has obtained from or under a tax avoidance arrangement.

GAARs like the New Zealand section BG 1 operate similarly to the judge-made substance-over-form approach or the sham transaction rule of the United States of America[2] or the *Ramsay*,[3] or "fiscal nullity", doctrine of the United Kingdom. At a risk of over-simplification, these rules operate by going behind the legal form of a transaction and taxing it according to its economic substance.

The second significant feature, or, more accurately, legal development, was a change in the appeal rights from judgments of New Zealand courts. Historically, as was formerly the case for Commonwealth countries in general, appeals from New Zealand's highest court, the Court of Appeal, lay to the Judicial Committee of the Privy Council in London. Progressively, most jurisdictions in the Commonwealth apart from very small states had abolished this right and had indigenized their highest courts. New Zealand followed suit with the Supreme Court Act 2003, which established a Supreme Court to replace the Privy Council and abolished

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1 John Prebble "New Zealand Trusts in International Tax Planning" [2000] British Tax Review 554-564. See also John Prebble "New Zealand" in Milton Grundy and Aparna Nathan (eds) *Offshore Business Centres* (8th ed, Sweet & Maxwell, London, 2008) 175-179.

2 See, eg, *Gregory v Helvering* 293 US 465 (1935).

3 *W T Ramsay Ltd v Inland Revenue Commissioners*, *Eilbeck (Inspector of Taxes) v Rawling* [1982] AC 300 (HL).

appeals to London after 1 January 2004. But it was not until late 2008 that the Supreme Court issued its first judgment on the New Zealand GAAR, namely *Ben Nevis Forestry Ventures Ltd & Others v Commissioner of Inland Revenue*.[4] If this case is any guide, the Supreme Court will take a more fundamentalist, substance-over-form approach to applying section BG 1 than did the Privy Council. Generally the result will be for judgments to favour the Commissioner more than was formerly the case.

Against this background, 2009 saw two significant High Court judgments against the taxpayer, *BNZ Investments Ltd and Others v Commissioner of Inland Revenue* (15 July 2009, Wild J)[5] and *Westpac Banking Corporation v Commissioner of Inland Revenue* (9 October 2009, Harrison J).[6] These cases were the first and second of a series of appeals by the major New Zealand trading banks against tax assessments under section BG 1. The cases are sometimes known collectively as the "bank conduit" cases.

In aggregate, these cases involve some of the largest sums of disputed tax that as at 2009 were the subject of active litigation anywhere in the world: an estimated NZ$2.4 billion in tax and interest, with the possibility of penalties in addition. As an indication of scale, NZ$2.4 billion is approximately the total of the annual fees of the New Zealand legal profession and rather more than the $US1.4 billion (about $NZ1.9 billion) at issue in the celebrated United States KPMG tax shelter cases of the late 1990s, investigated in the early years of the present century[7] and the subject of prosecutions of KPMG partners and other professional tax advisers that were widely reported between 2005 and 2009.[8]

The initial reaction among the noisier sections of the tax advising community was to predict appeals to the Court of Appeal and then to the Supreme Court, with

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4 [2009] 2 NZLR 289 (SC).

5 (2009) HC WN CIV 2004-485-1059, 24 NZTC 23,582 Wild J.

6 (2009) HC AK CIV 2005-404-2843, 24 NZTC 23,834 Harrison J.

7 As at June 2002, audits of 186 taxpayers who had subscribed to the Presidio Bank/KPMG Bond Linked Issue Premium Structure, or "BLIPS", had disclosed $US1.4 billion in allegedly unpaid tax. BLIPS, together with Foreign Leveraged Investment Program (FLIP), Offshore Portfolio Investment Strategy (OPIS), and the Corporation Charitable Contribution Strategy (SC2) were part of a menu of shelters available to KPMG clients. Carl Levin and staff, *US Tax Shelter Industry: the Role of Accountants, Lawyers, and Financial Professionals: Four KPMG Case Studies: FLIP, OPIS, BLIPS, AND SC2*. Report for the Permanent Subcommittee on Investigations of the United States Senate Committee on Governmental Affairs, (Washington, 18 and 20 November 2003) page 3.

8 See, eg, Paul Davies and Chad Bray "KPMG Trial, Pared in Scope, Nears After Stormy Prologue" *Wall Street Journal* 13 October 2007.

good chances of success for the banks. The present author also expected appeals, but predicted judgment for the Commissioner. In the event, the Solicitor-General and the taxpayers settled all bank conduit cases on 23 December 2009, with the banks paying 80 per cent of total tax and interest, (that is, more than the original tax), but with no penalties. One case, not involving BNZI or Westpac, remained outstanding as at 1 March 2010,

The third feature, or, rather, development, was the publication in July 2009 of protocols governing the relationship between the Commissioner of Inland Revenue and the New Zealand Solicitor-General. Implications of the protocols are discussed towards the end of this article.

II THE BEN NEVIS CASE: FACTS

While the importance of *Ben Nevis,* the first of the three avoidance cases mentioned above, lies in its legal holdings, the facts are also instructive. In essence, the case involved a scheme designed to generate losses that would shelter taxable income of participants. The scheme relied principally on rules passed by the New Zealand Parliament to mitigate the problem of outgoings known as "black hole expenditure": that is, expenditure that is not deductible because it is on capital account, but that, at the same time, does not purchase a recognisable asset that qualifies for depreciation allowances.

The scheme was essentially a *Son of Boss* arrangement,[9] that is, a shelter where taxpayers in form incur very heavy obligations that according to the documents they must liquidate many years in the future, but that as a practical matter will never come home to roost or that will be closed out before maturity in one way or another.

The promoters contrived a form of property, not being land,[10] that qualified under New Zealand black hole rules as "fixed life intangible property",[11] namely a licence to grow Douglas fir trees on certain property for fifty years, the growing period of a Douglas fir at the latitude in question. The fee for the licence was $2,050,518 per "plantable"[12] hectare of ground, satisfied by a fifty-year promissory note from the licensee to the licensor. The claim was for depreciation allowances

9 See, eg, Robert Sommers "The Son of Boss Tax Shelter" (2008) www.son-of-boss.com/Son_of_Boss_Article.html, last consulted 6 December 2009.

10 Now Income Tax Act 2007 s EE 7(a).

11 Now Income Tax Act 2007 s EE 6(1) and (3); s EE 62 and schedule 14 (definition of "depreciable intangible property"); and s EE 67 (definition of "fixed life intangible property").

12 A term that appears to have been coined by the drafter of the licence.

on the cost of the licence. The court weighed this claim against a land cost of $580 per hectare for freehold title paid in the year before the scheme started.

Various measures and elaborations addressed the problem of what might happen if, at harvest, the timber proved to be worth less than the value of the notes, which would fall due at the same time. Perhaps the least convincing measure was a loss policy offered to participants in the scheme, contracted with a barely capitalised, special-purpose insurance company that the promoters incorporated in the British Virgin Islands.

The practical effect of the scheme was that taxpayers could subscribe for the number of hectares that they estimated they would need to generate deductions sufficient to offset the amount of income that they hoped to shelter.

When the facts of the case are described in terms of the preceding paragraphs the reader might wonder at the optimism of a promoter who would market such a shelter. But all the expenses and allowances that the taxpayers claimed qualified for deduction according to the relevant statutory rules, and it was undeniable that the Douglas fir forest was indeed planted and growing healthily. Further, the history of aggressive schemes in many Commonwealth countries, including New Zealand, is that they succeed more often than one might expect.

As recently as 2006 the Privy Council allowed an appeal against the New Zealand Commissioner in *Peterson v Commissioner of Inland Revenue*,[13] a film shelter case where the tax benefits were structured to be well in excess of the taxpayers' investments in all circumstances. It did not matter whether the film was even released, let alone whether it made any profit. There was even a finding of fraud against the promoters. The decision in favour of the taxpayer was surprising in that, apart from the fraud, the ingredients of the scheme were almost a copy of the facts in the English case of *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes),*[14] where the House of Lords had held that the scheme failed, even in the absence of a GAAR like that in New Zealand. In short, although the *Ben Nevis* arrangement was probably doomed from its inception, many tax advisers had looked to the litigation with hope. Since the *Ben Nevis*, *BNZ Investments* and *Westpac* cases, it seems that tax advisers are less optimistic about how robust aggressive schemes will prove against attack by the Commissioner under section BG 1 of the Act.

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13 [2006] 3 NZLR 433 (PC).

14 [1992] 1 AC 655 (HL).

III THE BEN NEVIS CASE: LAW

Every case on a GAAR starts from the position that the taxpayer's transactions satisfy the black letter requirements of relevant legislation. If that were not so, any attempted avoidance would be ineffective and charging rules would bite. That is, revenue authorities need not invoke an anti-avoidance rule if the taxpayer's transactions fail in their purpose of avoiding tax. A corollary of this consideration is that many GAAR cases require the court to consider the relationship between relevant charging provisions or exempting provisions on one hand and a GAAR on the other hand. In principle, this exercise is a question of statutory construction. Modern courts ordinarily regard it as a question of purposive construction. There are two themes in particular in the *Ben Nevis* court's contribution to this jurisprudence: the tandem approach and the Parliamentary contemplation approach.

The tandem approach purports to treat charging provisions and the GAAR as having equal force, or potentially equal force. That is, rather than treating the GAAR as a *deus ex machina* that descends from above and overrides a specific charging or exempting provision, the court should attempt to reconcile the provisions, though recognising that one or the other must prevail. The majority[15] put it this way:[16]

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

IV BEN NEVIS: PARLIAMENTARY "CONTEMPLATION"

The art of statutory interpretation and the canons and presumptions that it employs underwent considerable development during the twentieth century. Interpretation was formerly based on a number of rules and principles: less precise and more free-flowing in practice than they appeared in principle, but nevertheless generally formulaic in approach. One began with the literal rule, moved to the golden rule, and thence to the mischief rule. Over the second half of the twentieth century there was increasing focus on the purpose of Parliament, but even then the processes of reasoning that were acceptable to the courts followed certain

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15 Tipping, McGrath, and Gault JJ.

16 *Ben Nevis Forestry Ventures Ltd & Others v Commissioner of Inland Revenue* [2009] 2 NZLR 289 [103] (SC).

conventions. For instance, there was limited reference to extra-statutory materials. Nevertheless, development was such that by 2001 Lord Hoffman could say:[17]

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

For a time, Lord Hoffman's articulation appeared to be the high-water mark of purposive construction. Rarely, if ever, did a court faced with, say, a tax arrangement where the effect was to generate tax losses that were not economic losses, cut to the chase and conclude with words to the effect of, "Whatever Parliament intended they cannot have contemplated this result and would not have done so had they turned their minds to it". A notable development in the *Ben Nevis* case is that the learned judges did indeed proceed some distance down this road and asked themselves what Parliament might have contemplated. Their Honours said:[18]

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

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

18 *Ben Nevis Forestry Ventures Ltd & Others v Commissioner of Inland Revenue* [2009] 2 NZLR 289 [107], [108] (SC).

V REPOS IN THE BANK ARBITRAGE CASES

Whatever exegesis of the GAAR the *Ben Nevis* court had decided to apply, it seems likely that the decision would have been in favour of the Crown. The position might have been different in the first of the international arbitrage cases mentioned earlier, *Bank of New Zealand Investments Ltd v Commissioner of Inland Revenue*,[19] commonly known as "*BNZI*", had the doctrine of precedent not obliged the court to follow the *Ben Nevis* "Parliamentary contemplation" approach.

The New Zealand bank arbitrage cases involved transactions that in economic terms were loans from New Zealand banks to counterparty financial institutions in other countries, usually the United States or the United Kingdom. In form, the schemes were cross-border "repo", or repurchase, transactions that relied on different characterizations of income flows in the countries of residence (New Zealand) and of source (the foreign country). A repo has the appearance of a mortgage, usually of personal property, where the borrower sells property to a lender rather than issuing security over it, promising to repurchase the property at a future time. A significant difference from a standard flat mortgage, where the principal to be repaid remains unchanged at the end of the term of the loan, is that the contract often stipulates that the repurchase will be at a higher price.

The higher price takes the place of interest on a loan, where the lender simply advances funds to the borrower. The property sold and repurchased may comprise shares. In that event, dividends flowing from the shares to the lender/purchaser may also or instead take the place of interest on what would have been principal had the transaction been a standard loan.

It is in the nature of dividends to fluctuate with company fortunes. But borrowers and lenders of money ordinarily expect that the price charged to the borrower (normally interest) will be fixed, either by agreement or by some exogenous criterion. Since a repo is typically a surrogate for a loan, dividends, with their proneness to fluctuation, are not an ideal form of consideration for a borrower to employ to pay for the use of money. Parties to loans in the form of repos often add terms to cope with this problem, to ensure that the price of the borrowing is fixed. One method is for the original owner of the shares to retain the right to dividends and instead to pay interest, or, at least, sums in the nature of interest. Another is to sell and to repurchase shares where dividends are contrived to be fixed-rate, the method adopted in the *BNZI* case.

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19 24 NZTC 23,582 Wild J.

VI CONDUIT REGIME

The bank arbitrage cases relied on New Zealand's conduit regime. Conduit rules applied to income from sources in foreign jurisdictions that flowed via New Zealand to destinations in third countries. For example, an American holding company (A) might own a New Zealand regional sub-holding company (B) that in turn owned a company in a third country (C). From a tax policy point of view, there was no reason for New Zealand to tax dividends flowing from C (in a foreign jurisdiction), via B (in New Zealand), to A (in another foreign jurisdiction). Accordingly, the conduit transaction rules substantially relieved this dividend flow from New Zealand tax.[20] It follows from the reasons for the rules that only New Zealand companies owned by foreign parent companies qualified to benefit from the regime.

The bank arbitrage structures were repos that entailed sales of shares by foreign counterparties of New Zealand banks, to be followed by repurchases of the shares. (Strictly, the repo transactions were between special-purpose subsidiaries on both sides of the transaction.) Subject to variations of detail, the shares subject to sale and repurchase were in companies or other entities established for the purpose of creating equity interests that would be suitable for repo transactions. The shares produced fixed-rate dividends guaranteed by the counterparties: economically equivalent to fixed-rate interest on a loan. When the New Zealand lenders were paid for the use of their money, the payment came in the form of dividends. That is, the lenders' return on the repos came not from selling the securities back to the borrower at an enhanced price, but from dividends flowing from the shares.

In form, the New Zealand lender/purchasers had invested in equity shares in foreign companies. Since the New Zealand lenders were owned by foreign parent companies the conduit regime relieved inflowing dividends on these shares from tax in the lenders' hands. The bank arbitrage schemes included ancillary transactions that enhanced the overall return to the taxpayers, but the essential structure was as described.

VII TAX LOSSES

The banks funded their purchases of the securities that were to be repurchased by borrowing, generally on ordinary markets at market rates of interest. They claimed the right to deduct this interest pursuant to the interest deductibility rules

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20 At the time of the bank arbitrage transactions, the conduit tax rules were contained in the Income Tax Act 1996, subparts FH, KH, MI, and in s NH 7. They are now found primarily in the Income Tax Act 2007, subparts LQ (Tax credits for conduit tax relief companies) and OD (Conduit tax relief accounts), amplified by ss YD 9, 10, and 11 (Special residence rules for conduit tax relief companies).

in the Income Tax Act 1996, which applied at the time.[21] The result was an asymmetry in favour of the banks: a deduction set against exempt income. The banks shared the tax benefit of this deduction with their foreign counterparties by accepting below-market rates of return on the money that they advanced.

The Commissioner conceded that both the conduit exemption for inflowing dividends and the deduction for interest fell squarely within the terms of the Act. However, he disallowed the deduction for interest, arguing that the scheme was void by virtue of the GAAR. In the High Court in the *BNZI* and *Westpac* cases, Wild J and Harrison J respectively upheld the Commissioner; largely on the basis that Parliament could not have intended that taxpayers might exploit the conduit rules in the manner of the bank schemes.

VIII EARLIER TRANSACTIONS AND RULINGS

In 1996 and 1997, before the transactions at issue in the *BNZI* case, the bank had contracted repos with the American financial institutions AIG, Morgan Stanley, and Gen Re, that were substantially similar to the repos described above, except in two respects. First, the substantive advance of funds was north to south (the United States to New Zealand), instead of south to north, as in the *BNZI* case itself. That is, in the 1996 and 1997 schemes, the Americans purchased New Zealand-issued securities, rather than *vice-versa*. Secondly, since the United States offered nothing comparable to the New Zealand conduit rules, the schemes relied on engineering foreign tax credits to shelter inflowing income. The fiscal attack was on the United States tax base, rather than against that of New Zealand.

The United States Internal Revenue Service brought these earlier structures to an end by issuing Notice 98-5 on 20 January 1998. Notice 98-5 warned that the Treasury and the Service intended to issue regulations to frustrate this kind of structured financing. Rather than face the foreshadowed regulations, the parties had unwound or not proceeded with the repos. And rather than waste the planning that had gone into them, they reversed their structures to target New Zealand.

Although the Bank of New Zealand had sustained substantial costs by way of interest incurred in taking part in the 1996 and 1997 repos, the net result in these cases was a profit that yielded tax for the New Zealand Treasury, tax that in economic terms comprised United States revenue diverted from the Treasury in Washington. As a precaution, to protect its position *vis-à-vis* the New Zealand Commissioner, the Bank of New Zealand obtained binding rulings in respect of

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21 The rule that applied particularly to interest deductions by companies was s DD 1(3) of the Income Tax Act 1996, enacted in 2001 with retrospective effect to the start of the 1997-1998 tax year.

three of these transactions. It seems that one of the reasons for choosing New Zealand as the jurisdiction of residence of parties in the 1996 and 1997 transactions was the availability of advance rulings that were binding on the Commissioner.[22] The rulings did not avail the bank in the *BNZI* case itself because, even had they been *in pari materia,* New Zealand legislation disqualifies rulings from serving as any form of precedent.

Westpac, a New Zealand bank that also engaged in repo conduit transactions, also obtained a favourable binding ruling, but in Westpac's case the ruling was in respect of a repo where the funds flowed south to north, that is, in respect of a structure of the pattern at issue in the New Zealand arbitrage cases, the New Zealand party being the funder. The result was that the Commissioner was precluded from challenging that particular repo. Since he challenged south to north repos in the *BNZI* case, and similar south to north repos in the Westpac litigation, it appears that the Commissioner changed his mind some time after issuing the Westpac ruling.

In hindsight, apart from this last ruling, which is understood to have saved Westpac about NZ$25 million in tax, the rulings may have been supererogatory. The reason is that the New Zealand Income Tax Act defines "income tax" as tax imposed by the New Zealand Act, except where the Act requires otherwise. The Act does not otherwise require in section BG 1, the GAAR. Since the 1996 and 1997 repos yielded extra tax for New Zealand, it is hard to see how their schemes could have been categorized as "avoiding" tax. The fact that the income that yielded the extra tax was in effect United States tax that the north to south[23] repos had converted to New Zealand income was neither here nor there.

IX INLAND REVENUE/CROWN LAW PROTOCOLS

The third factor of those mentioned in the first paragraph of this article is an apparently innocuous posting to the Crown Law Office website in July 2009. In New Zealand, the Solicitor-General and his department, the Crown Law Office, fulfil in tax matters a role similar to that of Treasury Solicitors and Counsel in the United Kingdom. In July 2009, the Crown Law website published a document, "Protocols between the Solicitor-General and the Commissioner of Inland Revenue". At the same time, the website published a chart to show how the

22 Tax Administration Act 1994, part VA, Binding Rulings. The New Zealand system of binding rulings stems from proposals in John Prebble *Advance Rulings on Tax Liability* (Wellington 1986).

23 North to south in terms of the direction of funding and of the repurchase. The first step in the scheme, the purchase of property, sent the property south (from New Zealand) to north (to the United States).

relationship between the two would be managed for purposes of structured finance litigation, which includes the bank arbitrage cases that are the subject of this article. By virtue of the protocols, it seems that the Crown Law Office will in future have a significant role in settling rulings and other interpretative statements that emanate from the Inland Revenue Department, at least in some circumstances. A possible upshot of the protocols will be that future rulings and interpretations will embrace a more substantive approach, which would broaden the effect of the GAAR. If so, the result will be for the Commissioner to adopt a more robust approach towards avoidance, and this in a country where the authorities are already relatively ready to attack avoidance transactions, as compared with formalistic approaches that apply in some jurisdictions.

X CONCLUSION: LESSONS FOR NON-RESIDENTS

Since the enactment of the country's international trust regime in 1988,[24] non-residents have come to rely on New Zealand as a safe haven for their funds, a haven that will not suddenly tax those funds. At first sight, the *Ben Nevis*, *BNZI,* and *Westpac* cases (with the courts' upholding of the Commissioner's uncompromising deployment of the GAAR, together with the Solicitor-General/Commissioner protocols that have been mentioned), may be disturbing for non-residents who cause income streams to be diverted to New Zealand trusts. Such concern is not warranted. The GAAR attacks only avoidance of tax on income that would otherwise be taxable under the New Zealand Act. Such income does not include income from foreign sources derived by non-residents, or income that might have been derived by a non-resident had it not been channelled to a New Zealand-resident trustee. If anything, the appearance, indeed the reality, of New Zealand as a jurisdiction that is ready and willing to defend its tax system by a hard-hitting substance-over-form rule may give some comfort to non-residents; section BG 1 becomes a kind of smoke-screen.

A second lesson is more subtle. The Bank of New Zealand's applications for rulings in the north to south repos of 1996 and 1997 may have been not only supererogatory but both self-harming and even more harmful to the bank's American counterparties. From the perspective of a tax administration, a great merit of a rulings system is that applications for rulings are a rich source of tax intelligence. There is reason to believe that the New Zealand Revenue may have shared the intelligence that they gleaned from the AIG, Morgan Stanley, and Gen Re applications with the United States authorities – entirely legitimately, since information exchange is covered by Article 25 of the New Zealand-United States

24 Now Income Tax Act 2007, subpart HC.

Double Taxation Convention, which came into force on 23 November 1983. It may have been this information that led the United States' authorities to issue Notice 98-5.