

Victoria University of Wellington Institute of Policy Studies
Henry Lang Fellowship 2004
Project: Measures to Frustrate Tax Avoidance
Fellow: John Prebble, Professor of Law

Nature of the project

To risk over-simplification, tax avoidance occurs when taxpayers construct transactions in a manner that complies with the form of the law but that in substance results in a reduction in tax liability. Different jurisdictions endeavour to frustrate tax avoidance in different ways. Some, including New Zealand, enact general anti-avoidance rules that provide, in essence, that transactions that have the purpose or effect of tax avoidance may take effect between the parties but are ineffective for tax purposes. Others, like the United Kingdom and the United States of America, rely to a greater or lesser extent on judge-made rules. This project examined tax avoidance and anti-avoidance measures from a number of perspectives. The project continues.

Duration and resources

Henry Lang Fellowship funding is in principle for three months. As a result of a series of happy chances, Professor Prebble was able very considerably to extend his fellowship during periods over 2005 to 2007. Further, by collaborating with a number of honours and masters students, and through receiving financial assistance from the New Zealand Inland Revenue in addition to the Henry Lang Fellowship, he was able to undertake and to complete much more work than originally envisaged. He addressed a number of conferences, published a number of papers, and ran a colloquium that compared the general anti-avoidance rules of seven jurisdictions. Other papers have been accepted for publication, and work is still in progress on others. Finally, certain earlier work was revisited and published in a number of different countries. In the lists that follow, all work is by John Prebble, with co-authors as mentioned.

Publications

- 1) Avoidance and Other Consequences of Publishing Commissioner's Interpretation Guidelines, (2004) 19 Australian Tax Forum, 245 – 266.
- 2) With Rebecca Prebble & Catherine Vidler Smith, "Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation" (2006) 22 NZULR 271 – 299. The Peterson Case and its Impact on the Rules in BNZ Investments Ltd and Cecil Bros, in Adrian Sawyer (ed) Taxation Issues in the Twenty-First Century Centre for Commercial and Corporate Law, Christchurch 2006 117 – 128.
- 3) The Peterson Case and its Impact on the Rules in BNZ Investments Ltd and Cecil Bros, in Adrian Sawyer (ed) Taxation Issues in the Twenty-First Century Centre for Commercial and Corporate Law, Christchurch 2006 117 – 128,
- 4) With Rebecca Prebble & Catherine Vidler Smith, "Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance" (2006) 22 NZULR 17 – 49.

Forthcoming publications

- 5) "Justice Hill and the Autopoiesis of Income Tax Law", accepted for publication as a Working Paper of the VUW Centre for Accounting, Governance, and Taxation Research.

- 6) Prebble, John and Z.M. Prebble “Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Rechtsmissbrauch (Abus de Droit)” Part I accepted for the International Bulletin of Fiscal Documentation, 2008.
- 7) Prebble, John and Z.M. Prebble “Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Rechtsmissbrauch (Abus de Droit)” Part II accepted for the International Bulletin of Fiscal Documentation, 2008.

Republication of earlier work in different jurisdictions (same article)

- 8) “Income tax law: a structure built on sand” (2006) Part 1, 162 *Forfaitair* (Groningen, the Netherlands) 20 – 24, Part 2, 163 *Forfaitair* 17 – 21, Part 3, 164 *Forfaitair* 11 – 14.
- 9) Trans A.M. Grau Ruiz “El Impuesto Sobre La Renta: Una Estructura Construida Sobre” *La Arena* (2006) 121 *Cronica Tributaria* 113 – 130 (Spain)
- 10) “Income Taxation: a Structure Built on Sand” (2007) 1 *International Journal of Tax Law, Fiscal Policies, and Administrative Studies*, 1 – 21 (Nigeria).

In progress

- 11) With R Prebble, “Tax Avoidance and the Rule of Law”
- 12) With L Tat, “Fiscal Nullity: a Review of the Cases”
- 13) With Z Prebble, “The Morality of Tax Avoidance: Why the Legal Difference Between Evasion and Avoidance is Insufficient to Ground a Moral Distinction”
- 14) With A Rosenow, *The Character of Taxation Law* (a comparative study of the general anti-avoidance rules in Austria, Germany, New Zealand, and Australia)

Conference and occasional addresses

- 15) “Fictions of Income Tax Law” Society of Legal Scholars Annual Conference, Sheffield, 15 September 2004; International Bureau of Fiscal Documentation, Amsterdam, 21 September 2004; Law and Economics Assn of New Zealand 18 October 2004.
- 16) With G Hikaka, “Legal Autopoiesis and General Anti-Avoidance Rules”, Australasian Tax Teachers Association Conference, Wellington, 27 – 28 January 2005. Judged *proxime accessit* for best paper in the conference.
- 17) Tax Avoidance is a Non-Sequitur, conference dinner speech, Australasian Tax Teachers Association Conference, Wellington, 27 – 28 January 2005.
- 18) Deterring Tax Avoidance, London School of Economics Financial Markets Group Seminar, November 2005.
- 19) Developments in Tax Law and Policy, Tax Policy Group, United Kingdom Treasury, November 2005
- 20) The Peterson Case and its Impact on the Rules in *BNZ Investments Ltd and Cecil Bros Pty Ltd*, 18th Australasian Tax Teachers Association Conference, Melbourne University, 30 January to 1 February 2006.
- 21) Lon Fuller and Fictions of Income Tax Law, Otago University Law Faculty Staff Seminar 4 May 2006.
- 22) With Zoë Prebble, *The Morality of Tax Avoidance: Why the Legal Difference Between Evasion and Avoidance is Insufficient to Ground a Moral Distinction*, International Conference on Legal Ethics: Professional Ethics and Personal Integrity, Auckland University 22- 23 June 2006.

- 23) Overview (Convener's Address): Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of *Rechtmissbrauch* (Abuse of Law), Colloquium and Master Class, International Bureau of Fiscal Documentation, Amsterdam, Institute for Policy Studies, Wellington, and the New Zealand Association for Comparative Law, Victoria University of Wellington, 31 July 2006.
- 24) Legal Autopoiesis and the General Anti-Avoidance Rule, Joint Session, Jurisprudence and Tax Sections, Society of Legal Scholars Annual Conference, Keele University, UK, 4 – 7 September 2006
- 25) With Amparo Grau Ruiz, Evasion and the Evasion/Avoidance Interface, Prebble-Chowdry Symposium on Jurisprudential Perspectives of Income Tax Law, Chartered Institute of Taxation and King's College London, Maughan Library, Chancery Lane, 13 and 14 September 2006.
- 26) With Monica Chowdry, The General Anti-Avoidance Rule (GAAR) and the Rule of Law, Prebble-Chowdry Symposium on Jurisprudential Perspectives of Income Tax Law, Chartered Institute of Taxation and King's College London, Maughan Library, Chancery Lane, 13 and 14 September 2006.
- 27) With James Penner and Zoë Prebble, Morality and Avoidance, Prebble-Chowdry Symposium on Jurisprudential Perspectives of Income Tax Law, Chartered Institute of Taxation and King's College London, Maughan Library, Chancery Lane, 13 and 14 September 2006.
- 28) Form and Substance in Income Tax Law, Seminar for Judges of the Supreme Court and the Court of Appeal of New Zealand, Judges' Common Room, Court of Appeal, Wellington, 8 November 2006.
- 29) With Rebecca Prebble, Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach the Rule of Law? 19th Australasian Tax Teachers' Association Conference, University of Queensland, 22–24 January 2007, judged most original paper.
- 30) With Lisa Tat, The History of Fiscal Nullity, Address to staff of the Office of the Chief Tax Counsel, Inland Revenue, New Zealand, 23 November 2007.

Colloquium

- 31) John Prebble, organizer and convener, Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of *Rechtmissbrauch* (Abuse of Law), Colloquium and Master Class, International Bureau of Fiscal Documentation, Amsterdam, Institute for Policy Studies, Wellington, and the New Zealand Association for Comparative Law, Victoria University of Wellington, 31 July 2006. (Papers on Germany, France, the United Kingdom, the United States of America, Australia, New Zealand and the European Community. Consolidated papers to be published identified at numbers 6 and 7 above.