

SPECTRE OF ANTI-AVOIDANCE LOOMS LARGE

Inland Revenue has routed the taxpayer in a spate of recent anti-avoidance cases, the most recent ones being the High Court decision in *Alesco* and the Supreme Court decision in *Penny and Hooper*. Inland Revenue's views on non-market salaries, and on avoidance and reconstruction generally, have been set out in Revenue Alert RA 11/02 and draft Interpretation Statement INS0121 respectively.

In *Alesco* the use of optional convertible notes (OCNs) issued by Alesco NZ to its Australian parent company Alesco Corporation to fund company and business acquisitions in New Zealand was held to be abusive tax avoidance. The decision will affect a number of other taxpayers.

In *Penny and Hooper* two doctors were held to have avoided tax through having been paid artificially low salaries. Inland Revenue's view on similar arrangements that are likely to be of concern has been set out in Revenue Alert RA 11/02 issued in August 2011.

What does this mean? Have the rules changed? The rules themselves have not changed, but the Courts' approach to interpreting them has changed.

The fundamental rule remains the same: in any arrangement involving a tax reduction the tax avoidance purpose or effect must be merely incidental to the commercial or family objectives. But, following the Supreme Court decision in the *Ben Nevis* case the focus of any inquiry into avoidance from now on will be on whether income tax legislation has been followed in a manner that was within the contemplation of Parliament when the relevant laws were enacted.

Inland Revenue has issued a draft Interpretation Statement INS0121 on the interpretation of sections BG 1 and GA 1. The Statement is dated 16 December and the deadline for comments is 31 March 2012.

For a description of the approach espoused by the Supreme Court and the type of rigorous avoidance analysis that will be required when deciding whether an arrangement falls foul of the rules see the new Avoidance section in the website.

<http://davidco.co.nz/index.php?page=avoidance>