

**THE TAX ADVISER: RESPONSIBILITIES  
AND LIABILITIES OF THE  
PROFESSIONS**

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## THE DIFFERENT ROLES OF THE LEGAL AND ACCOUNTING PROFESSIONS

Both professions have skills the other lacks, and must recognise this.

The best tax advice in my experience occurs when the CLIENT, his LAWYER and his ACCOUNTANT all participate and co-operate. It is also the most enjoyable.

A well informed client appreciates your efforts, understands and accepts the risks inherent in tax planning, and does not underestimate the importance of his role as implementor. Most importantly, this client sees tax in the wider context as part of his business and strategic planning rather than as a 'stand-alone' issue.

It is vital to remember that tax advice is rarely given in isolation from commercial advice. If you are only consulted in a pure tax issue, remember that the tax is a CONSEQUENCE of some commercial transaction. Often you are actually being consulted on a commercial issue which even the client often fails to realise.

Pure tax advice as such is the field of few, it is usually part of a wider advisory role.

Apart from determining the tax consequences of past transactions most tax practice deals with future commercial activity.

In reality the question is 'How do I achieve this end result?' It is not always apparent what the commercial objective is. The answer MIGHT lie in pure tax knowledge, but often it lies in finding an alternative means to achieve the commercial objective which eliminates the tax hurdle previously in the way.

This requires what Dr Molloy so aptly describes as 'Commercial imagination'.

Lawyers typically are involved on a one-off basis, either as draftsman or as advocate.

Accountants are usually, because of their ongoing contact, better placed to identify problems or opportunities.

The client expects his lawyer to solve problems he has identified. He expects his accountant to FIND problems he has NOT yet identified.

Whilst it is easy to identify the need to include tax skills in your practice, make no mistake tax practice is HARD.

It is constantly changing, in part based on un-codified policy in N.Z. often inadequately policed and yet of continuous importance to taxpayers. When I started it really only involved absorbing the annual Amendment Act. It now involves monitoring overseas developments and anticipating changes in attitudes and policies of the Commissioner, the Government, Treasury, and the Opposition as well as attempting to unravel three or more annual Amendment Acts. You are expected to know whether new proposals (such as imputation) are a good thing, how they work overseas, and when they will be introduced in N.Z.

### Privilege

Unlike lawyers, accountants do not have privilege. I have not found this a particular difficulty although it is always a risk, particularly if Revenue/Taxpayer relations become strained. Australians will tell you of visits by inspectors accompanied by police, and of prosecutions against Q.C.'s etc.

Although the power is sparingly used, the Revenue in N.Z. and overseas do have power to access audit files and from time to time the issue rears its head. Proper co-operation between the professions however enables sensitive documents to be collectively designed but generated from and stored on lawyers' premises.

The nearest thing in N.Z. is the 'Section 17 letter' which the Revenue now use more frequently. A quick browse through the Inland Revenue Act will remind you of the extent of the Revenue's powers. Loss of your personal credibility with the Revenue is much more serious than a loss of credibility with one particular client.

### **The Auditor as Tax Advisor**

There is an obvious potential conflict between audit and tax advice.

The client thinks the tax advice will be constrained by an audit mentality and the accountant thinks of the prospect of being both the first and second defendant if anything goes wrong. The same is true of insolvency and accounting services. It is one thing to give advice which the client can take or leave (and Dr Molloy quite rightly stresses the obligation to give such advice however sensitive the subject).

The accountant however is left to file the tax return or sign the audited accounts so that he must not only give the advice but later decide himself whether the client's response to that advice was or was not correct. I can assure you this is harder than giving the advice.

From time to time, attempts are made to have separate tax advisors and auditors. In my experience this rarely works. It leaves the auditor to ferret out all advice and re-check it and if (as is likely) the tax advisor has a reputation for being aggressive the auditor will be VERY careful.

Tax advice which is going to be unacceptable to your auditors will not help you unless you hide it from them with all that that entails.

### **Responsibility to the CLIENT**

In an academic sense one can define the role as based on current law and practice and most importantly duty to the client.

The N. Z. Society of Accountants have recently published a 'Guideline on Ethics in Tax Practice (GU8). This Statement which is based on a similar international Standard, makes (among others) the following points:-

One may put forward the best position in favour of a client provided it is in your opinion consistent with the law.

One may resolve doubt in favour of a client if in their judgment there is reasonable support for their position.

One should not hold out that one's advice is beyond challenge and ensure the client does not misinterpret an expression of opinion as an assertion of fact.

One should not associate with any return or communication which:-

- (a) contains a false or misleading statement
- (b) contains statements or information furnished recklessly by the client without any real knowledge of whether they are true or false
- (c) omits or obscures information required to be submitted and such omission or obscurity would mislead the Revenue.

I do not see any reason why you should not tell a client that in your experience the Revenue are unlikely to find out. One difficulty is whether you should advise him to rely on that. More difficult still is whether you then condone the returns it is necessary to file. I wonder how long it will be before the professional advisor will be obliged to also sign a declaration on the client's return form.

These professional obligations are easily spelt out within the professions where they are understood.

Your fellow professionals may understand your role but the client WILL NOT and (if things go awry neither will the media or the public).

The true role of an auditor is almost universally misunderstood. How many people still think that an audit report means that the company is solvent or even well managed?

Client perception of professional responsibility is different.

In the client's eyes, the benchmark is simply whether you are 'right' in the end event. He sees tax as a simple (albeit technical) matter which, like death, is certain.

If you tell a client that something is not deductible, it is quite likely that it will be allowed and he thinks you are wrong.

Conversely, if you tell him something is not taxable, and it is assessed, unless the case is heard in Court (and for every one that is there are hundreds that are not pursued for economic reasons) the client thinks you are wrong.

The client will also blame you for failing to correctly predict Government or Revenue initiatives.

The client also thinks that:-

If you can't match the tales he hears at the club you are no good. If you can't match the opposition's schemes you are no good (whether those schemes actually work or not).

It is, as I have often said, easy to pay no tax – you just have to have no income.

This state of affairs is true of many proud non-taxpayers, for example the lawyer who spent his income on a farm which then decreased in value, or who paid \$40,000 to buy a plastic die worth \$400.

Such taxpayers, either through pride or ignorance NEVER boast of their lack of income, only of the tax they did not pay.

### **Responsibility to the PROFESSION**

Almost all discussion on responsibility of the professions focuses on the DUTY to the CLIENT.

I believe that the professions also have a wider duty to THEMSELVES. It is, I suggest, trite to say that the professions' ONLY role is as an advocate or as a sort of encyclopedia of factual information and imply that responsibility to the client is all that matters.

Whether they like it or not the professions also have responsibilities to

their country, and particularly to the long-term credibility of their own profession. This is not to say that they are to be self-appointed protectors of the tax base.

The professions are increasingly marketing themselves and their involvement in matters which the 'ordinary man' views as a bit 'naughty' will affect the reputation of the profession. WE may know that the 'ordinary man' is un-informed, or even mis-informed but if the professions wish to retain their present exalted image in the marketplace they need to keep one eye on the potential consequences of blindly following the 'service to the client' ethic.

The time-honoured sentiments about every man's right to avoid taxes are not shared by most of today's judiciary. Those quotes were made at a time when few paid tax and the Revenue were required to prove beyond doubt a liability to tax. Today, paying your share of the national tax burden is seen as a responsibility of every citizen.

In recent years tax avoidance promoters have thrived on:-

- The Revenue's inability to find avoidance;
- The Revenue's propensity to confuse questions of deductibility and assessability with avoidance;
- The Revenue's inability to successfully prosecute;
- The Revenue's snail-like pace in prosecuting.

In the excitement of the last few years it is easy to get swept along in this 'beat the taxman' competition.

It has been fuelled by incompetence on the part of both Government and the Revenue.

However, overseas experience clearly indicates that such periods have occurred in all western countries in the past. They are followed firstly by draconian legislation as a reaction. Secondly, when this doesn't work, by a more aggressive and competent defence of the national purse. And thirdly, a change in taxpayer morality away from the 'sharp' scheme



which has become too risky.

We should remember that tax avoidance is almost exclusively available only to the wealthy, and the majority of the population would rejoice at hearing stories of the rich being hammered.

I believe that within the near future a major company will be assessed for millions of dollars, perhaps as a result of one of the hairier financing transactions which have been popular, or perhaps just because they didn't implement an arrangement properly. Make no mistake, the press will have a field day. The other corporates will try and disown this company, and the man in the street will howl for blood. Unfortunately, the directors will turn on their advisors and you will all pay increased negligence premiums in consequence.

One has to overlay a strictly professional definition of morality in tax practice with a commercial view based on the market position of YOUR practice and YOUR profession in the long run. It is therefore necessary for each of you to ask yourself:

**WHAT SORT OF PRACTICE DO I WANT?**

If you go deeply into the avoidance areas, you may make market gains in the short term, but trading that close to the edge has risks. If you don't go into areas in which you feel uncomfortable (notwithstanding pressure from partners and clients to provide a competitive edge) will you be better off in the long term?

I believe that a useful rule of thumb is to imagine you are summoned to the Commissioner's office. On his desk is the letter you wrote years earlier (which you are now about to sign). How would you feel? If you would feel uncomfortable or embarrassed then don't sign it.

However much he may DISLIKE the letter doesn't matter. The issue is whether your personal professional self-image would still be intact.

## Conclusion

I believe it is dangerous to view tax practice in a narrow sense as a field of professional specialisation.

Tax is always at the forefront of economic management and as such the role of the participants in tax practice will be subjected to public scrutiny. These days it has become fashionable to question the professions' 'elitist' position and it is important that we all remember the importance of maintaining the credibility of the profession.

There will be tax-based claims against advisors, and probably also against promoters of tax schemes in the not too distant future. Make no mistake, everyone's negligence premiums go up as a result.

At the end of the day, we all have the choice of refusing to act although I suspect it is used less frequently than it should be. The worst mistake you can make with a client you don't really like or want is to do the job you dislike half-heartedly rather than declining it altogether.