THE TAX ADVISER: RESPONSIBILITIES AND LIABILITIES OF THE PROFESSIONS

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The duty to advise

We have it on impeccable authority that

i it is the right of the businessman, and the duty of the company director, to consider lawful means by which to minimise tax: cf IRC v Burmah Oil Co (1981) 54 TC 200, 220D per Lord Fraser of Tullybelton (HL,Sc).

ii it is negligence for those tendering advice to businessmen or companies to ignore or overlook the tax consequences of commercial proposals: cf Tayles v CIR [1982] 2 NZLR 726, 728 lines 9-10 per Cooke J, as he was then, (CA).

Duty remains, even respect of a proposed artificial avoidance scheme or a proposed sham

It would also seem to be uncontentious that, if a scheme is put to an adviser which is highly artificial, or even a sham or a fraud, the client remains entitled to advice.

The nature of the advice that can be given in such circumstances may be severely qualified, as I shall suggest later in more detail.

But to the extent to which the proposed scheme is legal, the client is entitled to be told how to do it, and what to avoid. And in all cases, whether the proposal is legal or not, the client is entitled to expect advice as to his rights in law; as to any alternatives lawfully open to him; and as to the adverse fiscal or penal consequences, as well as the advantages, of the adoption of each of those alternatives.

The ethical corollary of the duty to advise

The client has a right to this advice, and a right to be indemnified if it is negligently given and causes him damage, only because there rests on the lawyer a professional duty to give the advice.

If the matter is seen as one of duty, then it must follow, not only that is it **ethical** to advise, even on

artificial schemes or shams, but that it would be positively **unethical** for the lawyer professing tax as among his fields of practice not to do so.

Whether advice to be confined to technicalities

Because Courts are concerned with legality, not morality, it does not befit the judiciary to pass public moral censure on the efforts of the subject to avoid tax if he can do so without dishonesty. But lawyers and accountants impoverish the very concept of a profession if their private advice to clients is straightjacketed by purely technical considerations.

These technical considerations must be canvassed, of course, and with all diligence. The client is entitled to hear whether the proposal is lawful, or whether he will break the law if he proceeds; whether it complies with accounting standards, or whether those standards will be infringed or even reduced to tatters.

But the client surely is entitled to more than this. He is entitled to counsel on the matter generally. He has a right to have his perspective enlarged, or even corrected.

Mr Elliott Richardson was a distinguished United States lawyer and statesman. He resigned office as Attorney-General of his country sooner than obey President Nixon's ukase that Mr Archibald Cox be fired as Chief Watergate investigator. Richardson addressed some comments to the US Bar Association in Honolulu in 1974 and expressed the view that

> "We are not the keepers of our clients' consciences, but neither are we mere technicians whose sole function is to assure that legal limitations are narrowly observed. The attribute of our calling which most entitles it to be regarded as a profession springs from the fact that our highest allegiance is to the law and to our own consciences --- and of the two our own consciences are the more inclusive, though not necessarily the higher, authority. We fulfill the highest standards of our profession when our informed legal opinion is supplemented by judicious counsel. Without

> undertaking to preach to our clients, we can encourage them to ask not just 'is it legal?' but 'is it right?'
>
> The claim of what is right over what is merely legal, of unenforceable obligations over enforceable rights, is not exclusively addressed, of course, to [the legal] profession. But it is an appeal, essentially, for moral leadership, and we cannot, although some would disagree, plead a lack either of competence or of jurisdiction."
>
> ["The Mindless Slide" [1975] NZLJ 144, 147 right-hand column].

I do not believe accountants should have their sights set any lower than this, either.

Members of either profession betray both their clients and the community if they fail at least to attempt to temper the excitement and enthusiasm of a client who has discovered, or thinks he has discovered, a means for exploiting a tax loophole, and conducting a raid on the Consolidated Fund, in an exercise which will be commercially barren, artificial, and contrary to any concept of good citizenship, even if it will not necessarily be unlawful.

Of course, if, having received this advice, the client insists on proceeding with such a scheme, the adviser's duty clearly is to give all necessary technical advice and assistance in furtherance of the client's interests [:cf Leary v FCT (1980) 47 FLR 414, 434 per Brennan J (Full Federal Court)].

Limits on the scope of advice when the proposed scheme extends to illegality

If the client's proposed scheme goes beyond the merely commercially barren and artificial, and shades into deception or other forms of criminal behaviour; or if it attempts to ensure that the cupboard will be bare for the Revenue if an associated avoidance scheme fails; or if it involves a dubious proposition, the only attraction of which is that the "Department will never pick it up:" the technical advice must go no further than the legalities, the consequences, and the potential penalties. Nothing

said must be capable of bearing the construction that the adviser is endorsing the scheme, or showing how it could be done, or done more effectively. And clearly it will avail the adviser nothing to piously counsel against the scheme and then to draw up the documents or prepare the necessary accounts!

If the adviser confines his technical advice in this way, he is not straying from the ordinary and proper province of a professional adviser, and cannot properly be subjected to criticism.

But in this situation the need for counsel against the scheme is even greater than in the case of the contrived tax avoidance scheme. That need is greater for two reasons. First, to keep the client out of trouble. Secondly, to keep the adviser out of trouble.

In this latter connexion, the wise adviser will deliver to his client a written record of his unequivocal advice against proceeding with the scheme. The reason for taking this course has become disquietingly plain to tax advisers in Australia, and very recent utterances of the Under Secretary for Finance indicate that New Zealand advisers need to become well aware of it if they have not already done so.

That reason is the existence of the crime of conspiracy to defraud the Revenue.

Conspiracy to defraud the Revenue

Crimes Act 1961 s 257 enacts that

> "Everyone is liable to imprisonment for a term not exceeding 5 years who conspires with any other person by deceit or falsehood or other fraudulent means to defraud ... any person ... :"

"person," by s 2(1), being so defined as to "include the Crown."

In the Revenue context the Commissioner is the Crown [Cates v CIR [1982] 1 NZLR 530, 534 lines 23-38 per McMullin J; 535 lines 21-25 per Somers J (CA)], and the relevant intent is an intent dishonestly

> "to get out of the Revenue something that was

already in it, or to prevent something from getting into the revenue which the revenue was entitled to get."

[Parker v Churchill (1986) 65 ALR 107, 121 lines 1-3 per Jackson J (Fed Ct of Aust, Full Ct).

This is essentially a codified common law offence [cf R v Kidman (1915) 20 CLR 425, 437 per Griffith CJ (Full High Court)]. It is one so serious in its implications, and in its consequences, for it not to be any laughing matter. Of all the cases, only R v Starling (1665) 1 Sid 174; 82 ER 1039 seems to have amusement value. First, because the report is in law French. Secondly, because it tells of a conspiracy entered into, by an Alderman of London and 16 other brewers, to "depauperate les fermors del excise": to impoverish the excise men and make them unable to pay the King his due. The agreed means was to be that the brewers would combine for a time to make no more small beer, such as was sold to the poor, and thereby would incite the poor to rise up against the excise men, pull down the excise house, and make their continued functioning impossible.

To find conspiracy to defraud the Revenue it is not necessary that the Revenue actually be presently entitled to be paid tax. Even an entitlement which might come into existence, depending on the success or failure of a tax mitigation plan, will suffice: if the object of the agreement is to make that entitlement worthless.

"[I]t is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would or **might be** entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

[Scott v Metropolitan Police Commissioner [1975] AC 819, 840F per Viscount Dilhorne (HL,E). My emphasis.]

The relationship between tax minimisation schemes and such conspiracy

Carrying out a plan for tax mitigation of itself can involve no criminal liability under existing enactments.

Speaking in the context of company charges, not Revenue matters, in Re George Inglefield Ltd [1933] Ch 1, Romer LJ, in the English Court of Appeal, stated what is nonetheless the general principle:

> "If a man so conducts his affairs that he places himself outside the operation of an Act of Parliament, he cannot be said to be either evading it or defeating it. He has done nothing that is unlawful, and he has done nothing that calls for adverse comment from the Court."
>
> [Ibid 26].

If the intent behind a scheme [as judged by the acts by which it has been implemented: Stephens v Abrahams (1902) 27 VLR 753, 768 (Supreme Court of Victoria, Hodges J)] is **nothing more** than that income tax will not be payable as a result of it, there can be no question of an offence against the Revenue, even if the scheme ultimately be held to have been ineffective as having infringed Income Tax Act 1976 s 99 or some other anti-avoidance enactment; or even if it be held to fail for some other technical reason, such as inability to satisfy the common law or statutory requirements for validity of a particular transaction or component thereof.

If not only the intent of a scheme, but also its achievement, is the lawful reduction of tax liability, it cannot be a fraud on the Revenue that it also involved the savings being placed outside the jurisdiction, or otherwise made irrecoverable by the Commissioner should he --- before the scheme has been judicially upheld --- decide to make, and attempt to enforce, an incorrectly based assessment.

In Vereker et al v Rodda et anor; Forsyth v Same [Federal Court of Australia, Victoria District Registry, VG 296/1986, 297/1986: decision of Jackson J dated 1 April 1987], the appellants, including a QC, had been committed for trial by a Magistrate on charges of conspiracy to defraud the Revenue. Although the learned Magistrate did

Viscount Dilhorne was of a like mind, holding that

> "though the offence of conspiracy is complete when the agreement do do the unlawful act is made and it is not necessary for the prosecution to do more than prove the making of such an agreement, a conspiracy does not end with the making of the agreement. It continues so long as the parties to the agreement intend to carry it out. It may be joined by others, some may leave it. Proof of acts done by the accused in this country may suffice to prove that there was at the time of those acts a conspiracy in existence in this country to which they were parties and, if that is proved, then the charge of conspiracy is within the jurisdiction of the English Courts, even though the initial agreement was made outside the jurisdiction."
>
> [Ibid 825B-C.]

For these reasons, the fact that a conspiracy to defraud the New Zealand Revenue becomes complete overseas --- say in the Cook Islands --- does not rule out the prosecution for conspiracy of additional persons subsequently becoming parties to it in New Zealand.

Accessory rôles: inciting, counselling, or abetting

The the fact that the conspiracy may be already complete when he is consulted, will not protect an adviser, who fails to confine and qualify his advice, from becoming an accessory, and, therefore, a party to the conspiracy.

Thus, in Vereker et al v Rodda et anor; Forsyth v Same, [Federal Court of Australia, Victoria District Registry, VG 296/1986, 297/1986, 1 April 1987], Jackson J held:

> "It follows in my view that there may be offences under [a provision resembling Crimes Act 1961 s 61 (1)] brought about by inciting, urging, aiding or encouraging others to conspire in terms of [a provision corresponding to Crimes Act 1971 s 257] although the agreement the subject of the conspiracy has been entered into at a time prior to events alleged to attract [s 61(1)]. It is possible, of course, that some parts of [s 61(1)] will be inappropriate to the facts of particular cases, and perhaps of this case, but the issue was argued before me on the broad basis that [s 61(1)] could not be applicable to conspiracy cases and I think I need do no more than reject that broad proposition."
>
> [Judgment 30-31.]

In relation to conspiracy, the accessory provision is Crimes Act 1961 s 66(1), which enacts that

> "Everyone is a party to and guilty of an offence who ---
> (a) Actually commits the offence; or
> (b) Does or omits an act for the purpose of aiding any person to commit the offence; or
> (c) Abets any person in the commission of the offence; or
> (d) Incites, counsels, or procures any person to commit the offence."

Advising on how a crooked scheme may be carried out, or improved; preparing accounts or returns designed to effectuate the client's intention to throw sand in the eyes of the Commissioner; preparing documentation for a complex and fraudulent scheme; or backdating documents, including deeds, minutes, memoranda: all are examples. So, even, is preparing such a simple everyday document as a common agreement for sale and purchase, in which the respective values attributed to the land and to chattels or trading stock are to be manipulated in such a way as to raise questions to which the adviser deliberately turns a blind eye.

> "If a person is unaware of the essential matters constituting the offence because he has shut his eyes to the obvious, or because he has refrained from making an inquiry which he realised he ought to have made, he may still be convicted of aiding and abetting the offence."
>
> **[Halsbury's Laws of England** 4th edn Vol 11 para 45 note 2.]

The blindness must be wilful, not merely the result of negligence [:cf Giorgianni v The Queen (1985) 156 CLR 473, 488 per Gibbs CJ (Full High Ct)].

Duty not to act over and above one's duty as a solicitor or other adviser

The New South Wales Court of Appeal made some observations in R v Tighe and Maher (1926) 26 SR (NSW) 94, which bear repeating in this context:

> "It is expected of course of every solicitor that he shall act up to proper standards of conduct,

> that he shall give his clients sound advice to the best of his ability, and that he shall refrain from doing anything likely to mislead a Court of Justice; but, in the course of his practice he may be called upon to advise and to act for all manner of clients, good, bad or indifferent, honest or dishonest, and he is not called upon to sit in judgment beforehand upon his client's conduct, nor because he does his best for him as a solicitor within proper limits, is he to be charged with being associated with him in any improper way. In acting for a client, a solicitor is necessarily associated with him, and is compelled to some extent to appear as if acting in combination with him. So he may be, but combination is one thing and improper combination, amounting to a conspiracy to commit a crime or a civil wrong, is another thing. An uninstructed jury may easily fail to draw the necessary distinction between such combined action as may properly and necessarily be involved in the relation of solicitor and client, and such acts on the part of a solicitor, over and above what is required of him by his duty as a solicitor, as may properly give rise to an inference of an improper combination. I think, therefore, that it may be useful to point out the importance, in cases where a solicitor is charged with entering into an agreement with his client which amounts to a criminal conspiracy, of seeing that the jury are properly instructed as to a solicitor's duty to his client, and that it is made plain to them that, before a solicitor can be convicted of conspiring with his client to commit a wrong, it must be proved that he **did things in combination with him, over and above what his duty as a solicitor required of him, which lead irresistibly and conclusively to an inference of guilt."**
>
> [Ibid 108-109.]

In Vereker et al v Rodda et anor; Forsyth v Same [Federal Court of Australia, Victoria District Registry, VG 296/1986, 297/1986], Jackson J held these remarks to be "equally apposite to the position of a barrister" [judgment page 26]. They would seem, also, to cover the accountant giving tax advice.

The barrister involved in that case is the leading Melbourne tax silk, Mr NHM Forsyth QC. He was asked to advise on the validity of a company profit-stripping

scheme, involving dealing in objects d'art with a public art gallery at grossly inflated prices.

In a written advice he considered the scheme and expressed the view that it would be fiscally effective in the light of judicial attitudes then prevailing. He qualified his advice by noting the artificiality of the proposed scheme, and by warning that, to proceed would involve the usual risks that his opinion would be proven wrong, or that there would be a judicial reaction against artificial schemes.

Following receipt of that advice the scheme promoter launched into it on such a scale that, by the time the Revenue re-assessed to disallow the deductions, about $A30million of extra income tax was being claimed from the participant companies.

Trouble arose because the effect of the scheme had been to leave the companies stripped of any means to pay the tax.

The participants in the scheme were charged with conspiracy to defraud the Revenue. On the strength of his advice, Mr Forsyth QC was charged with having incited and aided them so to conspire.

A magistrate committed him for trial, but Jackson J, in the Federal Court, remitted the matter for reconsideration by the learned magistrate on all the evidence: remarking, however, that, on such of the evidence as had been placed before him, the learned judge could see much to support the view that Mr Forsyth had done no more than act as a barrister.

Since one cannot imagine that, on the Review Application, the Crown would have failed to mention any evidence against Mr Forsyth QC, this finding effectively appears to be a direction that the Magistrate rescind his finding.

It seems regrettable that counsel's advice, as reported in the reasons for judgment, ever could have put him in the situation of facing a conspiracy charge.

But, for all tax advisers except Mr Forsyth QC, the prosecution decision to lay the charges may have been a happy one: insofar as it has resulted in a warning to them of how far they may go in advising clients; and has resulted in a warning to the Crown that such charges are not to be made against a tax advisor who has done no more than advise his client in accordance with his professional duty and within the bounds of the "proper standards of conduct".

"Proper standards of conduct" for a tax adviser

In the passage cited at pages 10-11 ante from the reasons for allowing the appeal in R v Tighe and Maher (1926) 26 SR (NSW) 94, 108-109, the New South Wales Court of Appeal placed first, in its list of the things to be done or avoided by the tax lawyer giving advice, the obligation to "act up to proper standards of conduct."

The adviser as promoter

Obviously, if the adviser is in the position of overtly promoting a scheme which defeats the valid claims of the Revenue; or if his reward is a "slice of the action," or participation in the savings, rather than an ordinary professional fee: there is a great danger of his being found to have gone "over and above what his duty as a solicitor required of him" in a way that leads "irresistibly and conclusively to an inference of guilt" [R v Tighe and Maher (1926) 26 SR (NSW) 94, 109].

The reason has nothing to do with whether tax avoidance is legal or moral. It is simply that the adviser must cease to advise once his position admits any possibility of conflict between his personal commercial interests and his duty to his client. The considerations were canvassed by Sir Gerard Brennan, when, as a member of the Full Court of the Federal Court of Australia in Leary v FCT (1980) 47 FLR 414, he said this:

> "[The differences between the roles of professional adviser and of entrepreneur] arise because the field

> of professional activity is co-extensive with a lawyer's professional duty. That duty is to give advice as to the meaning and operation of the law and to render proper professional assistance in furtherance of a client's interests within the terms of the client's retainer. It is a duty which is cast upon a lawyer, as a member of an independent profession, whether his services are sought with respect to the operation of taxing statutes, the provisions of a contract, charges under the criminal law or any other of the varied fields of professional concern. It is a duty which arises out of the relationship of lawyer and client.
>
> But activities of an entrepreneur in the promotion of a scheme in which taxpayers will be encouraged to participate fall outside the field of professional activity; those activities are not pursued in discharge of some antecedent professional duty. Entrepreneurial activity does not attract the same privilege nor the same protection as professional activity; and the promotion of a scheme in which particular clients may be advised to participate is pregnant with the possibility of conflict of entrepreneurial interest with professional duty."
>
> [Ibid 434-435]

If the scheme is one coloured by fraud, the promoter will be a prime target for a charge of conspiracy to defraud, and he will be unable to hide behind his professional status because he will have abandoned that status by having adopted the entrepreneurial rôle.

Where the adviser merely assists a promoter

The same is likely to apply to the professional adviser who promotes someone else's scheme on a commission basis: except that the additional risk will arise of the commission of an offence under the Secret Commissions Act 1910.

Tax advice as a sales aid

Even where the adviser does not promote the other's scheme, but merely is asked to advise that other on it, great caution is required.

If the adviser knows his advice is to be included in a prospectus, it is proper to give his views on the

principles applicable to the facts on which he is asked to advise.

However, when one considers how frequently the actual implementation of merchandised schemes is found to vary from the proposed manner of execution, it would be, at best, imprudent were the adviser to fail to make it plain that his advice is being given on the basis that it must be published in full, and to ensure that that full advice makes it clear that it is based on certain factual suppositions which he has been asked to make, and that it will not hold good if those factual suppositions are not made out.

The advice should make clear that the factual suppositions are no more than that; that the adviser is in no way attesting that they will be made out; and that he is in fact cautioning investors to be alert to ensure that they are made good. Most schemes are sold on the basis that the parties will be carrying on a business. So it must also be made clear that if, in fact, no business is found to have been carried on, the conclusions expresseed in the advice will not hold good.

Finally, if any of those to whom the scheme has been almost sold approach the adviser for additional advice in connexion with their possible participation, it is at least imprudent to act, and it certainly would be improper to do so without pointing out emphatically that the adviser's situation is pregnant with the possibility of conflict between the respective interests of promoter and intended participant.

The adviser and negligence

Failure to qualify advice sufficiently may pave the way for an action against the adviser in negligence by those who are "sold" on entry into the scheme by the adviser's views published in the prospectus. And the adviser is likely to find his professional reputation affected adversely by his becoming tarred with the same brush as the promoter of artificial tax avoidance schemes, or, worse, of tax fraud.

As Sir Robin Cooke observed in Tayles v CIR [1982] 2 NZLR 726, 728 lines 9-10, an adviser who fails to explore for his client the fiscal possibilities as between the various approaches it is possible to take in order to achieve his commercial objectives, and fails to give him advice as to the most tax-efficient approach would be negligent. See also Morgan v Beck & Pope (1974) 1 NZTC 61, 225 (Quilliam J).

For negligence in this field the tax adviser clearly is liable. Although Dr Chambers undoubtedly will cover the relevant principles with his customary scholarship and clarity, it may be in order to refer briefly to some of the specific tax provisions which could give trouble.

Where a client has been advised to transfer property to a trust, failure to advise also of enactments, such as Income Tax Act 1976 s 67(4)(e), which will make the proceeds of any resale, or development and resale, within a fixed period thereafter susceptible to tax, will be negligent: cf Sacca v Adam (1983) 33 SASR 429, 437 per Zelling J (Supreme Court of South Australia, Full Court).

Failure to make a client well aware of the fact that, if the advice given turns out not to be concurred in by the Commissioner, the client may be confronted with the need to make payment of a large tax bill immediately; and that the mere fact that an objection is entered will not, of itself, be sufficient to ensure that proceedings to enforce collection and payment of that bill are stayed pending determination of the objection: also could be actionable. The Courts certainly disapprove attempts to enforce recovery whilst the Commissioner is not dealing expeditiously with objections to an assessment, or the stating of a case, and tend to regard such activity as an abuse of power: cf Clyne v FCT (1982) 43 ALR 342, 344 lines 28-40 per Mason J, "hoping" that the Commissioner's action in that case, seeking to institute recovery proceedings when the assessment was under challenge by way of case stated, was an unusual course. But the client nonetheless must be warned that the remedy of a stay of recovery proceedings is discre-

tionary, and that a large factor in the exercise of the discretion is s 34(2)(b), enacting that the pendency of the determination of an objection, case stated, or appeal, does not, of itself, suspend the Commissioner's right to sue for payment of assessed, but disputed, tax.

The client also must be told that penalties will accrue for late payment, and at the fearsome rate of 10% compounding at six monthly rests.

Further, if the advice is being given to a client whose scheme is fraudulent, then, as well as advice discouraging him from embarking on it, the practitioner must advise that there is provision for fining on summary conviction, or indictment under the Crimes Act, and for penalties which, taken with the late payment penalties, can inflate the tax payable to over 300% of what otherwise would have been payable.

Again --- and this particularly reinforces the observation as to the perils of an accountant giving advice in these areas without expressly confining his advice to opinions as to accounting practices, and suggestions as to the law and as to the practice of the Commissioner --- it is often not only the taxation questions which must be canvassed for the client. If, for example, a client is being advised to set up a trust, it must be made quite clear to him that it is of the essence of the trust that he will cease to be able to deal with the property beneficially. If a husband conducting a business is being advised to take his wife into partnership with him in the business, it must be made clear that the wife thereby becomes fully liable for the partnership debts: so that, if the business goes wrong, and the partnership becomes insolvent, the proportion of family assets which can be preserved may be significantly below that which would have been safe had the partnership not been embarked on.

And, in connexion with the view, advanced earlier in this paper, that a client with an artificial avoidance proposal is entitled to counsel which addresses the question "is it right?" as well as the question "is it

lawful?": it must be said that this sort of counsel is not to be confused with the mere "giving of inadequate social views as to the desirability or undesirability of various causes of actions" [Spry "Aspects of Solicitors' Duties as to Revenue Law" (1982) 56 Law Institute Journal 578, 580 centre column]. Actionable professional negligence almost certainly will result from any confusion between such views and the correct law.

A New Zealand Law Society Seminar on "Recent Developments in Taxation" has just noted that

> "In both the legal and accounting professions there is a strange reluctance to seek second opinions on many tax matters. This is a dangerous position to take. The closest analogy is the medical profession, where a general practitioner would not hesitate to seek the advice of a heart specialist. If he did not, he could justifiably be accused of professional negligence if what was considered (in his view) to be a minor problem transpired to be a transplant candidate."
>
> [Ibid pp 88-89.]

The same warning has been expressed from a slightly different viewpoint by a learned Australian Authority:

> "[W]here a solicitor accepts retainers which extend to revenue considerations, he should take pains to ensure that his level of skill and knowledge in these regards is not less than the level which his retainer impliedly, or in certain cases expressly, provides for and that he acts accordingly."
>
> [Spry "Aspects of Solicitors' Duties as to Revenue Law" (1982) 56 Law Institute Journal 578, 580 centre column].

Apart from the professional negligence risks attending advice given by the practitioner whose level of skill and knowledge is found wanting in this connexion, the other consideration justifying the use, by the presenters of the travelling seminar, of the expression "dangerous", is that failure to take a second opinion, even if that opinion ultimately be found to have been wrong, involves failure to obtain what otherwise could be protection against conviction of the primary adviser on those criminal charges

requiring proof of a guilty mind, or a strong argument in mitigation of penalty where a fiscal offence is committed through ignorance of the law [which, by Crimes Act 1961 s 25, is no defence].

Fair Trading Act

It is very plain that schemes are being merchandised by tax advisers in this country: complete with cyclostyled documents and explanatory memoranda. It is also evident that some of these are based on insufficient research, or are being touted as beneficial in circumstances to which they are unsuited.

Since 1 March 1987 a further question mark has been hanging over these, in the form of the Fair Trading Act 1986, enacting that:

> "9 No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> ...
>
> 11 No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, [or] suitability for a purpose ... of services."
>
> ...
>
> 13 No person shall, in trade, in connection with the supply or possible supply of ... services or with the promotion by any means of the supply or use of ... services, -
>
> ...
>
> (b) Falsely represent that services are of a particular kind, standard, [or] quality ...; or
>
> ...
>
> (e) Falsely represent that ... services have any ... approval, endorsement, performance characteristics, ... uses, or benefits; or
>
> ...
>
> (h) Make a false or misleading representation concerning the need for any ... services ... ."

By s 2(1) "Trade" is so defined that it means "any ... profession ... ."

There is jurisdiction to impose fines on individuals of up to $30,000 [s 40] and for the Commerce Commission to order publication of "corrective statements" [s 42]. And

it appears that "conduct likely to mislead or deceive" can be established irrespective of the existence of any intent to mislead [:Given v C V Holland (Holdings) Ltd (1977) 1 ATPR 17,384, 17,386-17,387 (Federal Court of Australia, Franki J).]

Miscellaneous offences: the tax adviser and the false return

The most common occasion on which tax advice is given may be in connexion with the preparation and lodgement of returns. Deliberate or reckless lodgment of a false return is triable summarily as an offence under Income Tax Act 1976 s 416 (b). A professional adviser who aids, abets, incites, or counsels a client in the making of such a return commits the offences. He can be tried summarily under Income Tax Act 1976 s 416(e), or he can be tried indictably under Crimes Act 1961 s 66(1). Adviser and client together may commit the crime, triable indictably, of conspiracy to defraud the Revenue.

The only course open for the professional adviser whose client is intent on lodging a false return is dissuasion. If this fails, there is no alternative to severance of the professional relationship so far as filing is concerned.

Even apart from the unlikelihood that the adviser's professional body could do other than strike off its rolls a member who had been convicted of aiding, or conspiracy to commit, tax fraud: the penalties are severe. For the false return, or the aiding and abetting, s 416B(3) of the Income Tax Act 1976 provides a $15,000 fine for the first offence, and $25,000 fines thereafter. Conviction on the conspiracy charge carries up to 5 years jail, and a Queensland chartered accountant has just discovered this after having been found guilty of that offence by a jury [:(1987) 16 Australian Tax Review 4].

The genuinely arguable return

Where the return is not false, but is truly arguable, no obloquy can attach to the omission of revenue from the

returned taxable income, or to the claim for a deduction, where the position in either case is not clearcut. The taxpayer is not obliged to adopt the point of view which maximises his liability when there genuinely is another side to the question.

In those circumstances, the duty is to put the Commissioner on notice that the return omits an item which then is adequately described in relation to the return, say in supporting accounts; or that the return includes a deduction which is similarly so described.

It is a breach of duty owed to the community, by both taxpayer and adviser, if the doubtful case is not so shown. It is in any event the height of folly not to show it because the statutory time limitation period, after which amendment of assessments becomes illegal, may then be ruled out by s 25(2) of the Income Tax Act 1976.

The duties not to betray the client's confidence and not to obstruct the Crown

It is also clear that both the client and the adviser must refrain from obstructing the Commissioner: Income Tax Act 1976 s 416(c); Inland Revenue Department Act 1974 s 47(1)(d). As well as owing that duty to the Revenue, however, the professional adviser owes a duty of confidentiality to his or her client, save where this duty is expressly stripped away by the Commissioner's powers of inspection, interrogation, and the like, conferred by Inland Revenue Department Act 1974 ss 17, 18 and 19.

Those provisions are to be read subject to the privilege in respect of confidential lawyer/lawyer and lawyer/client communications in connexion with the seeking and giving of legal advice for a lawful purpose. There is no doubt that the client could enforce by injunction, and action for any damages which could be shown, this right of confidentiality.

The duty not to obstruct in many cases will require that the client be advised to permit his accountant to make some degree of disclosure to the Department; and the duty

of candour will positively require various forms of disclosure which, if the client will not authorise them, may require that the professional connexion be severed.

Hybridising the legal and accounting functions

The accountant of course has a front line position in the tax field, and accounting firms are increasingly employing lawyers as part of their tax teams. In effect these are becoming tax firms, or tax divisions within larger firms. While there is undoubted pressure for this, the question whether it is a good thing for clients in the long run is an open one. Certainly, it can be said that accountants are no better equipped to give legal advice than pharmacists or nurses are equipped to give medical advice: and they act just as imprudently if they do so. On the other hand, sound tax advice requires both dimensions, and lawyers are equally ill-equipped to advise as to the whole picture.

Having said that, the fascination of tax practice for a lawyer is precisely that, if it is done properly, it involves as wide a range of the legal disciplines as it is possible to have brought together in any practice. Knowledge of, and experience in, equity and the law of trusts, company law, partnership law, the law of real and personal property, the law of assignments, the law affecting vendor and purchaser, the conflict of laws, banking law and bills of exchange law, international law, the principles of statutory interpretation, the law of negligence, the criminal law [particularly in these days when the Under-secretary for Finance is making loud noises about the possibility of promoters of some of the recently fashionable tax avoidance schemes being indicted for conspiracy to defraud the Revenue], and constitutional and adminstrative law. In additon, of course, the law of evidence plays a vital role, notwithstanding that the rules as to the admissibility of evidence in cases stated, although not in adminstrative law proceedings, are somewhat

relaxed [cf Anzamco Ltd v CIR (1983) 6 TRNZ 135, 141 line 50/142 line 2 (Barker J)].

Hybridisation inevitably will be attended by the dangers inherent in creating a hot-house atmosphere built largely round the Income Tax Act. The cross-breeding will be accompanied by inbreeding. No doubt there will be great familiarity with the provisions of the Act, and with relevant accounting standards, but detachment from the world of which these other disciplines are crucial components is pregnant with the same possibilities for the creation of mutant, deformed, and dysfunctional fiscal creations as attend inbreeding amongst other species.

Nonetheless, there is no doubt a tendency for younger lawyers to enter accounting firms in search of tax law experience.

They bring to their work minds closely familiar with the Income Tax Act. But they bring also with them the drawbacks of little experience in the other disciplines which I have mentioned, and of lack of the instincts which only time, and association with other experienced lawyers, can inculcate, and which are the sine qua non of sound legal advice. The result, which is already becoming so apparent, is that their --- what can only be called --- naïvety frequently prevents them from contributing the dimension badly needed by the accountants who employ them: the true legal "feel" of the thing.

Loss of objectivity

I have seen it suggested, in the media, by lawyers working for accounting practices, that, by adding the inhouse legal dimension, their employers are better able to give their clients "what they want."

It is precisely in this objective that there can be seen the greatest danger to the clients of both professions: the danger of the loss of objectivity attendant on advice indentified too closely with the client's stated requirements. Sir Gerard Brennan, a

justice of the High Court of Australia, has expressed the relevant concern in his very recent Inaugural Sir Leo Cussen Memorial Lecture "Pillars of Professional Practice: Functions and Standards."

> "But there is a dividing line, ever so thin, between the provision of informed and practical legal guidance and the provision of a total service to answer the client's requirements. On one side of the line the lawyer maintains his professional independence; on the other there is a risk of losing it. On one side of the line, the lawyer's function is to ascertain the law and to see it applied; he is professionally indifferent to its impact on the client's fortunes. The independence of the lawyer is guaranteed by strict adherence to legal principle, and the client's legal interests are fully protected by the integrity of the guidance which the lawyer gives. But if a total service is offered to meet a client's requirements, legal principle is but one of the factors in achieving the desired end. What if legal principle proves to be a frustration? ...
>
> If a lawyer undertakes to give more than practical legal guidance, he has started to identify himself with his client's cause. I venture to suggest that any experienced lawyer will have seen occasions when some loss of independence has been threatened by too close an identification with the client's cause. The objective of a total service may be seen to be the achieving of results satisfactory to the client, and that would eliminate the distance between the lawyer's duty to the law and the lawyer's interest in the client's affairs. Keeping that distance is essential to the integrity of the lawyer's conduct. To stay on the safe side of the line is to adopt a conservative approach to the provision of professional service but, in the long run, clients seek a lawyer's guidance precisely because it is independent of the client's interests and objective in its legal content."
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> [(1987) 61 ALJ 112, 116-117.]

Closely related to the danger of loss of objectivity in these new developments, is the loss of standards:

> "The proper standards of the legal profession cannot be set by statute or by contract; they must be set by the common understanding of lawyers themselves, disseminated by personal contact, and

adversely and for an end foreign to the purpose for which those powers were conferred.

The rapidly developing understanding of the place of the administrative law remedies in this connexion can provide a corrective for human failure to meet those ideals: but that has become a big subject and requires a paper of its own.