COURT OF APPEAL OF NEW ZEALAND

THE COMMISSIONER OF INLAND REVENUE v IAN DAVID PENNY & GARY JOHN HOOPER

[2010] NZCA 231

CASE SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest
http://www.courtsofnz.govt.nz/from/decisions/judgments.html

Mr Penny and Mr Hooper practise as orthopaedic surgeons in Christchurch. Initially they each conducted their practices on their own account. Later each set up a company to purchase their practice. The companies are owned substantially by Mr Penny's and Mr Hooper's family trusts. Mr Penny and Mr Hooper are employed by their respective companies.

Each of the surgeons was employed at a salary the Commissioner of Inland Revenue considered to be artificially low. The Commissioner took the view that structuring their affairs so their practices were operated through companies and they were paid an artificially low salary amounted to tax avoidance. The Commissioner considered that the surgeons were taking advantage of the lower company tax rate of 33 cents in the dollar and should have been taxed at the higher marginal tax rate of 39 cents in the dollar applicable to their personal revenue. The Commissioner reassessed the doctors' income for the tax years 2002 to 2004 by attributing salaries to them at a substantially higher level.

The statutory processes for tax disputes were followed. The matter then reached the High Court. The High Court Judge found that the way in which the surgeons had conducted their affairs did not constitute tax avoidance. An appeal by the Commissioner of Inland Revenue was heard by the Court of Appeal (Hammond, Ellen France, and Randerson JJ) in February 2010.

The Court of Appeal has held, by a majority (Hammond and Randerson JJ) that the particular arrangements did amount to tax avoidance and has reversed the High Court judgment in favour of the Commissioner. Ellen France J dissented. The three Judges delivered separate judgments.

The outcome is that the arrangements identified by the Commissioner in respect of the income tax years 2002, 2003 and 2004 are void against the Commissioner for income tax purposes in terms of s BG1 of the Income Tax Act 1994. The Commissioner has been awarded costs on the appeal.