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Retrospective tax law: has Pandora's Box opened never to be shut again?

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Abstract

The recent Chevron case[1] raised the issue of retrospectivity of legislation. While this issue is not new, it has been arguectiv 44eTv> (of government to protect the revenue in the public interest. This paper explores the history of retrosp legislation in Australia, and analyses whether such legislation was justified in the circumstances to achie authors argue that the Chevron case not only entrenches the right of governments to enact retrospectively v taxation laws, but unjustifiably extends that right in the name of 'protecting the revenue'. This will have serious imp for taxation practitioners and their clients. The authors contend that retrospective legislation should only be co most egregious circumstances, and that it is incumbent upon governments to acknowledge deficienc promptly, and amend such legislation quickly, in order to provide certainty and maintain public confidence system.

Key words: Retrospective laws; taxation; Chevron case

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[1] Chevron Australia Holdings Pty Ltd v Commissioner of Taxation

1. INTRODUCTION

James Popple, in his article "The Right to Protection from Retroactive Criminal Law",[2] considered that the right to protection from retroactive criminal law has been accepted

validity of retrospective taxation legislation. It is in light of this aspect of the

> [A]s regards any matter or transaction, if events have occurred prior to the passing of the Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but it would not be giving it a retrospective operation to treat it

operation of such legislation, in fact, appears to go beyond the 'noble purpose',[30] as Senator Chipp put it, of punishing tax cheats and seems to be becoming, as one commentator has noted, a 'fact of life'.[31]

As noted by the Australian Law Reform Commission, concerns about the scope of retrospective taxation laws have been widely expressed.[32] For example, in 2012, the Tax Institute of Australia made a submission to Treasury in which it noted an 'extremely concerning trend in recent months of the government announcing retrospective changes to the tax law'.[33] The Tax Institute warned that retrospective changes in tax law are likely to 'interfere with bargains struck between taxpayers who have made every effort to comply with the prevailing law at the time of their agreements'.

The initial legislation was introduced in 1982 in div 13 of the ITAA 1936. Division 13 was introduced to address emerging concerns about cross-border profit shifting. Each of Australia's tax treaties also contains articles that deal with transfer pricing. The Commissioner of Taxation has long held and publicly expressed a view that the treaty transfer pricing rules, as enacted, provide an alternate basis to div 13 for transfer pricing adjustments.[45] It was tested in Commissioner of Taxation v SNF (Australia) Pty Ltd[46] and as a consequence of the decision it was decided that the legislation required amendment and strengthening. Consequently div 815-A of the ITAA 1997 was enacted to operate retrospectively so as to ensure that treaty relation to transfer pricing have separate application to div 13. This subdivision applies to transactions entered into on or after 1 July 2004 but was enacted on 8 September 2012. While it was observed in the Explanatory Memorandum that this retrospective application of the legislation had not been entered into lightly, there was a perceived significant risk to the revenue which could only be protected with retrospective legislation. In fact, the SNF case was considered on the basis on div 13 alone and no reference was made to the relevant treaty. It was considered, however, that div 13 'may not adequately reflect the contributions of the Australian operations to multinational groups, and as such in some income cases treaty transfer pricing rules may produce a more robust outcome'.[47] This reflects inadequacy or errors in the drafting rather than the intention of the Parliament.[48]

The Australian Law Reform Commission in its Interim Report 127 Traditional Rights and Freedoms — Encroachments by Commonwealth Law commented as follows in respect of the proposed changes to transfer pricing laws as a consequence of the case:

> In introducing the legislation, it was explained that this would 'ensure the Parliament's view as to the way in which treaty transfe

taxpayers pay their tax voluntarily. Significant actions by large or sophisticated taxpayers to reduce their tax payable with 'artificial' measures or misuse of existing law will eventually see a reduction in this level of voluntary payment.

Perhaps more importantly, the issue of retrospectivity should be specifically addressed during the legislative process itself, from policy consideration and approval through to the drafting stage. Presently, the Legislation Handbook (the 'Handbook'), published by the Department of the Prime Minister and Cabinet,[62] provides guidance on the requirements of the legislation process. With regard to retrospective legislation, paragraphs 5.19 and 5.20 of the Handbook provide, relevantly:

> 5.19 Provisions that have a retrospective operation adversely affecting rights or imposing liabilities are to be included only in exceptional circumstances and on explicit policy authority (see paragraphs 3.7(i) and 3.19(b) and also paragraphs 3.26 to 3.29 concerning announcement of legislation to operate from the date of announcement).
>
> 5.20 Departments need to be aware that the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights, which scrutinise all bills, expect that an explanation and justification for any retrospective provisions will be included in the explanatory memorandum and statement of compatibility with human rights (see paragraphs 7.20 and 7.29(c) to 7.29(d)).

Paragraphs 3.7 and 3.19 provide, in summary, that a justification for retrospective legislation must be included in any policy approval as well as an explanation of any adverse impact.

Paragraph 7.29(c) states that an explanatory memorandum 'must set out whether, and why, retrospective application of the Act would adversely affect any person other than the Commonwealth and, if applicable, include an assurance that no person would be disadvantaged by the retrospective application of the Act' (emphasis added).

Whilst the government may still enact retrospective legislation, the 'safeguard' here, as it were, is that the proposed legislation does not adversely affect any person and no person must be disadvantaged by it. This appears to be a quite broad, almost ambiguous, statement. The Handbook does not specifically prescribe that any retrospective legislative proposal must demonstrate that it is in the public interest, and, as far as taxation legislation is concerned, whether the proposal is designed to counter a real and serious threat to the revenue, the nature of that threat, and therefore a justification for retrospective action in the circumstances. If, as Lon Fuller suggests, a genuine law is one that operates prospectively,[63] an explanation and justification for any retrospective provisions should include a 'statement of compatibility with the public interest' (similar to the 'statement of compatibility with human rights'),[64] outlining that, in the circumstances, the retrospective approach is warranted, given the

7. CONCLUSION

Having started with the premise in 1789 that laws should not be retrospective as it does not allow taxpayers to fully appreciate the implications of their actions, the decision in Chevron relating to the retrospective nature of the transfer pricing legislation appears to have finally put to rest this premise. In fact the previously long held view, as enunciated in cases such as Commissioner of Stamps (Qld) v Weinholt[65] and Perpetual Trustees (Australia) Ltd v Valuer-General[66] that taxpayers will have organised their affairs to comply with existing legislation no longer appears to hold sway. Indeed, retrospective legislation now seems to be 'a fact of life'. This should cause practitioners great concern particularly at a time when government is proposing new legislation concerning transparency and international transactions, not to mention the proposed changes to superannuation contributions announced in the 2016–17 Federal Budget, which appear to have a retrospective element with regard to non-concessional contributions.[67]

Practitioners should not accept retrospective legislation as 'a fact of life', and must resist this trend — we should insist on governments responding with alacrity and effectively to perceived deficiencies in legislation. Retrospective legislation should only be countenanced in the most egregious circumstances in order to truly protect the revenue in the public interest, rather than simply to render past events no longer legitimate, which is now the trend in this area. This could be addressed via amendments to the Handbook, wherein it should be prescribed that any retrospective legislative proposal (and ensuing explanatory memorandum) demonstrate that it is in the public interest, and, as far as taxation legislation is concerned, whether the proposed legislation is designed to counter a real and serious threat to the revenue, the nature of that threat, and therefore a justification for retrospective action in the circumstances, rather than an assurance that the proposed legislation does not adversely affect any person. Such an approach would enhance the transparency of the process.

The question now is, how do we provide advice to our clients, secure in the knowledge that we have adhered to the law as it exists at the time they enter into transactions when we don't have a functioning 'crystal ball' to tell the client that the advice we provide currently may be illegal or even criminal in the future? If this is the case, not only should clients be concerned but also practitioners, in that they may face the Pandora's Box governments have opened and will have to explain and defend this new view to their law-breaking or indeed criminal clients.

[65] (1915) 20 CLR 531.
[66] (1999) 102 LGEter /Ty-1.v(ts)-A4 (Ec)3.Tw 0 Tc 0 Tw (.)Tj 8.1010d ( )Tj EMC /P <</MCID 10 >>2DC 6 -0 0 6