

messy since pooling of funds eases compliance and administration issues but nonetheless it would have been the most likely commercial alternative to have followed. An investment from Luxembourg to Australia would not have been considered as a commercial option. Direct investment from the "home" jurisdictions would have been the path to follow. Comparable DTA benefits would then have arisen - hence Pt IVA cannot apply.

This will be a key battleground in determining the outcome of this case - Pt IVA cannot apply if the counterfactual were held to be a direct investment from other DTA

countries into Australia as it is likely that the same DTA benefit would be achieved under that counter-factual.

Conclusion

These four questions and their resolution hold the key to how this case unfolds. Interestingly, for the taxpayer to win it need only win on Question 2 (ie if it is capital, Australia cannot tax).

If the Commissioner is to prevail he would need to win on Question 2 and either Question 3 or 4.

[2309] The Rule of the Regulator

by Robin Speed, Speed and Stracey Tax Lawyers

The ITAA 1936 and ITAA 1997 comprise over 10,000 pages. It has been estimated that if their growth continues at the current rate, then by the end of this century they will cover 830 billion pages and take 3 million years to read.

Even without such growth, the sheer size of that legislation, let alone its complexity, varying interpretations and ever changing changes, makes it impossible for any one person to know the law.

This has had two profound consequences.

First, the tax laws require an unsustainable level of required compliance from taxpayers. The Treasurer has recently said that our tax system is perceived as a "tax jungle". Not only is that the perception - but the ATO is perceived as the "predator" in the jungle, and the taxpayer, the "prey". Taxpayers increasingly look not to the law or courts for protection, but to not being seen.

Second, the ATO, as the administrator of the tax laws, has been required to take on an ever increasing role, so that in practice what is critical is not what the tax law says, but what the administrator says it says. In the last 8 years the ATO has issued over 80,000 private tax rulings.

What we are now seeing is an even more disturbing third consequence, namely Parliament abrogating its role of making objective tax laws and instead delegating to

the ATO the role of working out a result. This much is clear from proposed changes to the non-commercial tax loss rules, contained in the *Tax Laws Amendment (2009 Budget Measures No 2) Bill 2009*.

Under the existing rules, if an individual meets one of the four legislative objective tests he is entitled to set off losses from one business activity against earnings from another.

Under the Bill, individuals who earn less than \$250,000 per year will remain subject to the existing objective rules. But those who earn more must go cap in hand to the ATO (incurring the trouble and expense involved) and ask that it exercise a discretion to allow the set off of the losses.

The justification for this discriminating treatment is stated in the Explanatory Memorandum as:

"These amendments improve the integrity, fairness and equity of the non-commercial loss rules by recognising that the current exceptions operate in a discriminating way because high income individuals are more able to satisfy the objective tests and use these to avoid tax."

Thus, according to the Government, individuals who earn more than \$250,000 are better able than those who earn less to comply with the objective requirements of the law and obtain a tax deduction for the losses actually incurred. These individuals are to

be punished, by being denied the right to meet the law's objective requirements, and instead will be subject to an ATO discretion.

The Government has acknowledged that the \$250,000 figure was arbitrarily selected. Presumably it could have been, or may become, say, \$150,000 per annum or alternatively, the combined earnings of spouses of \$250,000.

Whilst an appeal will lie from the ATO to the AAT from an adverse exercise of discretion, taxpayers will incur further trouble and expense in any appeal, and at the end of the day it is still a matter of discretion for the AAT.

Whilst this third consequence will have the desirable effect of substantially reduc-

ing the volume of the legislation by a one line provision such as: "A taxpayer is not entitled to deduct any amount from its assessable income except if, and the extent determined by the Commissioner in his discretion." - it will have the deleterious effect of replacing objective legislative tests with an ATO discretion.

I suggest that if you stand back for a moment you will see that we are witnessing the replacement of the rule of law with the rule of the regulator (ie the ATO). This is considered not to be in the best interests of taxpayers, as increasingly the protection of objective legislative tests are removed and replaced by a decision made in the discretion of the ATO.

TAX PRACTICE UPDATE

[2310] New tax agent services regime starts 1 March 2010

On 26 November 2009, the Assistant Treasurer announced that the new tax agent services regime will commence on 1 March 2010. Senator Sherry said industry had approached him and requested a start date slightly later than 1 January to provide more time to prepare for the new regime. "A March 1 commencement delivers the right outcome and will give agents and the Tax Practitioners Board itself sufficient time to make the necessary preparations for the new regime," said Senator Sherry.

The Assistant Treasurer also announced that the new Tax Practitioners Board will establish a Consultative Forum of stakeholders through which it will undertake a detailed industry consultation on transitional issues. "The establishment of a Consultative Forum of stakeholders shows the Board's commitment to working with industry, even at the very earliest stage, and will ensure the transition period following March 1 is both smooth and successful," Senator Sherry said. (*Source: As-*

stant Treasurer's media release No 096, 26 November 2009 [http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/095.htm&pageID=003&min=njsa&Year=&DocType=1.]

The Chair of the Tax Practitioners Board, Dale Boucher, said the new Board is "gearing up to commence operations in March 2010". Mr Boucher noted that there are extended arrangements to bring BAS agents into the system. "All they will need to do is to notify the Tax Practitioners Board up to the end of August 2010. They will then be taken to be registered," he said. (*Source: Tax Practitioners Board media release, 26 November 2009.*)

On 25 November 2009, the Governor-General proclaimed 1 March 2010 as the start date of Pts 2 to 5 of the *Tax Agent Services Act 2009*: see para [2343] of this *Bulletin*.

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