International Tax Administration: Building Bridges

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Preface

The Australian School of Taxation (Atax) at the University of New South Wales has a long and proud history of convening what has become the most significant series of conferences on tax administration held worldwide today. Since Dr Ian Wallschutzky had the vision to convene the first of these conferences at the University of Newcastle in 1994, Atax has continued the tradition and there is no doubt that "tax administration" flourishes today as an important area of multi-disciplinary study. The many presenters and attendees from around the globe that have supported these conferences over the years are evidence of this, as are the growing number of publications and students engaged in research in tax administration.

At the 6th International Conference on Tax Administration hosted by Atax in 2004, the then Australian Tax Commissioner Michael Carmody described tax administration as an "art", a dynamic concept and the delivery of which required a "willingness to listen, learn, adapt and, if necessary, revolutionise". This dynamism will no doubt continue to drive interest in the "art" for decades to come as new challenges emerge and the body of knowledge continues to develop. This conference series continues to provide an excellent opportunity to engage in the dialogue, to share the challenges, research and ideas that will inspire others and lead to improvements in the effectiveness, efficiency and transparency of many tax administrations. Granted, not all will seek to revolutionise (or at least not always), but being prepared to reflect on one's own artwork from time to time and to look at and listen to the works of others, can be insightful.

Atax is very appreciative of the great enthusiasm that Jonathan Mendel, CCH's Editor-in-Chief, has shown from the outset for the publication of this edited book based on the 9th International Conference on Tax Administration hosted in 2010. It is the first of the series to be published by CCH and we do indeed hope that there will be many more to come.

Professor Margaret McKerchar

Head of School

Atax, UNSW

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OPENING ADDRESS

The Honourable Sir Anthony Mason AC KBE

Welcome

It is a pleasure to welcome you all to the 9th International Tax Administration Conference.

I am told that there are no less than 130 delegates at this conference, including 46 from overseas, of whom 14 are from New Zealand. The attendance is a record and it demonstrates the value of the conference, even in the wake of the GFC.

The theme of the conference is "Building Bridges", a theme illustrated by a photograph of the Sydney Harbour Bridge on the front page of the conference brochure. Just what kind of bridges do the organisers have in mind? The papers presented to this conference provide some indication of what they might be. For some years now Revenue authorities have been concerned to portray themselves as being rather different from the grim-visaged, lantern-jawed tax gatherers of the past. The modern Revenue authorities prefer to see themselves, and have others see them, as considerate, understanding people whose goal is to assist taxpayers.

This exercise in cosmetic surgery has been undertaken for a variety of reasons, one of which is the belief, which I regard as counterintuitive, that the new friendly image will play an important part in enhancing tax compliance. Whether this belief is soundly based is a very important question. It is a question which is addressed by a number of the papers to be presented at this conference.

I was mildly surprised to read in one of the papers a statement attributed to the OECD that the Australian Tax Office (the ATO) has one of the highest taxpayer satisfaction levels in the developed world[1]. It is by no means clear what the basis for this statement is. Presumably the source is material provided by the ATO itself[2]. Certainly the OECD has not carried out a taxpayer satisfaction survey in Australia.

1 OECD, 28 January 2009, *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2008)*.

2 ibid, p 5.

Further, there was much debate about, and criticism of, the Australian taxation system before the setting-up of the Henry inquiry. Much of that criticism emanated from commentators and business or groups associated with business. On the other hand, there are those who claim, and have claimed, that the Australian tax system favours big business[3].

There are a multiplicity of reasons why people do not comply with their tax obligations. They depend in part on the mindset of taxpayers and in part on their particular circumstances. Unless persuaded by hard evidence, I would not have thought that the perceived image of the Revenue authority, friendly or otherwise, had much to do with non-compliance. On the other hand, the perception that there are inequities in the tax system can be a motivating factor, particularly if it is thought that tax rates are so high as to be punitive or unjust. So also if less affluent taxpayers perceive that affluent taxpayers are not meeting their tax obligations. Such perceptions may play a part in the making of a decision by a taxpayer to evade or minimise tax. That said, it would make good sense to identify the main reasons why taxpayers do not comply with their obligations — these reasons are discussed in the papers to be presented — and take measures to address or counteract them.

Conversely, it is also possible, as papers dealing with the Scandinavian countries indicate, that expenditure on well-targeted welfare programs dispose taxpayers to accept taxation, even at higher rates more readily. I doubt that the Australian taxpayer is quite so altruistic. And, in any event, whether welfare programs are well targeted is bound to be a controversial issue.

Although criticism of penalties as an effective deterrent is supported by research findings referred to in the papers to be presented, penalties have a fundamental role to play in discouraging deliberate non-compliance. Penalties need to be specific and focused so that they operate as a rational deterrent. Otherwise they simply add to the costs of the Revenue and the taxpayer. They should also be large enough to deter the particular non-compliance which is targeted.

The effect of the GFC will be to focus more attention on the necessity to raise increased revenue in order to service the higher level of national debt and the need to reduce the tax gap between the tax revenue payable by taxpayers and the amount of tax actually collected. The necessity to raise increased revenue will in turn direct attention to the elimination of inequities in tax systems, in particular, inequities arising from concessions made to taxpayers simply because they are popular, eg concessions made in favour of owner-occupied housing, and concessions which are made for extraneous policy reasons in relation to policies which could be pursued by other means, eg welfare programs.

Only 10 days ago a Deputy Commissioner of Taxation was reported to have said that in Australia 40% of big business had paid no income tax in the years between 2006 and 2008 and, of those that do pay tax, most pay much less than the headline 30%[4].

3 Passant J, 30 March 2010, "Tax System Facilities Avoidance", *Australian Financial Review*, p 63.

4 ibid.

Perhaps it is with information of this kind in mind that the Commissioner of Taxation has stated that large corporate taxpayers should pay a fair share of taxes. Statements like this have been made as part of a strategy to encourage compliance with the tax laws.

One of the papers to be presented "A fair share of taxes — a bridge too far?" challenges the Commissioner's statement on the ground that there is no legal duty to pay a "fair share" of taxes, whatever the expression "fair share of taxes" may mean. I had not read the statement, and others like it, as a statement of legal duty but rather as a statement of moral duty or of what being a good corporate citizen entails. But if one looks at the matter from the angle that there is no legal duty to pay a fair share of taxes, it is not necessary for those who assert that there is no such legal duty to adopt the extreme position that a corporation and its directors are under a duty to take advantage of every technical loophole in the revenue laws and to pursue an aggressive stance on tax.

In the context of the Commissioner's rhetoric, if a corporation is not paying tax when it "should" be paying tax or not paying a "fair" share of tax, then its failure to do so is due to either: (a) a failure to frame the tax laws so that they impose tax in the relevant circumstances, or (b) a failure on the part of the Revenue authorities to administer the tax laws correctly, or (c) a failure of the taxpayer to manage its affairs efficiently. In the vast majority of cases, it will be the inadequacy of the tax laws that is the reason why the taxpayer escapes liability to tax. In some of these cases the corporation or related corporations will have structured their affairs with the consequence that no tax is payable or tax is reduced. In that event, neither the operative provisions of the *Income Tax Assessment Act 1936* (Assessment Act) nor Pt IVA apply. So that the reason why no tax is paid is that the legislation is not so expressed as to make tax or increased tax payable. As a taxpayer cannot be expected to pay tax when it is not legally payable, legislative amendment rather than rhetoric is the answer to the problem.

In the case of international transactions, where corporations seek to locate their profits in the low tax jurisdictions by means of transfer pricing or other means, the problem is more complex and legislative amendment may not remedy all the deficiencies in Div 3, Pt XIII of the Assessment Act. Indeed, it is possible that in this area that an international tax regime offers the only prospect of combating corporate strategies involving transfer pricing. But it is a distant prospect unless nations offering low tax rates are willing to sacrifice the commercial advantages, eg increased overseas investment which low tax rates bring. That is why the Revenue authorities still persist in the "good corporate citizen" rhetoric.

In 2009 Professors Pinto and Sawyer presented a proposal for a World Tax Organisation. This year in their paper to be presented they suggest ways in which such a WTO could operate to the advantage of member states. In their account of regional efforts to achieve transnational cooperation through cooperative associations, the authors note the regional groups and point out that tax evasion, tax havens and tax abuse has been a focus of attention. Among objects of attention is tax evasion

involving transfer pricing by multinational enterprises. If a solution to the problem is to be found, it is by means of international cooperation. Another paper by Richard Eccleston records what has been achieved by international cooperation, notably by the OECD Forum on Tax Administration.

One aspect of non-compliance is the fact that tax evasion is not regarded as ranking high on the scale of moral obliquity. Whether governments can change this perception is an important question for the future. The retention of heavy penalties for serious and deliberate tax evasion, accompanied by maximum publicity, would seem to be an essential element in any strategy to change public perceptions.

Conclusion

The papers raise many interesting and important issues for consideration. I am sure that the conference will be stimulating and valuable.

INTRODUCTION

Kalmen Datt, Dr Binh Tran-Nam and Kathrin Bain

This edited volume has its genesis in the 9th International Tax Administration Conference Building Bridges, held between the 7 and 9 April 2010 in Sydney, Australia. The conference, a biennale event organised by Atax at the University of New South Wales, was a great success. It drew over 100 delegates and speakers from developed and developing countries around the globe including Australia, Canada, Fiji, Indonesia, Malaysia, New Zealand, Papua New Guinea, Singapore, South Africa, South Korea, the UK and the USA. Six keynote addresses were delivered by the Commissioner of Taxation of Australia, the CEO of Inland Revenue Board Malaysia (IRBM), the CEO of Inland Revenue Department New Zealand (IRDNZ), the Inspector General of Taxation, Australia, the Chair of Tax Practitioners Board, Australia, and Professor Richard Bird, an internationally recognised tax economist.

The theme of the conference was "Building Bridges" and significant insights were given on how most tax administrations throughout the world are seeking to build bridges between themselves and taxpayers and the problems faced by both he administrator and taxpayers in meeting their respective obligations. As has been the case over the past few years the conference was privileged to have the Honourable Sir Anthony Mason, a former Chief Justice of the High Court of Australia, open the proceedings. A copy of his opening remarks appears as the opening address of this compilation.[1]

As part of his comments Sir Anthony made the point that some 10 days prior to the opening of the conference a Deputy Commissioner of Taxation in Australia had been reported as noting that many companies (possibly a majority) pay less than the headline tax rate of 30% and that this was possibly the basis for the Commissioner in Australia calling for corporate taxpayers to pay a fair share of taxes. Sir Anthony then reviewed a paper "A fair share of taxes — a bridge too far?" and made the point that in the context of the Commissioner's rhetoric, if a corporation is not paying tax when it "should" be paying tax or not paying a "fair" share of tax, then its failure to do so is due to either: (a) a failure to frame the tax laws so that they impose tax in the relevant circumstances, or (b) a failure on the part of the revenue authorities to administer the tax laws correctly, or (c) a failure of the taxpayer to manage its affairs efficiently. Sir Anthony was of the view that the call for payment of a fair share of taxes by the Commissioner was a statement of moral duty or of what being a good corporate citizen entails. Sir Anthony noted if one looks at the matter from the angle that there is no legal duty to pay a fair share of taxes, it is not necessary for those who assert that there is no such legal duty to adopt the extreme position that a corporation and its directors are under a duty to take advantage of every technical loophole in the revenue laws and to pursue an aggressive stance on tax. The discussed paper is a chapter of this book. The reader is invited to draw their own conclusions as to the validity of that author's views.

1 Not all conference papers mentioned in Sir Anthony's remarks are included as chapters in the book.

The remaining chapters in this book were derived from the 40 papers presented at the conference. They were all subjected to a formal review and revision process. Unlike previous conference proceedings, the chapters are fewer in number and more cohesive in terms of themes. The 12 chapters are organised into three parts. The first could be loosely described as legal issues arising from the administration of taxation, the second is concerned with understanding taxpayer compliance and the third with improving taxpayer compliance.

Part 1 of the book consists of four chapters. The first chapter, entitled "A fair share of taxes — a bridge too far?", is written by Kalmen Datt, a senior lecturer at Atax. In this opening chapter the author suggests that there is no such concept as a fair share of taxes, irrespective of the context in which that term is used. The author considers the law and concludes that the obligations imposed on corporate taxpayers are to pay that tax as is mandated by the law; no more and no less. The view is taken that as tax is an unavoidable expense, directors should, as part of their obligations to the company and its shareholders, ensure that the company pays no more tax than is mandated by law. The point made is that the need for revenue does not and should not translate into some form of social contract whereby companies pay more tax than the law requires. If companies wish to do good deeds they can do so openly and gain the benefits of being good citizens by increasing the value of their goodwill. The author suggests that payment of tax has nothing to do with being a good citizen nor is it reflective of good morals. Unless legislation specifically provides for the payment of a tax on income or any other tax there is no obligation to pay such monies to the state. There is no commercial or other advantage in paying more tax than is required by the law. This view seems to coincide, at least implicitly, with those of the Australian Commissioner of Taxation at the conference who stressed that what the tax office's mandate is to collect no more and no less tax than that mandated by the law.

John Bevacqua, a senior lecturer at La Trobe University and as part of his PhD thesis writes on the prospects of a successful misfeasance claim against the Commissioner. He undertakes an extensive review of the authorities and particularly the recent High Court decision in *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32. The author reaches the conclusion that the prospects of a successful claim of this type are remote. He is of the view that the *Futuris* judgment should be characterised as a statement of the normative rights of Australian taxpayers to argue misfeasance rather than an indication of the existence of a practically useful avenue for taxpayer relief and that in practical terms, in the vast majority of taxpayer claims against the Commissioner, proving the elements of the tort will simply be a bridge too far.

Professor Jacqueline Arendse of the University of the Witwatersrand, Johannesburg, South Africa writes on whether the penalty system in South Africa is an effective deterrent to evasion. She points out that the imposition of penalties is premised on the view that there is a negative correlation between the amount of a penalty charged and the extent of evasion and non-compliance. After a review of the literature she concludes that the correlation exists but is very weak. This raises the question, which the author seeks to answer, whether penalties are indeed an effective sanction to combat tax evasion. Professor Arendse examines the body of research on tax penalty