THE PLACE OF THE LAWYER IN TAXATION

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Beyond the hard core of legal function the practising members of the legal profession have traditionally added innovativeness to their services, and equally traditionally complained bitterly whenever such innovations have subsequently ceased to become the accepted province of the lawyer. The pity of this is that the patent attorneys, executor companies, land broker, accountants and others to whom these fringe functions have gone have tended to assess the legal profession on the merits or otherwise of its complaint and to lose sight of the real value of the profession.

Taxation is a sphere within which there are activities for which the lawyer alone is adequately equipped, as well as activities in which the lawyer may or may not even be proficient, depending on his individual aptitude and experience. The branch of taxation in which this point may readily be seen is income tax, although the same is true to some extent in all branches. Mention income tax work and the first impression is preparation of income tax returns. Excluding the country practitioner, one can safely assert that the legal profession prepares an almost insignificant proportion of the income tax returns lodged in Australia. (The country practitioner renders a wider service than mere legal practice; and to include what, for reasons peculiar to the country town, he does, is untenable in the present topic.) By far the greater number of the four and a half million tax payers prepare their own returns. Of the remaining returns the greater number are prepared by practising accountants included in the approximately 9500 registered tax agents. Of the returns prepared by lawyers (excluding the country practitioner), a substantial proportion relates to trusts and other matters already in the hands of the solicitor's office in question. In short, the community does not regard the lawyer as the man for his tax return. Nor do I.

The attributes required in a tax agent in relation to preparing large numbers of returns include at least some appreciation of business and accountancy as well as a detailed and up-to-date acquaintance with the Assessment Act, its judicial interpretation and Board of Review application, and (equally important in practice) the unpublished rulings of the Taxation Department. To mention but one aspect — the practical test for including or omitting some small item is "What will the Department say?", not "Will the Court uphold

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this?" The men (or the organisations, e.g. the tax section of a large accountants' office) who best comply with the above description are generally not lawyers. Not only, however, are they often not lawyers, but they may very often be twenty years or more older than the lawyer, who works as a professional sportsman, in the sense that his work is a profession, to which he devotes the whole of his energies. To spend a great part of one's life engaged in detailed tax work would destroy the lawyer's most valuable asset — the ability to advise or to contest on the application of law to facts in accordance with the principles applied by the Courts. Those principles become clearer with experience in applying them, not with inexperience in work of a routine nature governed by much by expediency as by principle.

To revert to taxation practice, in some cases a Departmental ruling (or Board of Review decision) may be wrong from a lawyer's viewpoint, if a taxpayer is prejudiced by such ruling or decision he may appeal, but it is not easy to challenge the application of the law in a constitutional court. To engage in routine tax work such as preparing returns, it is sufficient to know what is accepted; to approach the same question as a lawyer involves not what is accepted but what should be.

The lawyer is trained, among other things, in the interpretation and application of statute. Taxation law is necessarily statute law. The legal approach is the same as with a taxation statute as with any other — what does the statute say, in what context with what judicial interpretation, (if any), are the facts within the statute? Mayo J in In Re S.A. Unit Trusts Pty Ltd stated the position in the following terms:

"In construing a statute that imposes taxes or duties the language used must be interpreted according to its natural meaning and import. The phraseology is not to be strained for the purpose of giving effect to what is assumed (in the absence of clear indication) to be the legislative objective. The explicit statutory intention must, of course, be given effect. In the case of taxes and duties the imposition should be by provisions that are unambiguous. The reason of such a contribution to public revenues is to be free from any real doubt, that is to say any doubt, whether the legislature really intended to add the prescribed burden. If there be uncertainty of that nature in regard to some class of document, the postulated impost will not be treated as chargeable. Accordingly where the terms employed are equivalent, if or if not it be problematic whether a particular type of document is intended to be caught, the question must be resolved by considering (i) the nature of the document allegedly chargeable, and (ii) the construction of the provision, or provision, which (if it is claimed require it) be strained."

It takes time to reach a satisfactory answer to the questions raised by interpretation. The result is that a point must involve, be it a particular case or a recurring question, a substantial sum in tax, otherwise close scrutiny is not warranted. Where in tax work, therefore, does the lawyer find an outlet for his particular talents? I consider that there are a number of possible outlets which should bear scrutiny. They are tax planning, tax advising, objections and appeals, and collaboration with accountants and others.

Tax Planning: This is the work at assisting clients so to order their affairs that the tax attaching under the appropriate Acts is less than it otherwise would be. To say that this field has the blessing of the Courts may be exaggerating. Lord Simon once stated:

"My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income without sharing in the aggregate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are entitled to do so. There is, of course, no doubt that they are within their legal rights, but that is to say why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres."

It is however of long established legality. For example, Section 27 of the South Australian Succession Duties Act 1909 (which penalised any disposition judged inadmissible to be fraudulent and made for the purpose of evading duty) was construed by the Privy Council as still leaving people "at liberty to dispose of their property during life so that it should not form part of their estate at death for the purpose of taxation or any other purpose."

As a further example, the Duke of Westminster in the year 1926, executed deeds of conveyance to pay certain weekly sums for a specified period to persons who were in fact his employees. He reduced their wages or salaries by those sums. He then successfully claimed before the Court of Appeal and before the House of Lords that his payments under the deeds were not payments of wages or salaries, and were deductible for purposes of duty upon his income. Lord Tomlin said, "Every sum is entitled if he can to settle his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure his result, then, however unappreciative the Commissioners of Inland
Revenue or his fellow taxpayers may be of his ingenuity, he cannot
be compelled to pay no income tax.*

Tax planning can be profitable to the clients. For example, a hus-
band and wife, principal shareholders in a company clearly caught
as a “private” company for the purposes of Division 7 of Part III
of the Income Tax and Social Services Contribution Assessment Act
1968-1962, were assisted in the formation of a new holding Com-
pany in which the husband and wife between them held four ordinary
shares and twenty of the husband’s friends each held one preferen-
tive share carrying a vote and a dividend including “one two-thousandth
part of the rate per annum of any dividend paid upon the ordinary
shares”, but redeemable except between 25th June and 7th July in
any year. This was held to exclude the company from the definition
of “private” company for tax purposes, as voting power and particip-
ating share capital were both spread amongst more than seven
persons at 30th June, 1959 (the relevant date for the purpose). The
company and its subsidiary were then able to accumulate profits
without paying the additional tax which would have been incurred
by a “private” company, whilst for all practical purposes retaining
the attributes of a family concern.6

Tax planning can however be unprofitable if, for example, the Com-
misssioner successfully applied Section 269: in one case an ambitious
scheme for the tax-free distribution of £1,784,136 in dividends
failed and resulted in about three-quarters of that sum being absorbed
in tax with penalties of over £200,000.7

Tax planning is an outlet for legal services involving among other
things a close legal scrutiny of some proposed transaction (or a
series of alternative proposals) under circumstances where the proper
question is “What would the courts say of this?”—and therefore the true
province of the lawyer. This outlet is expanding.

Tax Advising: Where tax planning involves a lawyer’s checking (or
designing) a deliberate course of action, some event, or some trans-
action entered into without evading a licence to reduce tax-
ations, may find a client in need of advice. Should be include an item
as income, or claim a deduction, and on what basis? Should be accept
whatever assessment follows, or lodge an objection and, if necessary
appeal, and to what tribunal? What tax is involved, and what is the
risk of legal fees—on both sides—if the matter goes on appeal? This
outlet is also substantial.

Objections and Appeals: Objections are numerous, but to a great
extent attended to without legal advice. References to Boards of
Review and Valuation Boards are comparatively rare, and not all

review of the client's affairs including suggestions for saving death
duty and a revision of a will.

Conversely, a lawyer whose client desires to set up a new company
does well to bring the client's accountant into the picture at an early
stage, then leaving the accountant to supervise the Company's annual
accounts, tax returns, and sundry formalities from year to year. Or
the accountant's aid may be essential in a Departmental investigation
of a client's finances with a possible assessment under section 107
to follow.

In short, although I am not advocating that any lawyer retire from
any work he wishes to do and is capable of doing, I am advocating
that the legal profession make known to accountants and other advisers
and to the public the fundamental idea that a lawyer does in law,
and that any problem in law, including tax law, is within the province
of the lawyer whether or not he is a specialist in that branch of the law.
As a corollary, no lawyer ought to undertake tax work (or any work)
which is not within his capabilities, be the consequence a reference
to a senior or other counsel in his own profession, or the enlisting
of the aid of a member of the accountancy or some other profession.

The lawyer will not lose by such a stand. Working within his undis-
pputed scope he may charge confidently for his services. Recommend-
ing the services of other professions will bring reciprocity. The man
with something worthwhile to offer need not fear to admit the need
for the services of others, nor that his practice will suffer by the honest
and straightforward sale of his services for adequate reward.