THE PLACE OF THE LAWYER IN TAXATION

By A. K. Sangster*

Beyond the hard core of legal function the practising members of the legal profession have traditionally added innovations 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 brokers, 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 9,000 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Assessment Act, its judicial interpretation and Board of Review application, and (equally important in practice) the unpublished rulings of the Taxation Department.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. Nor should any lawyer resent this position, any more than he should envy the proficiency of a professional sportsman. To spend a great part of one's life engaged in detailed taxation work would destroy the lawyer's most valuable asset — the ability to advise or contend 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 immersion in work of a routine nature governed as 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 decison he may appeal, but in many cases a ruling or decision may stand unchallenged for years. 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 Statutes. Taxation law is necessarily statute law. The legal approach is the same 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.*[1] 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 intendment must, of course, be given effect. In the case of taxes and duties the imposition should be by provisions that are unambiguous. The exaction of such a contribution to public revenues is required to be free from any real doubt, that is to say any doubt, whether the legislature really intends to add the postulated 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 equivocal, or if *ex facie* it be problematic whether a particular type of instrument is intended to be caught, the question must be resolved by considering (i) the nature of the document allegedly stampable, and (ii) the construction of the provision, or provisions, which it is claimed require it to be stamped."

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

1. [1954] S.A.S.R. 227, 232.

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 of 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 appropriate 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 no reason 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."[2]

It is however of long established legality. For example, Section 27 of the South Australian *Succession Duties Act* 1893[3] (which penalised any disposition judicially declared 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 estates at death for the purpose of taxation or any other purpose."[4]

As a further example, the Duke of Westminster in the year 1930, executed deeds of covenant 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 surtax upon his income. Lord Tomlin said, "Every man is entitled if he can to order 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 this result, then, however unappreciative the Commissioners of Inland

2. *Latilla* v. *Inland Revenue Commissioners* [1943] A.C. 377, 381.
3. No. 567 of 1893.
4. *Simms* v. *Registrar of Probates* [1900] A.C. 323 per Lord Hobhouse at 337.

Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."[5]

Tax planning can be profitable to the clients. For example, a husband 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* 1936-1952, were assisted in the formation of a new holding Company in which the husband and wife between them held four ordinary shares and twenty of the husband's friends each held one preference 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 24th 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 participating share capital were both spread amongst more than seven persons at 30th June, 1953 (the relevant date for the purpose). The company and its subsidiary were thus 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 Commissioner successfully applies Section 260: in one case an ambitious scheme for the tax-free distribution of £1,764,136 in dividends failed and resulted in about three-quarters of that sum being absorbed in tax with penalties of over £600,000.[7]

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

Tax Advising: Where tax planning involves a lawyer's checking (or devising) a deliberate course of action, some event, or some transaction entered into without emanating from a desire to reduce taxation, may find a client in need of advice. Should he include an item as income, or claim a deduction, and on what basis? Should he 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

5. *Inland Revenue Commissioners* v. *Duke of Westminster* [1936] A.C. 1 at 19.
6. *W. P. Keighery Pty. Ltd.* v. *F.C.T.* [1958] Argus L.R. 97.
7. *Newton* v. *F.C.T.* [1958] A.C. 450.

involve legal representation. Appeals to Courts are like gems — attractive but hard to find. This outlet is limited.

Collaboration with Accountants and Others: Here, in my view, lies much of the scope for the lawyer — supplementing and complementing the work of others engaged in taxation matters: supplementing, in that a lawyer's check of the outline of an accountant's scheme or a client's own proposals is invaluable: complementing in that the lawyer may well originate the outline and then work in conjunction with the client and his taxation and accountancy advisers. One of the implications of such two way collaboration is that the non-lawyer's proposals can be checked and abandoned or altered as a result.

Consider for example an accountant in the year 1950 having read the case of *Grimwade* v. *F.C.T.*[8], and proposing that a client set up a company and allow similar steps to be carried out. In *Grimwade's* case, Grimwade held nearly all the "A" class shares in a Company and his sons and the executors of a deceased son all the "B" class shares. On a winding up the holders of "B" class shares would have been entitled to sixpence per share return of capital, while the holders of "A" class shares would have been entitled to the balance of the surplus assets. In 1942 and 1943 resolutions were passed by the shareholders (Grimwade being present but not voting) for a return of a total of 17/6d. per share on both "A" and "B" classes, and the reduction was duly sanctioned. The Commissioner failed in his attempt to uphold gift duty assessments on these reductions as amounting to gifts by Grimwade to his sons. The division of shares into classes and the other material used in 1942 and 1943 were already set up. To create such a set of circumstances afresh with the object of using them for such a purpose would provide such a link as to make the whole into a "transaction". A lawyer would warn that an apparent similarity in facts is not sufficient — a different principle may be invoked. In *Birks* v. *F.C.T.*[9] one Birks in fact transferred certain shares to his wife and daughter immediately certain resolutions were passed by the shareholders and other steps taken with Birks abstaining from participation: apparently with some similarity to *Grimwade's* case. In his judgment Kitto J. linked all the steps (including Birks' transfers of shares to his wife and daughter) together as a "disposition" amounting to a dutiable gift.

Again, consider the enthusiasm of some accountants for suggesting savings in income tax: the lawyer will add balance to such advice, emphasising the effect on the client and others of the substance of the proposed transaction as well as the resulting tax position. Or the lawyer may take the whole matter further and suggest and carry out a

8. (1949) 78 C.L.R. 199.
9. (1953) 10 A.T.D. 200.

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 167 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 deals 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 undisputed scope he may charge confidently for his services. Recommending 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.