



Justice Jennifer Davies
IATJ 7th Assembly
September 30th
October 1st, 2016
Madrid, Spain

Income Tax and Human Rights in Australia

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Constitutional Position:

- Australia does not have a charter of human rights constitutionally protecting basic rights and freedoms.
- Rationale: basic rights and freedoms are adequately protected by the common law and statute.
- Australia has ratified the International covenant on civil and political rights and at the European Convention on Human Rights but neither convention is part of the domestic law of Australia with respect to taxation.

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Income Tax Power:

- Under the Constitution the Commonwealth is given the power to make laws with respect to taxation.
- The only express restriction on that law making power is that federal taxes must be uniform throughout Australia.
- Nonetheless constitutional limitations have been implied into that grant of power which guarantee certain protections for taxpayers.

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Constitutional Limitations:

- A valid law with respect to taxation:
 - i. must be based upon ascertainable criteria by which the tax is imposed; and
 - ii. taxpayers must be able to contest the application of those criteria and the imposition of the tax upon them through the legal system.
- As all tax laws must be contestable, the right to challenge the imposition of tax is a constitutional prerequisite for the validity of the tax law and an implied constitutional right of taxpayers.
- The constitutional protection embeds the rule of law into the Australian taxation system.

Challenging a Tax Liability:

- Taxpayers can challenge the validity of tax laws as well as the basis upon which they have been assessed to tax upon any ground which affects their liability to tax, including the Commissioner's power to make the assessment and whether the exercise of administrative power is affected by error of law.
- Taxpayers may either seek independent merits review by an administrative tribunal or judicial review by the Court.
- The choice is at the taxpayer's election and there are appeal rights from both forums.
- Taxpayers can also challenge administrative actions of the Australian Taxation Office independently of contesting an assessment.

Challenging a Tax Liability (continued):

- The Constitution invests courts with a jurisdiction to compel Commonwealth officers to act in compliance with the law in the performance of their duties and to restrain them from acting unlawfully in excess of their powers or authority.
- The provision of this jurisdiction is a protective measure which enables the courts to scrutinise excesses of power or authority by Commonwealth officers and this jurisdiction cannot be taken away from the courts by Parliament.
- As well as constitutional remedies, taxpayers also have statutory rights of judicial review of administrative action which are co-extensive.

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Independent Oversight:

The Commonwealth has provided two specific legislative mechanisms to oversee the Commissioner's application of the taxation laws:

- the Inspector General of Taxation;
- the Commonwealth Ombudsman.

The Inspector General is an independent statutory agency that conducts reviews into and makes recommendations regarding the ATO's administration of the tax system.

The Commonwealth Ombudsman has the power to investigate complaints regarding the conduct of the ATO.

The Taxpayer's Charter:

- In 1997 a taxpayer's charter was introduced.
- It sets out the rights and obligations of taxpayers and what taxpayers can expect from the ATO as well as actions they may take if they are not satisfied.
- Not legally binding.
- Although not legally binding, tax officers are expected to comply with the Charter.
- The Charter is said to have been effective in raising ATO service standards and improving the relationship between taxpayers and the ATO.

The Taxpayer's Charter (continued):

- Criticism is that it has not been so effective in protecting and promoting taxpayer rights.
- Call for a legally binding Charter to give legal protections not otherwise available in Australia.
- Currently a review being conducted by the Inspector General in Taxation.

***Seymour v Commissioner of Taxation* [2016] FCAFC 18:**

Facts:

- Taxpayers have proceedings in the AAT contesting tax assessments.
- Taxpayers are resident overseas and applied to give their evidence by videolink.
- Part of the reasons was their concern that the Commissioner would serve a departure prohibition order upon them if they were to return to Australia to give evidence.
- The Tribunal decided to permit their evidence to be given by videolink. The Commissioner appealed that decision.

***Seymour v Commissioner of Taxation* [2016] FCAFC 18 (continued):**

- On appeal, it was held that the AAT had erred in taking into account the refusal of the taxpayers to come to Australia if they did not receive an assurance that a DPO would not be issued by the Commissioner. That conclusion was based upon evidence that the taxpayers would not return to Australia in any event unless they obtained an assurance that they would not be arrested for alleged tax crimes whilst in Australia.
- That decision was appealed by the taxpayers.
- Upheld on appeal (2/1). A reasonably based fear of arrest in the circumstances of that case held not to be a sufficient reason for making an order for evidence by way of videolink.

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***Seymour v Commissioner of Taxation* [2016] FCAFC 18 (continued):**

Compare ***Polanski v Condé Nast Publications Limited*** [2005] UKHL 10 (House of Lords).

- Held that, in general, in respect of proceedings which are properly brought in a domestic court, a claimant's unwillingness to be present in court because he/she was "a fugitive from justice" was a valid reason, and could be a sufficient reason, for making a video conference order.
- "Despite his fugitive status, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He can bring or defend proceedings even though he is, and remains, a fugitive. If the administration of justice is not brought into disrepute by a fugitive's ability to have recourse to the court to protect his civil rights even though he is and remains a fugitive, it is difficult to see why the administration of justice should be regarded as brought into disrepute by permitting the fugitive to have recourse to one of the court's current procedures which will enable him in a particular case to pursue his proceedings while remaining a fugitive."

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***Commissioner of Taxation v Donoghue* [2015] FCAFC 183:**

Facts:

- Law student working for the taxpayer's lawyers, without either the taxpayer's or the employer's knowledge, provided the Commissioner with documents relating to the taxpayer's taxation affairs that were subject to legal professional privilege.
- The Commissioner relied upon those documents in issuing Notices of Assessment to income tax to the taxpayer where the taxpayer had not waived the privilege.
- The taxpayer issued proceedings seeking to impugn the Commissioner's conduct and the validity of the assessments.

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***Commissioner of Taxation v Donoghue* [2015] FCAFC 183 (continued):**

Held: The conduct of the Commissioner in relying upon privileged documents in issuing the assessment amounted to conscious maladministration by the Commissioner and a lack of good faith. Assessment ruled invalid.

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On appeal:

- The use of privileged material of itself could not found maladministration by the Commissioner as the privilege was no more than an immunity against compulsory disclosure, not a rule of law conferring individual rights, the breach of which may be actionable. Consequently, no action lies against a party who receives documents which are privileged merely because those documents are privileged.

Compare ***O'Neill Motors Limited v R*** [1998] 4 FC 180

- Documents seized by the Tax Office under a warrant and on the basis of information contained in the documents, taxpayer assessed. The provision under which the warrant was issued later held to be unconstitutional and the seizure accordingly illegal. Held that the seizure was a violation of the taxpayer's rights under the Canadian Charter of Rights and the assessment invalid.

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Compare ***R v He* 2012 BCCA 318**:

Taxpayers charged with tax evasion. Crown relied on evidence obtained by the audit division of the Canadian Revenue Authority as part of an electronic record evaluation program without adequate warning that the material may be used for the purposes of a tax audit.

Held that the evidence was not admissible as the conduct was contrary to the Human Rights Charter to be free from an unreasonable search or seizure

“the reality that what the CRA did in this case was to abuse its powers and mislead Bo Ping He, in order to obtain from the respondents information from a survey that had nothing to do with the information that is or should be in the books or records of New BM or is related to any amount payable by [the taxpayers] under the [ITA](#) ..”

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Compare ***R v He* 2012 BCCA 318 (continued)**:

“The information sought and obtained from [the taxpayers] was not information in commercial records in the regulated field of taxation, and thus their Charter-protected interests were as the trial judge found, significantly affected.”

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***Macquarie Bank Ltd v FCT* [2013] FCAFC 119:**

Facts:

- Taxpayer relied upon practice note issued by the ATO setting out the ATO's position about the circumstances in which he would retrospectively apply a different view about the operation of the law.
- Practice statement not binding on the Commissioner.
- Commissioner subsequently assessed taxpayer contrary to the practice statement upon which the taxpayer relied.

Held:

- The practice statement could not operate to prevent the ATO from raising an assessment in accordance with the law.
- As the practice statement had no statutory force, there was no enforceable obligation against the ATO to apply the law in accordance with that practice statement.

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Denlay v Commissioner of Taxation [2011] FCAFC 63:

Facts:

- The Commissioner raised assessments for liability of tax based on information obtained by tax officers from a third party. The third party had obtained that information illegally.
- The taxpayer challenged the validity of the assessment on the ground that the tax officers concerned had reason to suspect that the information had been obtained by the third party illegally.

Held:

- There was no conscious maladministration by the tax officers.
- The Commissioner was not obliged to satisfy himself that a law had not been infringed in the gathering of the available information.

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On appeal:

- “It would be a remarkable state of affairs if the Commissioner were entitled, and indeed obliged, to refrain from what is expressed to be his duty [to make assessments of a taxpayer’s liability to income tax] by reason of a suspicion on his part, even a reasonable suspicion, that some illegality on the part of his officers may have occurred in the course of gathering the information...”
- “We are also unable to see that such a qualification is necessary in order to ensure that the Commissioner’s officers are discouraged from disobeying the law in carrying out their functions under the [Income Tax Assessment Act]. One may confidently say that, in carrying out their investigations, the Commissioner’s officers are subject to the law of the land; if they transgress the law of the land, then they will suffer the consequences. It is an entirely different thing to say that the interest of the Australian community in the making of taxation assessments based on the most accurate information available, ... should be defeated by a default on the part of the Commissioner’s officers which has no bearing on the accuracy of the assessment...”

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