



Dear IATJ Members:

The program for the 5th Assembly of the IATJ to be held in Washington, D.C. on October 23 and 24, 2014 is now complete. Attached is the Program Agenda including panellist members. The program is very interesting, covering both substantive areas of tax yet dealing with practical issues we all face such as dealing with the media. Full particulars of the program, registration, and accommodation availability are on the IATJ website. Please register now and reserve your accommodation.

Also attached is a wonderful article by a fellow member, Justice Jennifer Jones of the Federal Court of Australia. I am sure you will find this article, as well as the many others we have featured on our website, as most interesting.

I also wish to announce some notable personal successes by some of our members:

- Justice Tony Pagone was appointed to the Federal Court of Australia in June, 2013. Prior to this appointment, he was a judge of the trial division and the judge in charge of the Commercial Court of the Supreme Court of Victoria.
- Judge Friederike Grube has completed her PhD at the University of Passau, with her thesis on European Tax Law.
- Dr. Manuel Hallivis Pelayo has been named President of the Tribunal Federal de Justicia Fiscal y Administrativa.

Our best wishes and congratulations to our colleagues on these achievements.

Again, I wish to thank you for your continued support for the IATJ by your continued membership, and invite you to participate in any and all of the activities and conferences sponsored by or in which the IATJ participates.

Kindest personal regards,

E.P. Rossiter, President

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TAXING TIMES IN AUSTRALIA

Justice Jennifer Davies

Rather than writing about recent tax cases, I thought that it might be more interesting to look at some recent policy announcements that could be quite significant for tax administration in this country, if implemented.

(a) The outsourcing of the ATO's audit functions

In November 2013, the Australian Taxation Office (ATO) announced that it was considering allowing certain large corporates to use their own auditors to conduct assurance reviews of their tax affairs for the ATO. A Draft Discussion Paper released for consultation provides a high level conceptual overview of the 'External Compliance Assurance Process' (ECAP). It is intended that the ECAP may be used by eligible taxpayers for assurance review where a risk has been identified by the ATO and also to confirm a tax position before the ATO's expression of an audit interest. A favourable assurance report by an external auditor under the ECAP would be accepted by the ATO as a final position on taxpayer compliance (absent some concern such as conflict of interest or misconduct).

It is proposed that assurance reviews conducted by approved external auditors will be limited to checking matters of fact "where the law is clear", and would not involve interpretations of law to remove any potential for an external view to "supplant the [ATO's] determination and application of the law". As a control measure, the ATO would select matters suitable for review under the ECAP. If the ECAP was offered, the taxpayer could choose either to have its own external auditor to review the evidence and confirm the relevant facts to the ATO (at the taxpayer's cost), or to have the ATO conduct the review. Participation in the ECAP would be voluntary and if a taxpayer did not wish to use their existing external auditor to provide the assurance, the ATO would conduct the review in accordance with its current review process.

In the Discussion Paper, the ATO acknowledges "concern areas" which focus around the ATO's ability to ensure the integrity, objectiveness and competency of the external auditors conducting the assurance reviews on the ATO's behalf. The ECAP at concept stage incorporates some intended safety measures to deal with these concerns. Fairly obviously, those measures principally are directed at ensuring relevant qualifications and experience, independence and compliance with regulatory auditing standards.

From the judicial perspective, perhaps of more interest are some of the broader policy issues around the proposed legislative framework for the ECAP, which are not touched on at all in the Discussion Paper. Of particular interest will be how external auditors will be clothed with the requisite authority to conduct assurance reviews on behalf of the ATO and how the ATO proposes to bind itself to accept favourable reviews as the final position on tax compliance without fettering its duty to apply the law. Also of interest

will be whether, and if so how, it is proposed to provide some measure of protection for external auditors where it is readily conceivable that all manner of satellite disputes may arise based on claims against them of perceived or real lack of independence, negligence, breach of contract or of misconduct.

The proposal is at a very early conceptual stage and it will be interesting to follow its development into a fully thought out initiative with the ramifications explored. The consultation process has only just begun so it is likely to be some time yet before much, if anything, happens. So far there is little publically available comment and such comment as there has been tends to be levelled at concern over the ability for the process to be corrupted by the big corporates, rather than at the broader policy level.

(b) Taxpayers' bill of rights

The Inspector-General of Taxation (whose job is to scrutinize the ATO) has announced that his work program for 2014 will include consideration of whether a taxpayer bill of rights with enforceable remedies for inappropriate ATO conduct is needed. The announcement has received favourable press comment.

There is a Taxpayers' Charter already in place but the Charter is an administrative declaration by the ATO as to what taxpayers can expect and does not necessarily give the taxpayers legally enforceable rights. There are also some compensation schemes which provide some level of protection for taxpayers. The types of compensation that can be considered are financial losses that have a direct connection to the actions of the ATO that give rise to a finding of legal liability (such as negligence) or where there has been defective administration. However, the rules for compensation are thought by some to be uncommercial and also that better remedies are needed to protect taxpayers from the ATO's wide powers. A key concern raised by taxpayers is that the ATO has been abusing its position and acting in breach of its obligations as a model litigant. Some of this concern arises out of a string of cases that the ATO lost in recent years against taxpayers in major and expensive court battles.

Under consideration by the Inspector-General will be whether the Charter is enough or whether there should be a bill of rights that would give an aggrieved taxpayer some enforceable legal remedy against the ATO for inappropriate ATO conduct which is not available through the Charter. Presently taxpayers are effectively confined to a claim against the ATO for misfeasance in statutory office, which is an extremely difficult claim to make and succeed on.

(c) Tackling profit-shifting

Australia has assumed the presidency of the G20 in 2014 and tackling multinational tax avoidance is a key focus of the Australian government. At the World Economic Forum in Davos, Switzerland, Prime Minister Tony Abbott pledged to address the "leakage that we've had in recent times through transfer-pricing".

The government has expressed concern that some multinational companies are deliberately structuring their business activities to limit taxes paid domestically and has identified a large disparity between the level of economic activity that these companies have in Australia and the amount of assessable income reported and tax (income and indirect) collected in Australia. Tackling profit shifting by multinationals is high on the ATO's agenda.

The Prime Minister will seek agreement from global leaders at the 2014 G20 summit in Australia to reform international taxation and implement strategies to ensure that companies "pay tax in the case where [they] earn the revenue".

In the G 20 official communique following meetings in Sydney in February 2014, the group said that it is "committed to a global response to Base Erosion and Profit Shifting (BEPS) based on sound tax policy principles" and that in 2014 they are focusing their efforts on substantially completing by the Brisbane summit in November 2014 key aspects of the core reforms set out in response to the global financial crisis: "building resilient financial institutions; ending too-big-to-fail; addressing shadow banking risks; and making derivatives markets safer". The group said that by its Brisbane meeting in November, the member nations would start to "deliver effective, practical, and sustainable measures" to combat transfer pricing.

By September, the group expects to be able to detail its plan for implementing a common reporting standard that allows for reciprocal and automatic exchange of tax information between all relevant parties, including financial institutions.

By the end of 2015, the group expects to begin the automatic information exchange, with any nations able to begin at an earlier date encouraged to do so.

Domestically, Australia has strengthened its transfer pricing and anti-avoidance rules laws and more than \$AUD100 million has been set aside for compliance activities.

(d) Proposed amnesty for undeclared foreign-held assets

On a related topic, the ATO is considering a plan to offer amnesty to taxpayers who have hidden offshore income or assets to declare those holdings and avoid prosecution in an attempt to recoup an estimated \$AUD1 billion or more in tax revenue.

Taxpayers will be enticed to come forward with a deal that limits liability for back taxes to four years. Those expected to take up the offer include children and grandchildren of migrants who moved cash and assets overseas during the 1950s and 1960s.

A previous amnesty in 2010 netted \$AUD570 million in unpaid taxes.

June 24, 2014

**IATJ 5th Assembly
October 23 and 24, 2014
Washington, D.C., U.S.A.
AGENDA**

Thursday, October 23, 2014

- 8:00 a.m. to 9:00 a.m. **Registration**
(8:45 a.m. to 12:00 noon registration continues)
- 8:45 a.m. to 8:55 a.m. **Words of welcome**
- 8:55 a.m. to 9:15 a.m. **IATJ Business Meeting**
- 9:15 a.m. to 10:30 a.m. **Static v. Dynamic Interpretation (150 min.)**
Chair: Manuel Hallivis-Pelayo (Mexico)
Panel: Magen Altuvia (Israel)
Michael Beusch (Switzerland)
Klaus-Dieter Drüen (Germany)
Bernard Peeters (Belgium)
Alexandre Alkmim Teixeira (Brazil)
- 10:30 a.m. to 10:45 a.m. Health Break
- 10:45 a.m. to 12:00 p.m. **Static v. Dynamic Interpretation** (continued)
- 12:00 p.m. to 1:30 p.m. Lunch
- 1:30 p.m. to 3:00 p.m. **Media Relations and Handling (90 min.)**
Chair: John O. Colvin (United States)
Panel: Robert Bauman (Canada)
Peter Darak (Hungary)
Robert Jan Koopman (Netherlands)
David Sellers, Asst. Dir., AOUSC
- 3:00 p.m. to 3:15 p.m. Health Break
- 3:15 p.m. to 4:45 p.m. **Tax Haven Jurisdiction (90 min.)**
Chair: Philippe Martin (France)
Panel: Joao Francisco Bianco (Brazil)
Jennifer Davies (Australia)
Anthony D.J. Gafoor
(Trinidad-Tobago)
P. K. Malhotra (India)
To be confirmed, (Netherlands)

Friday, October 24, 2014

- 9:00 a.m. to 10:30 a.m. **Double non-Taxation (165 min.)**
Chair: Kees van Raad (Netherlands)
Panel: Patrick Boyle (Canada)
 Malcolm Gammie (England)
 Friederike Grube (Germany)
 Pramod Kumar (India)
 Albert G. Lauber (United States)
 Petri Saukko (Finland)
- 10:30 a.m. to 10:45 a.m. Health Break
- 10:45 a.m. to 12:00 noon **Double non-Taxation** (continued)
- 12:00 noon to 1:30 p.m. Lunch
- 1:30 p.m. to 3:00 p.m. **Protection of the taxpayer in Court (90 min.)**
Chair: Randall S. Bocock (Canada)
Panel: Lewis R. Carluzzo (United States)
 Vineet Kothari (India)
 Annette Kugelmüller-Pugh (Germany)
 Emmanuelle Cortot-Boucher (France)
- 3:00 p.m. to 3:15 p.m. Health Break
- 3:15 p.m. to 5:00 p.m. **A Comparative Look at Selected (105 min.)
Procedural Issues**
Chair: Michael B. Thornton (United States)
Panel: Harald Jatzke (Germany)
 Dagmara Dominik-Oginska (Poland)
 Tony Pagone (Australia)
 To be confirmed, (Switzerland)
- 5:00 p.m. to 5:30 p.m. IATJ Annual Meeting continued and evaluation