

11 July 2012

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: economics.sen@aph.gov.au

Dear International Tax Integrity Unit Manager,

Inquiry: Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No.1) 2012

The Rule of Law Institute of Australia (RoLIA) thanks the Senate Standing Committees on Economics for the opportunity to submit on the Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No.1) 2012.

About RoLIA

RoLIA is an independent non-profit entity formed to uphold the rule of law in Australia.

The Institute's objectives are:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

Introduction

RoLIA's concern with the Bill is its retrospective operation back to 1 July 2004.

The rule of law comprises a number of fundamental principles by which laws (and executive and judicial decision making) are measured to see if they fulfil those principles.

The principles include that laws should be capable of being complied with and therefore not operate retrospectively.

RoLIA acknowledges, however, that in exceptional circumstances retrospectivity is justified.

What is at issue with the present Bill is whether there are exceptional circumstances to justify the retrospective operation back to 2004.

Are there exceptional circumstances

The first circumstance is claimed to be that the Bill represents the intention of Parliament and that the Bill simply clarifies what Parliament has always intended.

We can find no evidence that this was the intention of Parliament. No Member of Parliament who spoke in reference to the original Bills said anything which would convey that was the intent. There is nothing in the second reading speeches which offers any support nor anything in the Senate.

We can find no reference to any Member of Parliament who has said that it was the intent to confer an independent power to assess.

Explanatory Memorandum on Tax Bills do not represent in practice the intention of Parliament, but the Commissioner's interpretation of the Bill.

The second circumstance is claimed to be that the Commissioner has stated over several years that his interpretation of the provisions was that the double tax treaties gave him an independent power to assess. Taxpayers have replied that they had a different interpretation. Frequently this occurs and the Commissioner tests his view in court. The matter is then argued and a decision made on whose interpretation is correct.

Here the Commissioner has not tested his view before the courts notwithstanding that he has had ample opportunity to do so, over 8 years.

Instead he now seeks retrospective legislation back to 2004 and does not explain why he has not requested legislation in the 2004 year or any subsequent year. Again he had ample opportunity to do so.

We find no merit in this second claim.

Furthermore, there is no suggestion that the Bill is to remedy an artificial tax avoidance scheme; *Huitson v HM Revenue & Customs* [2011] EWCA Civ 83. And there is no suggestion that other taxpayers will unfairly shoulder a tax burden unless the law is retrospectively amended.

Finally, this Bill is not just a domestic matter but involves our dealings with all those countries we have double tax treaties with; which is almost every country in the world. It also involves dealings by non-residents. The law on such a subject should

not be lightly changed, and certainly not retrospectively. It sends the wrong message that Australia is a place that retrospectively amends their law back to 2004.

Conclusion

We consider that the Government has the onus of establishing exceptional circumstances to justify the retrospective legislation. They have not done this in respect of the Bill.

Yours faithfully

Robin Speed
President
Rule of Law Institute of Australia