LEGISLATING AGAINST TAX AVOIDANCE

Table of Contents

ABSTRACT

1 INTRODUCTION
  1.1 Purpose of the thesis
  1.2 Context of the thesis
  1.3 Structure of the thesis

2 STATUTORY GENERAL ANTI-AVOIDANCE RULES – ADVANTAGES AND DISADVANTAGES
  2.1 Tax and tax avoidance
    2.1.1 What is tax avoidance?
    2.1.2 What is tax evasion?
    2.1.3 Tax evasion as a crime, and tax avoidance as a breach of a social contract?
    2.1.4 Tax avoidance and legitimate tax planning
    2.1.5 Conclusions
  2.2 Avoidance of taxation in Australia
    2.2.1 Income tax
    2.2.2 Goods and Services Tax
    2.2.3 State Stamp Duties
    2.2.4 Conclusions
  2.3 Consequences of tax avoidance
    2.3.1 Consequences of tax avoidance for governments
    2.3.2 Consequences of tax avoidance for taxpayers
    2.3.3 Consequences of tax avoidance for the economy
    2.3.4 Consequences of tax avoidance for tax avoidance
  2.4 Examination of statutory GAARS
    2.4.1 Purpose of statutory GAARS
    2.4.2 Nature of statutory GAARS
    2.4.2.1 The general form of a statutory GAAR
    2.4.2.2 The Role of Tax Advisors and Scheme Promoters
    2.4.2.3 The Ralph Report
  2.5 Advantages and disadvantages of statutory GAARS
    2.5.1 Advantages of statutory GAARS
    2.5.2 Disadvantages of statutory GAARS
    2.5.2.1 Uncertainty
    2.5.2.2 The Rule of Law
    2.5.2.3 Conclusions
    2.5.2.4 Do Statutory GAARS stop or slow avoidance?
  2.6 Conclusions
3 ASSESSMENT OF ALTERNATIVES TO GENERAL ANTI AVOIDANCE RULES: THE JUDICIARY, THE ADMINISTRATION AND THE LEGISLATURE

3.1 The judiciary
3.1.1 Judicial Anti-Avoidance Doctrines in the US
3.1.1.1 Re-characterisation
3.1.1.2 Economic Substance Doctrine
3.1.1.3 Statutory anti-abuse provisions
3.1.1.4 Conclusions on the direction of US judicial doctrines
3.1.1.5 Application of the US Doctrines in Australia
3.1.2 The Ramsay Principle in the UK
3.1.2.1 Development of the Ramsay Principle
3.1.2.2 Collector of Stamp Revenue v Arrowtown Assets Ltd
3.1.2.3 Barclays and Scottish Provident decisions
3.1.2.4 Application of the Ramsay Principle in Australia
3.1.2.5 Conclusions
3.1.3 “Substance over Form” and the Australian High Court
3.1.3.1 The Dick Smith decisions
3.1.3.2 Implications of Dick Smith for taxpayer certainty
3.1.4 Conclusions

3.2 The Administration
3.2.1 Administrative Powers
3.2.1.1 Powers of Administrators to gather information
3.2.1.2 Reciprocal Powers Legislation
3.2.1.3 Conclusions
3.2.2 Rights of Taxpayers against Administrative Powers
3.2.2.1 Legal Professional Privilege
3.2.2.2 Estoppel
3.2.2.3 Common law duty of reasonableness
3.2.2.4 Administrative decisions (Judicial Review) Act 1977 (Cth)
3.2.2.5 Ombudsman Act 1976 (Cth)
3.2.2.6 Freedom of Information Act 1982 (Cth)
3.2.2.7 Taxpayers’ Bill of Rights?
3.2.2.8 Conclusions
3.2.3 Use of investigative powers where a GAAR exists
3.2.3.1 PS LA 2005/24: Application of General Anti-Avoidance Rules
3.2.3.2 Use of administrative powers to build a common law avoidance case
3.2.3.3 Appearing before the GAAR Panel or continued roving inquiry
3.2.4 Use of Taxpayer Alerts and Rulings
3.2.5 Conclusions

3.3 The Legislature
3.3.1 Requirement of disclosure of schemes by promoters
3.3.1.1 United States
3.3.1.2 Canada
3.3.1.3 United Kingdom
3.3.1.4 New Zealand
3.3.1.5 Australia
3.3.1.6 Conclusions on the requirement of disclosure
3.3.2 Legislation abrogating legal professional privilege
3.3.2.1 James Hardie legislation
3.3.2.2 Use made of information gathered through the abrogation of legal professional privilege by the legislature
3.3.3 Retroactive SAARS
3.3.3.1 Retroactive SAARS: example of the Finance Act 1978 (UK)
3.3.3.2 Partially retrospective SAARS
3.3.3.3 Making statutory GAARS more certain
3.3.4 Interference by the legislature with advice by practitioners
3.3.4.1 Case study: US circular 230 and taxpayer certainty
3.3.4.2 Conclusions on interventions by the legislature in practitioner advice
3.3.4.3 Conclusions on the legislature

3.4 Case study: Hart case
3.4.1 The Hart case
3.4.2 The Judiciary
3.4.3 The Administration
3.4.4 The Legislature
3.4.5 Conclusions

4 STATUTORY GAAR IN AUSTRALIA’S INCOME TAXATION legislation
4.1 Introduction
4.2 Former Section 260
4.2.1 The Choice Principle
4.2.2 Extension of the Choice Principle
4.2.3 Revival of Section 260
4.2.4 Conclusions
4.3 Part IVA of the ITAA36
4.3.1 Introduction
4.3.2 Scheme
4.3.2.1 Statutory definition of “scheme”
4.3.2.2 Judicial limitations on the meaning of scheme?
4.3.3 Tax Benefit
4.3.4 Purpose
4.3.5 Cancellation of Tax Benefit
4.3.6 Penalties
4.3.7 Objections and Appeals against a determination
4.3.8 Part IVA and recommendations of Review of Business Taxation Committee
4.3.9 Is Part IVA of the ITAA36 sufficiently general?
4.4 Does Part IVA impose sufficient limits upon the Commissioner?
4.5 Response to arguments that Hart expanded Part IVA
4.6 Response to arguments for the abandonment of Part IVA
   4.6.1 Requirement of a purposive approach to statutory interpretation
   4.6.2 Expanding the judicial function
   4.6.3 Changing Community Values
   4.6.4 Conclusions
4.7 PS LA 2005/24
   4.7.1 Application of GAARS
   4.7.2 Application of GAARS in Rulings
   4.7.3 Role and operation of the GAAR Panel
   4.7.4 Other initiatives in PS LA 2005/24
4.8 Addressing the supply of tax avoidance schemes
   4.8.1 Link between promoters and avoidance
   4.8.2 Promoter Penalties Legislation
   4.8.2.1 Nature of the Promoter Penalties
   4.8.2.2 Improving Taxpayer Certainty: Part IVA and Promoter Penalties
   4.8.2.2.1 Legal Professional Privilege
   4.8.2.2.2 Reduction of promoter penalties for a tax adviser cooperating with the Commissioner
   4.8.2.2.3 Discretionary exercise of part IVA of the ITAA36 and Division 290 of the TAA53
   4.8.2.3 Conclusions
   4.8.3 PS LA 2005/25
   4.8.3.1 Nature of PS LA 2005/25
   4.8.3.2 Recommendations with respect to PS LA 2005/25
   4.8.4 Conclusions: Part IVA, promoter penalties, PS LA 2005/25
4.9 Case Study: the Hart case
   4.9.1 Similarities between the GAAR with regulations for its administration and Part IVA
   4.9.2 Differences between the GAAR containing regulations for its administration and part IVA
   4.9.3 Conclusions on the case study
4.10 Conclusions

5 FORM OF A STATUTORY GAAR
5.1 Introduction
5.2 International Comparison of Statutory GAARS
   5.2.1 New Zealand
   5.2.1.1 Judicial interpretation of the New Zealand GAAR
   5.2.1.2 Administrative policy for the application of the New Zealand GAAR
   5.2.1.3 Promoter Penalties in New Zealand
   5.2.1.4 Comparison of the New Zealand GAAR with part IVA of the ITAA36 - Conclusions
   5.2.2 Canada
5.2.2.1 Judicial interpretation of the Canadian GAAR
5.2.2.2 Administrative policy for the application of the Canadian GAAR
5.2.2.3 Promoter Penalties in Canada
5.2.2.4 Comparison of the Canadian GAAR with Part IVA of the ITAA36 - Conclusions
5.2.3 South Africa
5.2.3.1 South African GAAR operating until November 2006
5.2.3.1.1 Perceived problems with section 103 of the Income Tax Act 1962
5.2.3.2 The SARS proposal for a new GAAR
5.2.3.2.1 Preliminary issues
5.2.3.2.2 The SARS proposal
5.2.3.3 Enactment of a new GAAR
5.2.3.4 Conclusions
5.3 Australian GST GAAR
5.3.1 Differences between Part IVA and Division 165
5.3.1.1 Preamble to Division 165
5.3.1.2 Part of a scheme
5.3.1.3 Factors to refer to in determining the dominant purpose of a scheme
5.3.1.4 Conclusions
5.3.2 Division 165 Rulings
5.3.3 VCE and Commissioner of Taxation
5.3.4 Division 165
5.3.5 Conclusions
5.4 Australian Fringe Benefits Tax GAAR
5.5 Stamp Duty GAARS
5.5.1 New South Wales and Tasmania
5.5.2 Queensland
5.5.3 Victoria
5.5.4 South Australia
5.5.5 Western Australia
5.5.6 Australian Capital Territory
5.5.7 Northern Territory
5.6 Conclusions

6 A UNIFORM STATUTORY GAAR
6.1 Introduction
6.2 Uniform legislation
6.2.1 Spain and Germany
6.2.2 Uniformity in Australia
6.2.3 Uniform Evidence Legislation in the Commonwealth of Australia
6.3 Uniform administration
6.3.1 PSLA 2005/24
6.3.1.1 Rulings with respect to the GAAR
6.3.1.2 GAAR Panel
6.3.2 Uniform GAAR Panel
6.3.2.1 Proposed form of the GAAR Panel under a Uniform GAAR
6.3.2.2 Composition of the GAAR Panel
6.3.2.3 Advantages of a Uniform GAAR Panel for state/territory and Federal Governments
6.3.2.4 Proposed operation of the GAAR Panel under a uniform GAAR

6.4 Proposed uniform GAAR
6.4.1 Elements of a uniform GAAR
6.4.2 Proposed uniform GAAR
6.4.2.1 Proposed Intergovernmental Agreement
6.4.2.2 Proposed Uniform General Anti-Avoidance Rule Act
6.4.2.3 Proposed Uniform General Anti-Avoidance Rule Regulations

7 CONCLUSIONS
7.1 Findings of the thesis
7.2 How the thesis may be used
7.3 Further research that may follow from the thesis
7.4 Conclusions

8 APPENDIX A: PART IVA OF THE ITAA36

9 APPENDIX B: NEW ZEALAND GAAR

10 APPENDIX C: CANADIAN GAAR

11 APPENDIX D: SOUTH AFRICAN GAAR

12 APPENDIX E: GST GAAR

13 APPENDIX F: FBT GAAR

14 APPENDIX G: QUEENSLAND STAMP DUTY GAAR

15 APPENDIX H: VICTORIAN STAMP DUTY GAAR

16 APPENDIX I: WA STAMP DUTY GAAR

17 APPENDIX J: ACT STAMP DUTY GAAR

18 APPENDIX K: NORTHERN TERRITORY STAMP DUTY GAAR

19 BIBLIOGRAPHY