Tax Stability

“The hardest thing in the world to understand is income tax”

Albert Einstein

The internationalisation of Australian tax law

Multinational Anti-Avoidance Law (1 January 2016)

Diverted Profits Tax (1 July 2017)

Hybrid mismatch rules (Div 832 of the *Income Tax Assessment Act 1997* (Cth)) (1 January 2019)

Multilateral Convention to Implement Capital Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) (7 June 2017)

Considerations in an Internationalised Framework

Domestic tax laws of countries can differ

Considerations in an Internationalised Framework

Treaty interpretation

Interpretative Principles

Vienna Convention on the Law of Treaties [1974] ATS 2

Art 31

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

Art 32

"Recourse may be had to supplementary means of interpretation…"

Art 33

"When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language…"

“If the terms of an instrument enacted in Australian law were interpreted strictly in accordance with domestic principles of statutory interpretation, there would be a risk that the treaty would be interpreted differently even though other countries had adopted the same instrument. That risk is significant with double tax agreements. The whole point of those agreements – to prevent double taxation across two jurisdictions – would be frustrated if ‘they were to be interpreted in a manner which would permit or foster conflicting outcomes between the two States in question’.”

Bywater Investments Ltd v Federal Commissioner of Taxation

(2016) 260 CLR 169 at [148] per Gordon J

Differences of construction

"Interpretation is not an exact science"
Judge Michael Beusch,
Swiss Federal Administrative Court

Burton v Federal Commissioner of Taxation
[2019] FCAFC 141

Australia-US Convention Art 22(2):
"… in respect of income derived from sources in the United States… [but that] the credit shall not exceed the amount of Australian tax payable on the income."

Use of foreign case law

"… where the construction of an international treaty arises, evidence as to the interpretation of that or subsequent treaties in one of the participating countries forms part of a matrix of material to which reference could properly be made in an appropriate case."

Commissioner of Taxation v Lamesa Holdings BV

(1997) FCR 597

Tech Mahindra Limited v Federal Commissioner of Taxation

(2016) 250 FCR 287

Satyam Computer Services Ltd v Federal Commissioner of Taxation
[2018] FCAFC 172

Macoun v Commissioner of Taxation

(2015) 257 CLR 519

The problem of language

Thiel v Commissioner of Taxation

(1990) 171 CLR 338

Commissioner of Taxation v Lamesa Holdings BV

(1997) FCR 597

Considerations in an Internationalised Framework

Integration of soft law

OECD Model Convention and Commentaries

OECD Transfer Pricing Guidelines

MLI Commentaries

Considerations in an Internationalised Framework

Foreign law as an integer of domestic tax law

E.g. hybrid mismatch rules and diverted profits tax provisions

Proving foreign law

"The courts of Australia are not presumed to have any knowledge of foreign law. Decisions about the content of foreign law create no precedent. That is why foreign law is a question of fact to be proved by expert evidence."

Neilson v Overseas Projects Corporation of Victoria Ltd

(2005) 223 CLR 331 at [115] per Gummow and Hayne JJ

Expert evidence of foreign law

Content and operation of foreign law: a question of fact for expert evidence

Application of foreign law to facts of particular case: a question of law for judicial determination

"It is fundamental that the ascertainment of the law relevant to a matter before a court and its proper application to the facts of the particular case are of the essence of the judicial function and duty. Although those processes are properly the subject of submission, *evidence* of opinion, whether as to the identification of the relevant law or as to its proper application, is not admissible. The rationale underlying this fundamental principle may be expressed in various closely related ways: to admit such evidence would be to permit abdication of the judicial duty and usurpation of the judicial function; such evidence cannot be allowed to be probative or to rise higher than a submission; such evidence is necessarily irrelevant."

Allstate Life Insurance Co v

Australia and New Zealand Banking Group Ltd (No 6)

(1996) 64 FCR 79 at 83 per Lindgren J

"… the Court is concerned with foreign law as a subsidiary fact necessary to determine the rights and liabilities of the parties under the law of New South Wales… Evidence of foreign law experts as to the effect of foreign law, where the effect of foreign law is relevant to the administration of domestic law, is not capable of usurping the function of the court any more than is evidence of any other fact relevant to the determination of the rights and liabilities of the parties under domestic law."

Idoport Ptd Ltd National Australia Bank Ltd

(2000) 50 NSWLR 640 at 656 [44] per Einstein J

A tension?

Expert evidence can however include evidence as to how a discretion would be exercised by a foreign court.

Neilson v Overseas Projects Corporation of Victoria Ltd [2005] HCA 54

In the absence of proof

The presumption that foreign and Australian law are the same is

a general but not universal presumption

"Taxation law cannot be assumed to be a field resting on great and broad principles likely to be part of any given legal system."

Damberg v Damberg & Ors

(2001) 52 NSWLR 492 at 522 [162] per Heydon JA

"… an English translation of the text of foreign written law is not necessarily to be construed as if it were an Australian statute. Not only is there difficulty presented by translation of the original text, different rules of construction may be used in that jurisdiction."

Neilson v Overseas Projects Corporation of Victoria Ltd

(2005) 223 CLR 331 at 370 [115] per Gummow and Hayne JJ

"The Court is not well placed to resolve theoretical differences between competing experts whose judgments are soundly based and are responsibly held within established disciplines in areas of non-legal expertise: see *Bronzel v State Planning Authority* (1979) 21 SASR 513; 44 LGRA 34. It is common to find different opinions reasonably held in established disciplines, fields of learning, and areas of expertise which cannot be resolved by courts of law, and, as Wells J cautioned in *Bronzel v State Planning Authority* (1979) 21 SASR 513; 44 LGRA 34, a judge should not be cast in the role of a third valuer. In *Riverbank Pty Ltd v Commonwealth* (1974) 48 ALJR 438 Stephen J observed ay 484 that even the first step of selecting sales of properties thought to be sufficiently comparable may be attended with difficulty explaining why "the stuff of valuation" was "an art, not a science". Ultimately, however, a court needs to be persuaded that one or other of the opinions is to be preferred by reference to the explanations and reasons given by the experts for their opinions."

Resource Capital Fund IV LP v Federal Commissioner of Taxation

(2018) 107 ATR 249; [2018] FCA 41 at [112] per Pagone J

Expert evidence

in the determination of factual controversies

- An independent specialist taxation tribunal
- Appointment of referees:

Federal Court of Australia Act 1976 (Cth) s 54A; *Commissioner of Taxation v Caratti* [2018] FCA 465

The importance of international jurisprudence

Relevant foreign case law

Materials illuminating the underlying policy framework

Expansion of international tax law jurisprudence