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EDITORIAL

“Steady as she goes!” in the troubled waters of tax practice and tax administration 65

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What is a question of law? – *Stephen Gageler*

The distinction between fact and law has application not merely in the context of general questions of statutory construction, but more broadly, such as in circumstances where an error of law establishes a statutory ground of appeal. In Australia, it also has a constitutional dimension, underpinning the principles of the separation of judicial power and strong form judicial review of administrative action. This article discusses attempts to answer the perennial question of “what is a question of law?” 68

BEPS: Thinking inside or outside the box? – *Michael D’Ascenzo*

Base erosion and profit shifting (BEPS) has become a topical subject. There is little doubt that the current international tax architecture is struggling to provide a reflex of tax that is seen as satisfactory by all countries. However, finding substitute benchmarks for the allocation of tax amongst jurisdictions has so far proved elusive. This article considers the OECD’s BEPS Action Plan from the perspective of whether it is likely to provide holistic and globally acceptable solutions to the BEPS problem. It concludes that while the BEPS Action Plan constitutes a good start, some radical thinking and much political consensus will be at a premium. 75

Criminal law without the conventional safeguards: Are the procedural dispensations in relation to prescribed taxation offences fair? – *Mathew Leighton-Daly*

The prescribed taxation offences in the Taxation Administration Act 1953 (Cth) are the default criminal law response to tax crime. The regime contributes to the integrity of the tax administration system as well as the protection of the revenue. The provisions, however, also dispense with a number of conventions usually ascribed to the criminal law, including in relation to proof and fault. Empirical evidence suggests that procedural justice or fairness is a key factor in influencing taxpayer compliance. This article analyses the procedural dispensations associated with prescribed taxation offences by reference to some general criminal law conventions, taking into account any special considerations associated with the revenue. The general criminal law conventions are used as benchmarks from which fairness is gauged. It is concluded that notwithstanding the peculiarities associated with the revenue and objectives of the Taxation Administration Act, some of the departures from criminal law conventions are unfair. 86

Taxing trust income by “entitlement”: The end of the road? – *John Glover*

The presently entitled formula establishes and allocates tax liability for trust income in Div 6 of the Income Tax Assessment Act 1936 (Cth). However, entitlement does not provide a stable link between taxpayers and the economic advantages associated with trusts. The meanings of “presently entitled” and “trust estate” are ambiguous in both Anglo-Australian and American trusts law. Unsurprisingly, Australian courts have wrestled

with the terms for many years. The utility of continuing with the presently entitled formula to tax trust income is questioned in light of the new specifically entitled regime for taxing trusts' capital gains. The article also considers interest in possession trusts in the United Kingdom and the recent authorities of *Colonial First State Investments Ltd v FCT* and *Howard v FCT*. 101

Taxation determinations as de facto regulation: Private equity exits in Australia – *Robin Cao, Larelle Chapple and Kerrie Sadiq*

The Australian Taxation Office (ATO) attempted to challenge both the private equity fund reliance on double tax agreements and the assertion that profits were capital in nature in its dispute with private equity group TPG. Failure to resolve the dispute resulted in the ATO issuing two taxation determinations: TD 2010/20 which states that the general anti-avoidance provisions can apply to arrangements designed to alter the intended effect of Australia's international tax agreements network; and TD 2010/21 which states that the profits on the sale of shares in a company group acquired in a leveraged buyout is assessable income. The purpose of this article is to determine the effectiveness of the administrative rulings regime as a regulatory strategy. This article, by using the TPG-Myer scenario and subsequent tax determinations as a case study, collects qualitative data which is then analysed (and triangulated) using tonal and thematic analysis. Contemporaneous commentary of private equity stakeholders, tax professionals, and media observations are analysed and evaluated within a framework of responsive regulation and utilising the current ATO compliance model. Contrary to the stated purpose of the ATO rulings regime to alleviate complexities in Australian taxation law and provide certainty to taxpayers, and despite the de facto law status afforded these rulings, this study found that the majority of private equity stakeholders and their advisors perceived that greater uncertainty was created by the two determinations. Thus, this study found that in the context of private equity fund investors, a responsive regulation measure in the form of taxation determinations was not effective. 118