

**A MODEL OF TAXPAYERS' RIGHTS AS A GUIDE TO BEST
PRACTICE IN TAX ADMINISTRATION**

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SUMMARY

This thesis proves the hypothesis that it is timely and beneficial to articulate a Model of taxpayers' rights as a guide to best practice in tax administration. It first finds a rationale for a Model in legal and rights theory and concludes that a Model is necessary, timely and a realistic option in the context of current developments in tax administration. Next, it articulates the principles that should underlie any Model. These are drawn from traditional analysis of tax systems and refined to provide a standard approach and interpretation. It is noted that the content of any Model will be determined in part by the approach taken to its interpretation. A classification of taxpayers' rights in the context of the type of enforcement that gives them application provides the basis for a detailed analysis of enforcement mechanisms. The analysis is conducted in the light of recent developments in the application of constitutional law and alternative dispute resolution theory. The substantial part of the thesis comprises a detailed analysis and articulation of the primary and secondary legal and administrative rights that should be available to taxpayers in conjunction with a comprehensive framework of principles of good governance and good practice. A wide-ranging comparative analysis and synthesis of the substantial available literature in both law and other disciplines provides support for the articulation of a Model of taxpayers' rights. The Model is appropriate for use as a guide to best practice in tax administration.

CERTIFICATION

I, Duncan Bentley, certify that the work contained in this thesis represents my own work and has not been previously submitted for a degree or diploma in this University or any other institution.

25 November 2006

NOTATION OF PRIOR WORK

The following works of the author, which have been previously published, have been drawn on in the writing of this thesis:

- Alley, C.R., and D. Bentley, 'Tax Design Principles: Remodelling Adam Smith', (2005) 20 *Australian Tax Forum*, 579. (Only those parts of this article prepared by the author were drawn upon, and all references to this work are, of course, fully cited.)
- Bentley, D., (ed.), *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998).
- Bentley, D., 'Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules' (1996), 25 *Australian Tax Review*, 97.
- Bentley, D., 'Problem Resolution: Does the ATO Approach Really Work' (1996) 6 *Revenue Law Journal*, 17.
- Bentley, D., 'The Taxpayers' Charter: More Than a Mission Statement' (1995-96) 4 *Taxation in Australia Red Edition*, 259.
- Bentley, D., 'The Commissioner's Powers: Democracy Fraying at the Edges?' (1994) 4 *Revenue Law Journal*, 85.

STYLE

This thesis adopts the style guide of Kluwer International Law Publishers.

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TABLE OF CASES

AUSTRALIA

- A. v. Hayden*, [No. 2] (1984) 156 CLR 352
Baker v. Campbell, (1983) 153 CLR 52
Butler v. Attorney-General, (Vic) (1961) 106 CLR 268
Case 3/2004, 2004 ATC 119
Chu Kheng Lim v. Minister for Immigration, (1992) 176 CLR 1
Commissioner for Australian Federal Police v. Propend Finance Pty Ltd, (1997) 188 CLR 501
CTC Resources NL v. FC of T, (1994) 48 FCR 397
Edelsten v. Wilcox, (1988) 83 ALR 99; 15 ALD 546
FC of T & Ors. v. Citibank Ltd (1988) 83 ALR 144
FC of T & Ors. v. Citibank Ltd (1989) 20 FCR 403
Grant v. Downs (1976) 135 CLR 674
Gray v. FCT (1989) 20 ATR 649
Groffam Pty Ltd v. FCT, (1997) 36 ATR 493
Hepples v. FCT (1991) CLR 492, 497
Industrial Equity Ltd v. DFC of T, (1990) 170 CLR 649
MacCormick v. FCT, (1984) 15 ATR 437
Nationwide News Pty Ltd v. Wills, (1992) 177 CLR 1
Nodnara Pty Ltd v. Deputy Commissioner of Taxation, (1997) 38 ATR, 527
The Bribery Commissioner v. Pedrick Ranasinghe, [1965] AC 172

CANADA

- Attorney-General for Canada v. Attorney-General for Ontario*, [1937] AC 326
Baron v. Canada, [1993] 1 CTC 111
Ludmer v. The Queen, 95 DTC 5311 (FCA)
MNR v. Kruger Inc, [1984] CTC 506
Solonsky v. Canada, (1979) 105 DLR (3d) 745
Symes v. The Queen, [1994] 1 CTC 40, 94 DTC 6001 (SCC)
Tibbadeau v. Canada, [1995] 2 SCR 627, [1995] 1 CTC 212, 95 DTC 5998 (SCC)

EUROPE

- Abdulaziz, Cabales and Balkandali v. United Kingdom*, Series A, No. 94; (1985) 7 EHRR 471
Beudenom v. France, Series A, No. 284; (1994) 18 EHRR 54
Biehl v. Administration des contributions du grand duché de Luxembourg, Case C175/88 [1990] ECR I-1779.
Borgers v. Belgium, Series A, vol. 214-B
Case 98/78 [1979] ECR 69
Chassagnon and others v. France, (2000) 29 EHRR 615
Commission of the European Communities v. Belgium, Case C300/90 [1992] ECR I-305
Commission v. France, Case C270/83 [1986] ECR 273
C v. United Kingdom, Case No. 10358/83 (1983) 37 DR 142
Dombo Bebeer BV v. Netherlands, Series A, No. 274-A; (1994) 18 EHRR 213

Engel and others v. Netherlands, Series A, No. 22; (1979-80) 1 EHRR 647
Finanzamt Köln-Altstadt v. Schumacker, Case C209/93 [1995] ECR I-225
Fredin v. Sweden, (1991) 13 EHRR 784
Funke v. France, 10828/84 [1993] ECHR 7 (25 February 1993), Series A No. 256-A
Gebroeders van Es dooane Agenten BV v. Inspecteur der Invoerrechten en Accijnzen, [1996] E.C.R. I-431
Handyside v. United Kingdom, A24 (1976); (1976) EHRR 737
Heaney and McGuinness v. Ireland, Case No. 34720/97 (21 December 2000)
Hentrich v. France, 13616/88 [1994] ECHR 29 (22 September 1994), Series A No. 296-A
HWK v. Switzerland, Application No. 23399/94
James v. United Kingdom, Series A, No. 98; (1986) 8 EHRR 123
Lauko v. Slovakia, (App 26138/95)
Martin Bachmann v. Belgium, Case C204/90 1992 ECR I-249
National & Provincial Building Society and others v. United Kingdom, (1998) 25 EHRR 127
Öztürk v. Germany, Series A, No. 73; (1984) 6 EHRR 409
Ruiz-Mateos v. Spain, Series A, No. 262; (1993) 16 EHRR 505
R v. Inland Revenue Commissioners, Ex parte Commerzbank AG, Case C330/91 AG [1993] ECR I-4017.
R. v. Ministry of Agriculture, Fisheries and Food, ex parte Fedesa, Case C-331/88 [1990] ECR I-4023
Saunders v. United Kingdom, (1997) 23 EHRR 313
Société Stenuit v. France, European Commission of Human Rights, Application No. 11598/85, Report of 30 May 1991, 14 EHRR 509
Sporrong and Lönnroth v. Sweden, Series A, No. 52; [1982] ECHR 5, 18
Sunday Times v. United Kingdom, Series A, No. 30; (1979-80) 2 EHRR 245.
Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62 [1963] ECR 1, [1970] CMLR 105

NEW ZEALAND

Commissioner of Inland Revenue v. West-Walker, [1954] NZLR 191
High Court in Herewini v. Ministry of Transport, (1992) 9 CRNZ 307
Ministry of Transport v. Noort, [1992] 3 NZLR 260
Temese v. Police, (1992) 9 CRNZ 425

SOUTH AFRICA

DA Park-Ross v. The Director, Office for the Investigation of Serious Economic Offences, 1995 (2) SA 198 (C)

UNITED KINGDOM

Ali Fayed v. Advocate General, [2002] ScotCS 349
Associated Provincial Picture Houses v. Wednesbury Corporation, [1948] 1 KB 223
Chief Constable of the North Wales Police v. Evans, [1982] 3 All ER 141
Council of Civil Service Unions v. Minister for the Civil Service, [1985] AC 374
Garnett v. Bradley, (1878) 3 App Cas 944
Greenough v. Gaskell, 1 My. & K. 103, 39 E.R. 621
Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd, [1982] AC 617
IRC v. Commerzbank, (1990) STC (UK) 285
Marks & Spencer plc v. Halsey (HM Inspector of Taxes), Case C-446/03 [2006] Ch 184

Re W. (An Infant) [1971] AC 682, 700.
R v. IRC, ex parte Fulford-Dobson, [1978] Simon's Tax Cases
Vestey and Others v. IRC, (No. 2) [1979] 3 WLR 915
Vestey v. IRC, [1978] Simon's Tax Cases, 575

UNITED STATES

Colton v. United States, 306 F.2d 633 (2d Cir. 1962)
First Federal Savings & Loan Association v. Goldman, 644 F Supp 101, 102 (WD Pa 1986)
Fisher v. United States, (1976) 425 US 391
Hunter v. Southam, (1985) 14 SCC (3d) 97 SCC

TABLE OF STATUTES, TREATIES & REVENUE RULINGS

AUSTRALIA

Acts Interpretation Act 1901 (Cth)
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Administrative Appeals Tribunal Act 1975 (Cth)
Audit Act 1901 (Cth)
Commonwealth of Australia Constitution Act 1900
Crimes Act 1914 (Cth)
Crimes Act 1922 (Cth)
Financial Management and Accountability Act 1997 (Cth)
Freedom of Information Act 1982 (Cth)
Fringe Benefits Tax Assessment Act 1986 (Cth)
Human Rights and Equal Opportunities Commission and Public Service Act 1999 (Cth)
Income Tax Assessment Act 1936 (Cth)
Income Tax Assessment Act 1997 (Cth)
Inspector-General of Taxation Act 2003 (Cth)
Public Service Act 1999 (Cth)
Public Service Regulations 1922 (Cth), updated by the Public Service Act 1999 (Cth)
Queensland Legislative Standards Act 1992 (Qld)
Taxation Administration Act 1953 (Cth)
Taxation Laws Amendment Bill (No. 2), 1995
Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006
Taxation Laws Amendment (Self Assessment) Bill 1992.
Taxation Ruling TR 2006/2

CANADA

Canadian Income Tax Act (RSC 1985 (5th Supp.) c. 1)
Canadian Charter of Rights and Freedoms - Constitution Act 1982
Canadian Income Tax Act (amended 1986 and 1994)
Interpretation Act (R.S., 1985, c. I-21)

EUROPE

EU, Code of Conduct for Business Taxation, 1998 OJ (C2) 2, p. 2. Resolution of the Council and Representatives of the Governments of the Member States
EU, Commission of the European Communities, *Green Paper: The Presumption of Innocence* COM(2006) 174 final
EU, Conclusions of the ECOFIN Council Meeting on 1 December 1997 Concerning Taxation Policy, 1998 OJ (C2) 1
EU, Directive on Mutual Assistance Between Member States of the European Union (799/77/EC) European Convention on Human Rights
EU, Merger Directive (434/90/EC), art. 53a
EU, Parent-Subsidiary Directive (435/90/EC)
EU, Resolution of the Council and Representatives of the Governments of the Member States, Meeting within the Council of 1 December 1997 on a Code of Conduct for Business Taxation, 1998 OJ (C2) 2
EU, Treaty on European Union

Germany, Basic Law.
Germany, Fiscal Code, *Abgabenordnung*.
Netherlands, General Act on Taxation of 1959
Sweden, Regeringsformen, 1974
Switzerland, Ordinance of the FDF on Electronically Transmitted Data and Information
United Kingdom, House of Commons Disqualification Act 1975
United Kingdom, Interpretation Act 1978
United Kingdom, The Official Secrets Act
United Kingdom, Human Rights Act 1998
United Kingdom, Internal Revenue Service Restructuring and Reform Act of 1998

INTERNATIONAL

African Charter on Human and Peoples Rights
American Convention on Human Rights
European Convention on Human Rights
European Social Charter
General Agreement on Trade and Tariffs
International Covenant on Civil and Political Rights
Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights
Marrakesh Agreement Establishing the World Trade Organization
Universal Declaration of Human Rights
Vienna Convention on the Law of Treaties

JAPAN

Gyōsei Tetsuzuki Hō (Administrative Procedure Law (APL)), Article 1, Law No. 88 of 1993.
Individual Circular: On the Advance Recognition of Arm's Length Price Calculations on Intercompany Transactions [Kobetsu Tsūtatsu: Dokuritsu-kigyō-kan Kakaku no Santei-hōhō-tō no Kakunin ni Tsuite] (1987 Sachō 5-1 Gai-2-ka Kyōdō).

OTHER JURISDICTIONS

Malaysia, Income Tax Act 1967
New Zealand, Bill of Rights Act 1990
New Zealand, Tax Administration Act 1994, amended 2004.
New Zealand, Tax Administration Act 1994
Singapore, Income Tax Act
South Africa, Constitution of the Republic of South Africa 1996
South Africa, Income Tax Act no. 58 of 1962

USA

Extraterritorial Income Exclusion Act 2000
Internal Revenue Code 1986
Technical and Miscellaneous Revenue Act of 1988
United States' Omnibus Taxpayer Bill of Rights

SUMMARY OF ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ADR	Alternative dispute resolution
APL	Administrative Procedure Law
ATO	Australian Taxation Office
CFA	Committee on Fiscal Affairs
CRA	Canada Revenue Agency
CIAT	The Inter-American Centre of Tax Administrations/Centro Interamericano de Administraciones Tributarias
Council of Europe/OECD Convention	Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	The European Union
FDI	Foreign Direct Investment
FSC	Foreign Sales Corporations
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Services
HMRC	Her Majesty's Revenue and Customs (UK)
IBFD	Bulletin for International Bureau of Fiscal Documentation
IMF	International Monetary Fund
IRS	Internal Revenue Service (US)
NADRAC	National Alternative Dispute Resolution Advisory Council
OECD	Organisation for Economic Cooperation and Development
OECD Agreement	2002 OECD Model Agreement on Exchange of Information on Tax Matters
OECD Manual	OECD Manual on the Implementation of Information Provisions for Tax Purposes
OECD Model	Model Tax Convention on Income and Capital
PATA	Pacific Association of Tax Administrators
PRUs	Problem Resolution Units
STCT	Small Tax Claims Tribunal
TAGs	Technical Advisory Groups on aspects of the taxation of Electronic Commerce (of the OECD)
TIEA	Tax Information Exchange Agreement
UN Model	1980 UN Model Double Taxation Agreement Convention between Developed and Developing Countries
VAT	Value Added Tax