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On Literalism , Rule of Law and Due Process

EDITORIAL

ON LITERALISM , RULE OF LAW AND DUE PROCESS

By Jim Corkery

Interpret an Act ‘according to the intent of them that made it,’ instructs Sir Edward Coke.¹ To do this, our courts turn to the plain meaning of the wording of the Act. That is the ‘first and foremost’ canon of statutory construction.² But the meaning of the words is not always plain; so the finding of intent is not always easy.

There are some rules. First, if the words are plain, courts should give effect to them, as long as it does not lead to a capricious result. Second, if the words are confusing, the courts should look for intent or purpose, and interpret the words accordingly, allowing for a bias in favour of the taxpayer in tax statutes. The courts should always incline against a tax, for it is a forfeiture. But third, what if there is a gap or a lacuna in the statute? If the drafter is writing tax legislation and does not foresee this particular circumstance, and some taxpayer’s arrangements fall into that gap, surely the courts should not fill the gap and write in words, especially if those words reach deeper into the taxpayer’s pocket?

Some think that the courts should sometimes fill in the gap and write in its version of the missing words,³ ‘Even to the point of reading words into the legislation in proper cases.’ We take issue with such well-intentioned creativity from the courts, at least when we interpret tax statutes. The tax statutes neither enact high principle nor work with manifest fairness. They are not enactments that enshrine rights. They just describe and impose taxes. They extract money, usually for a good cause, but they are forfeiture laws. Forfeiture laws must be trim and clear and be read narrowly.

If some statement in the tax statute imperfectly or fuzzily extracts tax, let it fall. We certainly will not try to fix it and redraft tax legislation for the citizenry, the courts should say. A fuzzy tax law is capricious, and no court should give effect to it. Just as incoherent wording should have no effect, the unclear wording should, too.

1 Coke 4 Inst 330.

2 Lord Simons of Glaisdale in *Maunsell v Olins* [1975] AC 373, 391.

3 *FCT v Ryan*, 43 ATR 694; 2000 ATC 4079.

All of this emerges for debate again because the new leader of the Labor Opposition, Mark Latham, asks why tax laws cannot be clear and simple. Politically, it may become a potent point. Few laws are as intrusive in citizens' lives as the tax Acts. Yet none is as voluminous, and few, if any, are further from the citizens' understanding. The legislature pays scant heed to calls - even from this very journal - to stop the writing or, bless the thought, reduce the mountainous legislation. Indeed, the legislators have so little respect for this most intrusive of all statutes, that they leave the nation for years scrambling between two massive and overlapping Acts - the ITAA 1936 and the ITAA 1997. And meanwhile, another young monster - the GST Act - appears.

The courts can make the legislature pause. Indeed, the courts carry great weight on some taxing occasions. No one took the old s 260 tax avoidance provision seriously until the courts, post Barwick CJ, reinvigorated it. Perhaps the courts can lead the way on the problem of the prolixity and complexity of the tax statutes.

Lord Diplock said, 'Absence of clarity is destructive of the rule of law'.⁴ The term 'rule of law' includes the principle, as Joseph Raz puts it:⁵ that 'All laws should be prospective, open and clear ... Its meaning must be clear. An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.'

The US Supreme Court in *Connally v General Const Co*⁶ declares that a criminal statute 'which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law'.

The Supreme Court restated this principle in *State v Target Stores Inc*:⁷ 'this principle requires that a law be clear enough that all people of an average intelligence would easily agree about the law's meaning and how it is to be applied'.

So it is with tax laws. The tax statutes forfeit money and can punish twice, by the forfeiture itself and, if the money is not forthcoming as demanded, by a further penalty. Due process requires that the taxed situations be so lucidly described that ordinary people know when and what to pay and how to avoid punishment for

4 *Merkur Island Shipling Corp v Laughton* [1983] 2 WLR 778, 790.

5 'The Rule of Law and its Virtue' (1977) 93 LQR 195, 198.

6 269 US 385.

7 156 NW 2d 908 (1968).

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failure to pay. If ordinary people are confused by the meaning of the tax law, a vital element of due process is violated.

Vague tax laws, or exceedingly complex tax laws, which descend below the comprehension of reasonably intelligent citizens, should be unenforceable. They should be struck down by the courts, wiped from the books, and not rescued by the courts 'reading words into the legislation'.

But, you might say, there is a contradiction in this. That you cannot have concise, lucid laws *and* judges not reading words into the tax legislation, for short laws must have plenty of gaps. Not necessarily so. Take the admirable brevity and clarity of the Canada Business Corporations Act and the Hong Kong Inland Revenue Ordinance. It is to do with clear thinking and clear expression. Conciseness, clarity's footman, has much to commend it, too.

Literalism from the courts ought not lead to longer and longer laws from the legislature. Why, in response to unclear legislation would the frustrated legislator draft even more words? That can compound the problem. It is not the quantity but the quality of the words that will ensure that parliament's intention is carried out. It is clarity that counts. Part IVA that replaced s 260 was no triumph (except in size). A few well chosen words, some in replacement of existing words, would have repaired s 260 (10 lines) to health, and left the courts (and the taxpayers) free of the task of trawling through some dubious detail in Part IVA (14 pages), when confronted by a tax avoidance question.



The four volumes of the Income Tax Assessment Act 2003 editions sit next to the same statute 1981 edition. On top rests the Hong Kong statute, in two languages.