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Being Caught Up By The Past: The Enforcement Of Foreign Revenue Debts

Abstract

Historically, the Courts have not enforced the revenue laws of foreign governments. However, there have been developments internationally through the OECD to reverse that historic limitation on the collection of foreign country taxes. As a result of these changes Australia has adopted, in its bi-lateral tax treaties (DTAs) since 2005, a mutual assistance in tax debt collections article. These DTA changes have been reinforced with changes to Australia's domestic law. This article explores the extent to which the historical position has been altered.

Keywords

foreign revenue debts, enforcement of taxation, collection of tax, Australian Tax Office

BEING CAUGHT UP BY THE PAST: THE ENFORCEMENT OF FOREIGN REVENUE DEBTS

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Historically, the Courts have not enforced the revenue laws of foreign governments. However, there have been developments internationally through the OECD to reverse that historic limitation on the collection of foreign country taxes. As a result of these changes Australia has adopted, in its bi-lateral tax treaties (DTAs) since 2005, a mutual assistance in tax debt collections article. These DTA changes have been reinforced with changes to Australia's domestic law. This article explores the extent to which the historical position has been altered.

INTRODUCTION

Generally, foreign penal laws would not be enforced, nor would Courts enforce the laws of foreign governments in a home jurisdiction to collect taxes levied in a foreign country, except where formal reciprocal enforcement agreements exist between states.¹

However, there have been developments internationally through the OECD to reverse that historic limitation on the collection of foreign country taxes. Following recommendations in a 2003 OECD report, an optional mutual assistance in tax debt collections article has been developed.² On 28 January 2003, Article 27 was incorporated into the OECD Model Convention. Under the new Article 27, the Contracting States are required to lend assistance to each other in the collection of revenue claims. This includes taxes, interest, administrative penalties and costs of collection or conservancy related to such amount.

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¹ Roger Hamilton, Robert Deutsch, and John Raneri, *Australian International Taxation* (October 2002), para 2.30, citing A Radler, 'Basic origins of international double taxation and measures for its avoidance' reproduced in EA Owens, *International Aspects of US Taxation: Cases and Materials* (1980) at 1-59.

² OECD, *The 2002 Update of the Model Convention* (2003).

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As a result of this change, and with little fanfare, Australia has adopted the mutual assistance in tax debt collections article in its most recent DTAs since 2005. These DTA changes have been reinforced with changes to Australia's domestic law.

Given that these changes appear to have effectively internationalised Australia's debt collection powers, this article explores the extent to which the historical position has been altered. It does so by first providing the historical context before exploring the scope of the changes to Australia's debt collection powers, including exploring any limitations on their operation.

HISTORIC LIMITATIONS ON FOREIGN TAX DEBT COLLECTION

As discussed above, historically, foreign penal laws would not be generally enforced.³ Similarly, the Courts would not generally enforce the laws of foreign governments to collect taxes levied, including income taxes, death duties, municipal rates and compulsory social security levies, in a foreign country.⁴

This view was confirmed in the decision of *In re Visser*.⁵ *In re Visser*, Tomlin J was considering whether to enforce a claim for successions duty by HM The Queen of Holland against the estate of David Visser, who died domiciled in Holland. Although Tomlin J felt bound by the earlier case of *Municipal Council of Sydney v Bull*,⁶ he noted that his

... own opinion is that there is a well recognised rule, which has been enforced for at least 200 years or thereabouts, under which these Courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign states; and this is one of those actions which these Courts will not entertain.⁷

Similarly, in *Jamieson v Commissioner for Internal Revenue*,⁸ the New South Wales Supreme Court was asked to enforce a judgment for unpaid US income taxes obtained by the IRS in the United States Tax Court, against the estate of the plaintiff, who was the executrix of the estate. Justice Gzell held, citing the authority of the House of Lords in *Government of India v Taylor*,⁹ that at common law a judgment of the United States Tax Court relating to amounts payable in respect of taxes cannot be enforced in

³ *Banco de Vizaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140.

⁴ For example, see *Government of India v Taylor* [1955] AC 491.

⁵ *In re Visser* [1928] 1 Ch 877.

⁶ *Municipal Council of Sydney v Bull* [1909] 1 KB 7.

⁷ *In re Visser* [1928] 1 Ch 877, 884.

⁸ *Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324.

⁹ *Government of India v Taylor* [1955] AC 491.

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Australia. He also held that tax debts are expressly excluded from the scope of the *Foreign Judgments Act 1991* (Cth).¹⁰

Although courts will enforce the laws of foreign governments to collect taxes where formal reciprocal enforcement agreements exist between states,¹¹ the absence of a mutual assistance in tax debt collections article in the DTA with the United States meant the Court could not override the statute and the common law. The Court concluded that these tax debts cannot be collected in Australia.¹²

NEW DEBT COLLECTION RULES

To overcome these limitations, Australia, consistent with the developments in international forums, has adopted assistance in the collection of taxes article, based on Article 27 of the OECD Model, in most of its recent DTAs. It has been adopted in the DTAs with New Zealand in 2005 (and it was retained in the 2009 DTA), with France, Norway, and Finland in the 2006, and in the 2008 changes to the tax treaty with South Africa. Being an optional Article, the 2008 Japan DTA does not adopt the new rules.

As mentioned above, under the new Article 27, the Contracting States are required to lend assistance to each other in the collection of revenue claims. These include taxes, interest, administrative penalties and costs of collection or conservancy related to such amount. The rules of the home country determine the continued enforceability of the debt. Thus, the home country laws may prevent its collection even if it can be collected under the collecting country's laws. For the collecting country this means that the debt can be collected under its domestic law, however:

- the basis for actual revenue (ie, its existence, validity or the amount of a revenue claim) cannot be challenged in those proceedings; and
- any other domestic law limitations in the country of collection do not apply (e.g. time limits or any priority applicable).

To give support to the new article, the *Tax Administration Act 1953* (Cth) (TAA) was amended to introduce Division 263 (consisting of new ss 263-5 to 263-40).¹³ Under Division 263 the Commissioner is authorised to collect a tax debt (a 'foreign revenue claim') on behalf of a foreign tax authority or to take conservancy measures to ensure the collection of that debt.¹⁴ A 'foreign revenue claim' is defined as a claim made to the

¹⁰ *Foreign Judgments Act 1991* (Cth), ss 3(1) and 5(4).

¹¹ For example, see *The Reciprocal Enforcement of Judgments Act 1959* (Qld), and *Hunt v BP Exploration Co (Libya) Limited* (1979) 144 CLR 565.

¹² *Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324, at para 34.

¹³ Schedule 1 of the *International Tax Agreements Amendment Act (No 1) 2006*.

¹⁴ *Tax Administration Act* (TAA), s 263-5.

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Commissioner in accordance with a tax treaty for purposes of the recovery by the Commissioner of an amount of foreign tax.¹⁵

A formal procedure for collection is prescribed under the rules. Thus, a foreign revenue claim must:

- be made in the 'approved form' by the competent authority and be consistent with the provisions of the relevant treaty;
- specify the amount owed by the debtor in Australian currency; and
- be accompanied by a declaration by the competent authority stating that the claim satisfies the requirements of that treaty.¹⁶

The Commissioner is required to keep a register called the 'Foreign Revenue Claims Register'.¹⁷ The Commissioner must, if satisfied that a valid foreign revenue claim has been made, register the claim by entering particulars of it in the Register within 90 days after receiving the claim.¹⁸ This action results in the amount owing becoming a pecuniary liability to the Commonwealth by the debtor.¹⁹ The Commissioner may, with the agreement of the relevant competent authority, amend the register to correct an error and/or remove a foreign revenue claim or reduce the amount to be recovered from a debtor under the claim.²⁰

The Commissioner will usually issue a notice requiring payment to the debtor. The amount becomes due and payable 30 days after notice of the particulars of the foreign revenue claim is given to the debtor or on a later day specified in the notice.²¹ If the amount remains unpaid after it is due and payable, the debtor is liable for a general interest charge on the unpaid amount.²²

However, a debtor may, after receiving a copy of the particulars of a foreign revenue claim entered in the register, apply to the Commissioner in the approved form to have the particulars removed from the register. The Commissioner, after considering the

¹⁵ TAA, s 263-10.

¹⁶ TAA, s 263-15.

¹⁷ TAA, s 263-20(1). The form of the register will be determined by regulation - TAA, s 263-20(2).

¹⁸ TAA, s 263-25.

¹⁹ TAA, s 263-30(1). The amount to be recovered from the debtor will be a primary tax debt for purposes of TAA, Part IIB and the Commissioner may allocate the debt to a running balance account under that Part.

²⁰ TAA, ss 263-35(1) and (2).

²¹ TAA, s 263-30(2).

²² TAA, s 263-30(3).

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application, may remove the particulars from the register.²³ If the Commissioner does so, the debtor is taken never to have been liable for the amount (including any general interest charge).²⁴ Similarly, if under a foreign revenue claim the Commissioner reduces the amount to be recovered from a debtor, the amount of the reduction is taken never to have been payable by the debtor.²⁵

If the Commissioner recovers all or part of a registered foreign revenue claim, the Commissioner must remit the amounts collected to the foreign country or territory concerned.²⁶ The Commissioner may also pay to the competent authority all or part of an amount received that is attributable to the related general interest charge.²⁷

As mentioned above, there is a major limitation on the broad use of this collection methodology, being that the new rules only apply where there is specific inclusion in a tax treaty. Further, to have effect, diplomatic notes must be exchanged confirming that the relevant internal procedures required for the assistance in collection of taxes Article have been put in place. Despite five DTAs containing assistance in collection of taxes article, as at November 2009 only two of the assistance in collection of taxes articles have entered into effect (the articles in the 1995 New Zealand DTA and the Finland DTA).²⁸ Therefore, these new foreign debt collection rules currently have limited practical effect.

CONCLUSION

In summary, by adopting a new article on assistance in the collection of taxes, based on Article 27 of the OECD Model, in recent DTAs and the enacted domestic legislation and procedures to support the adoption of the new Article 27, Australia has effectively, for those five DTAs, internationalised its debt collection powers and reversed long standing legal precedent.

²³ TAA, ss 263-35(3) and (4).

²⁴ TAA, s 263-35(5).

²⁵ TAA, s 263-35(6).

²⁶ TAA, s 263-40(1).

²⁷ TAA, s 263-40(2). The *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth) has been amended to ensure that it applies to these debts. The amendments apply to requests made under a provision for assistance in collection in an international tax agreement from 15 September 2006, provided it has entered into effect.

²⁸ The diplomatic notes have been exchanged confirming that the relevant internal procedures required for the Assistance in Collection of Taxes Article in Australia's DTA with New Zealand to have effect have been completed. The Article has effect from 8 September 2008 – see Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, 'New Zealand to Collect Australian Tax Debt' (Press Release No 77, 18 September 2008). The assistance in collection of taxes article in the Finland DTA has had effect from 1 September 2009.

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Although there has been an increase in cooperation between revenue authorities, their ability to enforce debts is limited by the tax treaty renegotiation process. Given that:

- on average a DTA has currency for 30 years;
- changes to the OECD model upon which Australia's DTA are based, take 30 years to impact; and
- it has taken three years on average from the signing of the DTA and the assistance in collection of taxes article to come into effect;

these limitations on the collection of foreign debts are likely to continue. That said, the inability of foreign revenue authorities to collect the payment of foreign debts will become a thing of the past, with the first ripples of change occurring.