He Who Writes the Rules Will Win

By

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The Department of Finance's consultation paper in which it outlines various proposals to bolster the General Anti-avoidance Rule ("GAAR") in section 245 against taxpayers is a major shift in the fundamental principles of Canadian tax law. The paper lists alternatives to existing tax law, all of which are intended to remedy the circumstances in which the Canada Revenue Agency ("CRA") has lost in tax litigation. Finance wants to rewrite the rules to improve CRA's performance in the courts.

The principal proposal would change the onus on proof in GAAR litigation in establishing whether a tax structure abuses the policies of the *Income Tax Act*. Under existing law, the Minister of National Revenue has the burden in GAAR cases to establish that the taxpayer's business structures abuse the underlying policies of the *Act*. This is because the Minister possesses, and has access to, the public and confidential information in legislating particular provisions of the statute. This is the converse of the general rule in tax law that the Minister's assumptions of fact are *deemed* to be correct unless the taxpayer overturns them (the "reverse onus rule").

The Finance proposals would introduce an economic substance rule along the lines in the U.S. *Internal Revenue Code* and revert GAAR litigation to the reverse onus rule. Taken together, the two proposals tear the heart out of the longstanding fundamental principle of law that taxpayers have the right to arrange their affairs to lawfully minimize tax. This principle, which stems from the House of Lord's decision in the *Duke of Westminster*[1] is best articulated in Lord Tomlin's judgement, single most frequently quoted in tax law:[2]

> "it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called 'the substance of the matter', and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine. seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and its supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting 'the incertain and crooked cord of discretion' for 'the golden and streight metwand of the law.
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> Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt

[1] *Duke of Westminister* v. *C.I.R.*, [1936] AC 1; 19 TC 490.
[2] Ibid. at p. 14

> to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable."

Following the adage that he who writes the rules usually wins, Finance wants to reduce the scope of the *Westminster* principle to improve CRA's batting average in GAAR litigation.

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