Purpose

To amend 1982 unpaid company tax legislation to exempt from the tax certain minority shareholders with interests in public company shares, and to establish a tribunal to hear claims against assessments to unpaid company tax.

Background

The Crimes (Taxation Offences) Act 1980 came into effect on 4 December 1980 and attached criminal penalties to the activities of certain tax scheme promoters who had since 1 January 1972 secured the disappearance of numerous companies with an unpaid liability to company tax or Division 7 tax on current year or previous years' profits. Company records were consigned to the "bottom of the harbour". The final identity of the board discouraged Tax Office investigation. Reports during 1982 from the Costigan Commission inquiry into the painters' and dockers' union activities revealed the size of the avoidance during 1972-1980 and resulted in legislation to recover from former shareholders ("vendor shareholders") the benefit they received when the scheme promoters bought the company at a high price which discounted the tax liability. [See Bills Digest for Taxation (Unpaid Company Tax) Assessment Act 1982]

The 1982 Act, in section 5, imposed a liability on vendor shareholders to pay the unpaid tax. Liability of the promoters to up to 20 per cent of the tax avoided is provided for but may not always be recoverable. For each shareholder, a proportional liability is calculated, called the "primary taxable amount". Where shares are owned by a company or trust, the liability is further apportioned to the beneficiaries (subsection 5(5)) or the shareholders of
the company. This tracing process may be applied successively.

Section 6 recognized that it may be impossible to obtain payment of the primary taxable amount from a company or trust, because it may no longer exist. Further, its shareholders may have changed so that it is inappropriate to seek recovery from the company. In this case, liability to a "secondary taxable amount" may be imposed on persons who have obtained a benefit through share ownership etc. at a previous time. Subsection 16(8) permits the Commissioner to disregard secondary taxable amounts of less than $100 or which are unreasonable. This Bill would supersede that general provision in the anomalous situation to which it is directed.

The anomalous situation arises where the shares to which the notional benefit is attached and through which the ultimate tax liability arises were dealt with in a way which totally refutes the assumption of transmitted pecuniary benefit on which the legislation's tracing provisions are based. That assumption is most apposite to company shares valued on a liquidation basis at asset backing. Public company shares are not valued by the market in this way. Examples of shares trading at less than asset backing are legion. Although caution against takeover limits the margin, that will not avail company shares assessed by the market to have a low earnings potential, or so closely held that takeover is not feasible.

There have been many examples of the latter case, a public company's subsidiary or former subsidiary giving rise to unpaid company tax liability, which is notified to the Stock Exchange because it materially affects the public company shares (e.g. Jensen Investments Ltd., Australian Financial Review, 30 August 1983, p.44). Shares in Metro Industries Ltd. could be held, for a period during which its subsidiary, Dream High Ltd. was sent to the bottom of the harbour and sold at a loss, compounded by the later assessment of liability to unpaid company tax. Even where the public company shareholders did not sell at a loss, the assessment are "often for many times the amount of the dividend payments they received when they sold their shares" (Editorial, Australian Financial Review, 20 October 1983). The notional benefit is most clearly refuted where, as in the case of Alpex Commodities Ltd., the company became insolvent (Australian Financial Review, 26 October 1983, p.51). The contrary argument that in the normal course someone would have had to pay the tax breaks down here since the normal course would have been a tax debt in the insolvency, rather than lifting the corporate veil to pursue shareholders.
The Bill further provides for the Taxation Board of Review to sit as a tribunal. This may be quite appropriate at present since thousands of assessments have been issued to public company shareholders and some are under appeal to the High Court, raising a difficult choice between immediate payment or the possibility of late payment penalty. However, conventional board hearings may now be subject to a delay of a year or two and a recent report from the Administrative Review Council recommends transfer of the taxation decision review jurisdiction to the Administrative Appeals Tribunal (Administrative Review Council, Report No.17, 1983, Parliamentary Paper No.247/1983.)

Main Provisions

The Bill would add a new section 19A to the Taxation (Unpaid Company Tax) Assessment Act 1982, to commence at the date of Royal Assent, although it may apply to effectively refund payments made after 25 July 1982.

Subsection 19A(2) defines "vendor shareholder" to include persons liable for a primary taxable amount. The key provision is subsection 19A(1) which applies to persons other than "vendor shareholders" who are liable for or have paid vendors recoupment tax on a secondary taxable amount that arose in relation to a company which had public company status "in the income year in which the last sale time occurred". Subsection 19A(1) permits the Commissioner, in a case where the liability to tax is "unreasonable" having regard to enumerated matters including the connection of the person to other parties and the improvement (if any) in the person's financial position, to determine that the liability not arise. Refund or setoff of any tax already paid is facilitated.

Further provisions in the new section permit review of this determination by a Recoupment Tax Anomalies Tribunal, to be constituted by a Board of Review under subsection 19A(15).

For further information, if required, contact:

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Economics and Commerce Group
LEGISLATIVE RESEARCH SERVICE