TAXATION (UNPAID COMPANY TAX) ASSESSMENT AMENDMENT BILL (No.3)

Date Introduced: 3 November 1983
House: House of Representatives
Presented by: Hon. P.J. Keating, M.P, Treasurer

Short Digest of Bill

Purpose

To strengthen and improve the company tax recoupment measures contained in the Taxation (Unpaid Company Tax) Assessment Act 1982.

Background

The Taxation (Unpaid Company Tax) Assessment Act 1982, the "Principal Act", empowers the Government to recover retrospectively company tax, including undistributed profits tax, avoided by vendor-shareholders and promoters. The accumulated and/or contingent tax liabilities of the company were reflected in the consideration received by vendor-shareholders from the sale of their shares in the company and in the fee derived by promoters.

The "Principal Act" sets out the circumstances in which liability to recoupment tax is attracted. It is retrospective in effect as it deals only with such schemes carried out between 1 January 1972 and 4 December 1980, the date upon which the Crimes (Taxation Offences) Act 1980 made such conduct a specific criminal offence under Commonwealth law.

The first legislative attempt to extend recoupment of tax was introduced on 18 May 1983 in the House of Representatives. The Bill, together with its associated "Rates" Bill, sought to recover from the former owners of companies stripped of pre-tax profits, personal tax on the company's accumulated revenue and capital profits.

On 23 August 1983, the Government introduced a new Bill which was basically the same as the earlier Bill except that it had been modified to reflect changes in the recovery of personal income tax. Personal income tax was now assessed on the after-tax revenue (not capital) profits of those years of income where primary company tax was avoided.
No liability for personal income tax was to arise where the only company tax avoided was undistributed profits tax.

Basically, the earlier Bills were designed to enable the Government to recover personal income tax avoided by former owners of companies that were subjected to "bottom-of-the-harbour" schemes. In addition, the Bills aimed to strengthen and improve the "Principal Act" in several identified areas.

Outline

The current Bill is essentially a watered down version of the earlier Bills. It deals only with measures to strengthen and improve the company tax recoupment measures as originally proposed.

However, the current Bill does make one important departure from the provisions contained in the earlier Bills. It seeks to expand the anomalies relief provisions contained in the "Principal Act" to provide additional relief, in certain circumstances, to public company shareholders. Under the "Principal Act, the Commissioner has the power to give complete, but not partial, relief:

(a) where the amount otherwise payable is less than $100 and

(b) where persons have not in any way benefited from the evasion of company tax giving rise to the recoupment liability.

The relevant provisions will enable a public (not private) company shareholder, well removed from the actions giving rise to the recoupment tax liability, to be granted an appropriate level of relief from payment of recoupment tax by the Commissioner of Taxation. If the Commissioner does not grant adequate relief, the person concerned can have his or her case reviewed independently by a taxation board of review, sitting as a Recoupment Tax Anomalies Tribunal.

A still further change in the Bill, not contained in the earlier Bills, will enable a former owner to whom a refund of company tax is made as a result of a successful objection or appeal against the company assessment to receive interest under the Taxation (Interest on Overpayments) Act 1983 on the amount refunded.

The previous Bill sought to change the title and citation of the "Principal Act". The current Bill makes no amendment.
The strengthening of the company tax recoupment measures include the removal of the so-called "innocence clauses". No longer will people be able to escape liability for recoupment tax where the stripped company was the subject of an unsuccessful pre-sale and post-sale tax avoidance scheme.

The "stripping scheme test" and associated "disclosure" provisions will be abolished. The test and others in the legislation effectively limit the scope of the legislation to those cases where the company has been stripped of its pre-tax profits.

Non-payers of recoupment tax will be named in the Commissioner of Taxation's annual report.

Main Provisions

The amending Act is to come into operation on the day on which it receives Royal Assent (clause 2).

The definitions of "promoters recoupment tax" and "vendors recoupment tax" have been modified to include related additional tax imposed for failure to furnish requested information (Paragraphs 3(a) and (b)). Paragraph (c) of clause 3 proposes the repeal of sub-section 3(12) commonly known as the innocence clause. The repeal means that no longer will an unsuccessful post-sale tax avoidance scheme relieve a person from liability to recoupment tax or reduce such a liability.

By virtue of section 14 of the Income Tax Assessment Act 1936, the Commissioner of Taxation is required to report to Parliament annually on the working of that Act. It is now proposed to authorise the Commissioner to name in his annual report persons who fail to pay vendors or promoters recoupment tax or late payment penalty on such tax (Paragraph (a) of clause 4).

Paragraph (b) of clause 4 extends disclosure of information concerning the affairs of a stripped company from a former owner or promoter to any person who is, or is likely to become, liable to pay income tax.

Paragraph (c) of clause 4 proposes to remove the requirement of the Commissioner of Taxation (sub-section 4(5) of the "Principal Act") to disclose to a former owner all known information about the stripping arrangement which had the effect of rendering a company unable to pay its tax.

In addition, where company tax payable is reduced by reason of an amended assessment, the Commissioner is
empowered to refund the amount overpaid to the person or persons who paid the company tax or apply the potential refund against any recoupment tax liability of that person. The proposed new sub-section 6B will enable a former owner to whom a refund of company tax is made to receive interest under the Taxation (Interest on Overpayments) Act 1983 on the amount refunded (Paragraph (d) of clause 4).

Clause 5 intends to remove one of the tests of liability for recoupment tax which requires the target company to be rendered unable to pay all its company tax (paragraphs (a), (b), (c), and (d)). It also will ensure that a person will not escape liability for vendor recoupment tax by reason of an unsuccessful pre-sale tax avoidance scheme.

Clause 6 proposes to rectify a number of minor technical errors contained in the "Principal Act”.

Consequential amendments are proposed to Section 7 of the "Principal Act" to omit the "stripping arrangement" test from the provisions relating to promoters recoupment tax (clause 7). Clause 5 removes a similar test for vendors. Similarly, clauses 8 and 9 will make formal amendments to omit the reference to the "stripping arrangement" test in sections 10 and 11.

Clause 10 inserts a new section into the "Principal Act" to empower the Commissioner of Taxation to grant certain public company shareholders total or partial relief from recoupment tax. The Commissioner's decision will be subject to the rights of objection, review by an independent Recoupment Tax Anomalies Tribunal, and appeal to a Court.

Clause 11 will replace section 23 of the "Principal Act" to overcome the constitutional doubt which has arisen about the legislation. The certificate issued under the section will be prima facie, rather than conclusive evidence. The prima facie rule will revert to a conclusive evidence rule on a date to be fixed by proclamation (clause 12).

Remarks

Bottom-of-the-harbour - colloquialism

The Bill treats all companies in the same manner as if they had all been sent to the "bottom-of-the-harbour" given that the innocence clause contained in sub-section 3(12) of the Taxation (Unpaid Company Tax) Assessment Act 1982 is to be abolished. Not all companies sold under these schemes were dumped. Some companies met all requirements under existing tax and company law and it is the
shareholders of these companies who will be unduly penalised by the abolition of the innocence clause.

**Crimes (Taxation Offences) Act 1980**

The proposed deletion of the so-called innocence clauses in the Taxation (Unpaid Company Tax) Assessment Act makes the provisions in that Act harsher than the Crimes (Taxation Offences) Act 1980 (CTO). For example -

(i) it deprives a vendor-shareholder of the right to be relieved of that part of the recoupment tax liability where it can be shown that before the sale of shares that person reasonably believed that the relevant company did not have that marginal tax liability;

(ii) it places an absolute primary liability on vendor-shareholders who, had they carried out the same sale transaction under the CTO Act, might avoid liability because they can demonstrate reasonable belief; and

(iii) it penalises those vendor-shareholders who can demonstrate that after the share sale the company was placed into an arrangement which, under the law, could reasonably be expected to avoid a tax liability arising in the company.

**Tax Neutrality**

(i) **Discriminates between public company shareholders and private company shareholders**

The Tribunal incorporated in the current Bill has application only for public company shareholders. Unlike the private Senator's Bill where the Tribunal will apply to both public and private shareholders.

The Bill extends the anomalies relief provisions of the "Principal Act" to enable the Commissioner of Taxation to grant "partial relief" from recoupment tax to certain public company shareholders. Currently, the Commissioner has power only to give complete relief from recoupment tax to both public and private company shareholders.

Thus it will exempt certain public company shareholders where the relevant company was dumped but include private company shareholders where the
relevant company was NOT dumped. Further, it is possible that the legislation could exempt a public company shareholder who did indirectly receive a 'benefit' but apply to a private company shareholder who did not receive a 'benefit'.

(ii) Time Scale

By retrospective withdrawal of the "innocence clauses" the situation could arise whereby, as a result of identical actions, one taken before 4 December 1980 and the other after 4 December 1980, far greater tax will be payable under the retrospective legislation than under the current legislation.

(iii) Successful and Unsuccessful Avoidance

The removal of the so-called "innocence clauses" discriminates between vendor-shareholders who managed to get with a promoter who successfully avoided tax and vendor-shareholders with promoters who unsuccessfully avoided tax. The former shareholders would not be liable for recoupment tax, under the legislation whether or not the "innocence clauses" remain.

Legal Action

The Commissioner will contest the use of the so-called "innocence clauses" in the courts.

It could be argued that vendor-shareholders might find it difficult to succeed with action in courts of law based on grounds of innocence. How could a court of law differentiate easily between action taken to avoid tax and action to strip the company? No doubt such arrangements would be made concurrently.

Annual Report

The Bill provides for the naming of non-payers in the public annual report of the Commissioner of Taxation. Non-payers in similar circumstances under other sections of the Income Tax Assessment Act are not named publicly. Taxpayers listed in the annual report are those that have been charged additional tax under sub-section 226(1) and/or sub-section 226(2) of the Income Tax Assessment Act 1936 and where the amount of the statutory additional tax exceeds $1500 and the total additional tax is more than 25 per cent of the increased tax. Further, the taxpayer would need to have exhausted all rights of objection and appeal.
Loss of Revenue

Even where the so-called "innocence clauses" are being used, most taxpayers would have paid the tax liability subject to the ultimate outcome. Therefore there would be no immediate loss of revenue to the Government.

For further information, if required, contact:

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