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to England- capacity to put up a fight more important
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-Hughes

104 Taxation in Australia up until 1914: the warp and weft of protectionism
Caroline Dick

130 Exploring innovations in tax administrationFaucauldian perspective on th

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centred to employ more than half its members would fail to fill their vacancies this year.[10]

It is a great pleasure to be back in Melbourne. My links began with Harold Ford and I spent two months here in 1979. Since then I have tended to spend some of my sabbatical leave in North America at least in 1985 - 86 when I had the pleasure of being in Case Western Reserve University Law School in Cleveland, Ohio. I spent the year with Leon Gabinet, Erik Jensen and Karen Moore (now a Federal Judge) trying to make sense of the American materials which had just been cited enigmatically by the House of Lords in Furniss v Dawson.[11] The overwhelming message I came away with was that the US system with its doctrines such as form and substance, step transactions, economic substance and sham were all very well in their natural habitat but I was not at all sure that they would fit well in the UK where, it seemed to me, we place great emphasis on finding rules that are justiciable. As Lord Scarman said in Furniss v Dawson, the determination of what does, and what does not, constitute unacceptable tax evasion is a subject suited to development by judicial process.[12]

< R X Z L O O Q R W H W K D W / R U G 6 F D U P D Q X V H V W K H W H thereby showing that he had not taken his basic course in taxation well. However Lord Scarman was far too great a judge and classical scholar[13] - to have done that without thought and a revisiting of the terminology is overdue but not this evening.

In Part 2 Professor Tiley outlined the judicial approach to tax avoidance in the UK starting with the House of Lords decision in Ramsay in 1981. Having made the point that he preferred the judicial approach, he took the view that the House of Lords in Ramsay adopted a novel approach but without overturning what had been accepted as the cardinal rule of the Duke of Westminster, and really this was all just a matter of V W D W X W R U \ L Q W H U S U H W D W L R Q «

2 T[illegible]

My, rather large, brief is to talk about how we manage avoidance in the UK, our judicial/legislative responses, including recent UK developments and proposals, of anti-avoidance legislation. It includes my views on the approach of the House of Lords as compared, say, to the use of a general anti-avoidance rule (GAAR) or detailed legislation countering specific tax schemes. I must also cover the UK approach to notification or registration of tax schemes and the role of the tax advisor, given your own promoter penalties legislation. We shall look at the work of a new player in our fiscal legislative process, the House of Lords Select Committee on the Finance Bill. This Committee brings the considerable financial expertise existing on all sides of the House to inform consideration of the Finance Bill during its passage through Parliament. However it must not encroach on the financial privileges of the House of

security, should not be recognised. Accepting a new line of argument based on treating a series of transactions such as these as one composite transaction, the House of Lords decided there was no relevant loss for CGT purposes. The House was surely right. No system can tolerate a situation in which taxpayers up and down the country have a choice(,)] TJ ETpT BT /F2 11.04 Tf 1 0 0 1 297.86 682.06 Tm [<105B>] TJ ET B

mean the lower courts, the legal and accounting professions and, above all, Her 0DMHVW\¶V 5HYHQXH DQG &XVWRPV +05&

After Barclaysthe question for HMRC will be whether they will be comfortable to accept that approach indicated by the judges. It is not an approach which will stop all LQVWDQFHV RI ZKDW +05& QRZ FDOO µDEXVH¶ 7KH\ KDYH QR LQWHQWLRQ RI LQWURGXFLQJ a GAAR but I think the temptation is going to be resisted. My feeling about this is that they are not yet willing to set up the sort of rulings system that practitioners think would be needed. The HMRC view of rulings in the context of a GAAR was spelt out E\ WKH GHSDUWPHQW¶V VWDU ZLWQHVV EHIRUH WKH +

> ...I think there is a very significant issue that arises there: how sensible would it be to offer pre-transaction clearances for what were very clearly tax avoidance arrangements? Again, how sensible is it to offer arrangements like that which then enable planners to refine their product again and again and again, as we have seen with some of our existing clearance measures, until they have got something that they think works. So there are very difficult issues to be sorted out.[22]

In Part 3, Professor Tiley outlined some of the other ways in which tax avoidance was being dealt with in the UK. This included the use of targeted anti-avoidance rules, the possibility of retrospective legislation, imposition of penalties for tax advisers as well as improved relationships with large business. He also discussed the recently introduced (at that time) disclosure of tax avoidance schemes (DOTAS).

3 OTHER WAYS TO TACKLE TAX AVOIDANCE

These remarks are of course directed to issues of tax avoidance. Elsewhere some progress has been made. In November 2006 the Varney Committee reviewed links with large businesses. The Chancellor announced that he would implement the review in full; hence HMRC has now agreed to bring in advance rulings.[23] However, as far as I can tell, it is not a general system. Its purpose is to give business certainty about the tax consequences of significant investments and corporate reorganisations. I note a) it is confined to business, b) it may b t0 0 1 28395(i)-4(te)9(sd)-32(t)-4(ho)-21(l)-4(e)9

plforinvestmentronstrctio asenreorgegisatios.

HMRC may also increase the price of abuse by retrospective or retroactive legislation. We had a spectacular example of this when we removed loss relief from commodity

advised on schemes which failed.[40] Since 1 January 2001 we have had an offence of being knowingly concerned in the fraudulent evasion of income tax.[41]

It is time to talk, briefly, about our notification powers.[42] We now have four separate regimes: direct taxes, stamp duties,[43] VAT[44] and National Insurance.[45] I will concentrate on the direct taxes. The rules require a promoter and sometimes the taxpayer (or client) to provide the Revenue with information about a) notifiable arrangements and b) proposals for notifiable arrangements.[46] For a scheme to be notifiable it must enable, or might be expected to enable, any person to obtain a tax advantage in relation to any tax so prescribed in relation to the arrangements. It is also necessary that the main benefit or one of the main benefits that might be expected to arise from the arrangements is the obtaining of that advantage. There is protection for legal privilege.[47] So, the key question is whether the tax advantage is µ P D L Q E H Q H I L W ¶ The HMRC Guidance says:

increasingly obtain evidence from enquiries into the tax returns of companies and individuals who have used schemes.[64]

Some defaulters tell HMRC nothing more than that they have systems in place to identify whether or not their products are notifiable and that they are satisfied that the particular scheme is not. Such promoters will generally tell HMRC they hold that the scheme is not notifiable, but do not explain why the scheme is not notifiable. The proposed new rules are designed to resolve disputes about what is and what is not notifiable. They may well include a power to require more information and a pre-disclosure enquiry to help HMRC get clearer reasons why a promoter thinks the scheme is not notifiable. Where there is a doubt about notifiability there may be a procedure by which HMRC can ask the [First-tier] Tribunal to order that scheme be treated as if it were notifiable – you can imagine the problems of the burden of proof here. Even more dramatically, where there is such a doubt, there may be a procedure by which HMRC can ask the Tribunal to determine that the scheme is notifiable.[65]

In Part 4 Professor Tiley considered the proposal for a UK GAAR put forward by the Tax Law Review Committee of the Institute of Fiscal Studies. He is not a fan. Tellingly he said that in his view a GAAR is an admission of failure. He does not say whose failure: he may be referring to the legislation or HMRC or the judges or the system as D Z K R O H « «

4 THE GAAR PROPOSAL

We have had GAARs in the excess profits taxation rules introduced for the First and Second World Wars.[66] Similar powers were part of profits tax[67] and the special charge in 1967.[68] However, the impetus for the introduction of a GAAR with more general

The TLRC GAAR had several elements. In broad terms it proposed a purpose clause to deter or counteract transactions designed to avoid tax in a way which conflicted ZLWK RU GHIHDWHG WKH HYLGHQW LQWHQWLRQ RI 3DUOLDPHQW¶ WUDQVDFWLRQ ZLWK D QRUPDO WUDQVDFWLRQ with the normal transaction. Where, because the given transaction did not have a non-tax objective and so there is no normal transaction, tax was to be charged as if the WUDQVDFWLRQ KDG QRW WDNHQ SODFH $PRQJ WKH V WUDQVDFWLRQ¶ WR ZKLFK WKH UHSRUW UHIHUUHG ZRXOG EH QRW DSS made to Parliament giving full details of the operation of the rule.

The tax elite of the nation had worked on the TLRC report so the Revenue had to consider it; they produced a consultative document with its own clause.[71] Opinion within the Revenue was divided. Opinion in the profession was - WKH µHOLWH DOPRVW FRPSOHWHO\ KRVWLOH ,Q WXUQ WKH 7/5& Z proposal.[72] The truth is probably that the GAAR would have worked only with a proper system of rulings. The government was not willing to pay the financial cost of such a system, nor was it willing to pay the political cost of trying to force such a system onto taxpayers.

As we have seen earlier the rejection of a GAAR has not stopped the invention use of SURYLVLRQV EDVHG RQ µDYRLGDQFH¶ DQG HDFK PDM corporation tax, has contained it

With all the activity, legislative and administrative, and with an objective of what HMRC would see as raising the level of taxpayer behaviour by informal means, it is not the right time to make the dramatic and politically demanding switch to a GAAR. I have to acknowledge that in so far as this activity is legislative, the effects on the length of our statute book have been dire. Some see a GAAR as a way of shortening the statute book. You can tell me whether it has that effect here. I believe we can do at least as well – and probably better – with our existing approach, especially as it seems to mesh in well with our schedular approach to the definition of income. We have neither a general definition of income nor a general system of deductions and we are systematically mean on loss reliefs across the schedules.

In Part 5 Professor Tiley charts the development of the judicial approach to tax avoidance in the UK from Ramsay in 1981 through to Barclays in 2004.

5 FROM RAMSAY TO BARCLAYS

It is time to return to the story to what our judges have been up to. We left Ramsay (1981) as it had been expounded in Barclays (2004) where it was said:

> The modern approach to statutory construction is to have regard to the purpose of the particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. Until Ramsay F D V H K R Z H Y H U U H Y H Q X H V W D W X W H V Z H U H µ U H formalist methods of interpretation. The particular vice of formalism in this area of law was the insistence of the courts on treating every transaction which had an individual legal identity (such as a payment of money, transfer of property, creation of debt etc) as having its own separate tax consequence, whatever might be the ter

capital gains tax, saw the advent of marketed avoidance schemes. The Revenue continued to argue in traditional ways and so lost cases such as IRC v Plummer[79] or got the right answer by a slightly strained construction as in Ensor v Davis[80] where the House divided 3-2 with Lords Diplock and Wilberforce on opposite sides

$V ZH VDZ EURXJKW WKH +RXVH RI /RUGV LQ Ramsay the facts of which involved an artificial, circular, self-cancelling transaction: was there a chargeable gain or allowable loss? At the risk of quoting something very familiar to you I repeat 7HPSOHPDQ /-¶V FRQFOXVLRQ in the Court of Appeal:[81]

> The facts as set out in the case stated by the Special Commissioners demonstrate yet another circular game in which the taxpayer and a few hired performers act out a play; nothing happens save that the Houdini taxpayer appears to escape from the manacles of tax.
>
> The game is recognisable by four rules. First, the play is devised and scripted prior to performance. Secondly, real money and real documents are circulated and exchanged. Thirdly, the money is returned by the end of the performance. Fourthly, the financial position of the actors is the same at the end as it was in the beginning save that the taxpayer in the course of the performance pays the hired actors for their services. The object of the performance is to create the illusion that something has happened, that Hamlet has been killed and that Bottom did don an asses head so that tax advantages can be claimed as if something had happened.
>
> The audience are informed that the actors reserve the right to walk out in the middle of the performance but in fact they are the creatures of the consultant who has sold and the taxpayer who has bought the play; the actors are never in a position to make a profit and there is no chance that they will go on strike. The critics are mistakenly informed that the play is based on a classic PDVWHUSLHFH FDOOHG µ7KH 'XNH RI :HVWPLQVWHU¶V retainer entered the theatre with his salary and left with a genuine entitlement to his salary and to an additional annuity.

After Ramsay in the House of Lords we had to ask ourselves what the House had done. Lord Wilberforce concluded that nothing the House was doing set up the cardinal principle about substance and form. However, it was not clear what the House would do next. The fact that we can now say, post-Barclays in 2004, that it was all a question of construction does not alter that fact that at the time very different views were held. Was the House just adopting a realistic up-to-date approach to questions of fact and law or, was it a watershed case, like Donoghue v Stevenson,[82] rewriting the law and creating at least the opportunity for the development of a judicial GAAR? If the latter, what hedging doctrines or limits would the court develop? If it was less than a GAAR and more like a step transaction doctrine, when was it to be applied? Always or selectively? If selectively, then on what basis? Life was uncertain and, for an academic at least, great fun. For others things were more serious. What should the Revenue do with their success?

---

[79] [1979] STC 793.
[80] [1979] STC 379.
[81] W T Ramsay v IRC [1979] STC 582 (Court of Appeal).

exchange had been tax driven. The House of Lords held, unanimously and without effort, first that the tax avoidance purpose was not enough to invalidate the exchange[93] and secondly that the eventual sale to someone else did not fit the composite transaction test[94].

Craven v White[95] was more difficult; the House of Lords split 3-2. Once more there was a share for share exchange with an Isle of Man company. This time though the sale did go through to the intended purchaser, but only just. At the time of the share exchange (11 July) the prospects for the sale to a company called Oriel (O) did not look promising and an alternative disposal was considered. However, on the same day, O asked for a further meeting. The Commissioners had held that the primary objective of the share exchange was the sale to O and that the taxpayer company was keeping its options open. Following further negotiations, including one more meeting, the sale to O finally went through on 9 August of the same year. This time the House of Lords said no tax avoidance, but by a bare majority. The majority consisted of Lord Oliver and the two Scottish law lords Keith and Jauncey.

Lord Oliver refers to a series of transactions preordained in order to produce a given result and there being at that time no practical likelihood that the planned events would not take place in the order ord141.86 5FTJ rd141.86 5FTJ rd141.86 5TAes

And so to 2004 and two decisions:

not being exercised simultaneously, therefore the scheme could not be regarded as a

question and, critically, where that course of action cannot reasonably be regarded as reasonable.[133]

Another important feature of the UK GAAR is that a number of safeguards are built into the GAAR rules. These include:

- Requiring HMRC to establish that the arrangements are abusive (so that it is not up to the taxpayer to show that the arrangements are not abusive);
- $SSOLQJ µGRXEOH UHDVRQDEOHQHVV¶ WHVW the arrangements cannot reasonably be regarded as a reasonable course of action. 7KH µGRXEOH UHDVRQDEOHQHVV¶ WHVW whether it would be reasonable to hold the view that the arrangement was a reasonable course of action. The arrangement falls to be treated as abusive only if it would not be reasonable to hold such a view;
- Allowing the court or tribunal to take into account any relevant material as to the purpose of the legislation that it is suggested the taxpayer has abused, or as to the sort of transactions which had become established practice at the time when the arrangements were entered into. HMRC has ZLWK DQ LQWHUQDO $GYLVRU\ 3DQHO GHYHORSHG
- Requiring HMRC to obtain the opinion of an independent advisory panel (the GAAR Advisory Panel) as to whether an arrangement constituted a reasonable course of action, before they can proceed to apply the GAAR.[134]

From 3rd June 1947 international juridical double taxation between the United Kingdom and Australia has been dealt with through a series of bilateral double taxation agreements[2]. Prior to the entry into the first of these agreements in 1946 the problem of double taxation of income by the United Kingdom was dealt with as part of a system NQRZQ DV µ'RPLQLRQ ,QFRPH 7D[5HOLHI¶ ,Q WKH 6 Income Tax Relief system operated from 1st July 1921 and 30th June 1947.

the 1919 conference between the Sub Committee of the United Kingdom Royal

by Louis Botha (the Prime Minister of Transvaal) and Botha

Although the need for relief intensified when the United Kingdom raised its top marginal rate to 6/in the ç(30%) no relief was enacted. The issue was considered again at the Imperial War Conference of 1918. There the then Chancellor of the Exchequer, Andrew Bonar Law, stated:

> It is certainly essential that this whole question be settled, and I think it should be settled immediately after the war. It is even in our interest that it should be done ± I mean the interest of the British Exchequer ± because it is quite obvious that with the income tax as high as it is likely to be after the war, unless adjustment of this kind is made, businesses which can be conducted in the Dominions without having an office in London will be transferred there and we shall lose the whol

P R U H L P S R U W D Q W W K D Q L Q W L P D W H N Q R Z O H G J H R I ,
Hughes recommendation George Knibbs, the Commonwealth Statistician, was[26]

One DSSURDFK ZDV WKDW WKH µFRXQWU\ RI RULJLQ¶ V
income otherwise subject to double taxation and that the other country should surrender
DQ\ FODLP WR WD[LW (ZLQJ ULJKWO\ VXUPLVHG W
Imperial Exchequer in such serious reductions in revenue that it may be possibly be
IRXQG LPSUDFWLFDO IRU WKH ,P[34]SHULDO *RYHUQPHQW

7KH RWKHU DSSURDFK ZDV WKDW D µEURDG (PSLUH Y
Under this approach Ewing HQYLVDJHG WKDW µD FLWL]HQ RI WKH
RQ LQFRPH DVVHVVHG LQ PRUH WKDQ RQH SDUW RI
WD[SD\DEOH VKRXOG EH WKH KLJKHVW DPRXQW SD\D
letter set out, in some detail, how, in his view, relief should be provided under the second
approach. First the amount of income actually taxed in both countries would need to be
ascertained. Then the highest amount of tax payable on that income in any part of the
Empire would QHHG WR EH GHWHUPLQHG DQG WKDW WD[ZR
to the several taxes assessed on the income, between the parts of the Empire in which it
KDV EHHQ WDVVHVVHG LQ SURSRUWLRQ WR WKH
[34] What Ewing envisaged is clear from an example that he provided in
subsequent correspondence. On an income of £1000 the United Kingdom tax was £150
(representing a 15% rate) while the Australian tax was £45/14/1 (representing
DSSUR[LPDWHO\ D UDWH 8QGHU (ZLQJ¶V VFKHI
United Kingdom tax of £150 which would be apportioned between the United Kingdom
and Australia in the same proportions as the tax that each jurisdiction would otherwise
levy bore to the sum of the taxes that would otherwise be levied by those jurisdictions.
The total tax that would otherwise be levied was £195/14/1. The United Kingdom tax
that would otherwise be levied of £150 represented 76.65% of the total tax that would
otherwise be levied. This same percentage would then be applied to the £150 that the
United Kingdom levied which LF K PHDQW WKDW WKH 8QLWHG .LQJGR
UHWDLQ … RI WKH … WD[WKDW LW OHYLHG $
would be 23.35% being £35/0/7.[35]

Ewing suggested that the income doubly taxed in more than one part of the Empire

relief and to provide all necessary particulars to show the manner and extent to which WKH WD[SD\HU¶V LQFRPH KDG EHHQ GRXEO\ WD[HG[36]

Ewing also recognised that there would probably be a few cases in which there would be double taxation between Australia and parts of the Empire other than the United Kingdom but considered that those cases would not present any features not found in the United Kingdom

CLR 568as authority that in the case of a business which conducts some operations in Australia profits from sales outside Australia arise, at least in part, from sales within Australia.[53]

$VVXPLQJ WKDW DQ\ RU DOO RI WKH GHEWRUV ZHUH WR Q WKH S
EH DFFHSWHG (ZLQJ DQWLFLSDWHG WKDW µJUHDW G
ZKHWKHU WKH 8QLWHG .LQJGRP RU $XVWUDOLD LV WR
that Ewing was envisaging a conflict of source rules and, on this basis, [54] It appears
LPSOLFDWLRQ WKDW KH GUHZ IURP WKH *RYHUQPHQ

%U L W L V K *R Y H U Q P H Q W DV $X V W U D O L D Wh[ha G µF R Q V L
received by British purchasers of Australian goods.[58]

On the question of whether his draft agreement of 22 X O \ K D G W K H *R Y H U Q P
approval Ewing pointed out that the draft merely expressed the policy of the United Kingdom Excess Profits Tax and the Australian War Time Profits Tax and, as no question of policy was involved in the draft agreement, the matter was entirely different from double income taxation within the Empire.[59]

Ewing closed by noting that he was attaching a copy of a memorandum on the causes of double taxation that he had provided to Knibbs prior to his departure and by F R P S O D L Q L Q J W K D W & R O O L Q V ¶ O H W W H U X Q G H U U H S O
received from the Treasury in connection with the present consideration of double taxation within the Empire and that he had not possession of reports of Colonial conferences which Collins had sent to Knibbs.[60]

Collins then sent a Minute Paper to Ewing asking him to

The contention, without qualification, that a primary right to tax income is possessed by the country whence the income is derived to the exclusion of the right to tax it in the country of residence violates the principle that each country has complete freedom to choose its own measure of liability in imposing taxation, and its difficult to justify on theoretical principles. If this contention were admitted, the United Kingdom would be called upon to sur(et)-ae admid0 1 dadmto tde BT ch in-41(dh0 1 3(i4 BTxi)1 0 0 1(t)6(hat)h)]7(ca)

disclosed by him it is not possible to further advise him as to what may be done by him LQ WKLV PDWWHU ¶[88]

7KH DXWKRU KDV EHHQ XQDEOH WR ORFDWH D UHSO\ E cable of 12th November 1919.

In the meantime Knibbs sent a further cable to the Australian Prime Minister as follows:

> Believe representations to sub-committee Double Income Tax will completely fail.
>
> If you think it desirable I should discuss matter unofficially with high members commission itself, please advise. Probably this best done through meeting them socially, in which case liberal allowances are absolutely necessary.
>
> Please telegraph early reply.[89]

The Australian Treasurer, W. A Watt, replied by cable on 18th November 1919 that there was no objection to Knibbs discussing problems with high members of the Commission but that the scale of allowances for Knibbs SURYLRXVO\ GHWHUPLQHG ZDV IRU WKH SXUSRVH ¶[90]

.QLEEV¶ QH[W FDEOH WR WKH 1RYHPEHU 1919 advised: 7UHDVXU\

> Double Income Tax Committee rejects both our proposals, but favours mutual sacrifice. Scheme on existing Fede

Scheme proposed Inland Revenue Officer here somewhat similar principle

Harrison proposal would have involved rebates given by the Dominions in some
F L U F X P V W D Q F H V , Q G L U H F W V X S S R U W I R U W K L V F R

only.[120] The rate of United Kingdom tax was to be calculated by reference to the W D [S D \ H U ¶ V J U R V V L Q F R P H Z L W K R X W I L U V W G H G X F W Commission observed that calculating the appropriate United Kingdom rate by reference to the gross amount was necessary if relief were to be granted consistently with the principle that only the higher tax should ultimately be paid on the same source of income.[121]

An important feature of the proposal was the treatment given to dividends. The Sub Committee proposed that there would be an adjustment at the United Kingdom resident company level by reference to the rates charged to the company by the United Kingdom and by the Dominion respectively and that a subsequent adjustment of United Kingdom rates could be made b04C>-4<0 141.86 635.14 Tm (e)9(nne)-2(s)9(141.86(o)-75(d324(he)31

taxation between the States and the Commonwealth would continue.[135] Ewing then indicates that he was attaching 8 schedules illustrating the operation of the Royal Commission scheme in a variety of hypothetical circumstances. Unfortunately, copies of these schedules are not currently contained in the relevant Australian Taxation Office file located in the National Archives of Australia. Ewing anticipated that, for the Board of Inland Revenue, in particular, but also to some extent for the Dominions, significant complexities would be involved in the application of the scheme to companies. Ewing anticipated that further complications might arise in the case of companies due to:

> the differences between the bases of assessment in the United Kingdom and Australia. The United Kingdom taxes on profits which means net gain and involves deduction of many items which are not deductible in Australia. This feature will be the main difficulty to be overcome in isolating the actual

Winston Churchill, as Secretary of State for the Colonies, sent a despatch to the Australian Governor General on 30th June 1921 enclosing a draft clause that the United .LQJGRP *RYHUQPHQW VXJJHVWHG EH LQVHUWHG LQ O to reciprocal relief from international double taxation of income. Churchill also sent the memorandum referred to above on Dominion Income Tax Relief issued to the public by the Board of Inland Revenue.[144] &KXUFKLOO¶V GHVSDWFK VWUHVV Kingdom system was based on a comparison of the rates of United Kingdom tax and Dominion taxes and not on the amounts it was desirable that the rates of United Kingdom and Dominion taxes should be determined in the same way for the purposes RI UHOLHI LQ WKH 8QLWHG .LQJGRP +DYLQJ &KXUFKLOO¶V GHVSDWF of United Kingdom relief the method for determining the rate of United Kingdom tax differed from the method applied for determining the rate of Dominion tax. The calculation of the United Kingdom rate was determined by dividing tax payable by the WD[SD\HU¶V LQFRPH OHVV GHGXFWLRQ RI DQ\ DEDWHP determined by dividing the amount of tax payable by the WD[SD\HU¶V allowing for any abatement. The rate of United Kingdom Super Tax payable was taken into account in determining the appropriate rate of United Kingdom tax and was determined by dividing the amount of Super Tax payable by the income which was subject to Super Tax. The despatch also indicated that to avoid complications that ZRXOG EH LQYROYHG LQ GHILQLQJ µWKH DSSURSULDW Kingdom revenue authorities would issue certificates in the attached form indicating what the appropriate rate of United Kingdom tax was. The despatch went on to point out that, as the principle underpinning the system was that the lower of the two rates of tax should be eliminated, it followed that in assessing United Kingdom or Dominion tax as the case may be no deduction should be allowed for the other tax. In modern parlance WKH IRUHLJQ LQFRPH VKRXOG EH µJURVVHG XS¶ IRU domestic tax payable. The despatch concluded by advising that certificates as to the

General by cable on 15th October 1921.[147] The cable noted that the Board of Inland Revenue regarded United Kingdom law relating to Double Income Tax as very FRPSOLFDWHG DQG UHLWHUDWHG WKH SROLF\ PDGH 6HSWHPEHU 1921 regarding the method for determining the rate of United Kingdom tax and Dominion tax and made the following suggestions on administrative procedures:

> It will be necessary also before or as soon as Commonwealth provisions operate to make arrangements as regards certificate of United Kingdom rate(s) of relief to be furnished to taxpayer claiming complementary relief in Commonwealth also Commonwealth and United Kingdom taxation years corresponding for purpose of relief. Board feel that in intricate matter mutual co-operation from the first would minimise administrative difficulties and friction with taxpayers. Suggest that Board should be supplied in advance with proposed Commonwealth provisions or if there is representative of Commonwealth Government in this country conversant with question he should discuss with Board in order that liaison should exist from the first. Should be glad to know whether Ministers agree.[148]

7KH $XVWUDOLDQ 7UHDVXU\ SDVVHG &KXUFKLOO¶V FD October 1921.[149] Ewing did not reply until 22nd November after the release of the first report (discussed below) of the Warren Kerr Commission. As will be seen a majority of the Warren Kerr Commission recommended that both the Commonwealth and the States grant reciprocal relief as part of the Dominion Income Tax Relief system. The

& R P P L V V L R Q ¶ V U H F R P P H Q G D W L R Q V [152] noting the loss of revenue to Australia that would result for adopting the proposal, the Warren Kerr Commission stressed that several witnesses had testified to it that double income taxation acted as a distinct deterrent upon the investment of British capital in Australia.[153] The Warren Kerr Commission also regarded the concession which the proposal asked Australia to make as one which might rightly be regarded as a practical expression of the spirit of reciprocity which, as far as possible, should govern inter Empire transactions.[154] The Warren Kerr Commission pointed out that the theory of the British arrangements was that:

> the Empire should for certain important purposes be regarded as a unit, and that while each self-governing portion retains its full right of imposing taxation at its own rates and within the limits which itself fixes, from the point of view of membership of such an Empire no taxpayer can consider himself aggrieved if his total taxation, where he is taxed by more than one authority, does not exceed the higher of the two taxes.[155]

Although they each imposed income taxes in this period, the Governments of the

1922.[164] After noting that no State Government had yet indicated its intention to be a party to the arrangement the letter indicated that the intent of the Australian legislation was to eliminate double taxation as between the United Kingdom and the Commonwealth of Australia to the extent that would be required if the States were parties to an arrangement for the elimination of treble income tax as recommended by the Warren Kerr Commission. Under s12A, where only Australian Commonwealth tax and United Kingdom tax was payable, Australia granted a rebate of tax where the Australian rate was greater than one half of the British rate. The amount of the rebate varied according to whether or not the Australian rate was greater than the British rate. Where the Australian rate was greater than the British rate then the Australian rebate was one half of the British rate. Where the Australian rate was greater than the British rate the Australian rebate was the excess of the Australian rate over one half of the British rate. The Australian legislation would apply from the financial year commencing on 1 July 1921. As was standard Australian practice at the time assessments for that year would be based on income derived in the year ending 30 June 1921.

The letter envisaged several possible problems that might arise in the application of the system. First, although tax years between the Commonwealth and the Australian States were the same the United Kingdom applied a different tax year. Here, the letter

to absentees (non-residents in modern parlance) while the United Kingdom taxed companies at a flat rate. It was anticipated that difficulties might arise in the case of businesses owned by individuals or partnerships as the applicable rates would vary according to the amounts of taxable income assessed to the individual or the respective members of the partnership.

The letter set out in some detail the procedures that the Australian Taxation Office would follow in implementing the system in the case of an Australian branch of a United Kingdom business. These envisaged an itemised dissection of the income of the taxpayer showing the income that had been subject to Australian or United Kingdom taxation and the income that had been exempt from Australian tax with certification of these amounts by the Australian and United Kingdom taxation authorities at differing stages of the rebate process.

The procedure set out in the letter was bound to be cumbersome and clearly took a more detailed itemised approach to differing tax years and differences in tax bases than the approach that was proposed to be used in the United Kingdom. Correspondence between the revenue authorities in the two countries continued but, as is discussed in more detail below, despite this the two countries took significantly different approaches in

not relevant. It is possible though that, if Ewing had been present at the meetings of the Sub-Committee of the United Kingdom Royal Commission, he may have been persuaded of the virtues of a notional as distinct from a measured approach to relief.[170]

'HVSLWH .QLEEV¶ IHDUV LQ DQG WKDW WKH considerable balance of tax (due to the application of its progressive rate scale to worldwide incomes), in fact, Australia by the 1930s regarded the system as working well.[171] By contrast in the 1930s the United Kingdom made intermittent efforts to reform the system as its high rates of taxation and at times limited being one half of its applicable rate meant that it was bearing the major portion of relief that was granted. United Kingdom efforts in 1930 to amend the system so that the Dominions exempted some classes income (principally, fixed interest stocks) from taxation on a source basis while the United Kingdom and the Dominions bore equal shares of relief on the remaining classes of income[172] received a frosty reception from the Dominions with Australia again leading the dissent.[173] Neville Chamberlain as United Kingdom Chancellor of the Exchequer subsequently made desultory efforts to revive the 1930 proposal[174] but when he failed to follow up on a request for a response to his proposal Australia simply decided not to reply at a3<0048>9<0048>3. W* n BT /FJest4(h)11(e)-22(sy)9(st)4(

system meant that the Dominions wanted it to continue but the United Kingdom wanted it modified.[176]

3 U L R U W R $ X V W U D O L D ¶ V D e d u c t i o n s y s t e m i n f a v o u r o f l a w V G L Y L

imputation system in 1923, notwithstanding the prior discussion in the report of the Sub Committee of the United Kingdom Royal Commission, difficulties were experienced in determining whether the company or the shareholder was entitled to the relevant rebate under Dominion Income Tax Relief. The Commissioner of Taxation received correspondence from tax practitioners and businesses on this issue and the Australian Taxation Office view was that Australian shareholders were entitled to any Australian rebate but was unwilling to rule on whether the shareholder or the company should make the application to the United Kingdom for any applicable rebate of United Kingdom tax. In the case of non-resident shareholders the Australian Taxation Office view was that where the shareholder was separately assessed on the dividend the shareholder should apply for any Australian rebate but where this was not the case (that is where the company elected to withhold tax at source) the company should be the applicant.[177]

Prior to 1923 the Australian system principally provided relief from economic double taxation of dividends by relief at the company level. The system was that the company

practical difficulties were associated with collecting surtax from non-residents. The availability of various reliefs to residents could mean that, in some circumstances, a natural person resident shareholder could be entitled to a refund of tax in respect of dividends received. In effect resident shareholders were being given credit for United Kingdom corporate tax paid.[179]

Difficulties associated with the interaction of the two systems of corporate shareholder taxation within the system of Dominion Income Tax Relief appear to have subsided when Australia in 1923, for reasons associated with Federal-State co-operation in income tax collection, abandoned its dividend deduction system for an imputation system in which shareholders received rebates (which eventually were to be non-refundable), the effect of which in most cases was that no tax on dividends was payable at the shareholder level.[180] As mentioned above, throughout the 1930s successive Australian governments viewed the system as working well.

Dominion Income Tax Relief survived Australia's

Kingdom parent companies on dividends paid by wholly owned Australian subsidiaries approached 67.5%.[183]

While Dominion Income Tax Relief was operating within the British Empire, the League of Nations was working on the problem of international juridical double taxation. At the same time the United States was refining the foreign tax credit system that it had introduced in 1918. Moreover, Double Tax Agreements that can be seen as the progenitors of the current OECD Model Double Taxation Convention had been entered into by some States. Importantly these included agreements between States, such as Sweden, with a schedular system of taxation and States, most notably the United States, which used a global system. Each of these developments have been the subject of detailed discussion elsewhere.[184] For the purposes of this paper three important points can be noted from these developments.

First, none of the reports of the League of Nations committees regarded the system of Dominion Income Tax Relief as optimal largely because of the administrative difficulties associated with it but also because it was not suited to eliminating international double taxation where one State was using a schedular system while the other was using a global system. Secondly, a consensus developed through actual treaties and the work of the League of Nations committees that involved a different approach to sharing the burden of relieving international juridical double taxation to that taken in the Dominion Income Tax Relief system. The international consensus came to be that source countries would reduce their taxes on investment income (such as interest, dividends and royalties) and that the residence country would have the primary right to tax this income subject to giving relief through a foreign tax credit. In the case of business profits the consensus that developed was that the source country would have the primary right to tax with the residence country having a residual right to tax provided it granted a foreign tax credit. The consensus was based on paradigms, adopting different treatments for different categories of income and treating the corporate tax as distinct from the shareholder tax, which reflected in different ways, paradigms of the schedular and classical tax systems of the countries that dominated the League of Nations committees and early treaty negotiations. Thirdly, in this period, the United States developed the practice of limiting its foreign tax credit by reference to the United States tax otherwise payable on the relevant foreign source income. Tax planning subsequently led the United States to develop other limitations but none of the limitations prevented a foreign jurisdiction from increasing its tax rates to the level of United States rates to take advantage of the United States foreign tax credit. The end result of these developments was that by the end of World War II international practice, and particularly United States practice, had begun to settle on limiting the source FRXQWU\¶V ULJKW WR WD[LQYHVWPHQW LQFRPH JLY tax business profits and requiring the residence country to relieve double taxation by

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[183] For a detailed discussion of the approaches of both Australia and the United Kingdom to dividends XQGHU WKH V\VWHP RI 'RPLQLRQ ,QFRPH 7D[5HOLHI IROORZLQJ $X Taylor, Negotiation And Drafting 1946 Treaty, supra note 178, pp. 205 to 206 and Taylor, Dreary Subject, supra note 178, pp. 218 to 220..

[184] See S Picciotto, International Business Taxation, Weidenfeld and Nicholson, London, 1992 at pp 12 to 0 - *UDHW] DQG 0 0 2¶+DU µ7KH µ2ULJLQDO ,QWHQW¶ 2I 8 6 , Law Journal 1021; P Verloren van Q 7KHPDDW µ7KH $QJOR $PHULFDQ *URXS RI 7D[concluded since 1939, compared with the ZHU U H Cahiers De Droit Fiscal International pp 1 WR 0 % &DUURO µ'RXEOH 7D[DWLRQ &RQYHQWLRQV &RQFOXGH Cahiers De Droit Fiscal International pp 25 to 78.

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The Tiley trilogy and US anti-avoidance law

Erik M. Jensen*

Abstract

This article considers an influential set of pieces, written by Professor John Tiley in the mid- to late 1980s, about US anti-avoidance doctrines.

trilogy might have been in some respects, this was not an exercise in dispassionate analysis.[15] This was a subject about which John Tiley had very strong views.

The details of US tax law have of course changed since the trilogy was written, and the

by citing an anti-avoidance doctrine, he could avoid the hard work of analysis.[22] As John put it, an invocation of doctrines as if they determined the case without explaining how.[23] It is easier, that is, to say that the substance of a transaction is X, and that the tax results should follow from that characterisation, than to have to interpret difficult revenue statutes (and, for that matter, to explain why the substance is X and not Y). John quoted the legendary Judge Learned Hand, who in 1932 described judicial recourse to [illegible] to avoid the pains of reasoning.[24] John added:

> It is all too clear from the American authorities that a simple invocation of this doctrine as if it answered the problems presented is an easy a [sic] t

more difficult than in that of general anti-avoidance doctrines.[37] Such a doctrine potentially leaves all acts at the risk of being re-characterised.[38]

Parliament establishes both the substantive rules and the governing tax doctrine.[42] This reduces doctrinal complexity and lessens the need for judicial development of anti-avoidance doctrines.

The form that tax legislation takes in the two countries provides another reason for judicial participation in the US lawmaking process in a way frowned upon in the UK. In - R K Q ¶ V Z R U G V µ the legislation which the courts have to apply contains many provisions of a complexity equal to the worst of the United Kingdom legislation but it is much more prone to introduce relatively wide concepts and leave matters to the courts to resolve.[43] ¶ , W Z D V E H F D X V H \ R X K D G W R G R V R P H V W X ¶ G H Y H O R S µ O H Y [44] (and sometimes much more) level 7 reasoning comes much more naturally to United States lawyers than to their United Kingdom colleagues not least because they recognise that their statute provides a framework for the judges to develop doctrine, a premise which United Kingdom lawyers do not share.[45] 4-4(ch Un)14(i)-4(t)-4(e)

John may also have overstated the extent to which the US Constitution, which imposes limitations on the national taxing power, contributes to the enactment of fuzzy statutes that invite, or even demand, judicial intervention. In particular, John emphasised the significance of the Sixteenth Amendment to the Constitution, ratified in 1913. Without the Amendment, a tax that reached income from property would (the Supreme Court had held in 1895[48]) be a direct tax that would have to be apportioned among the States on the basis of population.[49] Apportionment would have made the income tax absurdly H[HPSWLQJ µWD[HV RQ LQFRPHV¶ IURP WKH DSSRUWL made the modern income tax possible.[50] EXW RQO\ LQVRIDU DV WKH WD[LV Hence the uncertainty, or so John argued.

US courts, John wrote, have to construe legislation

> not only in terms of what Congress intended but also in terms of what the Sixteenth Amendment allowed. The legislation in the early years was broad and many of those broad principles have remained in place. Broad legislation sensibly construed in a broad way. Issues of form and substance first emerged in this era and the preference for substance over form, being concerned with fact classification rather than re-characterisation, is a natural and correct way to determine the facts of the case.[51]

It is true that Supreme Court cases from the 1920s and 1930s regularly contained GLVFXVVLRQV DV WR ZKHWKHU D SDUWLFXODU LWHP F the Sixteenth Amendment.[52]

signifi

UK.[54] But the Report issued by Graham Aaronson contains little that the author of the Tiley trilogy might have objected to. The recommendations were quite limited in their scope, and intentionally so. The Committee did not recommend anything like the importation of US substance-over-form doctrines, and, in any event, the Committee recommended

The US for years had resisted codification of any general anti-avoidance rule. Although the Internal Revenue Code includes many provisions that contain authority for application of substance over form principles, those provisions are targeted at specific transactions.[72] The George W Bush administration did not support codification of a general anti-tax avoidance rule largely on the ground that doing so would fossilise doctrines that need to be fluid, to be able to adjust quickly to the ever-evolving imagination of tax planners.

Nevertheless, as part of the healthcare legislation enacted in 2010, popularly and unpopularly known as Obamacare,¶

1

The study of history is often lambasted for being of no use. Henry Ford[2] famously said that it is µmore or less bunk ¶

individuals) (see Myddelton, 1994; Daunton, 2001). The most recent review of the UK tax system, the *Mirrlees Review* 0 L U U O H H V D F E H S W H G 6 P L commanding µnear-universal support ¶but felt that µthey are not comprehens4(supp)9(oraderbse4

the justification for this paper. This is not a new debate, but one which has, quite literally, raged for centuries.

7KH UHVW RI WKH SDSHU LV VWUXFWXUHG DV IROORZV of taxation in detail, followed by a consideration of David +XPH¶V DQG 6DPXH -RKQVRQ¶V YLHZV LQ 6HFWLRQV DQG UHVSHFWLY conclusions.

2

Locke (1632±1704) was a leading English figure at the forefront of the phenomenon which came to be known as the Enlightenment (c1688±1800), also referred to as the

> make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.
>
> Locke, 1690b, II.8.95

> Political power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of

difficult to unravel the sequence of his works and the development of his ideas, as he re-wrote and re-published major works under different titles and his thoughts on a particular subject may not be confined to a given work.

In his essay *Of the Original Contract* (1748), Hume argues that governments are founded by violence,[7] not F R Q W U D F W X D O D J U H H P H Q W U H M H F W L consent. His essay considers the philosophical differences between the Tories and the Whigs on the origin of government and concurs with the Tory thinking that political power derives from divine right: the Whigs adopted Lockean theory. In the essay *Of the First Principles of Government* (1741), he suggests that protection of the public interest and of the rights to power and property are the basic reasons for the establishment of government, arguing in *Of the Origin of Government* (1777)[8] that the objective of government is to maintain justice (see Kelly, 2003, p. 211).

7 K H U H L V W K X V L Q + X P H ¶ V W K L Q N L Q J Q R X Q G H U S L Q Q L

potential independence of America would be like (he says) Cornwall setting itself up as an independent country: unthinkable.

In *Taxation No Tyranny* (1775, p. 7) Johnson specifically refers to the Americans enjoying ‘security of property’ by the grace of English law. If the Americans accept law, they must accept all of it: they cannot pick and choose the laws they want and reject the ones they do not want – and ‘by a chain which cannot be broken’ must accept ‘the unwelcome necessity of submitting to taxation’ (*ibidem*, p. 9). Colonists were always ruled by the terms of the original charter: they were not in a ‘state of nature’ (*ibidem*, p. 9[10]) as were the native inhabitants. While they cannot vote for representatives in an English parliament, this has been their choice.

> As man can be but in one place, at once, he cannot have the advantages of multiplied residence. He that will enjoy the brightness of sunshine, must quit the coolness of shade. He who goes voluntarily to America, cannot complain of losing what he leaves in Europe. He, perhaps, had a right to vote for a knight or burgess; by crossing the Atlantick, he has not nullified his right; but he has made its exertion no longer possible. By his own choice he has left a country, where he had a vote and little property, for another, where he has

eJournal of Tax Research Locke, Hume,

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Taxation in Australia up until 1914: the warp and weft of protectionism

Caroline Dick*32.98 555.91 Tm[(*)] TJETq0ET5/30 0 1 136.22 551.95 Tm[(32.98 555.97 Tm[(*)] TJETq0ET08.63 0

1 INTRODUCTION

> The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but the power to keep alive.[1]

public expenses for the Colony of New South Wales consisted chiefly of expenditure connected with the support and management of British convicts[25] and were borne almost entirely by the Imperial Government. [26]

maintain colonies in which it could relocate surplus convicts[27] . It also allowed her to continue to carve out colonial outposts where resources, both human and natural, could be regulated and turned to an advantage in building up the expanding Imperial Empire.[28] Britain not only owned the new colonies and all their natural resources, but the Imperial government deemed itself to be in the best position to minutely regulate and guide the activities of all British colonial subjects. At the same time, it maintained public order and established a clearly defined hierarchical social order. During the transportation period, for instance, the British government regulated what clothing which most inhabitants could wear. [29] Early convicts were in most part identifiable by a uniform which was made distinctive by a coloured stripe.[30]

This form of paternalism,[31] where the Imperial Government was the universal provider,

many exigencies: an uncertain economy, a disinterested British government, unrest and dissatisfaction of prisoners and settlers, the irregularity of shipments and the lack of local industries and businesses.[37] Harris suggests that the Colonies did not have a great need for revenue during the first half of the 19th Century .[38] Whilst most of the costs of transportations and the establishment and running of the penal settlements were borne during this period by the Imperial Governments, through the raising of funds from the London markets and the sale of public land to free settlers, local tax collection in the

and luxuries.[50] This growth in imported items reflected the period of rising trade and the increase in economic prosperity of the colonies and the spending capacity of their populations. In New South Wales, for instance, the total amount of imported British-made clothing more than quadrupled between 1848 and 1853[51] and much of the -produced tradeable goods.[52] There was also an enormous spike in the demand for imported clothing during the gold-rush period when a rising population of prosperous consumers[53] spent their newly found wealth on all sorts of imported luxurious and superior ready-made fashion apparel, even though these goods attracted high customs duties.[54] This rapid growth in exports and the dramatic increase in disposable income in this period also soon resulted in a rapid expansion of banking and commerce.[55]

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government was granted to five of the six Australian colonies between 1855 and 1859.[56] From then on, and in a relatively short period, these colonies, albeit in different degrees, began to achieve some economic and political independence. In 1850 the *Australian Colonies Government Act011(ood)g448uu49ET0.0154Ca.(shor)-5(t)o80442(oni)BT1d7g448uu49ET46*

continuous and passionate advocacy

Just as sumptuary regulation from its earliest inception in the fourteenth century had existed in a close symbiotic relationship with protectionism ,[89]
we see the same development of a close symbiotic relationship in Australia between taxation tariffs and protectionism. And just as the [90] later

protection. [150]

and accessories were still necessities of life for the poorer classes.[167] High protective duties had even made socks[168] and hat pins[169] luxury items.

On the other hand, there were some Protectionist members of Parliament who took a vastly different view as to the economic effect of these old laws.[170] They strenuously argued in favour of the value of the English protective sumptuary laws, which had compelled the wearing of English goods and prohibited the exportation of raw materials. They contended such laws were at the heart
commerce under Queen Elizabeth I.[171] They argued that the imposition of a protective tariff along with rigorous navigation laws, which prevented free trade in shipping and compelled English colonies to trade in English ships, had made England the great workshop of the world. [172] Protectionists, such as McColl MP, argued that just as England was built up under protection
prosper in the same way under moderate, reasonable, and discriminating protection. [173] Yet, they continued to object to any high protective duties which were unreasonable and unwise

Mother Country [184] favourable or preferential treatment, as against similar products from other parts of the world.[185] The proposal was to leave the tariff untouched for these British goods and to increase, by ten per cent,

of the enormous benefits of protection policies, these employers had to provide superior

which sought to protect certain industries from unfair outside competition. [214] It was also the first Federal tariff which provided for preferential treatment for the United Kingdom. [215] However, its glory was short lived: the *Excise Tariff Act* 1906 was challenged as being unconstitutional and the High Court declared it to invalid.[216]

However, there was, a positive legacy for workers arising from this failed New Protection paradigm. [217] In the Arbitration Court, Justice Higgins [218] continued to develop and consolidate his rules relating to arbitration and wage determination. So

wage,

[219] became the bedrock for future legislation[220] and arbitration practices linking the minimum wage with the cost of living. This meant that protection, albeit without any statutory nexus, became a basis for Australian living standards.[221]

8 AUSTRALIA'S CONVERSION FROM PROTECTIONISM – FINDING MORE EMPTY HEADS

> Consumers have always been a weak countervailing force against protection because of the free rider problem of collective action.[222]

By the end of the first decade after Federation Australian politicians began to take a more uniform approach to protectionism[223] and contemporary political discourse,[224] which was not only preoccupied about the potential effects of protection had also adopted a more pro-protectionist advocacy and fervour. [225] At the same time protectionist rhetoric had also begun to take on a more noticeable semiotic engagement with the language and concerns of sumptuary regulation.

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[214] Reitsma, above n 3, 16.
[215] Reitsma, above n 3, 16.
[216] *R v Barger*
Higgins JJ had the task of deciding whether the *Excise Tariff Act*

redistribution.[261] The promise of higher wages and better working conditions for workers in protected industries dispelled the concerns of the Labor members, and the Labor Party then effectively resolved its own divided position to become more united behind protection.[262]These government promises not only highlighted the rise in the relative importance of manufacturing in Australia since the 1890s but also reflected a direct correlation with rise of the Labor Party and its aim for a high wage economy.

grasp of the poorer classes of the community.

The Cook government set up this Commission and authorised it to formally investigate claims for increased tariff protection.[302] Not only did the Commission have the power

the same time they appeared to be fully cognisant of the possible repercussions of this new, more formalised method of scientific protection. [317]

10 CONCLUSION

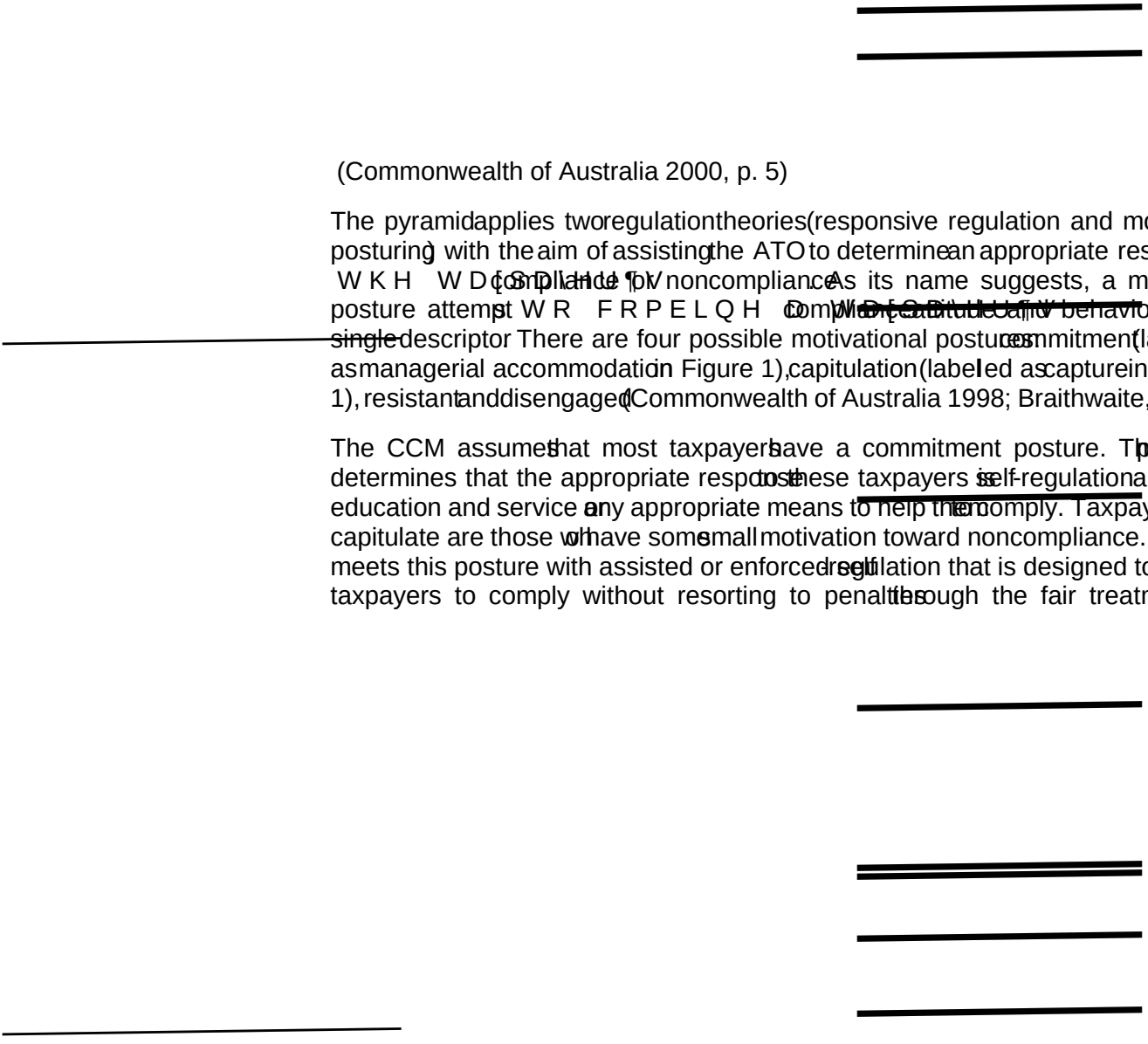
This article argued that echoes of sumptuary regulation were evident in Australian taxes from the earliest colonial taxes through to the restrictive and onerous protective tariffs of the first two decades after Federation. The article began by showing that the early Australian colonial taxing regime had much in common with the sumptuary paradigm.

1 INTRODUCTION

Taxation plays an important role in economic management and in the provision of public goods and services (Allan 1971). Consequently, improving voluntary compliance with tax systems is a goal of many governments and revenue authorities (OECD 1998; Tanzi 20 ' ¶ $ V F H Q] R & R P P R Q Z H D O W K Compliance has been traditionally achieved through deterrence methods such as the fear of audit and associated penalties based on the assumption that taxpayers will comply only when forced (Becker 1968; Allingham & Sandmo 1972; Braithwaite, V 2002a). In more contemporary times many revenue authorities have sought other approaches to improving voluntary compliance by taxpayers.

The Australian Taxation Office (ATO) adopted the cooperative compliance model

Figure 2: The CCM for LBI



(Commonwealth of Australia 2000, p. 5)

The pyramid applies two regulation theories (responsive regulation and motivational posturing) with the aim of assisting the ATO to determine an appropriate response to WKH WDIJHWHG ¶SUREOHP· of noncompliance. As its name suggests, a motivational posture attempts to WR FRPELQH DWWLWXGH DQG EHKDYLRXU into a single descriptor. There are four possible motivational postures: commitment (labelled as managerial accommodation in Figure 1), capitulation (labelled as capture in Figure 1), resistant and disengaged (Commonwealth of Australia 1998; Braithwaite, V 2002).

The CCM assumes that most taxpayers have a commitment posture. The pyramid determines that the appropriate response to these taxpayers is self-regulation aided by education and service and any appropriate means to help them comply. Taxpayers who capitulate are those who have some small motivation toward noncompliance. The ATO meets this posture with assisted or enforced self-regulation that is designed to persuade taxpayers to comply without resorting to penalties through the fair treatment and

- Current and former ATO employees.
- Taxation academics.
- Other ± comprising tax professionals or members of the Cash Economy Task Force who are not in any of the other categories above.

Table 1 provides details as to the numbers interviewed.

Table 1: Interviewee categories

Category of Interviewee	Number of interviews

way of enacting power with the goal of producing behaviour instead of oppressing it (Foucault 1977, 1978; Mills 2003). Society also became a confessing society offering up information for institutions to use for behavioural control (Foucault 1978; Rouse 1994).

$ Q R W K H U R I) R X F D X O¶V W K H V H L V R I W K H U H L V D Q H [S D Q V L R Q V L Y H commensurate with disciplinary power since it relies on the knowledge gained through the use of social science methods and theories in order to understand and then control behaviour of individuals and populations (Foucault 1977, 1978; 2 ¶) D U U H O O

Enclosures and partitions are supported by functional sites multi-purpose architectural forms within prisons, schools, factories or hospitals) R X F D X O W 2 ¶) D U U H O These are also designed to aid in observation but also to help make the individual produce output effic or

concerns over mechanical treatment given to small debtors when the Joint Committee of Public Accounts and some in the profession commented that ATO audit officers at times placed too much emphasis on following procedure rather than achieving the appropriate outcome (Commonwealth of Australia 1993; Lampe and Williams 1996). &ULWLFLVPV RI WKH $72¶V WUHDWPHQW RI GHEWRUV References Committee a few years later (Senate Economics References Committee 2000).

to the introduction of the prison system, such a punishment was determined with the aim of rehabilitating the criminal. Similar observations can be made in the development and adoption of the CCM. The first response that the ATO made in response to the above criticisms was essentially forced upon it by the Joint Committee of Public Accounts.

The Joint Committee of Public Accounts argued that ensuring proper conduct was $ 7 2 ¶ V U H V S R Q V L E L O L W \ a n d \ O H J L V O D W L R Q (C R P P R Q Z H D O W K \ R I \ $ X V W U D O L D \ 1 9 9 3 ; Williams 1996). Therefore it recommended that the ATO adopt a 7 D [S D \ H U V ¶ & K D U W to redress the balance of power between it and taxpayers (Commonwealth of Australia 1993; McLennan 2003). It was important for the tax system to be fair and seen to be fair and the 7 D [S D \ H U V ¶ & K D U W was to help achieve that (Bentley 1995). Upon releasing the draft 7 D [S D \ H U V ¶ & K D U W on 30 October 1995, Commissioner Carmody acknowledged that the ATO had wide-ranging powers and that a sense of balance between these and the rights of people in the community was required (Australian Taxation Office media release 95/46 as cited in Williams 1996; Edmonds 2010). After its adoption on 1 July 1997, the 7 D [S D \ H U V ¶ & K D U W appeared not to gain widespread acceptance within the ATO, a development that Commissioner Carmody was disappointed about

the CCM became popular within the ATO (Commonwealth of Australia 1998). Applying penalties to taxpayers who genuinely found it difficult to comply was regarded as inequitable in the eyes of the Cash Economy Task Force members.

> 6R LI \RX NQHZ \RXU LQGXVWU\ ZDV UHDOO\ VWU
> UHVLVWDQFH \RX ZRXOGQ¶W JR µ\RX EDVWDUG Z
> µORRN , NQRZ \RX¶UH VWUXJJOLQJ¶ DQG WKDW¶V
> ,¶YH WDONHG WR RWKHUV¶ VR WKDW \RX FDQ DF
> VLWXDWLRQ DQG WKHQ \RX VD\ WR WKHP µ\RX¶U
> VRPH ZD\ RI ZRUNLQJ WKLV RXW ZH QHHG WR JH
> CashEconomy Task Force member).

The CCM therefore allowed the ATO to move away from a one-size-fits

Foucault argued that the method of choosing the punishment advocated by the reformers had the advantage of diluting responsibility of the punishment making it difficult to determine who decided it. The CCM works in a similar manner since the ATO could deflect criticism of its approach by appealing to the CCM and its balanced method of dealing with tax-6( )11(t)-5h;l

management were important steps forward that aim as they allowed the ATO to focus its resources on the risks to the revenue (Wickerson 1994a, 1995, 1996). Project Based

7KH $72¶V FRPSOLDQFH VWUDWHJ\ DV GHVFULEHG DE
space, albeit notional, and time in accordance with the techniques of discipline (Foucault 1977). As Foucault described in *Discipline and Punish*, the enclosure was described as a clearly defined space such as a prison or a hospital where the group being regulated is clearly defined as prisoners or patients. Although the ATO pays more attention to some taxpayers than others, it nevertheless regulates all taxpayers and thus the entire taxpaying population may be regarded as the enclosure. The ATO has no jurisdictional authority over citizens who are not taxpayers in a similar fashion to prison guards having no authority over free citizens. The market segments just described may

Similar types of data was used in the painting industry and the fish and chip shop industry with respect to the amount of paint required to paint a room or the amount of fish required for a serve of fish and chips. This knowledge was used to assess the likely noncompliance of the taxpayer in those industries. These examples illustrate how society became a confessing society in accordance with Foucauldian theory.

Some techniques were newly developed during the Cash Economy Task Force. One technique was the real time review (Commonwealth of Australia 1998). These reviews

and emerges from them (Foucault 1977). This implies that knowledge goes through a process within each institution before it is used. The ATO will need to be careful that whatever process it uses to officiate its knowledge does not lead to its corruption and that there are no bias in its selection.

While the CCM takes into account and attempts to deal with the social causes of noncompliance, it continues to use deterrence measures for those who are determined to remain noncompliant. The noncompliance of these taxpayers may not be due to his or her circumstances, but rather due to some attribute within him h5(t)-4(s [(de)9(tu332(of)-3(

tan17ff1249re2-525le) [(c)e)9(r)7(m)17(i)an3f no140-(e)-9(t)-4(.)11( )] TJ ET BT 1 0 0 1597.223 673.0(non)11(com)1axp

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1 INTRODUCTION

In December 1760, effective 1 March 1761, the colonial assembly in Jamaica passed an act imposing stamp duties on the island colony.[1] By its own provisions, the act was due to expire on 31 December 1761, but it was in fact extended until 1763.[2] There had been a stamp act in existence in England since 1712,[3] and the colonial legislatures of Massachusetts and New York passed acts similar to the English one in 1755 and 1756 respectively.[4] One of the principal reasons for the introduction of all these stamp acts was the necessity of raising funds in a time of war.[5] The Jamaican act was no exception as the island struggled to cover the costs associated with a slave rebellion in 1760, QRZQ DV µ7DFN\¶V 5HEHOOLRQ¶ RU µ7DFN\¶V :DU¶ difficulties posed by the ongoing Seven Years War.[6]

The purpose of this article is to examine in detail the 1760 Jamaican stamp act, about which little has thus far been written,[7] and explore the contextual background to its introduction. Previous references to the Jamaican

Britain generated revenue for the British crown through payments made by Jamaicans

£160 million.[27]

article to examine this topic in depth.[42] However there are some commonly accepted reasons that have especial relevance to the period leading up to the introduction of the Jamaican stamp act in 1760. While it would seem obvious that a desire for freedom would be a reason, or indeed the most compelling reason, there were usually other factors as well that led to open rebellion.[43]

SchuOHU FRPPHQWV WKDW µVRPH IDFWRUV ZHUH PRUH

A further reason, neglected by the literature on slave rebellions according to Geggus, was the movement of British troops and differing strengths in the local garrisons.[53] It was recognized by the colonial powers that the presence of garrisons would go some way to ensuring security where there was such an imbalance in the ratio of slaves to settlers.[54] *HJJXV VD\V LW LV µVHOI HYLGHQW¶ WKDW VODYH movements, and planned any revolt to coincide with reduced number of regular soldiers.[55] When referring to this aspect of slave rebellions, Geggus covers a broad sweep of the eighteenth and early nineteenth century, but mentions in particular 7DFN\¶V 5HE

2.4 Taxation in Jamaica

The fourth and final contextual feature relevant to understanding the emergence of the VWDPS GXW\ LV -DPDLFD¶V SUHYLRXV DSSURDFK revenues during the eighteenth century were primarily from the deficiency tax supplemented by various other taxes (see below). The deficiency tax was designed to address the preponderance of negroes compared to whites in Jamaica that had existed prior to its being conquered by the English and was of sufficient concern in 1716 that legislative action was considered necessary. The Deficiency Act, reenacted annually, established a quota system whereby persons were required to employ white persons in

3	For Stamping each and every Sheet of Paper commonly called Post Paper Pro Patria or Fool Cap Paper or any Paper Piece of Skin of Vellum or Parchment of the same size	One Shilling and Ten pence half penny
4	For Stamping each and every Sheet of Paper Commonly Called Kings Arms Crown or Post Paper or any Paper Piece or Skin of Vellum or Parchment of the same Size	Seven pence * half penny

The dutiable documents and respective duty payable are detailed in the Appendix to the paper. The majority of dutiable items were legal documents including mortgages and court instruments, grants, and letters patent. Also dutiable were bills of lading, wine and spirit licences and certificates of naturalization.

Specifically exempted from duty were:

> Any Act of the Council or Assembly, Proclamation, Acts of State, Votes or matters ordered to be printed by either Branch of the Legislature
>
> Bills of Exchange accounts Bills of Fees or any Bills or notes not Sealed for Payment of Money nor to Charge the Probate of any Will or Letters of Administration of any Common Sailor or Soldier who shall be slain or die in +LV 0DMHVW\¶V 6HUYLFH WKH VDPH DSSHDULQJ E Captain under whom he served with the Duties charged by this Act.

The machinery for operating the stamp duty was particularly cumbersome. Commissioners were appointed, comprising the Governor and members of the OHJLVODWLYH FRXQFLO DQG DVVHPEO\ ZKR ZHUH WK Execute andSHUIRUP WKH 'XWLHV DQG 7UXVWV KHUHDIWHU was 1tT<0013(J ET BT /F2 11.04 Tf 1 0 00049p03700427 Tm [(w)5(as)-4t5P7.86 qu(t)-4(y

2D	If any Deed, Instrument or Writing or Copy thereof by this Act Charged with Payment of a Duty aforesaid shall Contrary to the true Intent and meaning thereof be written Ingrosse or printed by any Person or Persons whatever not being a known Clerk o Officer who in respect of any Publick Office or Employment is or shall be Intitled to the making, writing or Engrossing the same upon Paper Parchment or Vellum not marked or Stamped according to this Act or marked or Stamped for a lower Duty as aforesaid that then and in every such Case	Pay to the Receiver General the Sum of five Pounds over and above the duty
3		

failure of the imperial stamp act of 1765.[97] A summary of the oral evidence of the witnesses is contained in a document held at the British Library.[98] The committee was chaired by Mr Fuller and on June 17, James Carr, a Jamaican merchant and attorney, gave evidence in relation to the Jamaican stamp act. James Carr confirmed that the tax KDG EHHQ LQWURGXFHG DV D GLUHFW FRQVHTXHQFH in relation to the workings of the act in terms of what documents it applied to and also the manner of its collection. Carr was adamant that the most problematic aspect UHODWHG WR LW EHLQJ µXQHTXDO¶ E\ ZKLFK KH PHD poor, primarily as a consequence of its application WLRQ WR ODZ VXLWV VD\LQ SDLG IURP WR SHU DQQXP,[99] and later stated that RQ OD considerably more than half the revenue raised by the stamp act came from this source. Carr dismissed the suggestion that one possible benefit of the stamp duty on ODZ VXLWV ZDV WR FKHFN WKH µOLWLJLRXV GLVSRV problem, noW DQ\ µOLWLJLRXV GLVSRVLWLRQ¶

Carr also alluded to the difficulties in administering the act in light of the geographical distances involved, which was also a problem with the Imperial stamp act imposed on the British colonies in both America and the West Indies in 1765.[100]

There was some questioning by the Committee regarding the reasons for the repeal of the Jamaican Stamp Act, and despite the insistence of the questioner that the repeal would have been occasioned by the heavy tax on mi3(obl)-45C00 1 141.86pn03 Tm 6uesta

Irwin was also questioned as to the reason for the eventual repeal of the Jamaican VWDPS DFW DQG VDLG LW ZDV EHFDXVH RI µWKH H[WU SHRS.[164] He further observed that the first year of operation, the act was tolerated due to lack of understanding, whereas the second and third years of operation was µIURP QHFHVVLW\¶

Very little has been previously written about this peculiar tax. The drafting of the Act was unusual in its specificity, and the manner of its implementation was cumbersome to say the least. The choice of fiscal instrument almost certainly reflects political tensions, in particular around the impact of absentee landlords on the Jamaican social and economic environment.

4 CONCLUSION

Jamaica was one of the prized British colonies, making a substantial economic contribution to the British economy; important at a time of military engagement in the Seven Years War which threatened the contribution of Jamaica to the British purse.

NLQJ¶V DXWKRULW\ LQ P\ SHUVRQ WKDW KH K
influence in the community, destructive of the good order of his fellow citizens, so I shall willingly resign myoffice, the moment the king my master shall judge it to be conducive to his service; and that those who may with my removal, shall have no other motive to desire it, but the welfare of WKLV LVODQG , GR ZLWK WKH DGYLFHWRR¶VKLV P
name, prorogue this general assembly unto Tuesday, the 4th day of January next, and its prorogued accordingly.

17	Deed, Conveyance, Reconveyance, Lease Release, Renunciation, Mortgage Surrender, Gift Grant any other Deed	Two Shillings and sixpence
18	Attestation or Exemplifications that shall pass the seal c any Court	Twenty Shillings
19	Institution, Licence, Letters, Testamentary, Letters of Administration Letters of Guardianship, Dedimus Potestatem Warrants of Appraisement or any other Instrument that shall pass under the Seal at Arms of the Governor and Commander in Chief as Ordinary or Duplicates in Offices of Record or Office Copies thereo or any Letter of Mart	Ten Shillings
20	Licence forselling Wine called Grand Licence	Ten Shillings
21	Petty Licence	Five Shillings
22	Declaration or copy Writ of Summons or Arrest signed b the respective Clerk of any Court	Seven pence halfpenny
23	Writ of Error, Certiorari Habeas Corpus, Capias Replevi Partition Dower Possession Scire Facias or Distringas	Two Shillings and sixpence
24	Writ issuing out of the Supreme Court or any Inferior Cc	

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Not argued from but prayed for: the role of legal principles in interpretation

Hans Gribnau

Abstract

What is the use of legal principles in taxation? And do they have anything to do with morality? These are the main questions this article addresses focusing on the theoretical and practical role of fundamental legal principles on the European continent. It is argued that principles indeed embody the dimension of morality (justice, fairness) rather than policies. These abstract principles are to be distinguished from rules, which contain more specific standards for behaviour.

Moreover, law-making and law-applying institutions are not the authors of legal principles, for they find the principles in the law. Because principles are external standards to lawmakers, the body of rules established by lawmakers should be in conformity to fundamental legal principles. Hence, legal principles embodying the ó intent ï function as morality essential criteria of evaluation. Furthermore, these regulative ideals can be entrenched in a broader philosophy of law which accounts for some of their characteristics such as inconclusiveness. Legal values and principles connect the legal system with the moral values and principles prevailing in society; the former function as a kind of filter. Thus, legal principles are vehicles in the movement back and forth between legal values and legal rules. Abstract principles in turn cannot be applied directly unless they are specified and elaborated in rules.

Next, this theory is put into practice. Some examples in the field of tax law are discussed in order to show the added value of the principle-based method of legal reasoning which can take account of varying circumstances. It will be shown that judges actually make use of principles, for example as the normative basis for rule-making. Moreover, it will appear that if it is not (yet) possible to establish a rule, priority principles may be developed to guide decision-making. Thus, these examples show some aspects of principle-based reasoning in tax law. The practice of tax law reflects a theoretical approach which conceives of law as a system of rules based on coherent set of moral principles.

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1 INTRODUCTION AND OUTLINE

1.1 Introduction

Legal principles seem to be a source of confusion. John Tiley once wrote that principles in European law have "an aspirational aspect which they are waiting to be not analysed but invoked".[1] Also strange to common lawyers and especially tax lawyers is "the method by which it states the principle and then ... [has] very little to the higher level of abstraction accustomed to the rules which helps one to construe it".[2] According to John Avery Jones external to the ground in contradistinction with "European" principles stay close to level of abstraction causes common lawyers to change the terms of discourse from legal reasoning to praying[3] which is mildly surprising to some other lawyers, for example those from the European continent.

Xavier Groussot for example states, that

ï a feature which John Tiley may have had in mind. Rules, however, contain less general, more specific standards for behaviour. As a result, both the abstract and the aspirational aspect of principles, elaborated in rules, may become manageable. Thus legal principles, themselves not in any way rigid standards of behaviour, but on the contrary, flexible standards, are fleshed out in rules in specific contexts and situations. All the more reason, not to be afraid to use principles.

The research question of this article, therefore, is formulated as: how to understand legal principles as regulative ideals in a broader philosophy of law which accounts for their relationship to rules? I will not elaborate on the common law conception of principles. Nonetheless, I will briefly deal with some common law authors to give the reader an impression so as to appreciate the radically different starting point of a broader theory and the various features of principles as they are conceived by legal scholars on the European continent.

In passing I cannot but touch upon some aspects of

(§ 5). Law is oriented towards its supreme value: the idea of law. Law aims to realize justice. Radbruch maintains that law is not just a social fact, because it is value-oriented. Law is ultimately motivated by an understanding of a basic human good, viz. justice. Radbruch distinguishes three elements of justice that the law aims for: legal equality, purposiveness, and legal certainty. These fundamental values underlie the legal system. It will be argued that they are not mere abstractions but are elaborated and clarified in concrete situations. The value of purposiveness conceptualizes the external, i.e. societal and statal input into the legal order which, however, has to pass the filter of e[6c whi

morally empty understanding of the rule of law. This version of the rule of law has no content requirement which, therefore, renders[18]

Dworkin's substantive conception of law, however, enables us to account for the role of principles as standards for evaluating existing law. It gives principles a place besides the legal rules and standards established by legal authorities. As will be shown, legal principles in the narrow sense have an existence of their own; they are not the product for example of the legislator. On the contrary, they set limits to legislative voluntarism. In this sense they are external to law-making institutions, though law-making institutions may develop principles by specifying them in rules and applying them to concrete situations.

Here, Dworkin elaborates on the distinction between principles and rules. He opposes the

law.ô[24] Ass. John Tiley reminds us by quoting the Amer i
is not simply a means of raising revenue. It is the most pervasive and privileged exercise
of the pol[25] ice power.ô

To conclude this section, legal principles constitute the moral core of the legal order-
comparable to Fuller's o[26] inner morality of l
morality, but they are not purely moral standards, for legal principles serve legal values
(see below § 6) in contrast with moral principles which serve moral values. Indeed, law
and morality are not identical. Legal principles are (moral) standards which are specific
for the law, they are elaborated within the legal system. Thougg815 (h)11(1(g)22(6(e)9(d)1DC

There is another point of disagreement explicitly mentioned by Hart himself on what he calls -choenóconclusivenessô of principles. This reg necessitate particular legal consequences, dictating a result or outcome, whereas principles do not because they have a dimension of weight.[31] Principles, therefore, do not conclusively determine a decision. Hart does not accept this sharp contrast between principles and rules. However, for Dworkin this is a crucial difference, for principles embody the dimension of morality, they appeal to moral values. The search for a legal philosophy of values to entrench principles (see § 5), therefore, probably would shed light on the -fcoantculesoóvmeonsô. If this will appea values, -choenóconclusivenessô of legal principles wi

whole body of rules in an Act. Moreover, these principles are capable of coming into conflict with each other.

Explicating general principles in this way, MacCormick creates the possibility of

(again, in the narrow sense). Like Dworkin, he maintains that the principle regards the moral element in law, which marks a clear difference with policies. The legislator or another lawmaker

inhis wordingóheld the law to be nothing but s
be nothing but obedience.ô He argues that the l
command of the state but primarily as a striving toward justic

we may value.[78] Thus, as Habermas clarifies, values are teleological. A value, insofar as it is a criterion for action and not simply the result of an evaluation, is the final goal that requires its realization through teleologically oriented activities. Like principles, different values compete for priority in concrete situational configurations[79] filled with tension.

To conclude, this section, it may seem that value jurisprudence is transcendent without any connection to reality. As shown above, a dichotomy exists between ought and is and the value relating perspective of law, softens this gap between value and reality, for law must be conceived as a totality of facts and relations, whose purpose is to realize justice. The idea of Stoffbestimmtheit (material determination) signifying a mutual influence between matter and idea provides another bridge. The idea of the Stoffbestimmtheit of the idea of law means that the idea of law, is related to its matter, law. The idea of law, justice, therefore is not a free floating value. Justice both determines and is determined by the reality of law.[80] The idea of the Stoffbestimmtheit is part of the legal doctrine of the nature of the thing (Natur der Sache), which is essentially the idea that existing factual relations in part determine what rules and principles should regulate these relations.[81] When making new regulations, one should take into account of existing natural, social and legal facts which set boundaries to the freedom to design new rules to policy considerations. Moreover, our ideas themselves about law are

(Gemeinwohl).[83] Consequently, the purpose of law is the good which is determined by the political theories of the day. This second value is the gateway through which all kind of societal and ethical values may enter the legal system. I would suggest that these different societal and ethical values account for all kinds of policy goals in the legal system.[84] As a result, values have to contend with other legal principles.[85] However, there are many views (theories) about the good (society), and therefore about the actual purpose of law. According to Radbruch, a definitive determination of the purpose of law is impossible. So a choice between the many views about the

modern democratic state. Principles can be conceived as applications of fundamental

and interpreted in an[106] Again, this also goes for taxation. Taxes, therefore, should be levied in accordance with fundamental legal principles.

As stated above, debating case law in terms of principles may reveal a degree of consistency which otherwise would not be not visible. Outcomes in concrete cases may seemingly completely lack consistency. However, tracing the underlying principles at stake may show principled coherence, for principles state reasons which argue in one direction, but do not necessitate a particular decision. The collision of principles, therefore, gives insight in the underlying diverging reasons.[107] Thus a relevant principle (reason) contributes to the decision even when it does not prevail.

national tax measure which contravenes a free movement provision is rendered automatically inapplicable.[110] Nonetheless, the EU member states as a matter of principle retain extensive competences in tax matters. They remain free to determine the structure of their tax system and to determine the need to allocate between themselves the power to tax. Moreover, the member states are also at liberty to pursue objectives, e.g., the protection of the environment or stimulation of research and development. Consequently, the ECJ, interpreting and applying provisions of the TFEU, has to reconcile the consequences of the fiscal sovereignty retained by EU member states with the obligations flowing from the EU free movement provisions. This has to be reconciled with the obligations enshrined in the EU.[111]

As Douma argues, the literature on this subject traditionally attempts to identify mistakes or missed opportunities by the ECJ by taking generally accepted principles of national and international tax law and existing ECJ case law as a starting point. In his view, this "internal" approach cannot lead to a substantiated answer to the question whether the ECJ case law is correct or incorrect with respect to the reconciliation of national direct tax sovereignty and free movement, for it results in an oversimplified discussion in which positions are taken which are often motivated only by referring to the position itself. Douma submits that a proper analysis can only be made in the light of an assessment model which is external to and independent of the ECJ case law. This model should account for the fact that one cannot say that free movement always prevails over national direct tax sovereignty, nor that national direct tax sovereignty always prevails over free movement. Theories, therefore, which regard some principles as being absolute – instead of relative – cannot serve as an inspiration for the development of a theoretical assessment model. Douma concludes that a theory is needed which regards national direct tax sovereignty and free movement as prima facie reasons or principles and which provides a framework for reconciling these principles. The framework should be designed in such a way that no principle would always trump the other. They should be given a very wide scope.[112] Otherwise, narrowing the scope of the relevant principles in advance, this would essentially result in one principle always trumping the other.

Douma subsequently develops a model that recognizes that free movement and national direct tax sovereignty are fundamentally equal principles which may be conflicting in individual cases have to be balanced. The theoretical optimization model he proposes has six phases:

1. To which disadvantage does the tax measure lead?
2. Does the tax measure at issue have a respectful objective?
3. If yes, does the tax measure have a sufficient degree of fit in relation to its objective?
4. If yes, is the tax measure suitable to achieve its objective?
5. If yes, does the tax measure reflect the most subsidiary means to achieve its objective?

[110] The Treaty on the Functioning of the European Union TFEU contains only a few possible exceptions which are almost never applicable to national direct tax rules.
[111] Douma 2011, p. 4.
[112] Cf. R. Alexy, A Theory of Constitutional Rights (trans. J. Rivers), Oxford: Oxford University Press, 2002, p. 201: "A wide conception of scope is one in which every case in which the relevant constitutional principle suggests that should be protected falls within the scope of pr

6. If yes, is the cost to free movement caused by the tax measure in proportion to

administration. Thus, the taxpayer may derive legal certainty from administrative rules.[128]

As a result, the citizens are often not governed by the provisions of statutes but by their specification in policy rules. Moreover, most citizens do not have much knowledge of the tax legislation in force and depend for their knowledge of tax law on communications by the (Dutch) tax administratio

concerns the principle of honouring legitimate expectations.[133] Both the principle of

that the promise is in the spirit of the law, and 4) the tax inspector is competent to deal with the taxpayer. To be sure, all criteria have to be met. For example, if the taxpayer is in bad faith, criterion 3 is not met and the principle of legality prevails.[136]

Reviewing the behaviour of the tax administration, the Dutch Supreme Court has not only developed a system of priority rules in the field of the principle of legitimate expectations, but also in the field of the principle of equality as a principle of proper administrative behaviour.[137] Hence, different factual situations in part determine what principle should regulate these situations; they yield different principles. The choice of the correct regulative principles to be balanced in a situation, therefore, depends on the nature of that situation (*Natur der Sache*; see § 5).[138]

7.5 Retroactivity and priority principles

Colliding principles generate rules in the con
However, in other (tax) contexts it is often not possible to translate the outcome of the collision of legal principles in (hard and fast) rules for lack of certain types of regularly occurring situations. Interestingly, there is another outcome possible when principles are balanced. This balancing can result in lower level principles, the so-called óprior principles.ô

As Radbruch argues, legal certainty is definitely one of the most fundamental legal values. This also applies to taxation. There, Adam Smithôs second maxi taxation in general springs to mind: óThe tax wl ought to be certain, and not arbitrary.ô[139] Notwithstanding its importance, the concept of legal certainty is not an easy one. óLegal ce more so than any other general principle, and its precise content is difficult to pin down.ô[140]

Non-retroactivity of law is one of the well-known desiderata formulated by Lon Fuller which links in to the value of legal certainty. Fuller criticiz retroactive law is.[141] However, he goes on to argue that there is no absolute prohibition on retroactivity, for, situations may arise in which granting retroactive effect to legal rules, ónot only b

[136] Happé & Pauwels 2011, p. 248.

[137] An example is the situation in which the tax administration has a certain favourable policy that is not published. Here, the principle of equality has priority over the principle of legality if the taxpayer is able to prove that such a favourable policy exists and his or her situation is covered by that policy rule. According to this the priority rule the tax administration should apply that policy rule to that taxpayer. Happé & Pauwels 2011, p. 248.

[138] This a well-known feature of principle-based reasoning. Cf. Rawls 1999, p. 25: óThe c correct regulative principle for anything depends on the nature of that thing.

[139] A. Smith, The Wealth of Nations

The last example dealt with priority principles developed to guide decisions with regard to retroactive tax legislation

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Progressivity in the tax transfer system: changes in family support from Whitlam to Howard and beyond

Helen Hodgson[1]

Abstract

Since the 1970s personal income tax rates have become less progressive throughout the OECD. During this period inequality has also increased. This is also true of Australia, where over the same period transfer payments have been more closely targeted to those in need. Accordingly over this time the Australian tax transfer system has shifted from a system with highly progressive tax rates coupled with universal benefits in respect of children and pensioners to a system of flatter tax rates and transfer payments that are recognised as among the most targeted in the OECD. In this paper I will explore the relationship between personal income tax rates and means tested transfer payments in developing a progressive transfer tax system since the 1970s, in the context of support for families.

Keywords: Tax transfer; Family Tax benefit; Universal benefit; Progressive tax rates

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regardless of a person's means (except for those who earn higher incomes who have to make a contribution to the state. Further, if the benefit is also included in taxable income, a proportion of the benefit is clawed back which effectively applies a means test to that benefit. In contrast Australia is usually classified as a liberal welfare regime, in which the state and private enterprise work together: the state will subsidise the private sector in the provision of goods and services that are social goods, but does not usually

extent that payments in respect of dependants are included in these benefit entitlements.

The benefits may be available as a tax concession, resulting in a reduction of personal income tax that would otherwise be payable by the taxpayer, or as a transfer payment paid directly to the claimants, but direct provision of services and consumption taxes are not discussed in this article.

2 THE 1970S: THE WHITLAM ERA

In the 1970s the Australian tax and transfer systems were not integrated, with family benefits within both systems. The predominant policy rationale was based on horizontal equity in order to recognise that families with children, compared with people without children at the same income levels, had greater calls on their available income. Hence family payments recognised this and increased the disposable income of all families with children. Vertical equity was delivered through a highly progressive tax system with personal tax rates ranging from 0.3% to 66.7% in 1972.

)DPLO\ EHQHILWV FRQVLVWHG RI WD[GHGXFWLRQV I spouse and children; additional pension or benefit payments for parents on income support; and Child Endowment.[10] Child Endowment was a universal payment, payable to all families with children, and based on the number of children in the family. It was intended to complement the minimum wage as the basis of ensuring that families received an adequate income; however, evidence was emerging that certain groups in the community, including low income families, large families and sole parents, were at a high risk of poverty.

Child Endowment was paid to the primary carer while tax deductions or additional income support payments were paid through the pay packet to the breadwinner. Taxpayers could claim concessional deductions through the tax system.[11] Currently with the universal Child Endowment for taxpayers. Families receiving pensions or benefits through the transfer system received additional payments for children, added

Table 1 Change in Personal Marginal Tax Rates Following RATS

1983–84: Before RATS Reforms	1987–88: After RATS Reforms

reducing the tax paid by families.[26] However, although the tax payable by low income families may have reduced, the taper rates resulted in increased EMTRs over this period.

From 2000 the FTB could be claimed either as a tax benefit or a transfer payment, although it was clearly linked to the tax system by the government and promoted as reducing the effective tax rates paid by families.[27] However, from its inception over 90% of FTB payments were claimed by instalments as a transfer payment, not as an annual lump sum through the tax system. Income support recipients, who represented about 25% of FTB recipients in 2007, were required to claim the benefit on a fortnightly basis.

Unlike the GST component of the package, the changes to family benefits were evolutionary change, as the new system was based on the related payments in place before 2000: child related payments remained means tested and affluence tested, with low income families being entitled to higher payments while high income earners lost entitlement. The dependant spouse rebate was removed from the tax system in relation to families with dependent children, being replaced by the FTB Part B. However, this development was also consistent with the Home Child Care Allowance that had been in place between 1994 and 1997, which had also paid the rebate as a benefit to the primary carer.

A more significant development was the increased rates of child related payments payable to middle income families. This was a function of the increased payment rates and the lower withdrawal rates at both the upper and lower income thresholds that allowed more families to qualify for FTB, but the longer taper range meant that more families experienced increased EMTRs as FTB was withdrawn.

Analysis of the impact of the ANTS package on tax and benefits concluded that the package was, overall, redistributive towards lower income households.[28]

However there were later adjustments to personal income tax rates that clearly benefitted higher income earners. Between 2001 and 2006 the thresholds for the higher income tax rates were increased, culminating in a substantial lift in the year ended 30 June 2007.

[26] Peter Costello, 'Costello Hands Down Ninth Budget' (2004) ABC Lateline 11/05/2004 <http://www.abc.net.au/lateline/content/2004/s1106256.htm>

[27] Australian Treasury, *Not A New Tax: A New Tax System* (AGPS, 1998) 52; Peter Costello, 'Meet the Press 30/04/2006' (2006) <http://legacy.ten.com.au/promo.aspx?currentpage=2&factSheetYear=2006&factSheetMonth=4&factShe

indexation of payments places financial pressure on low income families as the cost of living increases, while the freezing of the upper family income threshold for FTBA results in a form of bracket creep.

The FTB was within the terms of reference of the Henry Review,[30] which made a number of recommendations.[31] The report recommended changes to child contingent pay

of the EMTR is the labour force participation impact. High income earners are more likely to be in receipt of investment income and are also more likely to be highly skilled and able to relocate to obtain or change employment. Accordingly, they are more likely to be responsive to changes in income tax rates at the highest marginal tax rates. The withdrawal rates for transfer payments are not likely to be a major consideration for high income earners because the application of the income test would limit any entitlement.

Figure 2 Couple Family Benefits in Australia 1984 - 1999, by Quintile $ per week 1999 prices[52]

The biggest distributional shift followed the reforms to Family Allowance from the late 1980s. Although the 1983 Family Income Supplement had assisted low income familes when introduced, the low rate eroded its effectiveness until the 1987 reforms directed increased Family Allowance and FAS to families in the lowest quintiles.

The effect of the 2000 reforms is not reflected in Figure 2 because data from the 2004 Housing and Income Survey are not directly comparable with data for the previous surveys due to changes in measurement. However, Harding et al[53]

was a trigger that signalled the need to address the redistributive effect of the tax transfer system.

In contrast the second significant change, the application of means and affluence tests to target benefits to low income families, was a response to exogenous economic and political factors. The economic shocks of the 1970s were followed by structural change to the global economy that was reflected in the Australian economy from the 1980s, with an impact on poverty levels.

The political philosophy of the government affected the policy design: the Hawke Labor government in Australia used the transfer system in conjunction with the social wage as an income support strategy.

In the late 1990s the Howard Liberal government increased integration of the tax and transfer systems, providing compensation to low and middle income families for the impact of the GST. Although increases in rates were linked to the GST in Australia the increased integration of family benefits with the tax system was an endogenous change triggered by feedback within the system. It had become clear that the family tax transfer system was not effectively redistributing resources to needy families; accordingly the system was adjusted in an attempt to align the tax and transfer aspects of the system.

eJournal of Tax Research (2013) vol. 12, no. 1, pp. 238 - 252

The

1 INTRODUCTION

was formed, the move towards harmonisation of the taxation systems continued for the remaining three territories of the Federation of Malaysia. The income tax statutes

if any, consideration of the jurisdictional context in which it was to apply, either in terms of needs or suitability.

7 K L V G H V L U H W R W U D Q V S O D Q W W K H 7 D [2 U G L Q D Q F H & R O R Q throughout the colonies appeared to be based on the notion of one size fits all and failed to consider cultural or societal differences (Likhovski, 2011); or even basic governance principles. Moreover, the processes and capacities of tax administration

Littlewood, M. (2010). Taxation without representation: The history of Hong Kong's successful tax ordinance. Hong Kong University Press, Aberdeen, Hong Kong.

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The Straits Times (20 Augu

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Abstract

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2 AN OVERVIEW OF REVENU E AND TAX FARMING

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3 METHODOLOGY

5 MALACCA OVERVIEW

5.1 The VOC trading port of Malacca

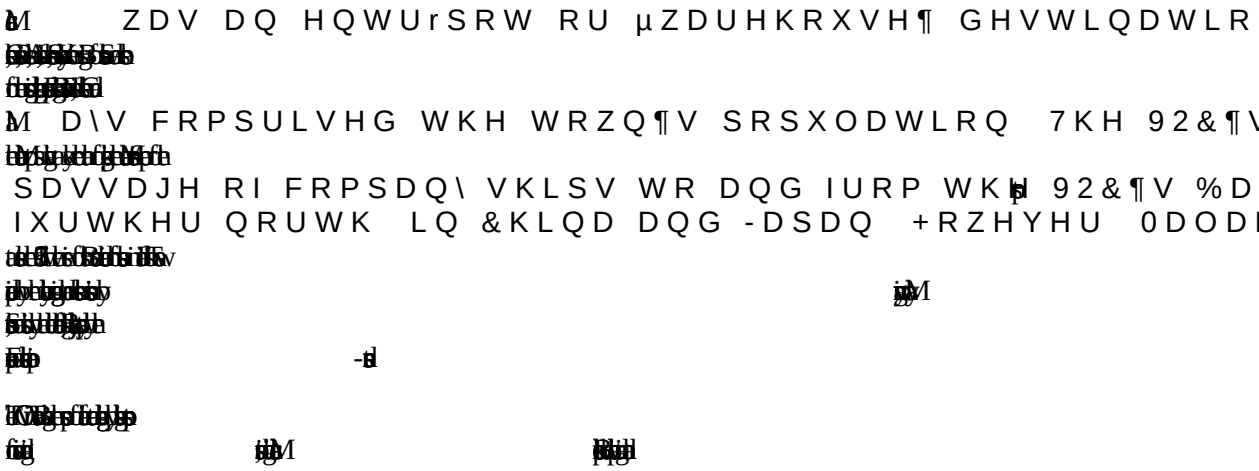

Figure 2. Governors of VOC Malacca: 1717-1795; and post-VOC[52]

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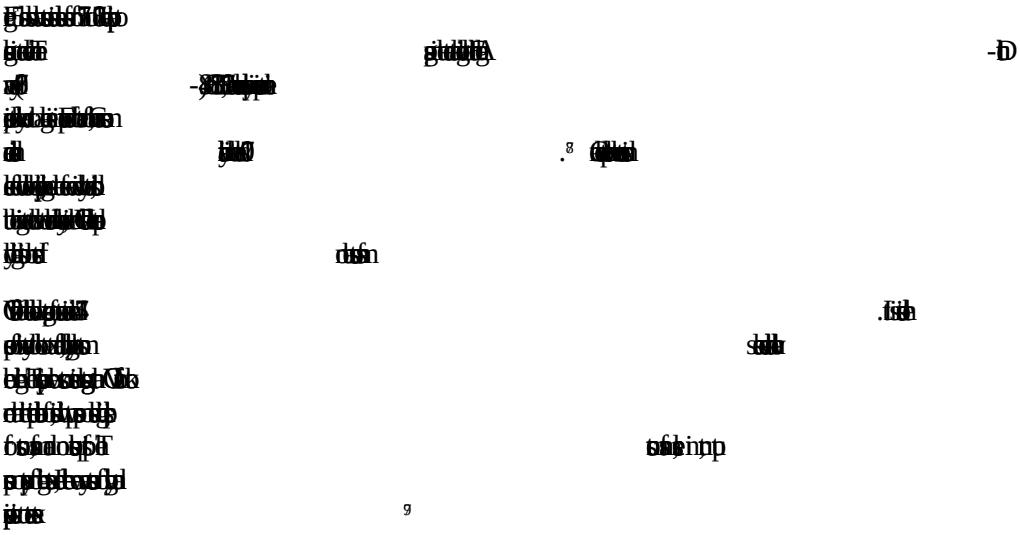
Figure 5. Malacca: 17751790, revenue by type[77]



5.6 Tax farm revenue

[7] *Jan Compagnie*,

[8]

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Figure 7. Malacca Town, 1678–1817: ethnic mix[85]

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Figure 8. VOC Malacca: 1681-1795, small tax farms lease fees[88]

5.8 Customs and other large tax farms

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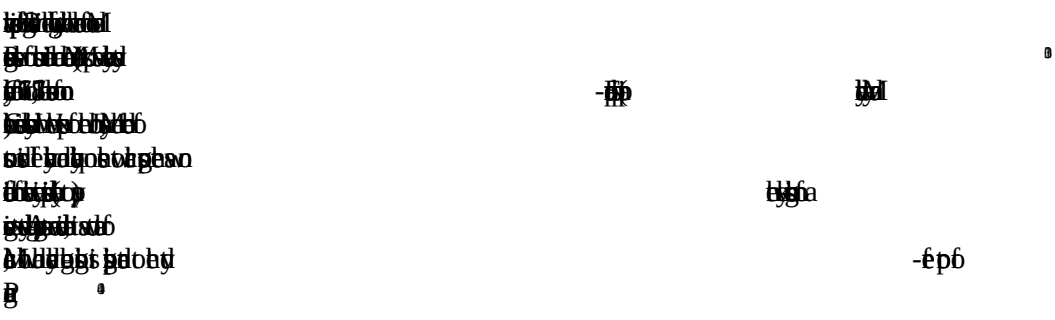
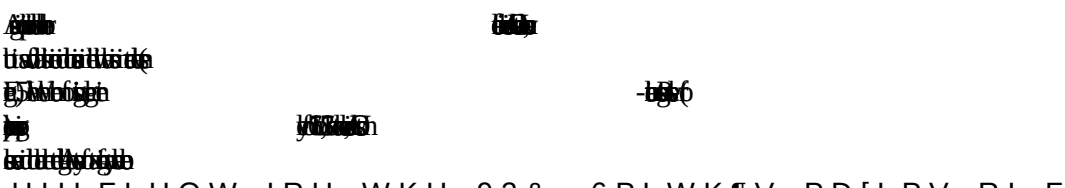
Figure 10. VOC Malacca: 1761 to 1785, number of sh arrivals[102]

	1761	1765	1770	1775	1780	1785
Nationality/Ethnicity	Number of Ships					
M	4	1	3	2	7	2
E	5					





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APPENDIX B.

VOC Malacca: 1681-1796 tax farm lease fees, average per cent share of revenue

Tax Farm	Ave %tage	**Other - tax farm	Ave %tage
Customs Farm	60.2	Slaughter tax	2.1
Sea and river fish	7.4	Portuguese ships	1.2
Chinese poll tax	5.0	Rice-sellers in the market	1.1
Weigh-house	415.71 Tm 0 g 0 G [(Ta)-60(x)-57(u8775 019(.(W)-52e)19(b-28(t)-28v)116(e)19((R)31(uu)19(g)19((e)19(r		

APPENDIX C.