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Announcements

General anti-avoidance rules (GAARS) - Papers (and a translation into Japanese) by John Prebble, Professor of Law, Victoria University of Wellington

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Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law

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"An American GAAR"

TaxProf Blog, 2010

Victoria University of Wellington Legal Research Paper No. 131/2017

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The President signed § 7701(o) of the Internal Revenue Code, the first U.S. statutory general anti-avoidance rule, or "GAAR," into effect on 30 March 2010. The birth of the American GAAR was buried in § 1409 (a) of the Health Care and Education Reconciliation Act of 2010 (H.R. 4872). With § 7701(o) the muster of common law jurisdictions without GAARs is dwindling. India and the UK remain prominent hold-outs.

Section 7701(o) applies to "any transaction to which the economic substance doctrine is relevant." A standard GAAR says that an avoidance transaction is void for tax purposes and authorizes the Commissioner to reconstruct the transaction and to tax that notional reconstruction. The economic substance doctrine operates similarly. It tells the Commissioner to disregard legal transactions and instead to tax the economic substance beneath.

The Obama GAAR has extra bite. It strikes down a transaction where the economic profit is not "substantial" in relation to its net tax benefits.

This relative benefits rule was presumably intended to reverse the result in cases like *Compaq Computer Corp v. Commissioner*, but the drafting of § 7701(o) betrays all sorts of compromises. Paragraph (5)(C) says: "The determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as if this subsection had never been enacted." Congress seems to be saying, "We may appear to have armed the Commissioner with a GAAR. But we don't really mean it. Everyone carry on as before." But that interpretation is too bizarre to be tenable. On the contrary, § 7701(o) is a true GAAR that will prove a powerful weapon in the hands of the Commissioner. Notwithstanding its novel drafting, it will operate much as GAARs do in other common law jurisdictions. Like GAARs elsewhere it will become a focus of scholarly writing.

"Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law (In Japanese, translated by Fumihiro Komamiya)"

Journal of the Japan Tax Association, Vol. 8, pp. 293-320, 2008

Victoria University of Wellington Legal Research Paper No. 132/2017

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The English version of this paper can be found at: <http://ssrn.com/abstract=1473612>

The article compares the general anti-avoidance rule of income tax law with the civil law doctrine of abuse of law (Rechtsmissbrauch, abus de droit) in eight jurisdictions: Germany, Croatia, New Zealand, Australia, France, the United States, the United Kingdom and the European Union. The article deals with the core concept of avoidance and addresses the statutory and judge-made general anti-avoidance rules in these jurisdictions. The article focuses on transactions that most people would recognize as avoidance and on how these eight jurisdictions either frustrate avoidance or allow it.

Writers who contributed to the article and the jurisdictions that they covered include: Séverine Baranger (France, general anti-avoidance rule), Dennis Becher (Germany, abuse of law), Svenja Brandt (Germany, general anti-avoidance rule) David Dunbar (Australia), Matthew Fountain (New Zealand), Franca Frenzel (European Union), David Pickup (United Kingdom), Philip Postlewaite (United States), Rebecca Prebble (Croatia), Viktoria Preusker (Germany, abuse of law), Yves-Louis Sage (France, abuse of law).

"Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law"

Bulletin for International Taxation, April 2008

Victoria University of Wellington Legal Research Paper No. 133/2017

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This paper is available in Japanese, translated by Professor Fumihiro Komamiya under the following name: この論文の日本語版は、次のURLで参照することができます <http://ssrn.com/abstract=1479931>

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abuse of law (Rechtsmissbrauch, abus de droit) in eight jurisdictions: Germany, Croatia, New Zealand, Australia, France, the United States, the United Kingdom and the European Union. The article deals with the core concept of avoidance and addresses the statutory and judge-made general anti-avoidance rules in these jurisdictions. The article focuses on transactions that most people would recognize as avoidance and on how these eight jurisdictions either frustrate avoidance or allow it.

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The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

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