

Retroactive Legislation

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Background

Over the past number of years, the Government of Canada has made repeated use of retroactive legislation in a number of tax contexts:

- The *Excise Tax Act* was retroactively amended in order to react to interpretations of the law by the Courts and to substantively change the law regarding certain applications of the GST to school busing;
- The General Anti-Avoidance Rule provisions of both the *Income Tax Act* and *Excise Tax Act* were amended retroactively in 2004 with application back to **1988**, purportedly to “clarify” what the government believed to be the appropriate interpretation of those provisions although it is clear that the so-called clarifications are in fact substantive changes to the law; and
- The limitations provisions of the *Income Tax Act* related to enforcement of tax debts were amended retroactively with application back to **1917!**

In each of these cases the retroactive change was made without consultation with or input from the public, business community or tax professionals, and without apparent regard to either the fairness or the business impact of such retroactive changes on taxpayers.

The Supreme Court of Canada recently affirmed the right of the Government of Canada to make such changes in circumstances where it was deemed appropriate to do so. In the case of *Imperial Tobacco Canada Limited v. British Columbia*, the Supreme Court of Canada stated:

“Except for criminal law, the retrospectivity and retroactivity of which is limited by Section 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our constitution.”

The Supreme Court went on, however, to note that:

“the absence of a general requirement of legislative prospectivity exists despite the fact that **retrospective and retroactive legislation can over turn settled expectations and is sometimes perceived as unjust**: see Edinger, “*Retrospectivity In Law*” (1995), 29 U.B.C.L. Rev. 5 at page 13 Those that perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and “determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or

unfairness”: *Landgraf v USI Film Products*, 511 U.S. 244 (1994), at page 268.”
[emphasis added].

Given these comments, it is clear that retroactive legislation is constitutionally possible. However, it is also clear that the use of retroactive legislation should only occur where the legislature has in fact actively turned its mind to the issues related to such retroactivity, and determined that the potential for disruption or unfairness to taxpayers is outweighed by the benefits of the legislation.

This conclusion is also consistent with the seventh report of the Standing Committee on Public Accounts of the House of Commons in the mid-1990’s. The question of government use of retroactive amendments to tax law was reviewed, and the Committee recommended that the government develop criteria to determine when such changes to tax legislation should be made. The Department of Finance responded to this in September, 1995, noting that retroactive amendments (even those considered to be “clarifying” in nature) “undermine the certainty that taxpayers should be able to expect from the tax system,” and should be made only in exceptional situations. Those exceptional circumstances were reviewed, and according to Finance retroactive amendments should only be made when they reflect a longstanding and well-known interpretation of the law applied by the Government; reflect a clear and well-known policy that is understood by taxpayers; are intended to prevent a “windfall benefit” to certain taxpayers; are necessary to preserve the stability of the government’s revenue base; or, lastly, that correct ambiguous or deficient provisions that were not in accordance with the objects of the Act.

Unfortunately, however, it appears that no action was taken subsequent to this to formalize the criteria that were being recommended. Rather, the Government appears to have left the door open for indiscriminate use of retroactive legislation, and unfortunately during the Liberal administration in recent years, neither the Government nor the Department of Finance have demonstrated any reluctance to apply retroactive legislation without regard to any of the criteria that had been suggested, as can be seen from the list of retroactive amendments passed in recent years. With due respect to those officials who advise the Government of Canada, and in particular the Department of Finance, in favor of the retroactive provisions outlined above, we do not believe that the Government in fact turned its mind to the serious impact that these retroactive changes had on taxpayers, businesses, and their professional advisors.

It is impossible for business and commerce to conduct and plan its affairs in an environment where the government can, apparently on whim, change its mind and retroactively change the state of the law. Business must know what the law is at the time the decisions are made, not expect that that law may suddenly change at some indefinite point in the future.

Recommendation

That the Federal government:

1. That any exercise by the Government of Canada of retroactive powers in the future be done on the basis of a full weighing of fairness versus benefits, with adequate opportunities for business to be consulted and to have input into that weighing process in advance of the change and not as an after-the-fact matter.