

TAXATION LAW RESEARCH PROGRAMME

ASIAN INSTITUTE OF INTERNATIONAL FINANCIAL LAW

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FACULTY OF LAW

UNIVERSITY OF HONG KONG

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INTRODUCTION

This is the Fourth Newsletter from the Taxation Law Research Programme (TLRP) at the Faculty of Law, University of Hong Kong (HKU). The TLRP is a programme within the Asian Institute of International Financial Law (AIFL), one of the Faculty's key research centres.

SECOND TLRP INTERNATIONAL CONFERENCE – JANUARY 2010

GREEN TAXATION IN EAST ASIA: PROBLEMS AND PROSPECTS

East Asia - and particularly Greater China - confront severe environmental degradation problems as a direct product of several decades of remarkable economic growth. It was for this reason that this conference made East Asia its primary focus. The conference remained fundamentally comparative, however. The ultimate aim was to inform the debate (as it relates to the use of tax and related measures) on meeting environmental challenges in East Asia by drawing on relevant world-wide experience.

The conference was run in collaboration with Civic Exchange and was opened by Professor Johannes Chan, SC, Dean of the Faculty of Law. Christine Loh, the CEO of Civic Exchange, was the keynote speaker.

Invited speakers presented papers related to: Australia; Canada; the EU; Hong Kong; Mainland China; New Zealand; Singapore and the USA. The papers presented at the conference have now been edited and compiled into a new book entitled *Green Taxation in East Asia* which will be published by Edward Elgar in 2011.



Some of the presenters at the Green Taxation Conference

TLRP VISITORS

We have seen a steady stream of welcome visitors to the TLRP. Many of them presented TLRP Seminars during their visits. Over the last year we have run around a dozen TLRP Seminars.



Dr Werner C Haslehner



Left to right: Bill Butcher and Professor Richard Cullen

Dr Werner C Haslehner

Fellow in Law, London School of Economics and Political Science

Seminar “**The Impact of Fundamental Rights on Taxation: the European Perspective**” (26 January 2011)

Fundamental rights have a long-standing tradition as the most important limit on the power of the state with respect to the individual in continental Europe. This is also true with regard to tax law. While this has been thoroughly studied in the context of national constitutional rights, the scope of limitations put on the national as well as the European legislator(s) by what falls under “European fundamental rights” has so far earned very little attention in academic writing and case law. Considering the wide range of rights involved, consisting of a mixture of national constitutional rights, European legal principles and international (human) rights, this is quite surprising. This talk aimed to explore the scope and potential ramifications of these rights for the exercise of taxing powers in Europe.

Bill Butcher

Associate Head of School, Australian School of Taxation and Business Law, University of New South Wales

Seminar “**Green Border Tax Adjustments and their Consequences for Chinese Tax Policy and Trade**” (20 January 2011)

Over the past year, China has pledged significant reductions in its emissions intensity and proposed the introduction of a carbon tax in 2012. These are hopeful signs but, as with all signals at the intersection of the economy and the environment, there can be no certainty that reality will match the promise. Authoritative voices around the world are making dark warnings of the trade barriers facing countries that fail to move to a low-carbon economy. As both a major polluter and exporter, China’s products are particularly vulnerable to the imposition of border tax adjustments (BTAs) by importing countries. This presentation considered the likelihood and legitimacy of such measures, specifically those based on environmental taxes, in light of the WTO’s BTA rules.



*Left to right: Professor C John Taylor and
Professor Richard Cullen*



Sarah Hinchliffe

Professor C John Taylor

School of Business Law and Taxation, Australian School of Business, The University of New South Wales

Seminar “**Globalisation and the Future of Corporate - Shareholder Taxation**” (15 December 2010)

Globalisation is placing source based corporate taxes under increasing pressure as exemptions for international investment income become widespread. Many countries have lowered their corporate rates and have adopted partial (Germany) or full (Singapore) dividend exemption systems but have not removed distortions between debt and equity financing and of investment choices. This Seminar evaluated approaches to relief at the corporate level (which can both reduce effective corporate rates and neutralise the debt and equity finance choice) and examined their implications for major capital importers and exporters (like China) and for countries (like Hong Kong and Singapore) that currently exempt dividends and tax on either a source or remittance basis.

Sarah Hinchliffe

Teaching Fellow, The University of Melbourne

Ms Hinchliffe gave two Seminars during her two Hong Kong visits in 2010.

Seminar “**Taxation Planning in an International Environment**” (21 September 2010)

This presentation provided a practical overview of international taxation planning ideas for entities who are establishing or restructuring business affairs. In an international financial hub, such as Hong Kong, taxation advisors and lawyers need to be particularly vigilant in ensuring that their clients comply with their taxation obligations and remain commercially savvy. International tax planning is a sophisticated area which involves careful planning, detailed implementation and thorough understanding of a number of fundamentals of both international and domestic tax laws. This presentation looked at four main international structuring techniques, namely (i) risk segregation; (ii) cross-border transactions; (iii) holding structures; and (iv) cost-sharing arrangements.

Seminar “**The Taxation of Offshore Residents from the USA, UK and Australia – A Comparative Analysis**” (2 February 2010)

This presentation provided an overview of the income tax consequences for citizens of the United States also residents of the United Kingdom and Australia who are employed abroad.

The historical foundations of the taxation approaches in each of these jurisdictions was drawn upon to explain the operation and effectiveness of each regime as it applies to individuals who are employed abroad.



Wei Cui



*Left to right: Professor Richard Cullen,
Frank P. Cihlar and Kevin M. Downing*

Wei Cui

Associate Professor, China University of Political Science and Law, Beijing, China

Seminar “**Taxation in Mainland China: Tax Law or Administrative Rulings - Which is ‘King’?**” (2 June 2010)

A decade after the adoption of the Legislation Law in the PRC, “normative documents” - the use of which the statute was intended to curb - are as popular among Chinese government agencies as ever, and in many areas still overshadow more legitimate sources of law. The hierarchy of legal norms set out in the Legislation Law consequently can seem remote from daily administrative practice. This seminar reviewed the production and use of normative documents in tax regulation, and examined: (A) why bureaucrats prefer normative documents over formal regulations; (B) why protocols for producing normative documents often lapse; and (C) how informal practices affect the content of normative documents. Professor Cui argued that the use of normative documents must be understood in light of wider phenomena such as: (1) the absence of norms and procedures for public input (or lobbying) in law- and regulation-making; and (2) taxpayers’ unwillingness to uphold legal norms through formal dispute resolution. This means that the Legislation Law must be thought of as only part of a more general effort to reform the administrative state. For advocates of the rule of law, it is important to make that more general effort a subject of study. Professor Cui also gave specific examples involving the use of problematic normative documents.

Frank P. Cihlar

Senior Counsel for International Tax Matters, US Department of Justice

Kevin M. Downing

Senior Trial Attorney, US Department of Justice

Seminar “**International Taxation Prosecutions**” jointly organized with the US Department of Justice (30 April 2010)

The speakers discussed (a) Global Tax Administration Issues; (b) the new Foreign Tax Account Compliance Act and its ramifications; (c) Deferred Prosecution Agreement; (d) John Doe Summons and (e) UBS tax prosecution. This event provided a unique opportunity for U.S. business representatives, lawyers, tax executives, accountants, and students to interact directly

with senior tax prosecutors from the U.S. Department of Justice. The panel presentation/discussion provided an opportunity for Q&A with two leading US criminal tax prosecutors of the UBS tax investigation.



Left to right: Professor Douglas Arner, AIIFL Director; Scott Michel and David Rosenbloom



Dr Michael Littlewood

H. David Rosenbloom

James S. Eustice Visiting Professor of Taxation and Director, International Tax Program, New York University School of Law; Member, Caplin & Drysdale, Washington, DC

Scott D. Michel

President & Managing Partner, Caplin & Drysdale, Washington, DC

Seminar “The IRS and Americans With Foreign Accounts: Looming Tax and Enforcement Issues” (22 March 2010)

The seminar discussed tax and reporting requirements relating to foreign accounts maintained by American taxpayers; potential civil and criminal sanctions resulting from the failure to comply with such requirements; respective roles of the IRS and Department of Justice, including their increased presence abroad; the rules and procedures for voluntary disclosure; processes available to the United States to obtain offshore information through treaties and other means; potential Congressional action in the international tax enforcement area (including Obama Administration proposed compliance measures and the Congressionally proposed Foreign Account Tax Compliance Act); and related issues including the role of foreign corporations and trusts, the involvement of professionals and enablers, estate and gift tax matters, the QI program, institutional and corporate examinations, investigations, and disclosures.

Dr Michael Littlewood

University of Auckland Law School, New Zealand

Seminar “Hong Kong’s Tax History and Some of the Questions It Raises” (25 February 2010)

In this seminar, Dr Littlewood reviewed the history of the Hong Kong income tax system, which was designed, above all, by a group of businessmen in 1940. Their objective – which they achieved – was a system that worked, he said, well enough at very low rates of tax, but was incapable of functioning at high or even moderate rates of tax. From 1940 until 1980, the British and Hong Kong governments regarded this system as an inadequate wartime compromise, and

planned to replace it, as soon as circumstances permitted, with a “normal” income tax with rates of tax “as high as possible” (meaning a maximum of perhaps 50 percent). But circumstances never permitted and eventually both governments came to accept the supposedly temporary wartime system as a permanent measure. Consequently, it remains largely in place today. The seminar also addressed some questions of contemporary relevance arising out of Hong Kong’s tax history. First, in the 1980s and 1990s, the Hong Kong courts, including the Privy Council, radically extended the scope of the Hong Kong tax system (without there having been any relevant change in the wording of the legislation); are there other instances of the Hong Kong courts engaging in law-making on this scale? Second, article 108 of the Basic Law appears to give some kind of constitutional status to Hong Kong’s “low tax policy”. But what does this mean? And is it justiciable? Third, is the wartime tax system designed in 1940 still adequate to meet the needs of modern Hong Kong? If not, what should be done? Would a GST be a good idea?

We welcome your comments and suggestions for further research and other activities, please feel free to email Richard Cullen at richard.cullen@gmail.com or Flora Leung at flkleung@hku.hk.

We look forward to your continuing support and to seeing you at future TLRP events.