

Retrospective taxation can be fair

By JOHN HYDE, MP

THE proposed legislation to recover bottom-of-the-harbour tax has brought the principles of tax equity and legal certainty into conflict so that neither principle can be completely satisfied.

However, the Government is committed and has the numbers to legislate with retrospective effect and will do so. Until the law is finally settled, some of the energy devoted to opposing it will be more profitably devoted to its detail to ensure that poorly thought out legislation does not do a needless injustice or establish a needlessly harmful precedent.

Retrospective legislation undoubtedly offends the principle of certainty before the law. However, the principle inhibiting retrospective law-making is not a principle which overrides all other principles, nor are all retrospective law equally heinous.

Most of the Budget legislation is retrospective, however. In those cases the laws date back to clear announcements.

If the marriage laws were to be changed with retrospective effect to validate some marriages thought to have been legally performed but which the courts had subsequently upset, I don't think many legal purists would then complain.

They would not complain because in most cases there would have been no penalty imposed on persons, and for those for whom the confirmation of their marriage was a penalty it could be argued that their benefit had been merely fortuitous.

The argument against retrospective law is primarily against the imposition of unforeseeable retribution and is most often discussed in terms of the criminal law.

Bearing in mind that it is not always possible to identify "penalties," the legislation to recover the bottom-of-the-harbour tax from vendor shareholders ought so far as it is possible avoid imposing on person who acted legally should be made worse off than if he had not sold his company.

It is not disputed that the companies were duly assessed for tax. The Government should trace the unpaid monies to those who actually benefited and recover that much along. So long as the Government recovers no more than this amount it cannot be reasonably argued that a "penalty" has been imposed.

Since the companies in question had, I am told, all been cashed up, the problem of establishing who benefited and by how much will in most cases not be difficult.

That portion of the unpaid tax which passed to the promoters of the schemes should also be traced, and the benefits of unpaid taxes should be traced through trusts and holding companies and deceased estates. Where the vendor shareholder is itself a company, it is important that it is traced to the shareholders of the holding company at the time of the sale, otherwise the wrong individuals will pay.

The vendor shareholder's liability to the Government should be limited by two independent maximums: first the limit of the stripped companies' liability to the Crown, and second an individual's net benefit from the sale of the company.

The principle is best understood by reference to a typical example: a company with one asset, namely cash at bank of \$200,000, sold for \$190,000, and with a contingent tax liability of \$100,000.

The net benefits derived from non-payment of tax are then: vendor shareholders \$90,000 and promoter \$10,000. On balance, although the vendor share-

holders have had the use of the monies over several years, I don't believe it is practical to charge interest. To do so is to invite claims that the interest charged is higher than that actually earned. Although zero interest is as arbitrary as any other rate, I think it is practical in that any higher rate will have the connotation of "penalty," even though it could be explained by inflation.

It is important that a bulwark is established from which in future the principles of the rule of law can be defended. It is therefore vital that the retrospective legislation cannot reasonably be said to have imposed "penalties."

If, after the Government has presented a bill which achieves the Government's objective with the least possible untoward side effect some members still wish to force a division and cross the floor, although I will not be one of them, I do not think their action would necessarily be a bad thing.

Reasonable and well intentioned people can disagree while arguments for the authority of Cabinet and party solidarity have too often been called to the defence of decisions that with the benefit of hindsight still look bad.

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"FINANCIAL REVIEW"

10 September 1982

DRY SIDE 2