ANOTHER LESSON FROM WORLD WAR II - *Minister for Home Affairs of the Commonwealth v Charles Zentai*

Introduction

World War II is a war that just won't go away.

On 15 August 2012, the High Court delivered judgment in *Minister for Home Affairs of the Commonwealth v Charles Zentai* [2012] HCA 28.[1] The decision concerned the interpretation of the Treaty on Extradition between Australia and Hungary (the **Treaty**). A majority of the High Court concluded that the Treaty did not allow Mr Zentai to be extradited for the crime with which he was charged in Hungary.[2]

Zentai is significant for taxpayers as it has important implications for the interpretation of double tax agreements.

The Interpretation of the Treaty

In *Zentai,* the High Court was called on to interpret Article 2(5)(a) of the Treaty. The Treaty had been incorporated into Australian law pursuant to the *Extradition Act* 1988 and the Extradition (Republic of Hungary) Regulations.

In the course of their judgment, the plurality (Gummow, Crennan, Kiefel and Bell JJ), said at [65] under the heading, "Discussion: interpretive approach":

> The limitation on the power of surrender with which this appeal is concerned arises in consequence of the engagement of s 22(3)(e) and the Regulations made under s 11(1) annexing the Treaty. **The meaning of the limitation set out in Art 2.5(a) is to be ascertained by the application of ordinary principles of statutory interpretation.** The limitation is not susceptible of altered meaning reflecting some understanding reached by the Ministry of Justice of Hungary and the Executive branch of the Australian Government. (emphasis added; footnotes omitted).

In other words, there was no reason to approach the interpretation of the Article by reference to its status as part of a bilateral treaty any differently from any other legislative provision.

French CJ, whilst agreeing with the decision of the plurality, took a very different path with respect to the interpretation of the Article. His Honour applied the principles of the Vienna Convention on the Law of Treaties, as both Hungary and Australia were parties to the Convention. His Honour applied Articles 31 and 32 of the Convention and said at [19] that:

> The rules of interpretation in Arts 31 and 32 have been said to represent customary international law. Whether or not they are or have been adopted as part of the common law of Australia, those rules are generally consistent with the common law. The common law requires treaties to be construed "unconstrained by technical rules of English law, or by English legal

---

1 For those with an interest in these matters, it will be apparent that the case has an unusual connection for this author, as the (war) crime that Mr Zentai will now not be asked to stand trial for was the murder of Peter Balazs.

2 For those with any interest in the broader issues, the dissent of Heydon J is worth reading.

precedent, but on broad principles of general acceptation". That was the approach adopted by Dawson J in *Applicant A v Minister for Immigration and Ethnic Affairs* who observed that:

> "Article 31 plainly precludes the adoption of a literal construction which would defeat the object or purpose of a treaty and be inconsistent with the context in which the words being construed appear."

McHugh J, with whom Brennan CJ agreed in this respect, said the correct approach to Art 31 was "a *single combined operation* which takes into account all relevant facts as a whole." It is that approach which is appropriate to the construction of Art 2.5(a) of the Treaty. (footnotes omitted)

Double Tax Agreements

Although the process for incorporating extradition treaties into Australian law differs from the process that now applies to the incorporation of double tax agreements into Australian law (as well as the process that applied prior to the passing of the *International Tax Agreements Amendment Act (No. 1)* 2011), it is considered that the differences do not result in a different approach being taken to the interpretation of double tax agreements as opposed to extradition treaties.

The approach taken by the plurality was averted to by the Full Federal Court in the relatively recent decision in *Russell v Federal Commissioner of Taxation* 79 ATR 315[3]; per Dowsett J (with whom Edmonds and Gordon JJ agreed) at pages 322-324. At [26] and [27], his Honour said:

> However both of those cases [referring to *Thiel* and *McDermott*][4] were decided prior to the decisions of the High Court in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 and *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 221 CLR 52. In both cases the Court emphasized the primary position of the words used in Australian legislation and the Australian rules of statutory interpretation in construing legislation which gives effect to international obligations, including treaties. Thus, in *QAAH* at [34], Gummow ACJ, Callinan, Heydon and Crennan JJ said, after discussing various aids to interpretation of such legislation:
>
> > The relevant law of Australia is found in the Act and in the Regulations under it. It is Australian principles of statutory interpretation which must be applied to the Act and the Regulations.
>
> After referring to the approach taken to legislation and regulations giving effect to international conventions their Honours continued:
>
> > But despite these respects in which the Convention may be used in construing the Act, it is the words of the Act which govern.

In light of what has been said in *Zentai*, it is clear that the approach of

---

3 [2011] FCAFC 10; a decision I have criticized on other grounds.

4 *Thiel v Federal Commissioner of Taxation* 21 ATR 531 and *McDermott Industries (Aust) Pty Ltd v Federal Commissioner of Taxation* 59 ATR 358

Dowsett J is correct.

That would also appear to call into question comments subsequently made by a differently constituted Full Federal Court in *Commissioner of Taxation v SNF (Australia) Pty Limited* [2011] FCAFC 74 where Ryan, Jessup and Perram JJ said at [119]-[120] that:

> But where Parliament expressly decides to incorporate the whole text of a treaty in domestic law and makes it plain, as here, that it is doing so, then it is appropriate to construe the provisions in accordance with the ordinary principles governing the interpretation of treaties. This is because the Parliament's use of the treaty shows its intention to fulfil its international obligations. This has been accepted by the High Court in respect of the double taxation treaties: *Thiel v Federal Commissioner of Taxation* [1990] HCA 37; (1990) 171 CLR 338.
>
> This conclusion is unsurprising. The double taxation treaties are designed to ensure that the taxing regimes of two jurisdictions do not result in double taxation. If they were to be interpreted in a manner which would permit or foster conflicting outcomes between the two States in question their whole point would be frustrated. It is true, as Dowsett J has observed in *Russell* (at 455-456 [26]-[29]), that the High Court has indicated in the context of the Refugee Conventions that domestic courts must recall that their task is to interpret the *Migration Act 1958* (Cth) and not the Conventions. But, unlike the present legislation, that Act does not adopt and apply the whole text of a treaty. When a State decides to implement, as it has in this case, a Model Law, it would be quite inappropriate to disregard that fact when construing the resultant statute.

Conclusion

It is now clear that the interpretation of double tax agreements will be less influenced by the fact that they are bilateral treaties. Correspondingly, the role of the OECD Commentary on the Model Convention and its United Nations (**UN**) equivalent is likely to be reduced when it comes to interpretation. That is not to say that there is no role for the OECD Commentary and its UN equivalent, but seeking answers from there, rather than in the text and the application of the relevant rules of statutory interpretation, may well lead to error.

The Commissioner of Taxation (not to mention Treasury, the Department responsible for negotiating and implementing double tax agreements) will also need to heed the words of the plurality. If he does, he will either press for legislative change, just as he has with transfer pricing, or he will need to revisit a significant number of rulings and interpretative decisions; beginning with TR 2001/13.

John Balazs

20 August 2012