Kelsen's Pure Theory of Law Sheds Light on, but Fails to Account for, General Anti-Avoidance Rules of Income Tax Law

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Abstract

It is time that policy makers and judges adjusted their reasoning to take into account the essentially contradictory nature of general anti-avoidance rules. The work of Hans Kelsen, possibly the leading, and certainly one of the leading legal philosophers of the twentieth century, sheds light on this question.

Kelsen is most famous for his "pure theory of law". For most of his scholarly life, Kelsen argued that, as part of the pure theory, two norms that contradict one another within the same legal system breach the philosophical principle of non-contradiction and therefore cannot both be valid. On other occasions he went further and argued that neither contradictory norm could be valid. Famously, Kelsen changed to the opposite opinion later in life.

This change confused people and attracted criticism. Nevertheless, both Kelsen's original position on the principle of non-contradiction, and his ultimate position, shed light on an area of law that he never considered: general anti-avoidance rules in income tax law. On one hand, if general anti-avoidance rules are valid law the unusual nature of these rules exposes a gap in Kelsen's pure theory. On the other hand, the very existence of that gap draws our attention to the need for general anti-avoidance rules and to the manner in which they must be interpreted and applied.

Kelsen's work sheds light both internationally and within Australasia. International concern about tax avoidance, especially by multi-national companies, and the enactment of general anti-avoidance rules in increasing numbers of jurisdictions, from the United States to Kazakhstan, mean that the insights that we obtain from Kelsen's work continue to be of great contemporary significance.

In Australasia there is a narrower focus, but a most illuminating one. Kelsen's identification of the problem of conflicting norms reveal's that Australia's policy of

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enacting GAARs that are ever more refined and detailed can never succeed. In the end, we see that GAARs must be broad and inclusive, like the broad models found in the United States and New Zealand. *It is time* that this reasoning informed both policy makers and the judiciary in Australia.