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Deputy S Ahier
Vice-Chair
Corporate Services Scrutiny Panel
States Greffe
Morier House
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Dear Deputy Ahier

P.119/2021 – Draft Taxation (Enveloped Property Transactions) (Jersey) Law 202-

Thank you for your letter of 19 January 2022. You have asked on behalf of the Corporate Services Scrutiny Panel for my consideration of whether or not it is possible for P.119/2021 Draft Taxation (Enveloped Property Transactions) (Jersey) Law 202- ("P.119") to be called in for scrutiny.

I am informed that P119 was lodged by the Minister for Treasury and Resources (the Minister) on 20 December 2021 for debate on 8th February 2022.

Article 11 of the Public Finances (Jersey) Law 2019 ("the Public Finances Law") provides as follows:

- “(1) If a lodged government plan proposes imposing or varying a tax for the next financial year, the Minister must lodge draft legislation containing a taxation draft that implements the proposal in sufficient time for the taxation draft to be debated and approved by the States before the start of the financial year.
- (2) paragraph (1) does not prevent the Minister from lodging other draft legislation containing a taxation draft at any other time.
- (3) If, at any time, the States approve a proposition that suggests that a taxation draft should be lodged and the Minister does not lodge draft legislation containing a taxation draft in sufficient time for it to be debated before this time when it should have effect, the Minister must explain why he or she has not lodged it.
- (4) Only the Minister may lodge draft legislation that contains a taxation draft.”

It appears therefore, that P119 does not comply with the requirements of Article 11(1) but Article 11(2) of the Public Finances Law permits the Minister to lodge a taxation draft at any other time.

P.119 does not seek to impose a tax for the next financial year as such (such as income tax for example, which would apply to the whole period) but rather it is a transactional tax which can, in theory be imposed at any time and without retrospective effect.

It appears to me, therefore, that P.119 has been validly lodged for debate.

P.119 being validly before the Assembly it now falls to be considered whether or not it can be subject to a process of scrutiny. To determine this it is necessary to consider the provisions of Standing Order 72 of the Standing Orders of the States of Jersey (Standing Orders).

Standing Order 72 provides for the ability of the Chair of a Scrutiny Panel to call a draft Law or Regulations in for the purpose of scrutiny once the principles of the legislation under consideration have been approved by the Assembly. Standing Order 72(10) qualifies that ability by saying:

“This Standing Order shall not apply to a draft Law or Regulation that includes a taxation draft that would implement any part of a Government Plan.”

Standing Order 79 allows any member of the Assembly to propose without notice that the Assembly requests the relevant scrutiny panel to consider any proposition. Standing Order 79(2) again prohibits the use of such a mechanism with regard to, at paragraph (d):

“A taxation draft that would implement any part of a Government Plan.”

The definition of a taxation draft is found within the Public Finances Law, at Article 1, which, amongst other things, defines a “taxation draft” as meaning the provision of draft legislation that provides for any of the following:

“(a) the imposition of tax or duty”

There are exceptions to that definition but they do not apply in the instant case.

It is clear therefore that P.119 is a taxation draft as its entire purpose is to introduce a tax on certain transactions that relate to “enveloped properties” namely Jersey land or buildings thereon which is owned by an entity such as a company and not by a private individual. The body of the draft law provides for the creation of such a tax and for its administration. It is accordingly, a taxation draft.

The next question is to consider is whether P.119 implements any part of a Government Plan.

There is some reference to “Enveloped Properties” in the Government Plans of the past. In the Government Plan 2022 – 2025 at page 117 under the heading “Impact on the Financial Position and Returned Balanced Budgets” one finds the following:

“In the absence of action, these cost estimates would create a fiscal gap and Ministers have identified a package of measures to close the gap by 2024/2025. That package follows on from the previous Government Plan and includes:

..... a review of commercial stamp duty levels and further changes to enveloped property measures.”

At page 155, of that plan one finds “Review of Stamp Duty/Land Transaction Tax and the Taxation of Enveloped Property” and it goes on to say:

“Holding real estate within a company is often referred to as an “enveloping” and historically need a stamp duty or land transaction tax applied where the ownership of Jersey commercial real estate is transferred by way of share transfer. Following a public consultation in 2019, new Law and Regulations have been drafted and consultation with key external stakeholders continues. The current intentions for the legislation to be lodged when the consultation process concludes.”

In the Government Plan 2021 – 2024 under the heading “Returning to Balanced Budgets” in reference to the impact of reduced income over the period of the Government Plan arising from the Covid Pandemic and the requirement therefore to run deficits, the following is to be found:

“Ministers have identified a package of measures to close the fiscal gap by 2024 that package will be introduced over the period of this plan and consists of:

..... a review of commercial stamp duty levels, further to changes to envelop property measures.”

It appears from the above that whilst the detail of any enveloped property tax was not contained within either the current Government Plan or its predecessor, the Government intended to introduce enveloped property measures apparently to address the deficit or shortfall.

The factual background considerations do not end there however.

I have found no mention of the Government Plans or implementation of a Government Plan in the report accompanying P.119.

Moreover, the financial and manpower implications set out in P.119 say as follows:

“There are no additional manpower implications. Additional financial costs in administering the new EPTT would be covered by the processing fee. Income from EPTT is uncertain but revenue received – up to £1m per annum – is proposed to be allocated to the Housing Development Fund.”

This appears to me to be significantly different from the anticipated purposes of the enveloped properties legislation as referred to in the Government Plans previously mentioned. Far from a tax designed to close the “fiscal gap” (see both Government Plans above) this is a tax intended to provide funding for the Housing Fund.

I proceed on the basis that the default position as set out in Standing Order 72 is that legislation can and normally will be subject to a scrutiny process and it is only not so subject if certain specified exceptions apply. I think that I should construe those exceptions narrowly in determining that this situation is one in which the Assembly should be denied its otherwise normal ability to examine legislation through the scrutiny process.

Applying these principles, it does not, given the depth of detail in the Government Plans and the terms of P.119, appear to me that the P.119 as lodged has for the purpose the implementation of a Government Plan and accordingly whilst it is clearly a taxation draft, it can nonetheless be made subject to the scrutiny process provided for within Standing Order 72.

Naturally my analysis above depends upon the facts as I currently understand them and if those facts turn out to be mistaken or incomplete then I must of course reserve the right to alter this view if it seems to me to be correct to do so.

In the meanwhile, however, I hope that this letter assists your panel.

I am copying this letter to the Minister so that she will be aware of the view that I have taken on P.119.

Yours sincerely



Bailiff

c.c. Deputy S Pinel, Minister for Treasury and Resources