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The transnational enforcement of tax liabilities

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IT is generally and widely assumed that no state will enforce--directly or indirectly--a tax debt due to another state.[1] This article examines that principle, and discusses how, in two important respects at least, the rule is not as absolute as it is sometimes thought to be.

The general rule of non-enforcement for foreign revenue claims

It is a widely recognised rule of private international law that one state will not assist in the direct enforcement of a foreign revenue claim. This rule prevents one state from suing in a foreign court for taxes owed to it; it also prevents a judgment given by the courts of one state for the payment of taxes from being enforced in the other state.[2]

This general rule is expressed by Dicey and Morris as follows[3] :

"English courts have no jurisdiction to entertain an action:

(1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State:…"[4]

The House of Lords case generally cited as authority for this proposition is *Government of India* v. *Taylor.* [5] In that case, a company registered in England had been trading in India. The undertaking of the company was sold in 1947, the proceeds remitted to England, and the company placed in voluntary liquidation in the United Kingdom. The Indian Government sought to prove in that liquidation for a claim in respect of capital gains tax arising on the disposal of the undertaking. The House of Lords unanimously held that claims on behalf of a foreign state to recover taxes due under its laws are unenforceable in English courts. The claim was therefore struck out.

The principle that a foreign state may not sue to recover taxes under its law has been applied to a foreign income tax,[6] capital gains tax,[7] estate duty,[8] a local government contribution towards the cost of improvement works[9] and a contribution to a compulsory state insurance scheme.[10]

The principle has also been recognised by the courts of several other common law jurisdictions. These include the United States,[11] Canada,[12] Ireland,[13] South Africa,[14] and Australia.[15]

The principle has also been extended from direct enforcement of foreign revenue claims to attempts at indirect enforcement of such claims. An example is *Rossano* v. *Manufacturers' Life Insurance Co.* [16] where the defendant insurance company was indebted on a policy to the plaintiff. The company was served with a garnishee order by the Egyptian revenue authorities in respect of unpaid tax. McNair J. held that the garnishee order was not a valid defence to the claim on the debt in England; to hold otherwise would be to permit the indirect enforcement of foreign revenue claims.[17]

Though the principle of non-enforcement of foreign revenue claims is often stated in absolute terms, there remain several important issues concerning the scope and exceptions to the principle.

Tax claims in cross-border insolvency

By far the most important exception to the general principle of non-enforcement of foreign revenue claims arises in the context of cross-border insolvency.[18] The scenario envisaged here is that a person has become insolvent in one state, having assets in another state, and the creditors include the revenue authorities of the first state. Can the trustee in bankruptcy, receiver or similar person gain access to the assets to satisfy the claims of creditors, including the revenue authority? A developing body of jurisprudence in several states indicates that the trustee or receiver can obtain access to the assets to satisfy, *inter alia,* the revenue claim.

The negative response to this issue was originally given by the courts of the Irish Republic. In *Re Gibbons* [19] the receiver in bankruptcy appointed by the English High Court was seeking an order in aid from the Irish Court to have certain property in Ireland realised and the proceeds transferred to meet claims in the English bankruptcy. The bankruptcy proceedings had been initiated by the Commissioners of Inland Revenue in respect of a claim for unpaid taxes (it is not clear from the report whether there were any other creditors). The Irish High Court refused the application.

Contrary decisions have been reached by the courts in Australia and South Africa. In *Ayres* v. *Evans* [20] the Federal Court of Australia ordered that aid be given to the New Zealand official

assignee of a bankrupt's estate to obtain control of property in Australia. Approximately 54 per cent. of the outstanding debts were due to the New Zealand revenue authorities. Two of the three judges expressly stated that the rule of public policy which prevented the enforcement of foreign revenue claims did not apply where the official assignee was seeking to get in property for the benefit of ordinary creditors as well as the revenue authorities.

The South African courts have reached a similar decision (relying heavily on *Ayres* v. *Evans*) in *Priestley* v. *Clegg.* [21] The English trustee in bankruptcy sought an order recognising his appointment and permitting him to administer the bankrupt's assets in the Republic of South Africa. Ninety-four per cent. of the amount claimed was in respect of debts to the Inland Revenue. Even so, the court held that the trustee in bankruptcy was not the representative of the British *fiscus* and that he was not seeking in substance to enforce the revenue laws of a foreign country.

"Tax bankruptcies"

A point left open by these two cases concerns the situation where the only creditor of a bankrupt's estate is the revenue authority--the situation which is sometimes referred to as a "tax bankruptcy." This issue has been discussed in various cases arising from the bankruptcy of the former Rossminster director, Roy Tucker.[22] Tucker was adjudicated bankrupt by the High Court in England in 1985. Assessments by the Inland Revenue exceeded £18m.; with penalties and interest, revenue claims were likely to be between £60m. and £80m. The trustee in bankruptcy (a partner of Price Waterhouse) sought orders in aid from the courts of the Isle of Man and Jersey. At the time of the hearing in the Isle of Man, all other creditors had been satisfied or had withdrawn except one (who was claiming approximately £32,000). At first instance, Deemster Luft granted the application since there was one ordinary creditor as well as the Inland Revenue.[23] On appeal the High Court upheld this decision, the two judges stating that it would have made no difference if the Revenue had been the only creditor.[24]

In Jersey, an application was made by the trustee to examine a local advocate as to the location of assets. By the time of the hearing of the application before the Royal Court, the remaining ordinary creditor had withdrawn his claim so that the Revenue was the only claimant. The Bailiff dismissed the application on the grounds that it was an attempt indirectly to enforce a foreign revenue law.[25] The Royal Court therefore had no jurisdiction to grant the request.[26]

An extreme case arose in Florida in *Bullen and Garner* v. *Government of the United Kingdom.* [27] In that case the appellants were convicted of fraudulent evasion of value added tax and declared criminally bankrupt. The Government of the United Kingdom sought recognition of the English judgment and for the Official Receiver to obtain title to a condominium in Florida. There is no indication in the report that there was any creditor other than the Commissioners of Customs and Excise. The Florida court treated the English judgment as no different from any other civil judgment and vested title to the condominium in the receiver. None of the cases mentioned above was cited to the court.

There seems little reason why aid should be denied to a trustee in bankruptcy or a receiver merely because one of the creditors for whose benefit he is acting happens to be a revenue authority. To deny cross-border assistance wherever there is a revenue claim would render cross-border insolvency law largely ineffective. However, there seems little sense in granting assistance where the revenue claim constitutes 99.9 per cent. of the claims on an estate, but denying assistance where revenue claims are 100 per cent. of the creditors' claims.

The issue has not been faced directly by an English court in recent years. The assistance of the English courts might be sought under several different grounds.[28] At common law the courts could provide assistance to a foreign trustee in bankruptcy. Section 426(4) of the Insolvency Act 1986 now additionally provides that United Kingdom courts shall assist the courts of specified foreign countries and territories. Finally, evidence might be sought in connection with a foreign insolvency under the Evidence (Proceedings in Other Jurisdictions) Act 1975.

Whether the English courts would follow the decisions of the Australian, South African and Isle of Man courts and provide assistance remains doubtful. The *Government of India* [29] case was, of course, an attempt by a foreign government to claim directly in an English liquidation rather than an attempt by an Indian receiver to obtain assistance to enforce creditors' claims over assets situated in the United Kingdom. However, the House of Lords relied heavily on the Irish case of *Peter Buchanan Ltd.* v. *McVey* [30] where the Scottish liquidator was denied the assistance of the Irish courts to enforce a claim on behalf of the Inland Revenue. The *Peter Buchanan* case also influenced the subsequent Irish decision in *Re Gibbons.* [31] In the light of these authorities it seems doubtful if the English courts would grant assistance to a foreign trustee or receiver

where the sole claimant was a foreign revenue authority. Query, however, whether assistance would be refused where there were ordinary creditors in addition to the foreign revenue.

There is at least some indication of a softening of judicial attitudes in respect of requests to provide evidence for foreign tax claims. In *Re State of Norway's Applications* [32] a Norwegian court issued a letter of request to the English High Court for the examination of two witnesses in the United Kingdom in connection with a claim for unpaid Norwegian taxes. The case revolved primarily around the meaning of the words "civil or commercial matter" in the Evidence (Proceedings in Other Jurisdictions) Act 1975. The House of Lords, granting the request, considered that the application was not an attempt directly or indirectly to enforce the revenue laws of the State of Norway.[33] Lord Goff, while acknowledging the rule in the *Government of India* case,[34] considered that the principle of non-enforceability of foreign tax debts did not qualify the jurisdiction of the courts to examine witnesses at the request of foreign courts.[35] In the light of this decision, it seems possible that the English courts may be willing to grant assistance to a foreign trustee in bankruptcy or receiver where the foreign revenue authority is one of the claimants.

Executors or trustees indemnifying themselves against foreign revenue claims

The second problem area concerns the scenario where the trustees of a trust or executors of an estate hold assets in two or more different jurisdictions. Are they entitled to indemnify themselves out of the assets in one state against revenue claims in another state? This has been answered differently by courts of different jurisdictions.

First, the Supreme Court of New South Wales in *Bath* v. *British and Malayan Trustees Ltd.* [36] refused an application to grant letters of administration to a trustee where the purpose of the appointment was to transfer assets from New South Wales to Singapore to meet an estate duty claim. The deceased had died domiciled in Singapore with assets in several jurisdictions; the assets in Singapore were insufficient to meet the estate duty claim and the executor in Singapore had given an undertaking to remit assets from abroad as a condition of the grant of administration. Because of this, the court refused to appoint the administrator favoured by the executor and instead granted letters of administration to one of the beneficiaries resident in New South Wales.

In *Jones* v. *Borland* [37] the deceased had died domiciled in Scotland with assets in South Africa; the estate duty claim exceeded the assets in Scotland. The court issued a declaratory judgment confirming that the South African executor was right not to transfer assets to Scotland to meet the tax claim since the claim was not enforceable in the courts of South Africa.

Similarly, in *Re Bliss* [38] a New York court held that the local trustee did not have to reserve funds to pay a British estate duty claim as the claim was unenforceable in New York.[39] However, the New York courts have also held that, where there are resident and non-resident beneficiaries, provision should be made for foreign death duties against the shares of resident beneficiaries; to do otherwise would require the full burden of foreign taxes to fall on the non-resident beneficiaries.[40]

A similar case which falls on the borderline is the decision of the Outer House of the Court of Session in *Scottish National Orchestra Society Ltd.* v. *Thomson's Executor.* [41] The testatrix was a permanent resident of Sweden when she died, but owned property in Scotland. The Swedish estate duty claim exceeded the assets in Sweden (the Swedish claim was approximately £19,000, and the Scottish duty was £5,000, on an estate of £39,000). One of the residuary beneficiaries brought an action to prevent the Scottish executor from remitting funds to Sweden to pay the estate duty claim. The Court of Session indicated that it would normally have ordered the executor not to transfer the funds. However, the will in this case provided for certain legacies to be paid to Swedish individuals free from all duties--this could only be done if the Swedish duty were paid. In order to execute the legacies, the court allowed the Scottish executors to make the transfer.

Finally, there are cases the other side of the line. First, in *Re Reed* [42] the testatrix had died domiciled in England but with the bulk of her assets in Canada. The English assets were insufficient to meet the claim to estate duty, so the trustee (an English company) sought reimbursement from the Canadian assets. The British Columbia Court of Appeal rejected an application from the residuary beneficiary to prevent the trustee reimbursing itself. The court considered that the English revenue authorities were not seeking to enforce a tax claim in Canada, and the trustee was therefore entitled to be indemnified out of the Canadian assets.

The English High Court has had to consider this issue in *Re Lord Cable.* [43] The testator had died domiciled in India; assets in the estate were invested in the United Kingdom through a private trust company. After the death of the life tenants there were claims on the estate for Indian

estate duty which could not be met out of the Indian assets--the trustees wished to remit assets from England to pay the estate duty. The residuary beneficiaries opposed this. Slade J. noted that the trustees were jointly and severally liable for the Indian estate duty and that the only way they could meet this liability was out of the assets in the United Kingdom. He therefore refused the order preventing them from remitting the assets to India. He indicated, however,[44] that the claim of the Indian revenue authorities could not have been enforced against the will trustees in any direct proceedings in the United Kingdom; remittance was permitted here, however, to protect the will trustees.

Re Lord Cable [45] would seem to give a clear indication of the attitude of the English courts. While foreign revenue claims may not be enforced directly against an estate or trust, where the trustee would otherwise be personally liable for the foreign tax, assets may be remitted out of the jurisdiction to pay the foreign duty.

Current status of the principle of non-enforcement for foreign revenue claims

This is an appropriate point to take stock of the principle that the courts of one state will not assist in the enforcement of a foreign revenue claim. It remains true that a foreign state may not sue directly to enforce a tax debt. However, if the taxpayer is declared bankrupt and the trustee in bankruptcy seeks assets abroad, it appears that some foreign courts will grant assistance to the trustee, and English courts may grant similar assistance to a foreign trustee, at least where there are ordinary as well as tax creditors. Similarly, where there is a tax claim against an estate or trust, it appears that English courts will permit trustees to transfer assets abroad to meet a tax claim, so long as the trustees would otherwise be personally liable for the debt. One is left wondering whether the principle of non-enforcement of foreign tax claims has been stated in terms which are too absolute given these substantial exceptions.

A version of this article will appear in *Tolley's International Tax Planning,* 1993. For a general discussion of this area, see E. Khan, "Enforcement of Foreign Revenue Law" (1954) S.A.L.J. 275; Albrecht, "The Enforcement of Taxation under International Law" (1954) 30 B.Y.I.L. 454; M. Mann, "Foreign Revenue Laws and English Conflict of Laws" (1954) 3 I.C.L.Q. 465; T. Stoel, "The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States" (1967) 16 I.C.L.Q. 663; P. Carter, "Transnational Recognition and Enforcement of Foreign Public Laws" [1989] C.L.J. 417; R. Smith, "The Nonrecognition of Foreign Tax Judgments: International Tax Evasion" [1981] U. Ill. Law Rev. 241, and Committee on International Property etc., "Local Enforcement of Foreign Tax Laws" (1985) 20 *Real Property, Probate and Tax Journal* 73.

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1.This principle may, of course, be overridden by agreement between the states concerned. This article examines the position in the absence of any convention between the states.

2.Thus, judgments relating to "a sum payable in respect of taxes or other charges of a like nature" are excluded from the Foreign Judgments (Reciprocal Enforcement) Act 1933. Similarly, Art. 1(1) of the Brussels Convention on Civil Jurisdiction and the Enforcement of Foreign Judgments provides that the Convention does not extend "to revenue, customs or administrative matters."

3.Dicey and Morris, *The Conflict of Laws* (11 Edn., Sweet and Maxwell, 1987), p.100 and esp. pp.105-106.

4.The rule appears to derive its origin from a series of cases in the eighteenth century involving the refusal to recognise the avoidance of foreign revenue laws as grounds for invalidating a contract--see *Boucher* v. *Lawson* Cast. Hard. 85, 194; *Holman* v. *Johnson* (1775) 1 Cowp. 341 at p.343; *Planche* v. *Fletcher* (1779) 1 Doug. 251 at p.258.

5.[1955] A.C. 491.

6.*Indian and General Investment Trust Co. Ltd.* v. *Borax Consolidated Ltd.* [1920] 1 K.B. 539.

7.*Government of India* v. *Taylor* (*supra*).

8.In the quaintly named case of *Re Visser, H.M. Queen of Holland (Married Woman)* v. *Drukker* [1928] 1 Ch. 877.

9.*Municipal Council of Sydney* v. *Bull* [1909] 1 K.B. 7.

10.*Metal Industries (Salvage) Ltd.* v. *Owners of the S.T. Harle* [1962] S.L.T. 114.

11.*H.M. the Queen in Right of British Columbia* v. *Gilbertson* 433 F. Supp. 410, 597 F.2d 1161 (U.S. Court of Appeals, Ninth Circuit, 1979)--on this see Stoel (1967) 16 I.C.L.Q. 662.

12.*United States of America* v. *Harden* 41 D.L.R. (2d) 721, (Supreme Court of Canada, 1963).

13.*Peter Buchanan Ltd. and Macharg* v. *McVey* [1954] I.R. 89, [1955] A.C. 516n.

14.*Commissioner of Taxes, Federation of Rhodesia* v. *McFarland* (1965)(1) S.A. 470 (Witwatersrand Local Division).

15.*Permanent Trustee Co. (Canberra) Ltd.* v. *Finlayson* (1968) 122 C.L.R. 338 (High Court of Australia).

16.[1963] 2 Q.B. 352.

17.On this see also *Brokaw* v. *Seatrain U.K. Ltd.* [1971] 2 Q.B. 476.

18.On this, see P. Smart; *Cross-border Insolvency* (London, 1991), pp.125-133, and also Smart (1986) 35 I.C.L.Q. 704.

19.[1960] Ir. Jur. Rep. 60.

20.(1981) 39 A.L.R. 129.

21.(1985)(3) S.A. 950 (Transvaal Provincial Division).

22.For a general discussion of the litigation arising out of the Tucker bankruptcy, see D. Graham; "Tucker and the Taxman" in I. Fletcher (ed.); *Cross-border Insolvency: Comparative Dimensions* (London, 1990).

23.See [1988] F.L.R. 154.
24.[1988] F.L.R. 323 at p.337.
25.[1988] F.L.R. 378.
26.The issue of obtaining evidence in support of a foreign revenue claim is discussed further below.
27.553 So. 2d 1344 (Florida District Court of Appeal) (commented on by J. Avery-Jones [1991] B.T.R. 109).
28.On this see P. Smart, *Cross-border Insolvency* (London, 1991), Chap. 14.
29.*Supra.*
30.*Supra.*
31.*Supra.*
32.[1990] 1 A.C. 723.
33.For a somewhat more extreme case where a decision was reached to hand over tapes to be used in a criminal case of tax evasion in the U.S., see *Re Request for International Judicial Assistance* (1979) 102 D.L.R. (3d) 18 (Alberta Court of Queen's Bench).
34.*Supra.*
35.Note, however, that the English courts have been more reserved in making similar requests of foreign courts. In *Re Tucker* [1990] 1 Ch. 148--a further chapter in the Tucker saga--the Court of Appeal refused to issue a summons under the Bankruptcy Act 1914, s.25 to examine a witness resident in Belgium since it would be contrary to an established principle of international law for the Belgian courts to lend their assistance to the enforcement of a foreign revenue law. In the light of the *State of Norway* case, this decision is now open to doubt.
36.(1969) 90 W.N. (N.S.W.) 44.
37.(1969)(4) S.A. 29 (Witwatersrand Local Division).
38.208 N.Y.S.2d 725 (1960, Supreme Court of Suffolk County).
39.On this see also *Re Matthew's Trust* 191 N.Y.S.2d 944; 21 Misc. 2d 356 (New York Supreme Court, 1959) and the discussion in Committee on International Property etc., "Local Enforcement of Foreign Tax Laws" (1985) 20 *Real Property, Probate and Tax Journal* 73.
40.*Re Gyfteas* 320 N.Y.S.2d 540; 36 App. Div. 380 (1971) and *Re Hollins* 139 N.Y.S. 713; 79 Misc. 200 (1913).
41.[1969] S.L.T. 325.
42.(1970) 17 D.L.R. (3d) 199.
43.[1976] 3 All E.R. 417.
44.At p.436.
45.*Supra.*