Feature

KEY POINTS

- Tax law is fertile ground for constitutional considerations, but also illustrates the decline in reasoned debate outside a court room setting.
- Questions of real interest in both social and constitutional terms are raised and tax law may be a barometer for the state of public opinion.
- Complex, multi-faceted fiscal policy loses out to the sound byte.
- Brexiteers wishing to challenge fiscal policy may not have seen that no presence in Europe is likely to mean less -not more- ability to challenge policy.
- The absence of detailed knowledge and informed debate about complex fiscal and economic matters derogates from public understanding and full debate which are hallmarks of a healthy democracy.

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The ultimate irony: fiscal policy and legal challenge

In this article, Alison Foster QC considers, post-EU referendum, how the tax-payer personally affected by an inimical tax policy can challenge the statutory provisions which affect him.

TAX AND PUBLIC ENGAGEMENT

Complex matters of taxation are an unlikely barometer for public opinion, but there are parallels in the last few months' Brexit debates with last year's "avoidance/evasion" arguments. Both reveal shortcomings in the democratic process.

Taxation has always had constitutional significance: it has provoked revolutions and lost us a colony. For the American revolutionaries no less than for the barons under King John, taxation was a central part of constitutionalism. Today, Magna Carta and the Bill of Rights are still-quoted sources of important principles concerning Parliament's authority to authorise the imposition of a tax.

The principle is a live one, it operates to restrict the imposition of tax both in name and in substance. There is no power to tax by a side wind – and a power to charge for services cannot be read as a power to make a profit. Thus a local authority cannot use its powers to charge for particular services to generate a general tax, nor, for example, use a car parking charge to make a profit as a contribution to its general revenue. (*Congreve v Home Office* [1976] QB 629; *R v Camden LBC ex parte Cran* [1995] RTR 346; *Djanogly v Westminster County Council* [2010] EWHC 1825 (Admin); *R (Attfield) v Barnet London Borough Council* [2013] EWHC 2089 (Admin)).

So tax cases have social significance as well as constitutional resonance. Unsurprisingly, in an age of financial austerity and some uncertainty, there is political capital to be made from attacks on big business and on wealthy individuals, where paying (or not paying) tax is the issue. The familiar lawyers' distinction between tax evasion and tax avoidance is a subtlety wholly unsuited to the 24 hour news cycle or the 90 – second sound byte on the Today Programme. Or indeed, to clear exposition by the last Prime Minister. Complex, multi-faceted fiscal policy loses out in the sound byte.

The ability properly to explain the factors lying behind fiscal measures is central to a proper debate, although sufficient time for that debate and for explanation is almost never afforded, outside the court room. The tax payer in the street has little opportunity to hear the detailed truth about fiscal policy and measures; time does not permit it in national debate. This is nonetheless important. Wittgenstein may have said in the Preface to the Tractatus that anything that could be said, could be said clearly. He did not say that it could be said *fast*.

Tax affairs have however, become the bellwether of the popular response to general economic policy. But, at the heart of much of the social intolerance towards multinationals, tax planners and tax gatherers, is a problem of fundamental economic ignorance, and a lack of communication. It appears to be remarkably difficult to impart the implications of fiscal, or even general commercial policy to a public who, willingly or unwillingly, remain ignorant of the complexities and polycentric, multifaceted nature of financial life. Many feel themselves at best disconnected, at worst deliberately excluded, from participation.

This sentiment dominated the pre-Brexit debate, and quite possibly, may have been responsible for its result. Contrary to the Brexit rhetoric, it is difficult to see how, absent a European legal influence, the taxpayer will enjoy more control of government taxation policy than hitherto.

The matters dealt with here do not touch on our European tax, VAT. VAT has been harmonised in the EU since 1977. No one knows, of course, what may happen once the UK actually leaves Europe. Technically, the UK would be most unlikely to remain bound by the VAT Directive and the UK's own VAT Act would represent the law. The government could, of course, change the regime altogether, though it is hard to think that the exchequer would forgo the revenue of an indirect tax, and would likely craft in its place a domestic purchase tax of sorts.

This article does not deal with VAT, but concentrates upon domestic tax provisions and the opportunities that Europe has provided hitherto for challenge to those. It is however a truth in respect of VAT as much as of other Brexit factors, that no serious public discussion of the ramifications ever took place.

TAX AND THE CONSTITUTION

Scrutiny in the courts

Tax matters have engaged the courts in some of the most important questions arising in law, including fundamental

principles of statutory interpretation and the constitutional divide between matters properly for the court, and matters for Parliament alone.

The scope of the charge to tax is in the first instance determined by Parliament in its law making function. The courts, in declaring the meaning of tax law, are responsible for determining the scope of the power to tax. Although any statutory construction might be said to contain elements of judgement as to what Parliament intended (and therefore as to what policy was in any case), subject to one very significant exception, fiscal policy is a matter entirely for the legislature, and legislation cannot be impugned on the basis of policy choice.

The effect of arguments arising in EU law and pursuant to the Human Rights Act, considered below, is the striking potential exception to complete sovereignty in fiscal matters.

Historically the courts have been sympathetic to the notion that the taxpayer, individual or corporate, should not be required to pay more tax than he was compelled by law to do: if he wanted to order his affairs so as to minimise tax, he might. Lord Tomlin in *IRC v Duke of Westminster* dispelled any notion that the court would ignore the legal position in favour of "the substance", but the old cases are full of entertaining phrases; it is almost one hundred years since it was said in *Ayshire Pullman v CIR* (1929) 14 TC 754 that no one in this country was 'under the smallest obligation moral or other so to arrange his legal relations to his business or his property as to enable the Inland Revenue to put the largest possible shovel into his stores'.

Later, following the House of Lords in *W.T. Ramsey Limited v Inland Revenue Commissioners* [1982] AC 300, the unduly literal interpretative approach ended. The courts were not compelled to look at material 'in blinkers, isolated from any context to which it properly belonged'. Constitution-based arguments to the effect that any attack on schemes of avoidance was a matter for Parliament were rejected. Last year, the Chancellor in *Eclipse Film Partners v HMRC* [2015] EWCA Civ 95 expressed it thus:

> 'There is no special rule for interpreting tax legislation … in Ribeiro PJ's oft-cited dictum from *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35],: "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically".' (although note that the case is under appeal)

An unblinkered approach to the analysis of the facts underpins the court's modern task, and the pragmatism of the court's relationship with the draughtsman is encapsulated by Bennion on Statutory Interpretation at s 278, p 767 where he recognises '… revenue from taxation is essential to the running of the state, and … the duty of the judiciary is to aid in its collection while remaining fair to the subject'.

TAX FORGIVENESS AND THE CONSTITUTION

There can be no question of the executive raising a tax without the consent of Parliament, likewise, the English constitution limits executive discretion to dispense with tax, and the courts have been willing to uphold those limits. The Bill of Rights provides:

> 'That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal'.

Case law recognises that this also is a matter of constitutional importance. In *F & I Services Ltd v Commissioners of Customs and Excise*, Lord Justice Sedley said of an attempt to derogate from the taxing power:

> 'It is of course serious for the taxpayer; but it is serious for the public and for the rule of law. It is the Bill of Rights 1688 — the nearest thing we have to a constitutional text — which abrogates the dispensing power of the Crown.'

Through a number of cases, the courts have evolved a balance between legitimate managerial discretion and illegitimate dispensation from tax. *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, *R v Inland Revenue Commissioners*, ex p MFK [1990] 1 W.L.R. 1545 at 1569 in *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30 *R (on the application of Gaines-Cooper) v Revenue and Customs Commissioners* [2011] UKSC 47 are some of the relevant materials.

SCRUTINY OUTSIDE THE COURTS

Few would disagree that scrutiny of the exercise of power by the executive consistently with the rule of law is essential to a functioning democracy. That process is well illustrated by the cases cited above.

> In the course of one of the hearings … the Chairman indicated she was not interested in illegality, she was interested in immorality.

Other aspects of the scrutiny of executive action and government policy in the area of taxation have arguably been far less effective. The Institute for Government in its paper *Parliamentary Scrutiny of Government* (Dr Hannah White, 2015) acknowledges that scrutiny of government within a well-developed civil society such as the UK involves a web of interconnecting activities, of which some are more effective than others. For the purposes of this article, the most striking feature among those it lists (the courts, inquiries, Royal Commissions, and other scrutineers) are select committees and the media. The public also features. On the issue of tax avoidance, the Public Accounts Committee (PAC) notoriously, cross examined a number of senior HMRC witnesses and others. In the course of one of the hearings, in cross-examining an accountancy expert who was explaining all activities were perfectly within the law, the Chairman indicated she was not interested in illegality, she was interested in immorality.

It is hard to think that the ability of the public to appreciate the real taxation issues

Feature

Biog box
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is increased rather than diminished by such an approach. Worse, other exposure serves to confirm the absence of access to informed debate. Serious analysis of policy and its ramifications cannot be communicated in two sentences of lively riposte in a broadcast interview: detail is liable to be boring and, even if essential, may be omitted.

So how *may* policy be examined, and perhaps challenged, other than through the symbolic challenge of the ballot box?

THE CHALLENGE TO POLICY

How does the tax-payer personally affected by an inimical tax policy challenge the statutory provisions which affect him? Under domestic law, no challenge to the rationality of legislation will lie. The answer is, in order to mount a policy challenge, the tax payer must give effect to the law which the UK may well have just renounced through the Brexit vote: he must articulate a challenge under European law and or the Human Rights Act, where different rules apply.

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Even though primary domestic taxation is (as described by Green J in *Gibraltar Betting and Gaming v Secretary of State* [2014] EWHC 3236 (Admin), [2015] 1 CMLR 28 at para [112]) 'at the apex of the exercise of the democratic decision-making process', the court will itself look at policy in a European or Human Rights case. Even though, generally, macro-economic and fiscal questions fall at the less rigorous end of the spectrum, a court in which EU and human rights principles are engaged will scrutinise legislation on the basis of its proportionality, necessitating an examination of matters of policy underlying the legislation.

The effect of s 2 of the European Communities Act 1972 is that where a domestic statutory requirement is inconsistent with directly enforceable EU law, that statutory requirement must where necessary be dis-applied and moulded to the extent necessary to enable those requirements to be applied in a manner consistent with EU law (*passim* the cases, and especially *R (on the application of Drax Power Limited) v HM Treasury* [2016] 2 CMLR 33, *Regina (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41; [2016] AC 697, *R (on the application of Sinclair Collis Limited) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 39).

It is accepted that taxation engages Art 1 Protocol 1 (A1P1) of the ECHR, effective by reason of the provisions of the Human Rights Act, although the state may enforce such laws as it deems necessary to control the use of property to secure the payment of taxes. Whilst the European Court of Human Rights has consistently held that member states have a "wide margin of appreciation" in relation to tax legislation, (*Gasus Dosier and Fordertechnik GmbH v Netherlands* (1995) 20 EHRR 403), nonetheless, the court will police the extent to which domestic tax legislation is "sufficiently accessible, precise and foreseeable" in its application, and proportionate (*NKM v Hungary* [2013] STC 1104).

The position in relation to ECHR law and Convention rights is similar to the position in relation to EU law, with the necessary modifications to reflect the fact that under the Human Rights Act courts and tribunals have no power to dis-apply primary legislation: *Regina (Hurst) v London Northern District Coroner* [2007] UKHL 13, [2007] 2 AC 189.

Proportionality as a general principle of EU law, shared by ECHR jurisprudence, goes far beyond the scope of a legitimate challenge to primary legislation under UK law. It can involve a consideration of whether the measure in question is suitable or appropriate to achieve the objective pursued; and whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous means. It allows articulation, in limited circumstances, of a merits- based challenge to the legislature on fiscal matters, representing a step change from the constitutional rigour of domestic law.

THE ULTIMATE IRONY

If the UK is to leave Europe, logically it must leave the Court of Justice behind too. If it truly separates itself from external input into its law-making, regains its "sovereignty" in the language of the hustings, it must logically proceed to a repeal of the Human Rights Act, which itself brings home rights derived from the European Convention, and which the courts interpret by reference to Strasbourg law. Yet this is the mechanism, and the only one, by which a challenge might truly be made to the legislature by the taxpayer. It is tempting to think that a failure to understand this fact, and to desire to sweep it away, is a function, again, of a lack of informed, careful debate about fiscal policies in the public forum. ■

Further Reading:

- Taxation, investments and the free movement of capital [2001] 8 JIBFL 363.
- Companies in financial difficulties and in formal insolvency: comments on UK taxation [2010] 3 JIBFL 164.
- LexisPSL: Banking & Finance: The German Constitutional Court's ruling in the "EU bailouts case": More than meets the eye.