GOVERNMENT OF INDIA v TAYLOR: THE END OF THE LINE?

Harriet Brown

The revenue rule—the principle that the courts of one jurisdiction will not collect the tax of another—has been a near-universal principle of legal systems around the world. In recent years it has been eroded by an increased international cooperation in tax matters. This article seeks to understand the origins of the rule and the way that its interaction with information powers has been interpreted by the courts of various jurisdictions in order to draw conclusions about its scope and how it is likely to interact with increasingly complex international rules. This informs the conclusions of the article that the revenue rule remains in place and relevant, but that it is likely to be further amended by international agreements, and through the development of legislation in this context. It is concluded, however, that the courts of Jersey (and other jurisdictions) should be cautious in attempts to develop or curtail the rule in the absence of clear legislative necessity.

"There where it is we do not need the wall:
He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.
He only says, "Good fences make good neighbours."[1]

1 "Good fences make good neighbours" is a proverb found in many cultures; the principle in *Government of India, Ministry of Finance v Taylor* is similarly one that is widespread throughout the world. The principle takes its name from an English case, though it is in fact much older than that case, and is also referred to as the "revenue rule", as well as often being mentioned in conjunction with Lord Mansfield's name.[2]

---

[1] Robert Frost, *Mending Wall*, www.poetryfoundation.org/poems/44266/mending-wall

[2] Presumably because of Lord Mansfield's early reference to it in English law in the case of *Holman v Johnson* (1775) 1 Cowp 341. Since the same Lord Mansfield's name is also sometimes used to refer to the rule of evidence that—in the US at least—both husband and wife were not entitled to give

2 In *Government of India, Ministry of Finance v Taylor*[3] ("*GoI*") Viscount Simonds quoted several earlier decisions (at 503) that set out the principle, and stated—

> ". . . I was greatly surprised to hear it suggested that the courts of this country would and should entertain a suit by a foreign State to recover a tax. For at any time since I have had any acquaintance with the law I should have said as Rowlatt J. said in the King of the Hellenes v. Brostron: 'It is perfectly elementary that a foreign government cannot come here—nor will the courts of other countries allow our Government to go there—and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he belongs.'"

3 This, shortly stated, is the principle in *GoI* ("the principle"). It has been developed, finessed and elucidated in subsequent cases, many of them to do with bankruptcy. It should also be noted that—while this article concentrates on tax provisions—the principle also applies to penal and other public law provisions.

4 It seems, therefore, to be the case that in international tax, as in farming, good fences have been considered to make good neighbours. However that assumption is changing. This can be seen in the proliferation in recent years of international tax agreements in relation to exchange of information (including FATCA, CRS, and the numerous bilateral TIEAs into which Jersey, as well as the majority of the rest of the world, have entered). However, despite all this, the principle has survived, albeit with statutory and treaty exceptions to it.

5 James Kessler QC in "Taxation of Non-Residents and Foreign Domicilaries" explains (at para 75.15)—

> "The proposition that foreign taxes are unenforceable in other countries now needs to be qualified. Enforceability of foreign taxes is a large topic, and may need investigation in the circumstances of the case; but under international treaties, foreign taxes are generally enforceable in other countries, and there may be other methods of enforcement (*e.g.* arrest of the [taxpayer] if they enter the jurisdiction concerned)."

6 The statement "foreign taxes are generally enforceable" is rather a large one, though it is undoubtedly the case that the principle has been, and continues to be, eroded in modern international treaties. However,

---

testimony on the question whether they had access to the other at the time of conception in questions of legitimacy, it is unhelpful to use this nomenclature.

[3] [1955] AC 491.

the starting point should always be that the principle applies, and that any legislative or treaty amendment to the principle must be set in that context.

7 Thus for the time being the principle remains important. The rest of this article considers—

- the international presence of the principle and the basis of the principle;
- the principle and its development in Jersey law;
- the link between the principle, tax collection and information;
- the modification of the principle by legislation and international convention; and
- the future of the principle.

The scope of the principle

8 The principle is necessary because "tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction" (*GoI*, at 514).

9 It is important to understand the limits of the principle. It was said in *Holman v Johnson*[4] that revenue laws[5] are never recognised abroad but this is to stretch the principle too far. For example, foreign rules about stamping documents and unstamped documents' validity have been recognised almost as long as the principle itself has been recognised: *Alves v Hodgson*[6] and *Clegg v Levy*.[7]

10 Similarly, foreign revenue law that forms part of the applicable law should be recognised. For example, in the English case of *Regazzoni v KC Sethia Ltd*[8] it was held that while the English courts will not enforce foreign revenue or penal laws, they will not entertain an action based on a transaction which is knowingly intended to involve a breach of such laws. In short, revenue law which is part of the applicable law should be recognised as part of that law as a matter of fact. Thus where enforcement is not in issue, foreign revenue laws

[4] (1775) 1 Cowp 341.
[5] The expression "revenue laws" has not been defined in case law. It should be the case that, when seeking to apply the principle, it will need to be considered on a case-by-case basis.
[6] (1797) 7 TR 241, at 243.
[7] (1812) 3 Camp 166.
[8] [1956] 2 QB 490.

should be applied if they are relevant to one of the issues in point (again, more on this later).

11 This point was, or almost was, recognised in the case of *IFM Corporate Trustees Ltd v Heliwell*.[9] This was a simple request for rectification of a trust. The trust had been intended to replicate the terms of a previous trust. The last subset of the class of beneficiaries of the original trust appeared on the back of the last page of the trust instrument and was carelessly, but perhaps understandably, missed from the replicant trust instrument. It was of paramount importance that the trust instrument was rectified to reflect the intention that such class be included.

12 So far, so good, and so little tax. In fact the UK tax position of the trust was not disturbed by the rectification and the only issue was that the trust was a very unusual one, its oddity explicable by its establishment in order to facilitate significant savings of UK tax. The Bailiff said—

> ". . . the Court was initially concerned that this particular scheme might have fallen into the category of aggressive tax avoidance and, if that were so, might therefore have been the sort of scheme where in the exercise of its discretion, the Court should consider whether such a fact, if true, should lead to the refusal to exercise discretion in favour of the applicant . . . [t]his Court recognises that there are strong ethical arguments why tax payers should recognise their obligations to the state in which they live, making their fair and appropriate contribution towards the outgoings which any modern state has in the provision of services for the benefit of the community. Indeed, many tax payers across the world recognise those obligations and, some uncomplainingly, make their contributions accordingly. On the other hand, it has long been the case that, as a matter of law, a citizen is entitled to retain his property unless by appropriate legislation, the state takes it away, or makes it chargeable to tax. That is the basis of the distinction between tax evasion, which is unlawful, and tax avoidance, which is not . . .
>
> Historically, the courts have always applied the principles of law rather than what are perhaps inchoate and uncertain ethical considerations in this area. **What seems to us perhaps to be open to argument is whether, in an area which involves the exercise of a judicial discretion in cases where the court's assistance is being sought for a mistake which has been made,**

[9] [2015] JRC 160.

> **there is room for the argument that the discretion ought not to be exercised if on the facts of a particular case, the scheme in question is lawful but appears to be so contrived and artificial that it leaves the Court with distaste if, in effect, it is required to endorse it.** [Emphasis supplied.]

13 It seems that the court's question might well have been answered had the advocate in the case—one Advocate Brown, whom I have no compunction in criticising for not so doing—suggested to the court that *Regazzoni* described a principle which might already form part of Jersey law: namely that revenue law which is part of the applicable law should be recognised as part of that law as a matter of fact. Of course, the applicable law of the trust was Jersey and so English revenue law did not form part of the applicable law, but the principle should perhaps have extended to allow the court to consider whether or not the scheme of the trust was offensive to English revenue law as a matter of fact.

14 It is difficult to see how, where Parliament cannot from one finance bill to the next decide what is and is not acceptable,[10] that a foreign court would, even with the assistance of expert evidence, be in a position to correctly determine such inchoate and uncertain ethical considerations. Consequently, had *Regazzoni* been drawn to the court's attention it may have provided a clear path through the difficulties identified by the court in *Helliwell*, namely that the moral dimension should remain irrelevant (for policy reasons if nothing else), but that it might be necessary to show evidence that the foreign law is not breached by the proposed arrangement.

The basis of the principle

15 The rationale for the principle is, surprisingly, rarely discussed in the case law from any jurisdiction. In particular, the basis for it is not discussed in the early case law where it appears to be assumed that its rationale is so obvious as to be beyond doubt (see, *e.g.*, Lord Mansfield in *Holman v. Johnson*[11], where he says "no country ever takes notice of the revenue laws of another"—clearly an overstatement of the modern principle, if it was ever correct to state the principle so

---

[10] For example, in recent years Parliament has legislated to prevent the "washing of gains" in foreign trusts by capital payments to non-UK resident beneficiaries in one year and UK resident beneficiaries in the following year while at the same time HMRC has given such schemes as an example of acceptable tax avoidance in its own "General Anti-Avoidance Rule Guidance".

[11] (1775) 98 ER 1120, at 1121 (KB).

widely). The basis for the principle—or at least a possible basis for it was discussed in the American case of *Moore v Mitchell*[12]—

> "Even in the case of ordinary municipal liabilities, a court will not recognise those arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are [e]ntrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper . . ."

16 Thus the basis for the principle appears to have been considered by the American courts to be—

(a) the issue inherent in the court considering the revenue law of a foreign state such that a court is not the proper entity to review the statutes of a foreign state (the separation of powers problem—"it involves the relations of the states"); and

(b) a court would be required to decide the validity of the foreign law, and thus run the risk of declaring the revenue law of another state unenforceable, violating comity.

17 If the latter is correct, the principle can be seen as a mere extension of the principle of comity. It is unlikely that this is the only reason for the principle not least because the separation of powers argument is not wholly convincing, or even easily discernible from the exposition of the judge in *Moore v Mitchell*. This reasoning does, perhaps, account for the adoption of the principle in most countries (since comity is itself a universal or almost universal principle) and also for the ease with which the principle has been eroded through international treaties.

---

[12] 30 F 2d 600 (2d cir 1929).

18 A different approach was taken in *GoI* where Lord Keith of Avonholm said (at 511)—

> "One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties."

19 Lord Keith of Avonholm went on to consider the reason given in *Mitchell v Moore* concluding—

> "On either of the explanations which I have just stated I find a solid basis of principle for a rule which has long been recognised and which has been applied by a consistent train of decisions."

20 The theoretical basis for the principle can, therefore, be framed in terms of a lack of jurisdiction of the foreign state. In essence the foreign state has no international jurisdiction to enforce its law abroad, and a national court will not exercise its jurisdiction to enforce or assist an excess of jurisdiction by the foreign state.

21 A different underlying reasoning—broadly based on the relevant jurisdiction being an "enforcement jurisdiction"—has been given as the rationale for the principle. This can be seen in a number of decisions but is helpfully discussed in the context of *GoI* in the *Lotus* case (*France v Turkey*).[13] In this case the Permanent Court of International Justice[14] said (at 18–19)—

> "Now the first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention."

22 In *R (Smith) v Secy of State for Defence*,[15] Lord Collins noted—

---

[13] (1927) PCIJ Ser A, No 10, at 4.

[14] The Permanent Court of International Justice was established in 1920 under art XIV of the Covenant of the League of Nations. It was dissolved in 1946, as was the League, and replaced by the International Court of Justice.

[15] [2010] UKSC 29, [2010] 3 All ER 1067, [2011] 1 AC 1.

> "That is a statement about enforcement jurisdiction, namely the limits of the right of a state to act on the territory of another state or to take measures on its own territory which require compliance in another state. Thus **a state cannot, without the consent of the territorial sovereign, perform official acts in a foreign state or carry out official investigations in the foreign state. The inability of a foreign state to claim, directly or indirectly, its taxes in England is sometimes put on the basis that it is an illegitimate extension of its territorial jurisdiction: see Government of India, Ministry of Finance (Revenue Division) v Taylor** [1955] 1 All ER 292, [1955] AC 491." [Emphasis supplied.][16]

23 This is a more convincing explanation than those given in earlier cases, though they may have been striving for the same position, possibly lacking the necessary precision of language.

24 Thus it can be seen that it remains the case that the principle is respected internationally. If its basis is in this "first and foremost" restriction in international law, it is easy to see why this is the case. However in the 1986 English case of *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd; Rumasa SA v Multinvest (UK) Ltd*,[17] Lord Templeman noted that the position might change—

> "There is another international rule whereby one state will not enforce the revenue and penal laws of another state. This rule with regard to revenue laws may in the future be modified by international convention or by the laws of the European Economic Community in order to prevent fraudulent practices which damage all states and benefit no state. But at present the international rule with regard to the non-enforcement of revenue and penal laws is absolute."

25 This has turned out—to a certain extent—to be the case. Indeed, the Permanent Court's statement that the—

> ". . . first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another state",

is particularly relevant to the development of exceptions to and possible erosions of the principle.

---

[16] See also *Jiminez v First Tier Tribunal (Tax Chamber)* [2017] EWHC 2585 (Admin), at para 55.
[17] [1986] AC 368.

The principle in Jersey law

26 *Re Tucker*,[18] *Re Walmsley*[19] and *Re Williams*[20] put beyond doubt the relevance of the principle in Jersey law. Revenue debts are also expressly "carved out" in the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, art 3(2)(b). This means that where tax is due to a foreign tax authority by a Jersey trustee it should not be enforceable against the trustee by a Jersey court. It was said in *Re Walmsley* (in the context of taxes payable by executors in relation to a deceased's estate)—

> "The principle underlying English law was well expressed in *Midgley v. Midgley* by Lindley L.J. at page 299:—
>
> > 'The general principle is, that it is the executor's duty to protect the estate against demands which by law cannot be enforced against it. This is his duty. That general principle is a wholesome principle, not to be cut away or narrowed . . . On general principle I take it to be clear that it was distinctly wrong for the executor to pay a debt which had been judicially decided not to be recoverable out of the estate which it is its duty to protect.'
>
> That principle was recognised in *In re Mark Bolan Charitable Trust* (1981 JJ 117), namely, that unauthorised payments to the Inland Revenue authorities in the United Kingdom by a Jersey trustee, might lay him open to a breach of trust by some of the beneficiaries. Mr. Birt invited me to extend the principles of English law I have adumbrated to Jersey. I see no reason why I should not; they seem to me to be sound common sense. Accordingly, I am of the opinion that an executor or trustee under a Jersey will or settlement should not pay unenforceable debts without an order of the Royal Court."[21]

27 Thus unenforceable debts of an estate should not, according to *Walmsley*, be paid without the Royal Court's sanction. This would, from *Walmsley*, appear to include UK tax debts, which is in line with the principle established in *GoI*.

---

[18] 1987–88 JLR 474. This case involved a bankrupt, who had immensely complicated and—for the times—international affairs. Cases in his bankruptcy and in relation to the principle were heard in the UK, Jersey, Guernsey and the Isle of Man. The Isle of Man case is discussed further below.

[19] 1983 JJ 35.

[20] [2009] JRC 054.

[21] *Ibid* at 38, *per* Sir Peter Crill, Bailiff.

28 Indeed, there is Jersey case law, which suggests that this is correct. In *In X's Settlements*,[22] the JLR note says—

> "On an application by an executor or trustee of a Jersey estate or settlement, the court will not grant leave to remit assets abroad to pay a foreign revenue claim that would be unenforceable if pursued in Jersey. If, however, the claim is enforceable in the foreign country against the trustee or personal representative, or if failure to pay would entail his breaching the law of that country, the court may give leave in order to protect him. The court will consider an express power given by the settlement to the trustee to pay unenforceable foreign taxes and the fact that no beneficiary could benefit until such taxes were paid. The court must also have regard to the overriding principle, as required by art. 20(2) of the Trusts (Jersey) Law 1984, that in exercising his discretion under a trust, a trustee must act in the interests of the beneficiaries . . ."

29 The recent case of *Ariel*—while not directly in point—suggests that the Jersey courts may now take a different policy view to the strength and breadth of the principle in Jersey law. This is, no doubt, in line with the recognition in *Heliwell* of the—

> ". . . strong ethical arguments why taxpayers should recognise their obligations to the state in which they live, making their fair and appropriate contribution towards the outgoings which any modern state has in the provision of services for the benefit of the community."[23]

30 The Jersey *Re Tucker* case also requires some consideration, notwithstanding that the principle has undoubtedly been further explored or developed since this time. The *Tucker* cases in Jersey and Isle of Man involve two of the most detailed considerations of the principle and the then-existing case law. It is also interesting to consider why the judges in two jurisdictions—both of which recognised the principle as forming part of their law—came to different conclusions on what were very similar facts (though it should be noted that at the time the Jersey case was heard HMRC was the only creditor of the bankrupt).

31 The facts in the case do not differ significantly from those described below in the Manx case. In short, information was required from the bankrupt's legal representative in Jersey concerning undisclosed assets of the bankrupt held in offshore trusts, and the

---

[22] 1994 JLR *N*–6b.

[23] *Ibid*, *per* Sir William Bailhache, Bailiff, at para 12.

trustee in bankruptcy obtained an order from the English High Court requesting the Royal Court to act in aid of and be auxiliary to the English High Court, as provided by the Bankruptcy Act 1914, s 122, which extended to Jersey. The order sought a private examination of a Jersey-based witness, and the production of documents.

32 Consequently the trustee applied to the Royal Court for an order in aid under s 122 but before the application was heard, the only non-revenue creditor in the proceedings withdrew his claim.

33 The Royal Court sought to resolve the application for the order by determining whether—

(a) in its application in Jersey, s 122 was subject to the public policy that courts will not enforce the revenue laws of a foreign state;

(b) the examination of the witness with or without documents amounted to an indirect attempt to enforce a foreign revenue law contrary to that policy; and

(c) a request for such examination pursuant to s 122, when the sole creditor was HMRC, also amounted to such indirect enforcement.

34 In considering these points, the Royal Court answered them in the following way—

(a) the principle did apply to s 122: although the Royal Court was a British court within the terms of s 122, for tax purposes it was—within certain defined limits—the court of an independent state such that the wording of that section merely enabled the Royal Court to act in aid and where the sole object of seeking aid was to enforce a foreign revenue claim then the court could exercise its discretion to refuse such aid; and

(b) the examination of a witness with or without documents and a request for such examination when the sole creditor was HMRC, amounted to an indirect attempt to enforce a foreign revenue law. There was no valid distinction between enforcing a tax debt or attempting to do so by a collection of that debt and the seeking of information to assist in recovering the debt. In each case, the court had to scrutinise the substance of the claim and if the effect of making an order would be to enable the trustee to enforce, however indirectly, a revenue claim as a result of information so obtained, the application had to be rejected.

35 *Tucker* was, of course, considered in the most recent Jersey case to consider the principle, *Halabi v HMRC*.[24] Astonishingly, however, it is

[24] [2018] JCA 114.

only referred to twice. Its wholesale and apparently barely considered dismissal is discussed in more detail below.

Development of the principle in Manx law: two cases across three decades[25]

36 This is not the place to provide a comprehensive discussion of how the principle has been dealt with worldwide; however, consideration of some of the jurisdictions with similar law (and the same language) is helpful. A useful place to start is the Isle of Man in *Re Tucker, ex p Bird.*[26] This was a case in which a resident of the United Kingdom, was declared bankrupt by an order of the English High Court and the respondent in the case was appointed as the trustee of his estate. The trustee in bankruptcy claimed that the debtor had personal assets totalling six or seven million pounds and that those assets were being held in numerous trusts and companies in the Isle of Man. The trustee obtained an order requesting the aid of the Manx courts in tracing those assets for the creditors of the estate.

37 Pursuant to that order, he applied to the High Court of Justice of the Isle of Man for an *ex parte* order that two Isle of Man resident liquidators of the debtor's companies be examined on oath before the court as to the affairs of the debtor and produce certain relevant documents in their possession. The court granted the *ex parte* order. A petition by the liquidators to set aside the *ex parte* order was dismissed on the basis that there were two creditors of the estate seeking payment: (i) HMRC (claiming tax assessments totalling £18 million); and (ii) a Mr Harris, who claimed for a little more than £30,000. This dismissal was then appealed.

38 On appeal, it was held that—

(a) the Manx courts had no jurisdiction to entertain an action for the enforcement either directly or indirectly of the revenue law of a foreign state; and

(b) the application by the trustee in bankruptcy, who had not been appointed at the instigation of the HMRC, for an order for the

---

[25] This section is, by necessity, brief and incomplete. It, particularly, permits me to discuss some interesting decisions from the Isle of Man which, as another low tax jurisdiction with tax law not vastly different from that of Jersey may of course be of relevance to the Jersey courts.

[26] [1988] LRC Comm 996. This involved the same Tucker as the Jersey case. The decision in the Jersey case, however, came to a very different conclusion. It may be that the facts in the two cases were distinguishable since by the time the Jersey case was heard the only remaining creditor was HMRC.

examination of witnesses to trace the assets did not constitute an action to enforce a foreign revenue law, even if HMRC was the only creditor.

39 The judge noted that the principle was a venerable one, and should continue to be applied, stating—

> "So far as public policy is concerned, it is vital that this is interpreted and applied to conditions as they are and not as they were 200 years ago. We adopt for the Isle of Man the rationale for the rule of Lord Keith in *Government of India v Taylor*. We accept that it developed as a defence to a claim by one sovereign in the courts of another for a money judgment for tax due, and that the basis of the rule was that the entertaining of the claim would be seen as the acceptance by the latter sovereign of an assertion in his own territory of the sovereignty of another. We fail to understand how such a doctrine can be said to apply to a situation where two friendly states adopt reciprocal legislation to enable the courts of each to aid the courts of the other. If the request for aid is an assertion of sovereignty, it is an assertion that has been willingly accepted by the other sovereign in exchange for a reciprocal submission."[27]

40 This is interesting for two separate reasons. First, it recognises that the mutual agreement of the sovereign states clearly overrides the principle. Secondly, it notes the well-established principle that law should be interpreted appropriately for the time in which the law is being applied. This has, however, been carried somewhat further in the more recent Manx case of *Re A*.[28] In that case it was said—

> "the public policy lying behind the 1955 English case is:
>
> > '. . . now being informed, if not transformed, by recent inter-governmental moves designed to ensure international cooperation in the enforcement of domestic taxation in which the Isle of Man has participated.'
>
> . . .
>
> It is right to record that the principle is still referred to in Dicey, Morris & Collins in *The Conflict of Laws* and it has been applied relatively recently in other jurisdictions. See for examples: *Joseph S Stauffer Foundation* 2007 CILR Note 7 (Henderson J in the Cayman Islands) and *Williams (as trustee in bankruptcy of Collett)* 2009 JLR Note 16 (Commissioner Clyde-Smith and Jurats Le Breton and Clapham in Jersey).

---

[27] *Ibid*, at 1012(b)–(d).
[28] CHP 2016/108.

> Whether the principle still amounts to good Manx law may be for the Appeal Division and the Judicial Committee of the Privy Council to determine in due course. Another rule in Dicey may bite the dust in due course, or at least its potential impact may be much reduced by legislative intervention and the increasing cooperation between civilised countries in respect of tax matters. The issue does not however arise for my determination today. I simply note the judgment of the Appeal Division in *Tucker* and Henderson J's comment at paragraph [122] of his comprehensive judgment in *Wahr-Hansen v Compass Trust Co Ltd* (2007) 10 ITELR 580:
>
> > 'None of the modern authorities provides any support for the notion that the boundaries of the doctrine should be expanded.'
>
> All I need say for the present is that the 'doctrine', if it still exists in Manx law, does not prevent the Trustee, on the facts in this case, discharging the Liabilities."

41 This comment, though undoubtedly *obiter*, is important for several reasons. First, it indicates a somewhat relaxed approach to a doctrine that is almost universal. As rightly indicated, the legislature or (perhaps) the higher courts of a jurisdiction may be able to declare that it does not form part of the relevant law. That relaxed approach may indicate a position of deeper concern. Given the punitive and some times aggressive approach taken to tax avoidance involving lower tax jurisdictions, it is understandable that the judiciary in smaller such jurisdictions may wish to indicate to larger, higher tax jurisdictions that they support the fight against tax avoidance and evasion.

42 This fight, even in the context of the difficult position of lower tax jurisdictions, should not, it is submitted, be at the expense of civil liberties or involve the wholesale dismissal of a principle established for sensible pragmatic reasons, particularly where that principle can be modified, or even dismantled, in a systematic, sensible and considered manner by the legislature. The decision of the court in *Re A* comes perilously close to dismissing a principle which may still be of significant importance to the Isle of Man.

Tucker in Guernsey

43 While *Tucker* was considered in many jurisdictions, it is of course here of primary importance to consider how the principle was dealt with in the case by the Guernsey Court of Appeal. In short, the court held that: (a) s 122 of the Bankruptcy Act.1914, which forms part of the domestic law of Guernsey, imposes on the court to which a request for aid is made a duty, not a discretion, to act in aid of and be auxiliary

to the High Court in the absence of some compelling reason to the contrary; and (b) the principle was at that time applicable in Guernsey and, where that principle applies, it deprives the court of jurisdiction to make an order which will infringe it even if the parties consent to such jurisdiction being exercised. However, the principle could not apply where a request for assistance had been made under an order in aid.

44 In coming to this conclusion the court held[29]—

> "We think these considerations were in the mind of Dillon LJ when he pointed out, in *In re Tucker* (RC) Ex parte Tucker (KR) [1988J 2 WLR 747, 758H that it might not be right to make an order under section 25(6) of the Bankruptcy Act, 1914 for the examination of this bankrupt's brother before a court in Belgium on the ground that . . . 'this is a tax bankruptcy and the ultimate reason of the trustee proceeding with the examination must be to get in assets of the bankrupt to satisfy the United Kingdom Revenue' . . . It seems to us that a Court in this Island, if satisfied that insolvency proceedings were being conducted solely for the benefit of the local revenue authorities, might in the proper exercise of its discretion refuse an order in aid sought under section 122 of the Bankruptcy Act, 1914; at least if it was satisfied that the insolvency proceedings were being used as no more than a device for enforcing the local revenue debt against assets outside the jurisdiction—c.f. Peter Buchanan Ltd and Macharg v Mc Vey [1955] AC 516. But it is not for the court to which a request is made to speculate whether it, if in the position of the requesting court, would have exercised its discretion to refuse to make the request. The duty of the recipient court is to give effect to the request."

45 Thus it is probably fair to say, notwithstanding the erudite and well considered judgment by the Guernsey Court of Appeal, that *Tucker* in Guernsey tells us more about the Bankruptcy Act 1914 as it applied in Guernsey than the principle itself.

The link between tax collection and information

> Something there is that doesn't love a wall,
> That sends the frozen-ground-swell under it,
> And spills the upper boulders in the sun;
> And makes gaps even two can pass abreast.[30]

---

[29] *Ibid*, at 15.
[30] Robert Frost, *ibid.*

46 Again, we can—though perhaps not much further than here—continue the analogy of Robert Frost's farmers: the "wall" that is the principle is to some extent beloved of governments because it protects them from "illegitimate extension of . . . territorial jurisdiction" of other nations. However, there is also the other side of the same coin, which "doesn't love a wall": the desire to collect taxes outside one's own jurisdiction. This is particularly the case in relation to collection from offshore jurisdictions, where there continues to be a popular and increasingly misguided perception that there are rich pickings for the governments of higher tax jurisdictions.

47 In this respect it is, perhaps, surprising that the principle has not been more frequently cited in lower tax jurisdictions, but in the course of my research I have found only one mention of it in Guernsey's published and/or reported cases and only five references in recent Isle of Man cases[31] (each time with, if consideration of the enforcement jurisdiction basis of the principle is correct, surprising approaches and outcomes, as considered above).

48 This is, perhaps, the reason why the principle has been interpreted relatively narrowly through time. The principle should prevent both direct and indirect collection of taxes—this is why it has not generally been possible for a foreign revenue authority to be the main creditor in a bankruptcy: this is an indirect enforcement of taxes of a foreign jurisdiction. However, "collection" is not interpreted widely, as has been seen in the *Halrabi* cases and in various other cases where tax authorities have been permitted to do a number of things that might be considered, at least, steps on the way to collection/enforcement.[32]

49 Such case law bears a reasonably detailed consideration. It is, though not chronological, helpful to start with *Jimenez*—discussed briefly above—as this case deals with the considerable body of English case law on the intersection between tax collection and enforcement and provision of information.

---

[31] Unfortunately I have had limited access to Isle of Man and Guernsey judgments so it is inevitable that some may have been missed.

[32] The issue of indirect enforcement is a vexed one, that arises in a number of unusual circumstances. One of these—where tax is charged on one person, *e.g.* a settlor, but there is a statutory right of recovery of that amount against another, *e.g.* the trustee—is considered by Professor Paul Matthews in "When is a revenue claim not a revenue claim?" (1999) 3 *Jersey Law Rev* 56 and "When is a revenue claim not a revenue claim?—a footnote" (2000) 4 *Jersey Law Rev* 300. Unfortunately this area of the topic is beyond the scope of this article, but is an interesting allied area that is ripe for development.

50 *Jimenez*[33] addressed a situation where HMRC had exceeded its jurisdiction by giving a notice under Schedule 36 to the Finance Act 2008 to the claimant in Dubai (a Schedule 36 notice is a formal demand for certain information and/or documents needed for HMRC to check that person's tax position, or the tax position of a third party). Mr Jimenez challenged the decision to issue an information notice to him by judicial review.

51 The intersection with the principle can really be traced back to the fact that Schedule 36 makes no mention of its territorial limits (it seems to be the case that legislation that is likely to be wholly domestic in its application rarely does—*gallum in suo sterquilinio plurimum posse* . . . [Every cock will crow upon his own dunghill][34]). In this respect the court quoted *Clark (Insp of Taxes) v Oceanic Contractors Inc*,[35] where it was explained by Lord Scarman in the following way—

> "It is well-settled law that English legislation is primarily territorial . . . The principle was recognised and formulated (admittedly in language which now has echoes of the world which has departed) by the Court of Appeal in [*Re Sawers, ex p Blain* (1879) 12 Ch D 522, [1874–80] All ER Rep 708] and was commented on with the approval of the Earl of Halsbury LC, in *Cooke v Charles A Vogeler Co* [1901] AC 102 at 107. Two passages from the judgments in *Blain's case* are directly relevant to the issue in this case. First, a passage from the judgment of James LJ ((1879) 12 Ch D 522 at 526). He referred to the—
>
> > '. . . broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction . . . But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation.'
>
> . . .

---

[33] [2017] EWCA 2585 (Admin). *Jimenez* is subject to appeal but had not been heard as this Issue went to press.
[34] Seneca, *Apocolocyntosis* vii.
[35] [1983] 2 AC 130.

> Put into the language of today, the general principle being there stated is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming into the United Kingdom, whether for a short or long time, have made themselves subject to British jurisdiction. Two points would seem to be clear: first, that the principle is a rule of construction only . . .
>
> . . .
>
> But, of course, the Income Tax Acts impose their own territorial limits. **Parliament recognises the almost universally accepted principle that fiscal legislation is not enforceable outside the limits of the territorial sovereignty of the kingdom. Fiscal legislation is, no doubt, drafted in the knowledge that it is the practice of nations not to enforce the fiscal legislation of other nations. But, in the absence of any clear indications to the contrary, it does not necessarily follow that Parliament has in its fiscal legislation intended any territorial limitation other than that imposed by such unenforceability**: see Government of India, Ministry of Finance (Revenue Division) v Taylor [1955] AC 491 at 503. Indeed, British tax liability has never been exclusively limited to British subjects and foreigners resident within the jurisdiction . . .” [Emphasis supplied.]

52 Thus the principle is an important restriction on the interpretation and application of UK legislation. There seems no good basis for saying that the position should be different in other jurisdictions, including Jersey and Guernsey.[36]

53 In the same case Lord Wilberforce put it in the following terms—

> “[The territorial principle], which is really a rule of construction of statutes expressed in general terms and which, as James LJ said a ‘broad principle’, requires an inquiry to be made as to the persons with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within

[36] Where jurisdictions have merely broadly similar rules of interpretation, it would seem axiomatic that the impact of the principle on the interpretation of national legislation should be the same. If a better reason for adopting this position is required, I would suggest that—since the Income Tax (Jersey) Law 1961 is based on the English Income Tax Act 1952 and the principle is accepted as being part of both jurisdictions’ legislation, the English case law should be highly persuasive here.

> the legislative grasp, or intendment, of the statute under consideration?"

54 This exposition of this principle as one of statutory construction is often referred to as the "*Masri* principle" because in *Masri v Consolidated Contractors Intl Co SAL*,[37] Lord Mance explained—

> "[10] The principle relied upon is one of construction, underpinned by considerations of international comity and law. It is that 'Unless the contrary intention appears . . . an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters': Bennion Statutory Interpretation (4th edn, 2002) p 282, section 106, cited with approval, along with the considerable case law, by Lord Bingham in R (on the application of Al-Skeini) v Secretary of State for Defence [2007] UKHL 26 at [11], [2007] 3 All ER 685 at [11], [2008] 1 AC 153 . . . Whether and to what extent it applies in relation to foreigners outside the jurisdiction depends ultimately as Lord Wilberforce said in Clark (Inspector of Taxes) v Oceanic Contractors Inc . . . upon who is "within the legislative grasp, or intendment" of the relevant provision. To this a nuanced answer may be given, as in that case where United Kingdom Pay As You Earn legislation was held to apply to a foreign company employing workers to work in North Sea operations . . .
>
> [19] I accept that the existence of a close connection between a subject matter over which this country and its courts have jurisdiction and another person or subject over which it is suggested that they have taken jurisdiction will be relevant in determining whether the further jurisdiction has been taken. It will be a factor in construing, or ascertaining the grasp and intendment of, the relevant legislation or rule . . ."

55 The matter can—before we return to *Jimenez* itself, rather than its summary of the law that went before—be summarised as follows—

(a) the principle provides an important limit in the application of the principle of statutory construction which provides that, unless there is clear indication to the contrary, an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters;

(b) the *Masri* principle is one of statutory construction—in essence unless a contrary intention appears a legislature is presumed,

---

[37] [2010] 1 AC 90.

rebuttably, only to have legislated a jurisdiction which it can enforce; and

(c) the application of the *Masri* principle is likely to result in variable results dependent on the facts of the case and the "grasp and intendment" of the legislation in question. It can be further posited that the principle itself should be a factor to be taken into account in determining the "grasp and intendment" of legislation related to tax.

56 In *Jimenez*, HMRC had asserted that the legislation in question gave them an undoubted right to serve notice on Mr Jimenez in Dubai simply because he owed tax in the UK—was a "taxpayer" and it did not matter where he was, or whether or not he was resident in the UK or elsewhere.

57 In finding for the claimant—thus finding that HMRC had exceeded their powers—Charles J said (at para 40)—

> "I accept the submission of the claimant that the question whether a taxpayer notice can be given to a British national who is resident or living abroad must be assessed by considering Sch 36 as a whole and not by isolating taxpayer notices. This accords with the proper approach to the interpretation and application of legislation because it addresses the territorial limits on the giving of taxpayer notices in their statutory context (see, for example, para [55] of *Derrin*). It does not preclude a different conclusion being reached in respect of taxpayer notices and other information notices, but it does require the justification of such a conclusion as a matter of statutory construction."

58 He went on to say (at para 43 *et seq*)—

> "The point relied on by the Revenue that Sch 36 permits the seeking of information for checking the liability of individuals to tax in member states or states in respect of which international tax enforcement arrangements have been made (see para 63(4) of Sch 36) seems to me to point to the conclusion that its reach extends only to the UK and that if the Revenue wants to seek information about liability to UK tax from persons who are abroad it should rely on such mutual assistance arrangements with the relevant state . . .
>
> The existence of such mutual assistance arrangements between states is well known and so it is also part of the background that is relevant to the interpretation and application of Sch 36. Such arrangements reflect the principles and approach referred to in the last cited paragraph from the speech of Lord Scarman in Clark v Oceanic . . .

> The existence of such mutual assistance arrangements also undermines the Revenue's arguments based on the public interest in promoting and so not hindering an investigative regime with the purpose referred to in para [41] above. Additionally, in my view these public interest arguments are undermined by the claimant's points that:
>
> (i) there is a valid distinction between administrative machinery related to a tax that Parliament intended a foreigner to pay . . . and a power of investigation . . ."

59 Thus the particular regime in question in *Jimenez* could not apply to permit HMRC to collect information outside of the UK's territorial limits because—

(a) the context of the legislation as a whole showed that the power extended only within the UK's territorial limits;

(b) the UK's network of mutual assistance treaties provided important context for the consideration of the territorial limits of the national legislation;

(c) the public interest in upholding an investigatory regime was sufficiently managed by such mutual assistance treaties and so it was not necessary to interpret the national legislation more widely; and

(d) the fact that foreigners were necessarily within the scope to tax was not determinative of the territorial limit of the relevant investigatory power.

60 It was indicated above that *Jimenez* would be used to summarise the relevant English law. Of course English law is not applicable in Jersey, but there are similar regimes—in this case a network of mutual assistance agreements based on the OECD models (very much like the agreements to which the UK is party) and it is suggested that the English case law can inform what the position in Jersey law may be.

61 However, it is not the case that there is no case law in Jersey. Indeed, for a jurisdiction of its size, Jersey has a wealth of cases in relation to exchange of information but since they do not deal with the situation where the collection of information is said to infringe upon the principle, they are not considered here. A recent case, *Halabi v HMRC*[38] did, however, consider whether or not provision of information might infringe the principle.

62 This was a case (the Royal Court decision was commonly referred to as *Ariel* for reasons that are not material) which considered whether

---

[38] [2018] JCA 114.

or not a trustee in bankruptcy, based in England, who had been recognised in Jersey ("the Jersey recognition") as an administrator in the bankruptcy could disclose documents obtained in the bankruptcy to HMRC. The Jersey recognition allowed the trustee to exercise all his powers granted by the English courts in Jersey, to the extent that they were not contrary to Jersey law. Such powers enabled him to obtain documents but such powers were expressly curtailed by the order, which provided that the trustee could, without leave of the court—

> "only use the information or documents so produced for the purposes of the administration of the estate in bankruptcy of Mr. Halabi, in whichever jurisdiction, under the direction of the High Court."[39]

63 Having been warned of the impending end of Mr Halabi's bankruptcy, HMRC informed the trustee that it intended to apply to the UK tax tribunal (the "FTT") for permission to give an information notice requiring the trustee to provide information about a third party (Mr Halabi) to HMRC. This put the trustee in a difficult position. Was he able to release documents to HMRC without breaching the terms of the order of the Jersey courts? Additionally, once the FTT had granted the necessary permission, there was the additional difficulty that the trustee could be subject to sanctions for failing to comply with the information notice so that refusal to release documents could make him subject to penalties.

64 The trustee applied to the Royal Court of Jersey for permission to comply with the FTT's order. HMRC was a party to the proceedings, arguing in favour of disclosure. The Royal Court found for the trustee/HMRC and Mr Halabi appealed to the Jersey Court of Appeal.

65 The Court of Appeal found in favour of the trustee/HMRC, on the following basis—

(a) no other means existed to secure the disclosure to HMRC of much of the information in question;

(b) the information was important for HMRC to further its investigation of Mr Halabi's tax affairs;

(c) the scope of that investigation and the need for the information had been explained to the FTT in the UK, for which the court thought it appropriate to approve the issue of the notice;

---

[39] *Ibid*, at para 7.

(d) the trustee was subject to that notice and the notice amounted to a direction to him by a court within the jurisdiction in which he practises to disclose information; and

(e) Mr Halabi, as an individual, had refused to provide the information voluntarily and had failed to comply with an information notice served on him personally for similar information.

66 The Court of Appeal addressed several decisions of the English courts in its consideration of the issues in *Halabi*, including *Jimenez*. In framing the points on which it had to decide the Court of Appeal said (at para 58)—

> "[58] . . . the theoretical basis for the Rule is a matter of some controversy but can be best explained through the notion that an assertion of sovereign authority by one state within the territory of another is contrary to all concepts of independent sovereignty: see *Government of India v Taylor* (at 511, Lord Keith of Avonholm) and *Re State of Norway* (at 808, Lord Goff).
>
> [59] The issue before this court is as to **whether the powers given to HMRC under Schedule 36 constitute a revenue law which is to be used through an exercise of extraterritorial sovereignty**." [Emphasis supplied.]

67 The Court of Appeal started by considering *In re State of Norway's Application No 2*.[40] In this respect they quoted the statement of Lord Goff of Chieveley on whether the execution of letters of request in relation to foreign civil proceedings in a fiscal matter should, if the request is made on the application of a taxing authority, be refused. In this respect he said—

> ". . . It is of importance to observe that that rule is limited to cases of direct or indirect enforcement in this country of the revenue laws of a foreign state. It is plain that the present case is not concerned with the direct enforcement of the revenue laws of the State of Norway. Is it concerned with their indirect enforcement? I do not think so. It is stated in Dicey & Morris, at point 103, that indirect enforcement occurs (1) where the foreign state (or its nominee) in form seeks a remedy which in substance is designed to give the foreign law extraterritorial effect, or (2) where a private party raises a defence based on the foreign law in order to vindicate or assert the right of the foreign state. I have been unable to discover any case of indirect enforcement which goes beyond these two propositions. Even so, since there is no

[40] [1990] 1 AC 723.

> authority directly in point to guide me, I have to consider whether a case such as the present should nevertheless be held to fall foul of the rule. From my part, I cannot see that it should. I cannot see any extraterritorial exercise of sovereign authority in seeking the assistance of the courts of this country in obtaining evidence which will be used for the enforcement of the revenue laws of Norway in Norway itself."[41]

68 Having quoted Lord Goff of Chieveley, the Court of Appeal went on to discuss the salient facts in *State of Norway* pointing out (at para 63)—

> "It is important to recollect that in Re State of Norway a Norwegian court, seised with a revenue dispute between a taxpayer and the Norwegian Tax Committee, issued a letter of request addressed to the English High Court requesting the oral examination of two witnesses residing in England, upon the basis of which the Norwegian state applied under Section 1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 for an order requiring the witnesses to give the evidence sought. For what it may be worth there was no suggestion of penalties being imposed in Norway or the conduct being criminalised there in the event of failure to comply with the proposed order. It can be seen therefore that, as Lord Goff indicated, the application in England was neither an attempt to enforce a revenue law extra-territorially nor was it a form of indirect enforcement."[42]

69 Following from this, the Court of Appeal identified the issue before it as, essentially, one of whether or not Schedule 36 is (a) of a "revenue nature"; and (b) whether or not the orders which might be given in Jersey would amount to direct or indirect enforcement.

70 In relation to the former, the Court of Appeal said—

> "It therefore appears that, **albeit part of a revenue statute, the provisions of Schedule 36 constitute a code for investigation into domestic tax affairs.** They are, however, a very important part of the revenue laws of the United Kingdom authorising, as they do, active investigation by the tax authorities, coupled with penalties and criminalisation in the event of failure to respond or active obstruction. They are, for a well-regulated state intent on seeking to ensure the proper distribution for the provision of

[41] *Ibid*, at para 62.
[42] *Ibid*, at para 63.

> government revenues, an essential mechanism in the fight against tax avoidance and tax evasion." [Emphasis supplied.][43]

71 Here we find the inevitable reference to how important it is for civilised states to fight tax avoidance.[44] It is not clear why this is a relevant consideration to either of the questions identified by the Court of Appeal as essential to its decision.

72 The Court of Appeal then turned to look at *Jimenez*[45] and *Derrin*[46]—the recent English cases on Schedule 36. While noting that *Jimemez* determined that whilst Schedule 36 provided investigatory powers, the inclusion of enforceable provisions for penalties and criminal sanctions indicated that the schedule was an enforcement jurisdiction, the Court of Appeal noted that *Jimenez* was not directly on point being, as it was, about territorial limitations.

73 The direct relevance of *Derrin* was also dismissed on the basis that—

> "among various observations made . . . were some which emphasised that the provisions of Schedule 36 related to the investigatory stage of checking possible tax avoidance or evasion."[47]

74 However, the Court of Appeal went on to say—

> "69. . . . In this matter, we reach the view that it would not be a proper characterisation of the provisions of Schedule 36 to fail to recognise that they **embrace both elements of investigation and elements of enforcement.** The totality is to provide a regime which seeks to reduce instances of tax avoidance and tax evasion by enforcing the implementation of the Tax Statutes. In that sense, as indicated by Lord Collins in Smith, **the carrying out of official investigations is an element of enforcement and cannot be carried out in a foreign state without the consent of the territorial sovereign.**

---

[43] *Ibid*, at para 66.

[44] It is possible to sympathise with this view; however, the fighting of tax avoidance by other sovereign states should not—it is submitted—be the primary concern of other states particularly where to do so may infringe on human rights or civil liberties of those subject to its own jurisdiction.

[45] *R (Jiminez) v First Tier Tribunal (Tax Chamber)* [2017] EWHC 2585 (Admin).

[46] *R (Derrin Bros Properties Ltd) v First Tier Tribunal (Tax Chamber)* [2016] 1 WLR 2423.

[47] *Ibid*, at para 68.

> 70. In the circumstances of the present case, however, the official investigations pursuant to the Schedule 36 powers are not proposed to be carried out in a foreign state. The trustee is resident in the United Kingdom and the relevant materials are under his physical control in that jurisdiction. Being within the jurisdiction he is subject to properly issued notices. The only issue is as to whether, given the obligations imposed upon him by the Royal Court in this jurisdiction, he should be precluded from responding to the validly issued notices." [Emphasis supplied.]

75 Thus while the comments highlighted in para 69 above are probably *obiter*, they do recognise the enforcement element of Schedule 36. Paragraph 70, however, indicates that the Court of Appeal took the view that because of the facts there was no excess of jurisdiction. On this basis it could be said that in determining the connection between information *Halrabi* as it stands (and the decision may, of course, be appealed) does not advance the position or understanding any further.

76 It is interesting that, unlike in *Jimenez*, the Court of Appeal does not appear to have considered whether or not the *Masri* principle (if it forms part of Jersey law) is relevant and, if it is, whether or not the principle is a relevant part of determining the "grasp and intendment" of the legislation in question.

77 Perhaps, therefore, *Halabi* does not take us very much further in understanding how gathering information and the principle interact. It may be correct to say that this is likely to be a matter of fact in each case.

78 As mentioned above, *Halabi* did consider the clear, bold and reasoned statements in *Tucker* in relation to whether or not collection of information amounted to indirect enforcement; it did (see above). Somewhat surprisingly, *Tucker* is only mentioned twice in *Halabi* and appears to be dismissed on the basis that the (English) House of Lords decision in *Government of Norway* was made after *Tucker*. If the rules of precedence in Jersey are considered, it might be thought that a reasoned judgment as to why a House of Lords decision was to be preferred to that of the Royal Court (neither decision binding on the Royal Court) should have been given. The Court of Appeal did not consider this necessary.

79 As such, *Halabi* does, however, once again highlight that the principle is potentially being eroded by international agreement. It must be the case that where a TIEA provision contains provisions which could in some circumstances constitute indirect enforcement it has eroded the application of the principle. In the next section, I

consider the extent to which the provision has been eroded to go on to consider how it might be further modified in future.

The modification of the principle by legislation and international convention

80 As mentioned at the outset, the principle is not what once it was and has been significantly modified by international agreement. There are, broadly speaking, three types of agreement that are likely to modify the principle:

(a) double tax treaties ("DTTs");

(b) tax information exchange agreements ("TIEAs"); and

(c) multilateral agreements on cooperation in tax administration.

Jersey has acceded to a number of DTTs and TIEAs.

The future of the principle

He moves in darkness as it seems to me,
Not of woods only and the shade of trees.
He will not go behind his father's saying,
And he likes having thought of it so well
He says again, "Good fences make good neighbours".[48]

81 There are, as it can be seen, few courts that would refuse to go behind the principle and indeed, the Isle of Man courts were happy to go behind the historic basis and apply the principle without consideration as to how it functions in a modern world. Similarly, many countries have modified or removed the principle in favour of treaties on mutual assistance that allow governments to collect tax on behalf of other states.

82 The driving force behind this has largely been the OECD—Organisation for Economic Cooperation and Development—by the introduction and promotion of the Multilateral Convention on the Mutual Administrative Assistance in Tax Matters ("the Convention").[49] This is, according to the OECD, a—

> "freestanding multilateral agreement designed to promote international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers."

---

[48] Robert Frost, *op cit*.

[49] https://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Con vention.pdf.

It provides for various forms of administrative co-operation between the parties in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion.

83 The Convention was initially only open to OECD Members and members of the Council of Europe (between which groups there is considerable overlap) however since an amendment to it in June 2011 it has been open to outside signatories. Jersey has been subject to the Convention, due to the territorial extension of the UK's assent to the Convention to Jersey, since 1 June 2014. The forms of mutual assistance potentially covered are the following—

(a) exchange of information;

(b) assistance in recovery; and

(c) service of documents.

84 Clearly while the exchange of information intersects with the principle, the key provisions here are those relating to assistance in recovery. Where there is such assistance pursuant to the Convention this is an example of the wholescale abandonment of the principle by legislation. When the Convention is adopted certain reservations and declarations are made. In the declaration of Territorial Extension to Jersey the first of these provides—

> "Pursuant to Article 30, paragraph 1(a), of the Convention, the Government of Jersey reserves the right not to provide any form of assistance in relation to the taxes of other Parties described in Article 2, paragraph 1(b), of the Convention."

85 Article 2(1)(b) provides:

"1 This Convention shall apply:

(a) to the following taxes:

(i) taxes on income or profits,

(ii) taxes on capital gains which are imposed separately from the tax on income or profits,

(iii) taxes on net wealth,

imposed on behalf of a Party; and

(b) to the following taxes:

(i) taxes on income, profits, capital gains or net wealth which are imposed on behalf of political subdivisions or local authorities of a Party,

(ii) compulsory social security contributions payable to general government or to social security institutions established under public law, and

(iii) taxes in other categories, except customs duties, imposed on behalf of a Party, namely:

A. estate, inheritance or gift taxes,

B. taxes on immovable property,

C. general consumption taxes, such as value added or sales taxes,

D. specific taxes on goods and services such as excise taxes,

E. taxes on the use or ownership of motor vehicles,

F. taxes on the use or ownership of movable property other than motor vehicles,

G. any other taxes;

(iv) taxes in categories referred to in sub-paragraph iii. above which are imposed on behalf of political subdivisions or local authorities of a Party."

86 Jersey and other parties thereto are limited to those of a party (and not its political subdivisions) in relation to income, profits, capital gains and net wealth. Taxes of particular importance that are not covered by the Convention include inheritance taxes and VAT/GST-type taxes.

87 The scope of the Convention in relation to Jersey is further restricted—

> "Pursuant to Article 30, paragraph 1(b), of the Convention, the Government of Jersey will not provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for all taxes listed in Article 2, paragraph 1, of the Convention."

88 Article 30(1) provides—

> "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval or at any later date, declare that it reserves the right:
>
> . . .
>
> (b) not to provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for all taxes or only for taxes in one or more of the categories listed in paragraph 1 of Article 2."

89 This provision is particularly important to the principle. It allows the parties to the Convention to decide that, while they may well provide information or adopt the provisions in relation to service of documents, (though Jersey does not adopt the service provisions either) they will retain the principle whilst agreeing to provide other forms of assistance. Thus Jersey is party to the Convention, but its manner of accession thereto appears to be one that leaves the principle almost untouched by legislative measures.

90 One further point arises from the reservations made by Jersey. The third reservation listed is—

> "Pursuant to Article 30, paragraph 1(c), of the Convention, the Government of Jersey will not provide any form of assistance in respect of any tax claim which is in existence at the date of withdrawal of a reservation made under Article 30, paragraph 1(a) or (b), of the Convention, in relation to taxes of the category in question."

91 Thus it has been made clear that, should the reservation on recovery ever be removed, its effect will not be retrospective. In this context, it is not clear why a similar provision in a bilateral agreement in relation to exchange of information, *i.e.* should be a reason for the courts to go behind that legislation and allow the information to be provided through the back door.

Time to knock down the wall?

92 There have been various developments—initiated both by courts and by legislature—to adapt the principle for the modern age. However, it is clear from the current reservations to the Convention that the wall of the principle still stands in Jersey. Whether the reservation is included because it is thought that the underlying reasons for the principle remain sound or because there is a concern that the administrative burden may be too great should assistance in recovery be offered to all the parties to the Convention (numbering 125 since Antigua and Barbuda signed the Convention on 27 July 2018), is not known. However, it must be true that, simply because the principle is an old one, it does not follow that it should be rejected as antiquated. There is an argument for saying that while the boundaries between states must be different in modern times, it is even more important that they are clearly delineated. The principle is nothing if not a delineation of sovereign powers.

93 Given that this is the case it is, perhaps, inappropriate for the principle to be too far modified by the courts, and it is certain that its demise cannot be pronounced upon by the lower courts. It will, however, in all likelihood, continue to be developed *via* its

intersectionality with the provisions (and lack thereof) on exchange of information. It is suggested that any such development should pay heed not only to the history of the principle but also to its express preservation when entering into international treaties.

94 Finally, it is interesting to note that despite the strong pronouncements made in the Isle of Man courts as to the relevance of the principle in modern times, the Isle of Man also includes a reservation as to recovery. Thus, as with Mark Twain, the rumours of the principle's death have been somewhat exaggerated.

Harriet Brown is an English barrister and Jersey advocate whose practice focuses on tax and trusts, particularly in the context of internationally mobile individuals and businesses. She is author of The Jersey Law of Trusts and co-author of The Interaction of EU Treaty Freedoms and the UK Tax Code. She also admits to—and is possibly the only person to do so—having a particular interest in the application of information powers in an international context (CRS, FATCA and TIEAs). She practises from Old Square Tax Chambers, 15 Old Square, London.