COLLECTING ANOTHER COUNTRY'S TAXES – RECENT EXPERIENCE IN THE CANADA-U.S. CONTEXT

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INTRODUCTION

When asking a U.S. tax adviser to describe the "revenue rule," it would not be surprising for the adviser to say that it refers to formal guidance issued by the I.R.S. that can be relied on by other taxpayers as authority for a position taken in a tax return.

However, the term has a much different meaning in a cross-border context. As explained by one author:

> The revenue rule, a common law doctrine with origins in the eighteenth century, is a battleground in the twenty-first century . . . . In its modern form the revenue rule generally allows courts to decline entertaining suits or enforcing foreign tax judgments or foreign revenue laws . . . .[1]

In a U.S. Supreme Court case of this century, the revenue rule is described in the following language:

> Since the late 19th and early 20th century, courts have treated the common-law revenue rule as a corollary of the rule that, as Chief Justice Marshall put it, '[t]he Courts of no country execute the penal laws of another.' . . . The rule against the enforcement of foreign penal statutes, in turn, tracked the common-law principle that crimes could only be prosecuted in the country in which they were committed. . . . The basis for inferring the revenue rule from the rule against foreign penal enforcement was an analogy between foreign revenue laws and penal laws [citations omitted].[2]

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The revenue rule can be overridden by treaty, and where it has, the U.S. and Canadian tax authorities have, in recent years, collected the taxes due in the other country.

This article will explore (i) the general development of the revenue rule, (ii) the applicable provisions of the Canada-U.S. Income Tax Treaty (the "Treaty") allowing for assistance in collection and exchanges of information, (iii) one U.S. wire fraud case, and (iv) several recent cases in the U.S. where taxpayers raised creative arguments to attack the validity of the Treaty provisions but to no avail.

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1 Mallinak, "The Revenue Rule: A Common Law Doctrine for the Twenty-First Century," 16 Duke J. Comp. & Int'l L. 79 (2006)).

2 *Pasquantino v. U.S.*, 544 U.S. 349, 360 *et. seq,* (2005).

DEVELOPMENT OF THE COMMON LAW RULE

English Common Law

Under common law, a court will not enforce the revenue laws of other countries. In the English case *King of the Hellenes v. Brostron*,[3] Rowlatt J. emphasized this revenue rule, stating:

> 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 in the country to which he belongs.

The Dutch government was also precluded from collecting Dutch succession duties levied on a Dutch estate with an English-resident beneficiary. Tomlin J. in *re Visser, The Queen of Holland v. Drukker*[4] stated:

> My own opinion is that there is a well-recognized rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain.

The reasons for not enforcing a foreign state's revenue laws was explained by the House of Lords in *Government of India, Ministry of Finance (Revenue Division) v. Taylor*:[5]

> If one State could collect its taxes through the courts of another, it would have arisen through what is described, vaguely perhaps, as comity or the general practice of nations inter se. . . . Tax gathering is an administrative act, though in settling the quantum as well as in the final act of collection judicial process may be involved. Our courts will apply foreign law if it is the proper law of a contract, the subject of a suit. Tax gathering is not a matter of contract but of authority and administration between the State and those within its jurisdiction. If one considers the initial stages of the process, which may, as the records of your Lordships' House show, be intricate and prolonged, it would be remarkable comity if State B allowed the time of its court to be expended in assisting in this regard the tax gatherers of State A.

Adoption in Canadian Courts

Canadian common law followed the revenue rule as set out in the above English case law. The revenue rule was applied by the British Columbia Court of Appeal in

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3 (1923) 16 Ll. L.Rep. 190, 193.

4 [1928] Ch. 877, 884; 44 T.L.R. 692.

5 [1955] A.C. 491. The factual background in this case is as follows. The government of India sought to enforce and collect capital gains tax from the sale of an English company that carried on business in India. The English company filed for voluntary liquidation and the Indian government brought its claim in the English bankruptcy proceeding. The House of Lords decision was unanimous.

United States v. Harden[6] when it refused to enforce a U.S. judgment obtained against Mrs. Harden, who was a Canadian resident at the time the case was brought. In earlier years, she was a resident of the U.S. In an attempt to sidestep the revenue rule, the U.S. government obtained a judgment against Mrs. Harden in the U.S. District Court for the Southern District of California, Central Division. The judgment was for outstanding tax plus interest in the amount of $200,037.28 for the 1945 U.S. taxation year and $439,462.87 for the 1946 U.S. taxation year.

In Canada, the U.S. conceded the application of the principle that no action will be pursued in Canadian courts by or on behalf of a foreign state to recover taxes payable under foreign revenue laws. However, the U.S. contended that the revenue rule does not apply once the foreign state has recovered judgment in its domestic courts and sues to enforce the judgment in Canada.[7] In essence, the U.S. argued that the once the matter was adjudicated in the U.S. court, the judgment stood on its own merits without the need of any reference to the underlying claim. However, the British Columbia Court of Appeal refused to enforce the California judgment because it remained a claim on behalf of a foreign state to recover taxation due under its law. The underlying claim tainted the enforceability of the judgment.[8]

"The introduction of Article XXVIA meant that a U.S. citizen would no longer be permitted to move to Canada in order to avoid his or her U.S. tax liabilities."

The Supreme Court of Canada unanimously upheld the decision of the British Columbia Court of Appeal.[9] At page 371 of its decision, the Supreme Court cited to the Irish decision *Peter Buchanan Ltd. & Macharg v. McVey*,[10] where Lord Sommervell of Harrow stated at page 515 that a foreign state could not circumvent the direct or indirect application of the revenue rule. The Supreme Court of Canada stated:

> A foreign State cannot escape the application of this rule, which is one of public policy, by taking a judgment in its own courts and bringing suit here on that judgment. The claim asserted remains a claim for taxes. It has not, in our courts, merged in the judgment; enforcement of the judgment would be enforcement of the tax claim.[11]

THIRD PROTOCOL TO THE TREATY ADOPTS ASSISTANCE IN COLLECTION

Article XXVIA (Assistance in Collection) was adopted by Article 15 of the Third Protocol to the Treaty, which was signed on March 17, 1995. That protocol replaced an earlier proposed protocol that was signed on August 31, 1994, but never went into force and was later withdrawn. The text of Article XXVIA appears in **Appendix I**.

The introduction of Article XXVIA meant that a U.S. citizen would no longer be permitted to move to Canada in order to avoid his or her U.S. tax liabilities as in *Harden*.[12] To that end, the Technical Explanation prepared by the Treasury Department

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6 (1962), 40 W.W.R. 428, 36 D.L.R. (2d) 602.

7 *United States v. Harden*, 36 D.L.R. (2d) 602 at p. 606.

8 *Id.* at p. 607.

9 [1963] S.C.R. 366.

10 [1955] A.C. 516.

11 *Supra* note 7 at p. 371.

12 Dianne Bennett, "Third Protocol to the Canada – U.S. Tax Treaty, " in *Report of Proceedings of the Forty-Seventh Tax Conference*, 1995 Conference Report

at the time the Third Protocol was submitted to the U.S. Senate as part of the approval process described the purpose and workings of the provision in the following language:

> Article 15 of the Protocol adds to the Convention a new Article XXVI A (Assistance in Collection). Collection assistance provisions are included in several other U.S. income tax treaties, including the recent treaty with the Netherlands, and in many U.S. estate treaties. U.S. negotiators initially raised with Canada the possibility of including collection assistance provisions in the Protocol, because the Internal Revenue Service has claims pending against persons in Canada that would be subject to collection under these provisions. However, the ultimate decision of the U.S. and Canadian negotiators to add the collection assistance article was attributable to the confluence of several unusual factors.
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> Of critical importance was the similarity between the laws of the United States and Canada. The Internal Revenue Service, the Justice Department, and other U.S. negotiators were reassured by the close similarity of the legal and procedural protections afforded by the Contracting States to their citizens and residents and by the fact that these protections apply to the tax collection procedures used by each State. In addition, the U.S. negotiators were confident, given their extensive experience in working with their Canadian counterparts, that the agreed procedures could be administered appropriately, effectively, and efficiently. Finally, given the close cooperation already developed between the United States and Canada in the exchange of tax information, the U.S. and Canadian negotiators concluded that the potential benefits to both countries of obtaining such assistance would be immediate and substantial and would far outweigh any cost involved.

However, the two countries were hesitant to allow the application of collection procedures to their respective citizens doing business in the other country. To that end, Paragraph 8 of the Article XXVIA provides:

> No assistance shall be provided under this Article for a revenue claim in respect of a taxpayer to the extent that the taxpayer can demonstrate that . . . the revenue claim relates to a taxable period in which the taxpayer was a citizen of the requested state.

EXCHANGE OF INFORMATION

Article XXVII addresses exchanges of information between the tax authorities in the U.S. and Canada. Originally adopted in 1984, the provision was modified by the Fifth Protocol to the Treaty signed on September 21, 2007. The text of Article XXVII appears in **Appendix II**.

(Toronto: Canadian Tax Foundation, 1996), 44:1-25, at 44:10. *Harden* was cited favorably by the Federal Court in 2015 F.C. 1082 at Paragraph 52 where the Federal Court stated that it was well settled that in no circumstances will a court directly or indirectly enforce the revenue laws of another country, unless expressly allowed to so in the home country of the person in question.

As currently in effect, Article XXVII authorizes the competent authorities to exchange information as may be relevant for carrying out the provisions of the Treaty or domestic tax law, insofar as the taxation under domestic law is not contrary to the Treaty. The Technical Explanation of the Fifth Protocol prepared by the U.S. Treasury Department as party of the approval process in the U.S. explains that the phrase "may be relevant" expresses the intention to allow the I.R.S. to obtain items of potential relevance to an ongoing investigation, without reference to its admissibility. The phrase is not intended to support a request in which a Contracting State simply asks for information regarding all bank accounts in one state maintained by residents of the requesting state.

The authority to exchange information is not restricted to residents of one or both states. Information may be exchanged for use in all phases of the taxation process including assessment, collection, enforcement, or the determination of appeals. Any information received by a state is to be treated as secret in the same manner as information obtained under the tax laws of that state. Disclosure of the information is limited to authorities, including courts and administrative bodies, involved in

- the assessment or collection of tax,
- the administration and enforcement of tax, or
- the determination of appeals in relation to tax.

Information received in any of the three categories may be disclosed in public court proceedings or in judicial decisions.

If one state requests information, the other state is required to use its information gathering measures to obtain the requested information. The requested state is not permitted to decline to obtain and supply information simply because it has no domestic tax interest in such information. This provision is in Article XXVII. It is intended to preclude the taxpayer argument that the requested state is not authorized to obtain information from a bank or fiduciary that is not needed for its own tax purposes.

Article XXVII does not impose an obligation on the requested state to

- carry out administrative measures at variance with the laws and administrative practice of either state,
- supply information that is not obtainable under the laws or in the normal course of the administration of either state,
- supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or
- supply information the disclosure of which would be contrary to public policy.

Nonetheless, Article XXVII does not prevent a requested state from voluntarily complying with a request on a discretionary basis, provided its internal laws are not violated.

A requested state may not decline to provide information because that information is held by a financial institution, nominee, or person acting in an agency or fiduciary capacity. Thus, domestic bank secrecy laws (or similar legislation relating

to disclosure of financial information by financial institutions or intermediaries) are overridden by the state's obligation to provide information under Article XXVII.

Finally, in a general note that accompanied the signing of the Fifth Protocol, Canada and the U.S. expressly agree that the standards and practices described for the exchange of information are to be in no respect less effective than those described in the *Model Agreement on Exchange of Information on Tax Matters* developed by the O.E.C.D. Global Forum Working Group on Effective Exchange of Information.

MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS

In negotiating income tax treaties, Canada has abstained from adopting provisions that enforce collection of a treaty partner's tax from its citizens. Along with the U.S., it refused to adopt the assistance in tax recovery provisions of the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (the "Convention"). The Convention was designed to cover:

> All possible forms of administrative co-operation between States in the assessment and collection of taxes . . . through exchange of information . . . to the recovery of taxes.[13]

The Convention was developed jointly by the O.E.C.D. and the Council of Europe. It was open for signature in 1988 and came into force on April 1, 1995. The Convention was amended by the 2010 Protocol. Although, Canada signed the Convention on April 28, 2004, it did not ratify the Convention until November 21, 2013. The Convention entered into force in Canada in 2014. The U.S. has not ratified the Protocol.[14] Article 6 of the Convention forms the foundation for what is known as the Common Reporting Standard ("C.R.S."). Although only 26 countries signed the 1988 version of the Convention, 130 jurisdictions are signatories at this time.

C.R.S. is an automatic annual financial information exchange for tax authorities and allows a tax authority to inform another tax authority of the financial accounts held by tax residents of other signatory jurisdictions. Beginning July 1, 2017, Canada Revenue Agency ("C.R.A.") shares information with members of the C.R.S. Multilateral Agreement with which C.R.A. has formalized a C.R.S. partnership, including details of bank accounts held by their residents in Canada. In return, C.R.A. receives information on financial accounts held by Canadian residents outside of Canada from its C.R.S. partners. The information exchanged by C.R.A. comes from filings made to C.R.A. by Canadian financial institutions. Exchanged information includes the nonresident account holder's (i) name, (ii) address, (iii) date of birth, (iv) account balance or value at year end, and (v) certain amounts credited or paid into the account during the year. In comparison to F.A.T.C.A. reporting, C.R.S. has no *de minimis* amount for reporting purposes. The U.S. is not a signatory to C.R.S., as F.A.T.C.A. has been successful in uncovering accounts held outside the U.S.

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13 See O.E.C.D., "Convention on Mutual Administrative Assistance in Tax Matters," last updated October 2019.

14 See O.E.C.D. and Council Europe (2011), The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol, O.E.C.D. Publishing.

by U.S. persons. Nonetheless, the U.S. has automatic bank deposit exchange of information programs with more than 85 countries.[15]

CANADIAN EXPERIENCE WITH INFORMATION EXCHANGE OBLIGATIONS

The automatic exchange of information is permitted by Section 2 of the Canada-U.S. Enhanced Tax Information Exchange Agreement Implementation Act (the "Implementation Act"). It states that Article XXVII of the Treaty authorizes the exchange of information for tax purposes. It is this provision of the Treaty that authorizes the intergovernmental agreement ("I.G.A.") for purposes of exchange of information to enforce F.A.T.C.A.[16]

Hillis v. Canada

Article XXVIA prevents C.R.A. from collecting penalties imposed on its citizens by reason of F.A.T.C.A. or its global counterpart, C.R.S. In *Hillis v. Canada*,[17] a motion for summary judgment was brought by two "accidental Americans" against C.R.A. seeking an injunction to prevent the supply of Canadian financial information to the I.R.S. Accidental American is a popular term in Canada for an individual who was born in the U.S. to Canadian citizens, moved to Canada as a child, and has never worked nor lived in the U.S. as an adult. It is the "accident" of birth in the U.S. that makes the individual a U.S. citizen.

In the *Hillis* case, the appellants argued that the Implementation Act was contrary to the provisions of Article XXVIA. The arguments of the appellants were similar to those who opposed the I.G.A. at the time of enactment. In broad terms, the arguments may be summarized as follows.

The provisions of the Implementation Act

- unduly harm the privacy rights and interests of all Canadians,
- unduly raise compliance costs to all Canadian financial institutions and Canadian taxpayers,
- impede Canada's efforts to enforce its own tax laws, and
- violate the spirit and potentially the letter of a number of Canadian laws and international treaties.

In sum, the appellants argued that by exchanging information under the Implementation Act, C.R.A. was effectively lending assistance to the I.R.S. in collecting tax from Canadian citizens, which is prohibited by Article XXVIA.

The Federal Court disagreed with the plaintiffs' assertions. The authority to exchange information obtained by Canada pursuant to the terms of the Implementation

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15 See Rev. Proc. 2019-23.

16 *The Agreement Between the Government of Canada and the Government of the United States of America to Improve International Tax Compliance Through Enhanced Exchange of Information under the Convention Between Canada and the United States of America with Respect on Income and on Capital.*

17 2015 F.C. 1082 (September 16, 2015).

Act is derived from Article XXVII of the Treaty. As indicated above, the exchange of information provisions of the Treaty do not expressly prohibit disclosure. The words used in the Implementation Act are explicit and the intention of the two governments was found by the Federal Court to be clear. The intent was that each country agreed to would obtain and exchange, annually and on an automatic basis, all relevant information with respect to reportable accounts, subject to the confidentiality and other provisions of the Treaty.

In reaching its decision, the Federal Court relied on the assurances of C.R.A. that:

> The IRS cannot use such information to administer non-tax laws (such as the US Bank Secrecy Act) or in its dealings with federal entities (such as the Financial Crimes Enforcement Network of the US Treasury Department) who are involved in money laundering repression. Indeed, the CRA will not assist the US in collecting non-tax related penalties such as penalties for failing to file the FBAR [Report of Foreign Bank and Financial Accounts]. Moreover, while the Canada-US treaty says that Canada may assist the US in collecting certain taxes, it also says that the Canadian authorities will not assist the US authorities in collecting a US tax liability if the person was a Canadian citizen when the liability arose. The Federal Court went on to state that, although the Treaty does not prevent the collection and the automatic disclosure of taxpayer information mentioned in Article 2 of the IGA with respect to US reportable accounts, the IRS cannot use such information to administer non-tax laws such as the Bank Secrecy Act in the US or in its operations directed to the suppression of money laundering, such as FinCEN. Consequently, CRA will not assist the U.S. in collecting penalties for failing to file FBAR forms.

"Each country agreed to would obtain and exchange, annually and on an automatic basis, all relevant information with respect to reportable accounts, subject to the confidentiality and other provisions of the Treaty."

As to the argument that the provision lends assistance in the collection of tax in a way this prohibited by Article XXVIA, the Federal Court disagreed, stating:

> Article XXVI A applies only to cases in which tax liability has been determined and is enforceable, and does not apply to the assessment of tax payable, the verification of taxpayer compliance, or related exchanges of information. Accordingly, I find that the automatic exchange of information allowed by the IGA does not amount at the present time to providing assistance in collection, and is thus not captured under this Article. The plaintiffs have conflated the assessment of taxes, verification of compliance, and collection of penalties possibly due by US persons for non-reporting. The arguments made in this respect are not relevant and are premature in any event.

At Paragraph 76 of its decision, the Federal Court concluded that the I.G.A. was not contrary to the Treaty or the Income Tax Act and it was not up to the court to amend the law. The court stated:

> True, a great number of Canadian taxpayers holding US reportable accounts are likely to be affected by a reporting system that in many quarters is considered unjust, costly and ineffective, considering that at the end of the day they are not likely to owe taxes to the US. In the absence of legislative provisions requiring all Canadian financial institutions (provincially and federally regulated) to automatically notify

their account holders about reporting to the CRA under the IGA and Part XVIII of the ITA, these taxpayers may also be taken by surprise by any consequences that flow from such disclosure. The plaintiffs may find this deplorable, but apart from a constitutional invalidation of the impugned provisions or a change of heart by Parliament or Congress, or the governments of Canada or the US, there is nothing that this Court can judicially do today to change the situation. The impugned provisions have not been held to be ultra vires or inoperative. Judicial courage requires that judges uphold the Rule of Law.

Deegan v. Canada

A similar conclusion was reached in *Deegan v. Canada*.[18] The provisions of the Implementation Act and Sections 263 to 269 of the Income Tax Act, R.S.C. 1985 (5th Supp.), were challenged by individuals who were accidental Americans.

The plaintiffs alleged that those provisions cause Canada to act as an intermediary between Canadian financial institutions and the I.R.S. Those institutions are required to provide C.R.A. with certain information concerning financial accounts belonging to customers whose account information suggests that they may be U.S. persons. C.R.A. then provides that information to the I.R.S. As a result, the plaintiffs alleged that the provisions of the Implementation Act violate the Canadian Constitution,[19] asserting that they constitute an unreasonable seizure of financial information belonging to U.S. persons in Canada. The plaintiffs also alleged that the information exchange under the Implementation Act violated other provisions of the Canadian Constitution because they singled out individuals based on citizenship or national or ethnic origin.[20] Finally, the plaintiffs alleged that the violations do not constitute reasonable limitations on the privacy and equality rights of affected individuals.[21]

The Federal Court disagreed with the allegations and held that the disputed provisions of the Implementation Act are not unreasonable and do not violate the Canadian Constitution.

The information that is obtained by C.R.A. from Canadian financial institutions is not an unreasonable search and seizure. Departing from the approach taken under the revenue rule, the Federal Court determined that an expectation of privacy is appropriate principally when a Canadian statute is criminal or quasi-criminal in nature. Reporting of tax information by Canadian financial institutions to C.R.A., and ultimately to the I.R.S., does not fit into that protected framework. Tax is essentially a regulatory statute, and the information relates to the manner in which income tax is calculated and collected. Hence, a lesser expectation of privacy exists.

The Federal Court also disagreed with the plaintiff's assertion that the information is not of a kind that is regularly obtained under the Income Tax Act and therefore should not be delivered to C.R.A. Following the holding in *Hillis v. Canada*, the banking

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18 2019 F.C. 960 (July 7, 2019).

19 Section 8 of the Canadian Charter of Rights and Freedoms (the "Charter"), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

20 Section 15 of the Charter.

21 Section 1 of the Charter.

information is foreseeably relevant to U.S. tax compliance and can be obtained by C.R.A. pursuant to a request from the I.R.S. under Article XXVII of the Treaty.

To the extent that the disputed provisions draw a distinction based on national origin and citizenship, they are not discriminatory. In reaching its decisions, the Federal Court took into account the detailed negotiations that were carried on by the Canadian government, attempting to negotiate a carve-out for Canada. When the Canadian government realized that a carve-out was not possible, it realized that entering into an I.G.A. was the only way to avoid a potentially devastating effect on the Canadian financial sector.

The plaintiffs alleged that the purpose of the Implementation Act was to assist the U.S. government in implementing F.A.T.C.A. and finding U.S. tax evaders and cheats, a purpose that cannot be described as pressing and substantial for the Canadian government or Canadian residents. However, at the same time that Canada was negotiating its I.G.A. with the U.S. government, the O.E.C.D. was involved in developing and implementing a common standard for the automatic multilateral exchange of financial account information along the lines of the I.G.A. Hence, the Implementation Act could not be said to be out of line with global expectations of financial privacy.

Finally, the argument that the Implementation Agreement resulted in discrimination based on citizenship and national origin were misplaced. The Federal Court held that a classification based on national origin is a form of discrimination only where it perpetuates ongoing disadvantages or prejudice. That is not the case where compliance with laws of a country of citizenship are in issue.

> The Charter does not require Canada to assist persons resident in this country in avoiding their obligations under duly-enacted laws of another democratic state, nor does it require this country to shelter those living in Canada from the reach of foreign laws. Indeed, as was noted earlier, insulating persons resident in this country from their obligations under duly-enacted laws of another democratic state is not a value that section 15 of the Charter was designed to foster.

Overall, the arguments raised by the plaintiffs paled in comparison to benefits that are derived by the banking industry in Canada. The I.G.A. was necessary for Canadian financial institutions to be deemed compliant with the requirements of F.A.T.C.A. and simplified the related data gathering obligations. In sum, the Implementation Act allowed Canadian financial institutions to avoid 30% withholding taxes on the receipt of capital payments on loans to U.S. residents and simplified the information gathering that would otherwise have been required under F.A.T.C.A.

CANADIAN ACTIVITY IN EXCHANGING INFORMATION

Canada has separate tax collection arrangements with Norway,[22] the Netherlands,[23] and Germany[24] that are similar to Article XXVIA. Each treaty has a minimum balance

[22] Article 28 of the Canada-Norway Income Tax Treaty.

[23] Article XXVIA of the Canada-Netherlands Income Tax Treaty.

[24] Article 27 of the Canada-Germany Income Tax Treaty.

that is required for a referral. The publicly released documentation by C.R.A. blacks out this information. Debts that can be referred arise under the Income Tax Act, the Excise Tax Act, any income or sales taxes collected by Canada on behalf of a province or territory, and all other categories of taxes collected by or on behalf of Canada.

The C.R.A. administrative position on exchanges of information can be found in the *National Collections Manual* (2015). Any referral that is sent to a treaty partner must detail the citizenship of the taxpayer and provide as much information as possible to help the treaty partner. Before it is sent on to a treaty partner, a referral must clear C.R.A.'s Tax Treaty Collection Program. The Tax Treaty Collections Program, upon clearing the request, will forward it to the treaty partner and will be the one that liaises with the treaty partner. Information on this program is not readily available. According to David Sherman, a tax lawyer and author, C.R.A. is reluctant to release any information pursuant to a request made under the Access to Information Act, and only through "tortuous litigation" was he able to obtain the following information[25] – some general statistics, albeit somewhat dated:

- From 1995 to 1999, 177 referrals were made by C.R.A. to the I.R.S. covering $47 million in tax-related debts (amount collected not disclosed) and 87 referrals were made from the I.R.S. to C.R.A. (amount at stake and amount collected not disclosed).
- From 1999 through 2005, 422 referrals were made by C.R.A. to the I.R.S. C.R.A. sent 94 referrals in 2003 and 90 referrals in 2004, covering a total of $96 million. The amounts collected were not disclosed. C.R.A. refused to disclose the number of requests that were received from the I.R.S.
- From 2008 to 2012, annual referrals made by C.R.A. to the I.R.S. ranged between 65 and 115 in number. Collections ranged between $13 million and $69 million. Although all requests were accepted by the I.R.S., no information on the amounts collected was released. During this period, no information was released about collection requests made by the I.R.S. to C.R.A.

PASQUANTINO CASE – FOREIGN CUSTOMS DUTY IS A PROPERTY RIGHT

Pasquantino v. U.S.[26] is a Supreme Court case in the U.S. involving a criminal scheme to defraud Canada of its rightful customs tax revenue. It does not involve a claim by Canada to enforce a customs fraud recovery in the U.S. The defendants attempted to expand the scope of the revenue rule to cover U.S. criminal prosecutions in the U.S. based on smuggling activity into Canada. At first, the defendants succeeded. Ultimately, they lost in the Supreme Court.

Facts and Prior History

Canada imposes substantial sin taxes on alcohol and cigarettes. As a result, a black market exists for those items. Capitalizing on the situation, petitioners David

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[25] David Sherman, "David Sherman's Notes – Canada – United States Income Tax Convention, 1980, Article XXVI-A," TaxnetPro (October 2019).

[26] 544 U.S. 349 (2005).

and Carl Pasquantino, both residents of Niagara Falls, New York, began smuggling cheap liquor into Canada.

Their business began in 1996 and continued through May 2000. Their general procedure was to arrange by telephone to purchase liquor from a discount liquor shop in Maryland. They would drive from Niagara Falls, New York, to Hagerstown, Maryland, to purchase the liquor that would be transported to New York and ultimately smuggled into Canada in hidden compartments in the trunks of cars.

The petitioners were indicted and convicted of wire fraud, in violation of 18 U.S.C. §1343, which provided:

> **§ 1343. Fraud by wire, radio, or television**
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> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

Upon appeal, the U.S. Court of Appeals for the Fourth Circuit[27] reversed the convictions because a scheme to defraud a foreign government of tax revenues was not recognizable under the wire fraud statute due to the application of the revenue rule. The Fourth Circuit acknowledged that Canada's right to collect taxes was a property right for wire fraud purposes but then concluded that the determination of whether Canada was entitled to the tax revenues involved an inquiry into the validity and operation of a foreign revenue law – an inquiry barred by the principles underlying the revenue rule. In so ruling, the Fourth Circuit joined the First Circuit in holding that a scheme to defraud a foreign nation of tax revenues did not violate the wire fraud statute.[28] The Second Circuit previously upheld wire fraud convictions for schemes to defraud a foreign government of tax revenues.[29] Upon motion of the government, the Court of Appeals granted rehearing *en banc* in *Pasquantino*, vacated its prior decision, and affirmed the petitioners' convictions.[30]

U.S. Supreme Court Ruling

The U.S. Supreme Court affirmed the petitioners' convictions for violating the wire fraud statute.

Wire Fraud Statute

The Supreme Court ruled that the two elements of the wire fraud – (i) a scheme or artifice to defraud and (ii) the object of the fraud being money or property in the victim's hands – were present in this case.

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27 *U.S. v. Pasquantino*, 305 F.3d 291 (4th Cir. 2002).

28 *U.S. v. Boots*, 80 F.3d 580 (1st Cir. 1996).

29 *U.S. v. Trapilo*,130 F.3d 547 (2d Cir. 1997).

30 *Supra* note 27.

"Odd as it may seem for the Federal government to prosecute a U.S. citizen for smuggling cheap liquor into Canada, the broad language of the wire fraud statute authorized such prosecution."

The petitioners' plot was a "scheme or artifice to defraud" Canada of its valuable entitlement to tax revenue. The evidence showed that the petitioners routinely concealed imported liquor from Canadian officials and failed to declare those goods on customs forms.

In addition, Canada's right to uncollected excise taxes on the liquor imported into Canada was "property" in its hands, given the economic equivalence between money in hand and money legally due. The fact that the victim of the fraud happened to be the government, rather than a private party, did not lesson the injury.

Revenue Rule

Having found that wire fraud requirement existed, the Supreme Court next moved to determine whether Congress intended to exempt the prosecution from the wire fraud statute under the common law revenue rule, which clearly barred a prosecution for violating a foreign tax law. The Supreme Court found that no common-law revenue rule cases decided as of the enactment of the wire fraud statute in 1952 barred the U.S. from prosecuting a fraudulent scheme to evade foreign taxes. Odd as it may seem for the Federal government to prosecute a U.S. citizen for smuggling cheap liquor into Canada, the broad language of the wire fraud statute authorized such prosecution, and no canon of statutory construction permitted the Supreme Court to read the statute more narrowly. The Supreme Court affirmed the judgment of the Court of Appeals.

The Supreme Court differentiated this case from the classic example of actions traditionally barred by the revenue rule – this case was not a suit to recover a foreign tax liability. Instead, this was a criminal prosecution brought by the U.S. in its sovereign capacity to punish domestic criminal conduct. A prohibition on the enforcement of foreign penal law did not plainly prevent the U.S. government from enforcing U.S. domestic criminal law.

The petitioners argued that the matter inherently involved a collection of tax because a conviction automatically provided restitution rights to the victim – the government of Canada – under the Mandatory Victims Restitution Act of 1996. The Supreme Court, however, adopted a different view. Under this view, restitution and tax enforcement are one and the same. However, the Supreme Court found that the purpose of the Mandatory Victims Restitution Act is merely to award restitution, not to collect a foreign tax. Restitution metes out appropriate punishment for the criminal conduct. If awarding restitution to foreign sovereigns were to be contrary to the revenue rule, the proper resolution would be to construe the act in a way that would not allow such awards, rather than to implicitly repeal the wire fraud statute when the defrauded party is a foreign sovereign.

The Supreme Court acknowledged that the criminal prosecution enforced Canadian revenue law in an attenuated sense but stated that the line the revenue rule drew between impermissible and permissible enforcement of foreign revenue law had always been unclear and no cases yielded a rule sufficiently well established to narrow the wire fraud statute in the context of the criminal prosecution of the petitioners.

The purposes of the revenue rule did not bar its application here:

- The prosecution posed little risk of causing international friction through judicial evaluation of the policies of foreign sovereigns.

- The prosecution embodied the policy choice of the two political branches of our government – Congress and the executive – to free the interstate wires from fraudulent use, irrespective of the object of the fraud. Such a reading of the wire fraud statute gave effect to the policy choice and posed no risk of advancing the policies of Canada illegitimately.
- The Supreme Court's interpretation of the wire fraud statute did not give it extraterritorial effect – the petitioners' offense was complete the moment they executed the scheme inside the U.S. The wire fraud statute punished frauds executed in interstate or foreign commerce and it was not a statute in which Congress had only domestic concerns in mind.

Dissenting Opinion

Justice Ginsburg wrote a dissenting opinion.

The dissent contended that the decision failed to take account of Canada's primary interest in the matter. U.S. citizens who have committed criminal violations of Canadian tax law can be extradited to stand trial in Canada, and Canadian courts are best positioned to decide whether and to what extent the defendants have defrauded the governments of Canada and Ontario out of tax revenues owed pursuant to their own, sovereign excise laws.

The defendants' convictions of wire fraud could not have been obtained without proof of their intent to violate Canadian revenue laws. The fact that the bulk of the defendants' sentences were related, not to the American crime of wire fraud, but to the Canadian crime of tax evasion showed that this case was primarily about enforcing Canadian law. The wire fraud statute contains no reference to foreign law as an element of the domestic crime of wire fraud. By construing the wire fraud statute to encompass violations of foreign revenue laws, the Supreme Court ignored the absence of anything signaling Congress' intent to give the statute such an extraordinary extraterritorial effect.

The opinion disregarded the recognized principal that "Congress legislates against the backdrop of the presumption against extraterritoriality." Notably, when Congress explicitly addresses international smuggling under 18 U.S.C. §546, it provides for criminal enforcement of the customs laws of a foreign nation only when that nation has a reciprocal law criminalizing smuggling into the U.S. At the time of the case, Canada had no such reciprocal law.

The tax treaty between the U.S. and Canada handles the request for assistance for collection of taxes, and the treaty required certification by the requesting nation that the taxes owed had been finally determined. However, the assistance-in-collection provisions did not apply here because such provisions did not apply to a revenue claim relating to a taxable period in which the individual taxpayer is a citizen of the requested state.

The defendants' conduct arguably fell within the scope of the wire fraud statute only because of their purpose to evade Canadian customs and tax laws; short of that purpose, no other aspect of their conduct was criminal in the U.S. The application of the Mandatory Victims Restitution Act of 1996 to wire fraud offenses is corroborative. The fact that the government effectively invited the district court to overlook the mandatory restitution statute out of concern for the revenue rule was revealing and demonstrated that the government's expansive reading of the wire fraud

statute warranted the Supreme Court's disapprobation. Congress has expressed with notable clarity a policy of mandatory restitution in all wire fraud prosecutions while in contrast, is quite ambiguous concerning the wire fraud statute's coverage of schemes to evade foreign taxes. Justice Scalia and Justice Souter join this portion of the dissent.

Finally, the rule of lenity would counsel against adopting the Supreme Court's interpretation of the wire fraud statute as the Supreme Court has long held that, when confronted with two rational readings of a criminal statute, one harsher than the other, the harsher one is to be chosen only when Congress has spoken in clear and definite language. (Justice Scalia and Justice Souter join this portion of the dissent.)

RECENT CASES REGARDING ASSISTANCE IN COLLECTION

As previously discussed, the Treaty contains an article calling for the assistance in collection of taxes of the treaty partner jurisdiction. Two cases in the U.S. illustrate that Canada and the U.S. have similar approaches to the application of Article XXVIA.

Dewees v. U.S.[31]

This case involves a U.S. citizen residing in Canada who, to his chagrin, decided to come into compliance with his U.S. tax obligations only to find that he was denied a refund of Canadian tax.

Facts

Mr. Dewees moved from the U.S. to Canada in 1971 and has continued to reside in Canada through the years in issue. He is the owner of a consulting business that was incorporated in Canada. He paid his Canadian taxes annually, but he did not file his U.S. Federal income tax returns in the U.S.

Mr. Dewees was concerned that the I.R.S. was actively investigating U.S. persons living abroad who did not pay taxes and did not report financial interests in foreign financial accounts. These are persons who did not file F.B.A.R.'s with FinCEN. The penalties for not filing an F.B.A.R. were severe. In 2009, the I.R.S. announced the 2009 Offshore Voluntary Disclosure Program ("O.V.D.P."). It offered taxpayers an opportunity to avoid criminal prosecution and a settlement of a variety of civil and criminal penalties in the form of single miscellaneous offshore penalty. It was based on existing voluntary disclosure practices used by I.R.S. Criminal Investigation. Generally, the miscellaneous offshore penalty for the 2009 program was 20% of the highest aggregate value of the unreported offshore accounts in the period beginning 2003 and ending in 2008. Participants were also required to file amended or late returns and F.B.A.R.'s for those years.

Mr. Dewees applied to participate in O.V.D.P. and was preliminarily accepted into the program. Ultimately, the I.R.S. asserted a miscellaneous offshore penalty in the amount of $185,862. Viewing the penalties to be excessive, Mr. Dewees withdrew from O.V.D.P. This led to an I.R.S. examination in which $120,000 in penalties were assessed. These penalties were related to the failure to file Form 5471, *Information*

[31] 767 F. App'x. 4 (D.C. Cir., April 9, 2019).

Return of U.S. Persons with Respect to Certain Foreign Corporations, with regard to multiple years.

Mr. Dewees administratively challenged the assessment of penalties through the I.R.S. Taxpayer Advocate's Office, and then through the I.R.S. Appeals Office. Neither succeeded. Dissatisfied, Mr. Dewees refused to pay the penalty.

In 2014, the I.R.S. introduced another program to encourage taxpayers to voluntarily disclose offshore assets – the Streamlined Filing Compliance Procedures (the "Streamlined Procedures"). The Streamlined Procedures differ from the O.V.D.P. in several respects. The Streamlined Procedures involve less paperwork and impose lower penalties than the O.V.D.P.. or no penalties, and only cover three years of noncompliance. In addition, the Streamlined Procedures do not offer immunity from criminal prosecution. Transferring between the two programs is generally disfavored, but taxpayers who are otherwise eligible for the Streamlined Procedures and made their O.V.D.P. submissions before July 1, 2014, were offered the opportunity of remaining in O.V.D.P. while requesting the more favorable terms available under the Streamlined Procedures.

In 2015, the I.R.S. sought assistance from C.R.A., and in 2015, the 2014 Canadian tax refund requested by Mr. Dewees was held back until the I.R.S. penalty was paid in full. This international collection assistance is permitted by Article XXVIA.

Contentions in Litigation

Mr. Dewees promptly sent C.R.A. a check in the amount of $134,116.34, representing the $120,000 penalty plus interest. In September 2015, he filed a claim with the I.R.S. seeking a refund of that amount. The claim was rejected in May 2016. Shortly thereafter, he brought a claim in the District Court for the District of Columbia ("D.C. District Court"),[32] asserting the Treaty provision was unconstitutional under the Excessive Fines Clause of Eighth Amendment, the Due Process Clause of the Fifth Amendment, and the Equal Protection Clause of the Fifth Amendment. The D.C. District Court granted the government's motion to dismiss the case failure to state a claim upon which relief can be granted.

The D.C. District Court granted the motion to dismiss, reaching the following holdings as to the three claims made by Mr. Dewees:

- The Excessive Fines Clause of the Fifth Amendment was not applicable because a tax penalty is considered to be remedial. The clause applies to penalties intended to punish an individual.
- The Due Process Clause of the Fifth Amendment was not violated merely because Mr. Dewees could not appeal the penalty to the Tax Court. The availability of a refund action in U.S. Federal district court afforded him with an adequate opportunity to be heard at a meaningful time and in a meaningful manner.[33]
- The Equal Protection Clause of the Fifth Amendment could not be addressed by the D.C. District Court because Mr. Dewees never applied for the Streamlined Procedures.

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[32] 272 F. Supp. 3d 96 (D.D.C. 2017).

[33] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Decision

On appeal, two issues were presented. Mr. Dewees claimed the D.C. District Court erred when it ruled that he was not denied rights under the Due Process and Equal Protection Clauses of the Fifth Amendment.

As to the Due Process claim, Mr. Dewees argued that he was denied the opportunity of challenging the penalties prior to payment. The court disagree, pointing out that Mr. Dewees had two opportunities to appeal the penalty asserted in the I.R.S. examination and was unsuccessful. The denial of an opportunity of a third appeal prior to payment does not amount to a constitutional flaw in the process.

As to the Equal Protection claim, Mr. Dewees argued that he was denied the opportunity of lower or no penalties that were subsequently allowed to participants in the Streamlined program. The appellate court agreed that, at a surface level, others were afforded more favorable treatment than he received regarding the penalties for failing to file Form 5471. Thus, he had standing to challenge the denial of entry. However, as a matter of substantive constitutional law, differences in government classification are allowed in there is a rational relationship between the disparity of treatment and a legitimate governmental purpose. In the case, a rational basis existed for different treatment. The Streamlined Procedures were designed to encourage taxpayers that were unknown to the I.R.S. as of June 18, 2014, to come forward. Mr. Dewees came forward previously. Moreover, he was not treated any differently than others with similar facts.

Retfalvi v. Commr.[34]

Retfalvi involves a claim for assistance in collection of Canadian tax made by C.R.A. to the I.R.S. The issue that was framed by Mr. Retfalvi was that Article XXVIA of the Treaty is an unconstitutional provision because it amounts to the adoption of a tax provision that did not originate in the House of Representatives.

Facts

Dr. Retfalvi, is a medical doctor who was born in Hungary. He moved to Canada in 1988 under a restricted work permit, and he became a Canadian citizen in 1993. That same year, Dr. Retfalvi came to the U.S. on a J-1 visa to participate in a medical residency program. After Dr. Retfalvi completed his residency in 1997, he returned to Canada.

The following year, Dr. Retfalvi returned to the U.S. under an H1-B visa. To ensure that he would have a place to live if his H1-B visa was not renewed, Dr. Retfalvi purchased a small condominium in Vancouver and signed a pre-construction contract to purchase a larger one.

In 2005, Dr. Ratfalvi was granted permanent resident status in the U.S. As Dr. Retfalvi was no longer planning to reside in Canada, he sold both condominiums in Canada. Dr. Retfalvi reported the sales on a U.S. Federal income tax return.

In 2008, the C.R.A. sent Dr. Retfalvi a summary of the audit adjustments, finding that he had improperly reported the sale of the condominiums. In 2009, the C.R.A.

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[34] F. 3rd. (4th Cir. Docket No. 18-2158, July 16, 2019) reported unofficially at 124 AFTR 2d 2019-5160.

sent him a Notice of Assessment. Dr. Retfalvi filed an untimely objection in February 2010. In March 2010, he filed a timely administrative appeal. C.R.A. denied his appeal and provided him 90 days to file a petition for review by the Canadian Tax Court. However, Dr. Retfalvi did not challenge the proposed deficiency by the deadline of October 3, 2011. As a result, the Canadian tax liability became final on that date.

Notably, on June 23, 2010, Dr. Retfalvi had become a U.S. citizen.

On October 27, 2015, C.R.A. referred the assessment to the U.S. for collection, pursuant to Article XXVIA. On November 16, 2015, the I.R.S. issued a Final Notice – Notice of Intent to Levy and of Your Right to a Hearing (the "Notice"), instructing Dr. Retfalvi to pay $124,286.83 in U.S. currency to satisfy the Canadian revenue claim. In the Notice, the I.R.S. advised that it intended to use its collection procedures if Dr. Retfalvi did not pay the assessment within the allotted period. The Notice indicated that Dr. Retfalvi had 30 days to seek a hearing before the I.R.S. Office of Appeals regarding the proposed levy. In addition, the Notice stated that the I.R.S. had no authority to adjust the underlying Canadian tax liability.

Dr. Retfalvi objected to the Notice on January 13, 2016, and requested a hearing. On February 23, 2016, he sought a hearing before the I.R.S. Office of Appeals under the Collection Due Process Program, pursuant to Code §6330. In response, Dr. Retfalvi was informed that he was not entitled to a hearing under that program, but he was entitled to a limited hearing under the Collection Appeals Program. Dr. Retfalvi then filed for that hearing. On March 24, 2016, the I.R.S. denied Dr. Retfalvi's Collection Appeal Request because it did not have the authority to adjust a foreign tax liability.

Contentions in Litigation

Dr. Retfalvi filed suit for a declaratory judgment and injunctive relief, but the court dismissed the suit for lack of jurisdiction pursuant to the Anti-Injunction Act.[35] Shortly thereafter, he paid the tax assessment and filed a refund claim with the I.R.S. When the claim was denied, Dr. Retfalvi filed a complaint in Federal district court. Several counts in support of recovery were asserted. Among them are the following:

- Article XXVIA violates the Constitution's Origination Clause, as a revenue raising measure that did not originate in the House of Representatives. The Origination Clause provides that all bills for raising revenue must originate in the House of Representatives. Dr. Retfalvi asserted that Article XXVIA is a bill that raises revenue.

- Article XXVIA does not have the force of law because it is not a self-executing treaty provision. Only Congress has the power to lay and collect taxes. Giving Article XXVIA legal effect absent implementing legislation unconstitutionally encroaches on congressional authority.

- The I.R.S. is not authorized to collect taxes because Article XXVIA has no legal force. The I.R.S. lacked statutory authority to use its domestic enforcement powers to collect a foreign assessment on behalf of Canada.

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[35] *Retfalvi v. Commr.*, 216 F. Supp. 3d 648 (E.D.N.C. 2016).

Decision

The district court rejected Dr. Retfalvi's contentions and dismissed the case. On appeal, the Fourth Circuit Court of Appeals affirmed the decision of the district court.

In broad terms, the court reached the following conclusions:

- The Canadian tax collected by the I.R.S. from Dr. Rafalvi was not a tax within the meaning of the Origination Clause. A law does not fall within the Origination Clause if it raises revenue for a specific purpose instead of the obligations of government, generally.
- While the taxing power is granted to Congress, that grant of power is not exclusive. The mere fact that a congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power.[36]
- In broad terms, a self-executing treaty provision is equivalent to an act of the legislature.[37] This rule does not apply to a treaty when (i) its text manifests an intention that implementing language is necessary; (ii) the Senate, in giving consent, or Congress, by resolution, requires implementing legislation; or (iii) implementing legislation is constitutionally required. Here, Article XXVIA relies on each country's existing tax laws and procedures for assessment and collection, and requires no additional legislation to operate effectively.
- Article XXVIA authorizes the I.R.S. to employ the procedures created under Code §§6201 and 6301 to pursue and collect Canadian revenue claims. It specifically provides that a revenue claim shall be collected by the requested state as though such revenue claim were the requested state's own revenue claim that has been finally determined in accordance with the laws applicable to the collection of the requested state's own taxes. Consequently, if the U.S. accepts a request from Canada to collect a revenue claim, the U.S. must collect the revenue claim as if it were its own revenue claim.

CONCLUSION

While the revenue rule is not dead within the common law, the world has changed since the time it was first enunciated. Today, treaties, multilateral agreements, and domestic criminal law have reduced the effectiveness of the doctrine. Whether the concept is F.A.T.C.A., C.R.S., the Convention, or criminal enforcement, tax authorities around the world speak with each other, provide information to each other, and provide assistance in collection of taxes. Governments realize that failure to pay tax that has properly been assessed is an activity that should not be supported. In particular, the U.S. and Canada have adopted a working relationship that benefits administrators in both countries. Tax cheats can no longer look with confidence to the revenue rule.

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[36] *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978).

[37] *Medellin v. Texas*, 552 U.S. 491 (2008).

APPENDIX I

Today, Article XXVIA provides as follows:

1. The Contracting States undertake to lend assistance to each other in the collection of taxes referred to in paragraph 9, together with interest, costs, additions to such taxes and civil penalties, referred to in this Article as a 'revenue claim'.

2. An application for assistance in the collection of a revenue claim shall include a certification by the competent authority of the applicant State that, under the laws of that State, the revenue claim has been finally determined. For the purposes of this Article, a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.

3. A revenue claim of the applicant State that has been finally determined may be accepted for collection by the competent authority of the requested State and, subject to the provisions of paragraph 7, if accepted shall be collected by the requested State as though such revenue claim were the requested State's own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State's own taxes.

4. Where an application for collection of a revenue claim in respect of a taxpayer is accepted

    a. By the United States, the revenue claim shall be treated by the United States as an assessment under United States laws against the taxpayer as of the time the application is received; and

    b. By Canada, the revenue claim shall be treated by Canada as an amount payable under the Income Tax Act, the collection of which is not subject to any restriction.

5. Nothing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's finally determined revenue claim by the requested State, based on any such rights that may be available under the laws of either Contracting State. If, at any time pending execution of a request for assistance under this Article, the applicant State loses the right under its internal law to collect the revenue claim, the competent authority of the applicant State shall promptly withdraw the request for assistance in collection.

6. Subject to this paragraph, amounts collected by the requested State pursuant to this Article shall be forwarded to the competent authority of the applicant State. Unless the competent authorities of the Contracting States otherwise agree, the ordinary costs incurred in providing collection assistance shall be borne by the requested State and any extraordinary costs so incurred shall be borne by the applicant State.

7. A revenue claim of an applicant State accepted for collection shall not have in the requested State any priority accorded to the revenue claims of the requested State.

8. No assistance shall be provided under this Article for a revenue claim in respect of a taxpayer to the extent that the taxpayer can demonstrate that

   a. Where the taxpayer is an individual, the revenue claim relates either to a taxable period in which the taxpayer was a citizen of the requested State or, if the taxpayer became a citizen of the requested State at any time before November 9, 1995 and is such a citizen at the time the applicant State applies for collection of the claim, to a taxable period that ended before November 9, 1995; and

   b. Where the taxpayer is an entity that is a company, estate or trust, the revenue claim relates to a taxable period in which the taxpayer derived its status as such an entity from the laws in force in the requested State.

9. Notwithstanding the provisions of Article II (Taxes Covered), the provisions of this Article shall apply to all categories of taxes collected, and to contributions to social security and employment insurance premiums levied, by or on behalf of the Government of a Contracting State.

10. Nothing in this Article shall be construed as:

   a. Limiting the assistance provided for in paragraph 4 of Article XXVI (Mutual Agreement Procedure); or

   b. Imposing on either Contracting State the obligation to carry out administrative measures of a different nature from those used in the collection of its own taxes or that would be contrary to its public policy (ordre public).

11. The competent authorities of the Contracting States shall agree upon the mode of application of this Article, including agreement to ensure comparable levels of assistance to each of the Contracting States.

APPENDIX II

Today, Article XXVII provides as follows:

1. The competent authorities of the Contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes to which this Convention applies insofar as the taxation thereunder is not contrary to this Convention. The exchange of information is not restricted by Article I (Personal Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the taxation laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to the taxes to which this Convention applies or, notwithstanding paragraph 4 , in relation to taxes imposed by a political subdivision or local authority of a Contracting State that are substantially similar to the taxes covered by this Convention under Article II (Taxes Covered). Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The competent authorities may release to an arbitration board established pursuant to paragraph 6 of Article XXVI (Mutual Agreement Procedure) such information as is necessary for carrying out the arbitration procedure; the members of the arbitration board shall be subject to the limitations on disclosure described in this Article.

2. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information because it has no domestic interest in such information.

3. In no case shall the provisions of paragraph 1 and 2 be construed so as to impose on a Contracting State the obligation:

    a. To carry out administrative measures at variance with the laws and administrative practice of that State or of the other Contracting State;

    b. To supply information which is not obtainable under the laws or in the normal course of the administration of that State or of the other Contracting State; or

    c. To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. For the purposes of this Article, this Convention shall apply, notwithstanding the provisions of Article II (Taxes Covered):

a. To all taxes imposed by a Contracting State; and

b. To other taxes to which any other provision of this Convention applies, but only to the extent that the information may be relevant for the purposes of the application of that provision.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings).

7. The requested State shall allow representatives of the requesting State to enter the requested State to interview individuals and examine books and records with the consent of the persons subject to examination.