



ESSAYS IN HONOUR OF
JOHN F. AVERY JONES

Tax Polymath

A LIFE IN
INTERNATIONAL
TAXATION

EDITED BY
PHILIP BAKER AND CATHERINE BOBBETT

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Tax Polymath: A life in international taxation

Why this book?

This book comprises a selection of papers presented at a conference in honour of John Avery Jones which was held on 22 and 23 April 2010 in London. The conference brought together experts in international and UK domestic taxation from around the world to celebrate Dr. Avery Jones's contribution to the fiscal arena to mark his 70th birthday and forthcoming retirement as Judge of the First and Upper Tier Tax Tribunals.

The participants of the conference were drawn almost exclusively from three groups: the International Tax Group (ITG) of which Dr. Avery Jones was one of the founder members; the Advisory Group on the OECD Model; and UK tax academics. The papers reflect Dr. Avery Jones's many areas of interest, covering both international taxation and various aspects of UK domestic taxation. Many of the papers drew their inspiration from Dr. Avery Jones's academic writings or from his contribution as a tax judge.

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Conference Papers

John Avery Jones: List of Publications

Double Taxation Conventions and Human Rights

Philip Baker QC¹

There is no doubt of John Avery Jones' passionate attachment to double taxation conventions, nor of his contribution to the academic scholarship and, latterly, jurisprudence on those conventions.² John's period of service as a tax judge has also seen the incorporation of the European Convention on Human Rights (ECHR)³ into UK domestic law by the Human Rights Act 1998, so he has been among the first generation of tax judges to apply the ECHR in practice. Perhaps the same passion has not quite been kindled by the ECHR, which is a little surprising as the ECHR is also an international convention designed to protect taxpayers, in much the same way as a double taxation convention.⁴

This contribution considers certain issues relating to the compatibility of double taxation conventions with human rights conventions. The models, on the basis of which the vast majority of double taxation conventions have been negotiated, predate the main developments in human rights law. It would not be surprising, therefore, if there were a need to update the model tax conventions to comply with those norms. This initial expectation must be tempered, however, by the realization that human rights instruments have, so far, had a limited impact in the field of taxation. Nevertheless, one can perfectly appropriately discuss the extent to which double taxation conventions may or may not be compatible with the – albeit limited – impact of human rights instruments in the tax field. This contribution seeks to initiate a discussion of these issues.

1. Grays Inn Tax Chambers, London; Senior Visiting Fellow, Institute of Advanced Legal Studies, London University. This paper is an updated version of Preliminary Topic I in my book on *Double Taxation Conventions*, looseleaf, (London: Sweet & Maxwell, 2001).

2. See, for example, John's decisions on place of effective management in *Smallwood* [2008] STC (SCD) 629 and on non-discrimination in *FCE Bank* [2010] UKFTT 136 (TC).

3. To give the Convention its full title: Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, 4 November 1950 (ETS No. 5). For a general discussion of the Convention and taxation see Baker, P., "Taxation and the European Convention on Human Rights", BTR (2000), pp. 211-377.

4. A good example of the overlap is the non-discrimination provisions found in both double taxation conventions and human rights treaties.

The starting point is to recognize that double taxation conventions, like any part of a tax system, may be scrutinized for compatibility with human rights norms. There is no reason why double taxation conventions should be immune from scrutiny to ensure consistency with international human rights instruments. Nor is there any reason in principle why taxpayers might not challenge the application to them of the provisions of double taxation conventions on grounds that those provisions infringe human rights norms. Such challenges may have a limited chance of success, given the limited impact of human rights norms in the tax field so far, but there may be a few specific areas where there are real issues to consider. Even where challenges are unlikely to succeed, those involved in amending the OECD Model might wish to consider changes to ensure that no possibility exists that conventions based on the Model might even appear to infringe human rights norms. There is no evidence to suggest that such a review has already taken place.

This contribution considers the provisions of the ECHR and of the International Covenant on Civil and Political Rights (ICCPR).⁵ It should be recalled, however, that in many countries there will also be constitutional or other guarantees for the rights of taxpayers which may give wider protection than these international instruments. There are also regional human rights instruments, such as the American Convention on Human Rights, which contain rights similar but not identical to those in the ECHR.⁶

1. Cases on double taxation conventions before the ECnHR and ECtHR

Double taxation conventions (or equivalent measures) have been considered in a small number of complaints brought by individuals under the complaint mechanism of the ECHR. This mechanism previously involved consideration of the complaint by the European Commission of Human Rights (ECnHR), but the functions of the ECnHR have now been assumed by the European Court of Human Rights (ECtHR).⁷ In none of these cases

5. Adopted by the UN General Assembly by Resolution 2200 A (XXI) of 16 December 1966.

6. Otherwise known as the Pact of San Jose, Costa Rica of 22 November 1969: There are presently 24 countries that have ratified (and not denounced) the Convention.

7. The equivalent mechanism for the ICCPR is reviewed by the Human Rights Committee. Unlike the system under the ECHR, not all contracting states have accepted the right of individual petition. At present, the author is unaware of any complaints to the Human Rights Committee which have involved double taxation conventions.

was a breach of the ECHR found; nevertheless the discussion of issues in these cases is illuminating.

In *Hanzmann v. Austria*,⁸ the applicant was an Austrian civil servant living across the border in Germany. As a result of the application of the Austria–Germany tax treaty of 1954, he was subject to taxation on his salary in Austria but, because he was resident in a foreign country, was subject only to limited tax liability. The consequence was that certain tax allowances, which were available only to persons with full tax liability, were not extended to him. He complained that, as a result of the refusal of these allowances, he was discriminated against both in comparison with an equivalent civil servant resident in Austria and with a civil servant, such as a diplomat, who was both resident and working in a foreign country. He based his complaint on Art. 14 (non-discrimination) of the ECHR⁹ in conjunction with Art. 1 of the First Protocol to the ECHR (protection of property). In line with its jurisprudence in many other tax cases, the ECnHR noted the wide margin of appreciation enjoyed by states in the field of taxation. The Commission found that the decision not to extend the allowances to a person subject to limited tax liability fell well within the margin of appreciation enjoyed by Austria.

Given the wide acceptance of the OECD Model or UN Model as a basis for double taxation conventions, one can assume that it is extremely unlikely that the conclusion of a convention based upon one of these models would be regarded as falling outside a state's margin of appreciation. That does not mean, however, that the provisions of these Models should automatically be regarded as compliant with human rights norms.

In the case of *H v. Sweden*,¹⁰ the applicant, who was a resident of Sweden, went to work in Germany for a period of 4 years. He did not report his income from his employment in Germany to the Swedish authorities. Following his return, he was assessed to additional tax and penalties for his failure to report the income. He appealed against the assessment and was given an oral hearing at the first trial, but no oral hearing on the subsequent appeals. He complained both of the absence of an oral hearing and of the failure of the Swedish tribunals to take account of the double taxation convention

8. Application No. 12560/86, 60 DR 194. It is interesting to compare this case with *Gilly v. Directeur des Services Fiscaux* [1998] STC 1014, [1998] ECR-I 2793 (ECJ).

9. Discussed below.

10. Application No. 12670/87. This case is available on the electronic, "HUDOC" database accessible through the website of the ECtHR (www.echr.coe.int).

between Sweden and Germany in determining whether he was liable to tax. The ECnHR dismissed the case on the grounds, inter alia, that the Commission had no jurisdiction to review a failure of the domestic tribunals to take account of the provisions of a double taxation convention.

The case of *FS v. Germany*¹¹ is perhaps the most interesting one so far. In that case the applicant complained under Art. 8 of the ECHR (right to respect for private and family life) against exchange of information between the German and Dutch tax administrations under the provisions of the European Community Directive on Mutual Administrative Assistance.¹² The ECnHR agreed that the exchange of information was an infringement of the right of privacy but that it could be justified within the scope of Art. 8(2) of the Convention: the measures in question were taken in the interests of the economic well-being of the country, and were necessary in a democratic society. The ECnHR noted the current trend towards strengthening international co-operation in the administration of justice and concluded that there were relevant and sufficient reasons for the introduction of the Directive.

In that case, the measure concerned was a European Community directive. It seems highly likely that an identical result would have been reached had the issue concerned an exchange of information under the equivalent of Art. 26 of the OECD Model.

2. Application to double taxation conventions of the ECHR and ICCPR

Turning from a consideration of complaints which have been made to the ECnHR or the ECtHR, one can consider this topic by examining the rights guaranteed by the ECHR and whether provisions contained in double taxation conventions might infringe these rights. Not all provisions of the ECHR are by any means relevant: the only provisions which are likely to have any relevance whatsoever in the context of taxation are Arts. 6 (right to a fair trial), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the ECHR; Art. 1 of the

11. Application No. 30128/96, also available on HUDOC.

12. Council Directive 77/799/EEC of 19th December 1977 concerning mutual assistance by the competent authorities of the member states in the fields of direct and indirect taxation.

First Protocol (protection of property); and Art. 2 of the Fourth Protocol (freedom of movement), or the equivalent provisions of the ICCPR.

3. Right to a fair trial and competent authority proceedings

Art. 6 of the ECHR commences as follows:

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

This article raises issues relating to the resolution of disputes by the mutual agreement procedure. If Art. 6 applied to that procedure, then there is very little doubt that the procedure would not satisfy the guarantees in the article. These guarantees include “the right to a court” – that is, the right to take the dispute to a tribunal including the right to an independent and impartial tribunal, and the right to make representations to the tribunal on the basis of an equality of arms. The mutual agreement procedure does not satisfy any of these guarantees. Specifically, the taxpayer has no right to participate directly in the proceedings. The competent authorities are not independent or impartial; the procedure is a classic example of an internal procedure involving the revenue authorities interested in the outcome of the dispute. Art. 6 also requires a determination within a reasonable time: while efforts have been made recently to improve the time taken to resolve mutual agreement proceedings, it is still the case that some proceedings would fail to satisfy the reasonable time requirement. It is always possible that competent authority proceedings will fail to reach a resolution of the issue at all; the taxpayer will not, therefore, obtain a determination of the issue through the proceedings, which may be the only ones that offer any prospect of an effective remedy for the taxpayer. Some of the failings in the mutual agreement procedure may be remedied by the introduction of binding arbitration through the introduction of new Art. 25(5) of the OECD Model, although the precise details of the procedure, including the participation of the taxpayer, are not set out in that article.

There are several questions, however, relating to the applicability of Art. 6 to competent authority proceedings.

First, the ECtHR has concluded that Art. 6 does not apply to litigation relating to the determination of a tax liability.¹³ The reason for this conclusion is that Art. 6 refers to the “determination of ... civil rights and obligations”.¹⁴ The ECnHR and ECtHR have both concluded that the draftsmen of the ECHR intended to exclude administrative law disputes because of the essentially public law nature of those proceedings. Competent authority proceedings are quintessential, public law proceedings carried out by way of discussions and negotiations between civil servants of the two contracting states. Although the case law of the ECtHR in this context has been criticized, this has been followed in recent cases.

It is notable, however, that the ICCPR employs slightly different wording, “the determination of ... his rights and obligations in a suit at law...”, although competent authority proceedings do not easily come within the phrase “a suit at law”.¹⁵ Recent jurisprudence before the Human Rights Committee may suggest a different approach to public law procedures under the ICCPR.¹⁶ At the same time, other regional human rights instruments such as Art. 8 of the American Convention on Human Rights expressly applies to fiscal matters.

Secondly, the mutual agreement procedure is an alternative or a supplement to litigation before the courts of the contracting states for most disputes. The guarantees of Art. 6 would usually be satisfied by the proceedings before the national courts. To satisfy Art. 6 it is not necessary that all stages of the resolution of a dispute fulfil the guarantees, so long as there is at some point the possibility of recourse to an independent and impartial tribunal which fulfils the requirements of Art. 6.

This argument only goes so far, however. There are some disputes where the only effective method of resolving the dispute is recourse to competent authority proceedings, e.g. the application of the final leg of the tiebreaker in Art. 4(2)(d). There are also rare cases where litigation in the contracting

13. See *Ferrazzini v. Italy* (Application No. 44759/98) and other cases referred to there. A number of people (the author included) consider that this case (which was an 11:6 majority decision, with the taxpayer not being represented) is wrongly decided.

14. The ECtHR has held that disputes relating to substantial tax-geared penalties may fall within the guarantees of Art. 6 for “criminal charges” – see *Bendenoun v. France* (Application No. 12547/86), (1994) 18 EHRR 54.

15. It is worth noting, however, that the equivalent provision in the American Convention on Human Rights expressly applies to fiscal disputes.

16. See *Lederbauer v. Austria*, CCPR/C/90/D/1454/2006, decision of 11 September 2007.

states has reached or will reach different results and the only way to avoid double taxation is via competent authority proceedings.

Thirdly, the jurisprudence of the ECtHR has come to recognize that disputes involving any substantial tax-geared penalty will fall within the criminal head of Art. 6. This will be true of many of the most significant types of dispute that can arise for the competent authorities. The prime example is a transfer pricing dispute, where substantial misstatement penalties are likely to follow for the enterprises that are involved in the dispute. The penalties would, of course, be matters of domestic law and may not even be at issue in the competent authority proceedings the purpose of which is to settle the transfer pricing issues or methodology. However, the eventual imposition of penalties may be regarded as integrally associated with the determination of the transfer pricing issues. In this context, note might be taken of the fact that the ECtHR has yet to develop a consistent approach to so-called “mixed” cases where issues of tax liability and issues of substantial penalties are determined in the same proceedings.

The taxpayer whose final tax liability in the two contracting states will be determined by competent authority proceedings may feel aggrieved that those proceedings do not begin to satisfy Art. 6. However, it still remains for the extent to which Art. 6 applies to those proceedings to be determined. A taxpayer may have a better argument under either the ICCPR or one of the other regional human rights instruments.

4. Double taxation conventions and the right to privacy

A second area where the ECHR may have relevance concerns the right to privacy in Art. 8 of the ECHR (or the equivalent provision in Art. 17 ICCPR) and the exchange of information under Art. 26 of the OECD Model. Art. 8 of the ECHR provides as follows:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The issue of exchange of information and infringement of the right of privacy was considered by the ECnHR in *FS v. Germany* (discussed above). As in that case, it seems that in virtually all cases the countries concerned could justify any prima facie infringement of privacy arising from the passing on of information relating to a taxpayer by reliance on the provisions of Para. 2 of Art. 8. In particular, in many cases the exchange of information will be necessary, being probably the only effective way, to combat international tax avoidance. In all cases the information would have also been collected by one of the revenue authorities prior to exchange: if that collection of information could be justified under Art. 8(2), then it is hard to think that the transmission of the information to another state would constitute an infringement of the ECHR.

One issue has previously arisen in France with respect to the disclosure to the taxpayer of information obtained from another revenue authority. The view of the French Administration was understood to be that provisions equivalent to Art. 26 of the OECD Model provide only for information which has been exchanged to be disclosed to “persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention [the relevant DTC]”. The taxpayer in respect of whom the information has been exchanged was not such a person, so disclosure to him was not permitted, even where the information is made available to the tax tribunal. Utilising information obtained by administrative co-operation, but not making that information available to the taxpayer concerned, appears to be a prima facie breach of the principle of equality of arms (always assuming that Art. 6 applies to the tax proceedings concerned).¹⁷ It is understood that French practice has subsequently changed and that information exchanged is now made available to the taxpayer. Most countries would be expected to take the view that a duty of candour (or similar duty of disclosure) requires them to disclose information obtained by exchange with another revenue authority to the taxpayer concerned.

There are situations where exchange of information may raise issues of possible infringement of human rights norms. One issue is where there is a real fear that the recipient country will not, in practice, preserve the

17. This issue is discussed in part in the case of *SA Diebold Courtage*, Conseil d’Etat, 8th and 9th subsections, 13 October 1999, Req. No. 191 191, *Revue de Droit Fiscal*, 1999, No. 52, Comm. 948. The case is printed with a partial translation in (1999) 2 ITLR 365.

show that he is in an objectively identical position to an equivalent resident of state B (save only for his place of residence), yet he is subject to a difference in tax treatment. Usually, the difference in treatment could be justified by pointing to the different course of the negotiations with states B and C, and the different priorities for the states arising from their different tax and economic systems. The difference is inherent in a system based on bilateral conventions. However, this is only a partial explanation for someone who is aggrieved by the failure to treat him in a fashion equivalent to his neighbour. This leaves the interesting question whether human rights instruments (or, more likely, constitutional guarantees) impose on a state the obligation to try to achieve a degree of commonality between the bilateral conventions it negotiates with other states.

At present, the OECD is in the midst of a review of the non-discrimination article in the Model. Consideration has been given to the non-discrimination rules in EU law. However, there is much to be said for comparing the non-discrimination articles in human rights instruments as a possible model for a new clause in tax treaties. For example, an article based on Art. 14 of the ECHR might look something like this:

The enjoyment of the rights and freedoms set forth in this [Double Taxation] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This wording has the attraction that its scope is limited to the rights under the tax convention itself (as is the case for Art. 14) so that it should be easier to foresee the exact impact of the article. This would then leave the broader issues of discrimination in the domestic tax systems to more general non-discrimination provisions.

6. The right to property and double taxation conventions

Art. 1 of the First Protocol to the ECHR protects the right to property as follows:²⁴

Article 1 – Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

24. There is no provision in the ICCPR equivalent to Art. 1 of the First Protocol to the ECHR.

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interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In general, double taxation conventions set out to relieve double taxation and so secure to taxpayers the enjoyment of property which they might have lost if they were doubly taxed.

This raises the (again, rather intriguing) issue whether provisions equivalent to Art. 1 of the First Protocol impose on states a duty to relieve double taxation. The ECnHR and the ECtHR have said on several occasions that the imposition of an excessive and individual burden of tax on a person, such that it fundamentally interferes with that person's financial position, may constitute an infringement of the right to enjoy one's possessions.²⁵ To date, cases where the taxpayer has shown that the provisions of any country's tax laws infringe this principle are rare.²⁶ Suppose, however, that the combined effect of two countries' tax laws, including the absence of effective measures to relieve double taxation, have exactly that effect. Neither country has individually imposed an excessive burden; in combination, however, the domestic tax laws of the countries and the lack of effective means of relieving double taxation have resulted in an excessive burden. This is not to impose on states a positive duty to avoid an overlap in tax jurisdiction, but rather to ensure that their tax system contains effective measures to relieve any double taxation which may result from claims to tax cross-border transactions. Perhaps there is at least some obligation on states to include unilateral provisions for the relief of double taxation in their laws or to seek to enter into a network of double taxation conventions. States would no doubt argue that it was within their margin of appreciation whether to include measures for relieving international double taxation. Given the widespread inclusion of such measures in countries' laws, however, the position may more correctly be that states have a margin of appreciation in the approach taken to relieve double taxation (credit or

25. See, for example, *Kaira v. Finland* (Application No. 27109/95) (available on HUDOC) and *Wasa Liv v. Sweden* (Application No. 13013/87), 58 DR 163 at 177-178.

26. An unusual, recent example was the case of *Di Belmonte v. Italy* (Application No. 72638/01) where a delay in payment of compensation meant that the payment was subject to a withholding tax which would not have been the case if the payment had been promptly made. The ECtHR held that the circumstances imposed an excessive and individual burden on the taxpayer concerned, and interfered with his right to property.

exemption, for example), but no discretion that some form of measures of relief are required to prevent the imposition of an excessive burden.

Art. 1 of the First Protocol also applies to measures for the enforcement of tax. The amendment to the OECD Model in 2005 to include new Art. 27 on assistance in collection of taxes raises the possibility that these measures contain inadequate protections for the rights of taxpayers. In particular, the provisions for taking protective measures or requiring the taxpayer to litigate the tax liability only in the country that imposes the tax raise potential issues as the taxpayer may be deprived of his property without adequate protection. Much may depend on the particular circumstances of a particular taxpayer who would need to show that the measures taken in his case exceeded the margin of appreciation.

7. Right to leave a country

A similar point arises with respect to Art. 2 of the Fourth Protocol which provides in Para. (2) that “Everyone shall be free to leave any country, including his own”. Generally, double taxation conventions remove barriers to the free movement of persons that might otherwise arise if the person were subject to double taxation on moving country. For states that have signed this protocol, an obligation may arise to ensure that the combined effect of the tax system and any double taxation conventions is to remove any barriers to the free movement of persons. An interesting extension of this would be an argument that, for example, an exit tax might impede the exercise of the freedom to leave one’s country. A double taxation convention would not impose such an exit charge, but might relieve from such a charge by providing, for example, that the charge is deferred until disposal of an asset within, say, 5 years of moving countries. The right to leave one’s country might, therefore, bolster an argument for a positive measure to be taken in the double taxation convention.

8. Concluding comments

The application of human rights conventions to tax matters is a relatively novel phenomenon: most of the case law of the ECtHR dates from the last 30 years. Many issues remain to be resolved, not least of which is the scope of application of certain key rights in a tax context, such as the right to a fair trial, or the right to enjoyment of property. By contrast, double taxation conventions are older, with a history which now exceeds 100 years. Much

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of the work of developing the current model conventions took place before the development of the application of human rights norms to tax matters. It is an appropriate point to open a discussion of the extent to which double taxation conventions might give rise to issues of compatibility with human rights norms, or whether changes might be made to the model conventions to ensure better conformity with those norms. This contribution is intended to point to some of the areas for further discussion.

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