

Separation of Powers

-- Questionnaire --

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Government have legislative competence on tax matters?

1.2. Does your Government draft tax bills proposals and present them to Parliament?

1.3. In case your answer to 1.1. and 1.2. is positive:

1.3.1 Does your Government usually exercise that competence?

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

1.4. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3. ?

1.1 The UK parliament has legislative competency on tax matters across the UK. No taxing power is devolved to Northern Ireland or Wales, although the Scottish Parliament has limited competency to raise or lower the basic rate of income tax only by 3%. It has not used this power to date.

Over 95% of tax is raised by central government in the UK.

1.2 General tax policy is determined by the Treasury, one of the most powerful government departments, headed by the Chancellor of the Exchequer, a member of parliament drawn from the governing party. The Treasury is the sole instigator of tax bills.

Almost all direct taxes are contained in primary legislation, ie Acts of Parliament and will go through the procedures described at 1.3.2. Secondary legislation, regulations in the form of statutory instruments promoted by Ministers, is used regularly in the context of the indirect taxes and tax credits. Naturally, secondary legislation is not subject to parliamentary scrutiny and its competency and can only be challenged through the courts on limited grounds.

1.3.1 There is a constitutional principle in the UK that income and corporation tax have to be re-imposed annually, so each year there is at least one Finance Bill. Occasionally there are two. This means that, unusually for a government department, the Treasury has guaranteed access to Parliamentary time each year.

Input to the Treasury comes from a variety of sources and pursues a variety of ends. The input from HMRC, the body responsible for the day to day operation of tax in the UK, is largely limited to identifying areas of avoidance or problems in the smooth application of the tax laws. In other words, HMRC has a responsibility to maintain tax policy rather than to develop it.¹ Ministerial contributions can drive the implementation of specific government policy, either arising from party manifestos or as of part of a drive by particular Chancellors to move the tax system in a specific direction. The impact of the views of taxpayers, pressure groups and business must also be recognized.²

1.3.2 The strength of the political party in office under the Westminster model of government means that tax policy is to an unusual extent within the control of that party. It is possible for a government to consult at various stages – in the formulation of broad policy, on detailed proposals and on draft legislation. Consultation at the first stage in the UK is almost unknown. It usually takes place at an advanced stage, after policy has been determined, and is thus normally restricted to the technical implementation rather than informing policy development. In recent years, there has been much more consultation on detailed proposals. Sometimes, although this is less common, draft legislation is circulated prior to publication as a bill. There is no legal requirement to consult - it is within the discretion of the department.

Once policy emerges from the Treasury in the form of a draft bill, there is little scope for further development during its parliamentary stages

The Finance Bill is introduced into the House of Commons by the Chancellor of the Exchequer and the main debate, since 1967, takes place before a “standing committee”

¹ Prior to the implementation of the proposals of the O’Donnell Review (the Review of the Revenue Departments, 1994) the division of responsibilities for tax policy between the tax authorities and the Treasury was blurred. The Review concluded that any coherence in tax policy in the UK was despite the then organizational structure rather than because of it. It proposed that Treasury be responsible for overall tax policy, with HMRC taking a more limited role.

² A recent example was the decision to drop the rate of capital gains tax on business gains following a particularly vociferous reaction to proposals announced in November 2007.

rather than being debated in front of the whole House of Commons. The opposition is allowed to choose some clauses to be debated in the whole House, which will be the more controversial clauses from a policy aspect.

Standing committees are made up of members of parliament drawn from the political parties in proportion with their respective strengths in the House. Standing Committees on Finance Bills typically meet about 10 times.

The clauses (individual sections) of the Bill are in theory debated one by one, although in practice it is only possible for a limited number to be considered in detail.

Amendments can be suggested, both from the government side (who might have had a chance to think a bit more about the draft legislation and who will have received the reaction of the professional bodies and others to the Finance Bill) and from the opposition, and it is these clauses which are likely to have most attention. Proposals for amendments of the Bill are then voted upon although the chances of an opposition amendment being successful is extremely limited as the members of the standing committee tend to vote on party lines. However, on occasion the government side will undertake to reconsider an contentious aspect and may subsequently move for its own amendment to take into account the opposition's objections.

Once the Committee stage has been concluded, the Bill is given a final reading in the House of Commons at which there is an opportunity to vote the Bill into legislation. Further amendments may be moved at this stage, but again it is unlikely that opposition amendments will be successful.

So, in summary, once policy has been decided, is highly likely that it will be implemented without serious challenge.

1.4 Parliamentary scrutiny of tax legislation is almost universally regarded as inadequate in the UK. There are a number of reasons for this

- the nature of the subject matter (often extraordinarily complex);
- the Parliamentary timetable (unless the Act of Parliament follows the Budget within about four months, any Budgetary resolutions fall);

- the exclusion of the House of Lords from the debates.³

A report on the process of making of tax legislation in 1993 concluded that, “the present system, which allows so much tax legislation to reach the statute book in the form in which it does, reflects in part the lack of balance in the process: the absence at any stage in the process of any institution that is entitled to demand and to receive an explanation of the policy and of whether the complexity it involves is justified. Parliament may be an imperfect instrument with which to fulfil this function.”⁴

More recently, the following, taken from a 2008 report to the Mirrlees Review, provides a critical summary:

“in the UK the processes of analysis, negotiation, and marketing take place much more within the Executive Branch than in the legislature, or indeed in politicians’ campaigns for election. The Executive has extensive agenda power, and Government proposals are rarely subject to significant amendment, let alone veto. The centralisation of revenues, lack of information and expertise in Parliament, rarity of coalition bargaining, and absence of any powers of initiative and referendum reinforces the familiar executive dominance of British politics.”⁵

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The professional bodies are also critical of current procedures. For example, there have been calls from the professional body of tax advisers, the CIOT, for a tax law commission to be set up to assist in the promulgation of and the scrutiny of tax legislation⁶ and the body representing chartered accountants in England and Wales, has

³ By virtue of the Parliament Act 1911, the House of Lords has no power to reject or amend a Finance Bill. A limited degree of House of Lords involvement has been possible since 2003, when a sub-committee of the House of Lords was set up to scrutinise the Finance Bill. It is clear that this is intended to be limited to a consideration of the technical aspects of the Bill rather than its policy but it is a task that the sub-committee took on board in a way which allowed more serious consideration of some of the clauses of the Bill. It takes evidence from various independent persons on several matters and, although it is hard to evaluate its impact, the involvement of the second House is a welcome step forward.

⁴ IFS *Making Tax Law* at <http://www.ifs.org.uk/comms/budd03.pdf>.

⁵ Alt, Preston and Sibieta, *The Political Economy of Taxation*, draft report to the Mirrlees Review, at http://www.ifs.org.uk/mirrleesreview/reports/political_economy.pdf This is still in draft form – please don’t quote further at this point.

⁶ CIOT, at

<http://www.tax.org.uk/attach.pl/6752/7908/Tax%20Law%20Briefing%20Mar08%20FINAL.pdf>.

called for more consultation.⁷ Many more examples of criticisms by the professional bodies could be found.

2. The meaning of legal indeterminacy in tax matters

2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

2.4. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

2.1 Tax legislation in the UK is in many parts extremely detailed, which is part of the reason for its extraordinary length and complexity.⁸ However, reference is still made to indeterminate concepts, for example “trade” or “income”. On the whole however, the UK would be regarded as having a rule-based rather than principle-based approach to legislation.

2.2 The debate about drafting techniques in the UK has taken place largely in the context of tax avoidance. Traditionally, the courts’ approach to the construction of legislation was literal: an approach possibly encouraged by a detailed drafting style, although an alternative explanation is that the legislature, taking account of the literal approach, did not trust the courts and so supplied the detail itself.⁹ Over the last twenty five or so years however, a more purposive approach by the judiciary has been evident in the construction of tax statutes, not just in the tax avoidance area. This has not yet however been reflected in any corresponding change in the style of UK legislation.

⁷ ICAEW at <http://www.parliament.uk/documents/upload/ICAEW2.pdf>.

⁸ According to the Wall St journal, the UK has the second longest tax legislation in the world, with India taking pole position. This is a result not only the detailed approach, however, as the “rewrite” (putting the legislation into clearer English) has also had an effect on the length.

⁹ Avery Jones “Tax Law: Rules or Principles?” [1996] BTR 580.

There are many in the UK and elsewhere who have argued for more principled based drafting, generally suggesting a hierarchy of stated principles through which more detailed rules underneath can be interpreted.¹⁰ However, more recently, the notion of principle-based drafting has spread to the Treasury and HMRC who are considering it in relation to avoidance legislation in the large business sector.¹¹ This is of course a long way from re-evaluating the approach in tax law generally.

2.3 The UK has no written constitution.¹² Under the doctrine of Parliamentary sovereignty, what “the Queen in Parliament enacts is law”.¹³ It is a fundamental common law traditional that the judges will uphold legislation enacted by Parliament.¹⁴ So, for example, Parliament has enacted both retrospective¹⁵ and extra-territorial legislation¹⁶ and, in theory at least, could order the death of all blue eyed babies.¹⁷

The UK judiciary have criticised legislation on a variety of grounds, complexity being the most common. Indeed there have been in the past occasions when the judiciary has not applied legislation on the basis that it is incomprehensible: in the words of Lord Simonds in the House of Lords in 1946,

“Yet I can come to no other conclusion than that the language of the Section fails to achieve its apparent purpose, and I must decline to insert words or phrases which might succeed where the draftsman failed.”¹⁸

However, indeterminacy is a different matter from complexity or mis-drafting, and in such cases the courts will regard it as their task to supply the necessary content.

¹⁰ Eg Tax Law Review Committee *Final Report on Tax Legislation*, 1996 at <http://www.ifs.org.uk/comms/comm55.pdf>; Drummond “A purposive approach to the drafting of tax legislation” [2006] BTR 669; Avery Jones “Tax Law: Rules of Principles” [1996] BTR 580, Freedman, “Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle,” [2004] BTR 332-357; Picciotto “Constructing compliance, game-playing tax law and the regulatory state” (2007) *Law and Policy*, 29 p 11.

¹¹ HMRC, *Principles-based approach to financial products avoidance: a consultation document* [2007].

¹² At least it is not all written down in the same place.

¹³ Barnett, *Constitutional and Administrative Law* (6th ed) p. 155.

¹⁴ Dicey, *Introduction to the study of law of the constitution* (1885), HLA Hart, *The concept of law* (1961).

¹⁵ The War Damage Act 1965.

¹⁶ The Continental Shelf Act 1964.

¹⁷ Stephens, *The Science of Ethics* (1882) p 81.

¹⁸ *IR C v Ayrshire Employers Mutual Assurance Association* (1946) 27 TC 331.

More recently, the theory of the sovereignty of the UK parliament has been placed under limitations through membership of the European Union and the entry into force of the Human Rights Act, each of which afford a basis of challenge to domestic legislation. So far, however, these limitations have not been called upon in the name of indeterminacy.

So, in sum, it seems most unlikely that the UK courts would deny the effect of legislation through indeterminacy.

3. The consequences of legal indeterminacy in tax matters

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

3.1 The final word in a case of legal indeterminacy lies with the courts. Obviously in a legal system with a strong tradition of *stare decisis*, previous court decisions are very important in the interpretation of terms used in legislation and lower courts are bound by the decisions of higher courts.

3.2 The constitutional basis would be found in the principle of the separation of powers, with the judiciary charged with the function of ensuring the executive act in accordance with their legal powers and obligations.

3.3 As well as case law, HMRC makes available to the public a considerable amount of its internal practice guidance available and frequently publishes statements as to how it interprets legislation. These statements are not binding on taxpayers, who can challenge them in court if they disagree with HMRC's interpretation, but they provide extremely

useful guidance for the taxpayers. The extent to which such *general* guidelines issued by HMRC are binding on HMRC is perhaps not entirely settled but it seems unlikely that they are.¹⁹ Authoritative decisions on indeterminacy can only be made by courts or subsequent legislation.

3.4 In the context of direct tax, statutory rulings are only available in a limited number of cases, usually where there is some kind of anti-avoidance motive test attached to a relief or benefit in the legislation.²⁰ However, HMRC is prepared give non-statutory clearances to business taxpayers where there is “demonstrable material uncertainty about the tax consequences of transactions affecting their business.”²¹ It will not advise on tax avoidance schemes.

In relation to non-business taxpayers, non-statutory clearances will only be given in limited areas.²²

Both statutory and non-statutory clearances are binding on HMRC in response to a specific request by a taxpayer who has made full disclosure, on the basis of legitimate expectation. If it turns out that the advice is wrong in law, the clearance will be withdrawn, although not with retrospective effect.

4. Relationship between the Tax Administration and the Domestic Tax Courts:

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

¹⁹ *R (on the application of Gaines Cooper) v HMRC* .

²⁰ See the list at <http://www.hmrc.gov.uk/cap/statutory-clearances.pdf>.

²¹ HMRC website <http://www.hmrc.gov.uk/cap/links-dec07.htm>.

²² HMRC website Code of Practice 10 at <http://www.hmrc.gov.uk/pdfs/cop10.htm>. These are

- the interpretation of legislation passed in the last four Finance Acts
- the application of double taxation agreements
- whether someone is employed or self employed
- Statements of Practice and extra-statutory concessions
- other areas concerning matters of major public interest in an industry or in the financial sector.

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

4.6. Does your Tax Administration circumvent your domestic courts' case law?

4.1 The UK courts, where requested to do so by the taxpayer, control application of the law.

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

No, except to the extent that they will hold them to them in appropriate circumstances (see 3.4.)

4.3 Yes. As far as I am aware, in general HMRC apply the law as it understands it, whether deriving from legislation or decisions of domestic courts or the ECJ.

It has often sought to change the effect of a domestic court's decision through legislation, but until it is so changed, it respects the court's decision. There may be areas at the margins where HMRC can be criticized for taking a slightly biased interpretation of a decision, but I don't believe that HMRC disregard of the law is viewed as a major issue in the UK.

4.4 The term "reciprocal observation" is not one which would be used in the UK. Formally, the courts and HMRC are entirely independent. Inevitably, there is some degree of overlap. For example, past the first appeal stage, it is often HMRC who choose to litigate. As a "repeat player" with significant resources, they are able to litigate strategically to try to get decisions which are favourable to them. This means that the courts' agenda is chosen by HMRC to an extent, although it is not the case that the courts are influenced by the outcome HMRC desires.

4.5 Yes, unless and until the decision is overturned on appeal. Permission is required for appeal to the House of Lords, the highest court in the UK, and is only granted where the point is sufficiently difficult or important.

4.6 As part of their overall litigation strategy, in the event that they lose a case, HMRC can and sometimes does pursue litigation in similar cases in order to achieve a more favourable result, but the extent to which they are able to do this successfully is limited

by the doctrine of stare decisis. Alternatively, different arguments could be made in order to tackle similar situations, but this would not strictly be described as circumvention. Furthermore, HMRC sometimes seek to reverse the impact of court decisions (usually prospectively) by legislation.

5. Relationship between different legal sources (legal pluralism):

5.1. How do your Parliament, Tax Administration and Courts react before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)?

Section 2 of the European Communities Act 1972 provides for the recognition of all directly enforceable Community law “passed and to be passed”. There is a tension in the UK between the doctrine of parliamentary sovereignty (which includes the principle that no parliament can bind a subsequent parliament) and the latter part of this section and this tension was to an extent resolved by the judicial invention of a fiction, the each piece of legislation is deemed to contain a provision which states that the UK legislation is without prejudice to EU legislation.²³ Technically, the UK Parliament could expressly exclude EU legislation, but it is unlikely in the extreme to do so. However, while the courts give primacy to EC law, this is not true to the same extent in relation to Parliament or the tax authorities, especially where the law is contained in the EU Treaty and is open ended in texture. There are still pockets of UK law which have to be regarded potentially contrary to the jurisprudence of the ECJ in the context of the Treaty freedoms but which continue to be applied by the HMRC and which are not amended by legislation.

In relation to international treaties,²⁴ the UK is a dualist state and these are only effective once they have been incorporated directly into UK law by statute or statutory instrument. Once this has been done, the courts will apply international law in the same way as other UK legislation. Directly effective EU law will also override both UK treaties incorporated into UK law.

²³ *R v Secretary of State v Factortame (No 2)* [1990] 3 WLR 818

²⁴ The UI will apply international customary law without incorporation, but I am unaware of any such tax law.

The courts will *apply* secondary UK legislation (which normally fills in the flesh of the bare bones of legislation) but they will also consider the legality of such legislation under domestic law, which they do not do in relation to primary legislation.

5.2. How is the hierarchy of different tax legal sources recognized by the constitution and the different domestic powers (Parliament, Tax Administration and Courts)?

Again, under the doctrine of parliamentary sovereignty, legislation is very much at the top of the hierarchy.

5.3. Does the taxpayer have access to different legal remedies that assure him/her effective protection of his/her rights granted by tax treaties, EC law and domestic law, or are those legal remedies in fact limited to protection of rights granted by domestic law?

As noted above, rights in treaties may only be relief upon if that treaty is incorporated into UK law. In relation to EU law, the courts give full recognition to the primacy of directly applicable EU law.

II

Please answer the following questionnaire, which aims at confirming your answers in I

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Parliament control tax authorities in an efficient way? yes - no

Yes, on the whole

1.2. Do tax authorities influence tax legislation to a major degree? yes - no

Yes, HMRC have a major input to tax legislation

1.3. Does your Parliament a) usually accept the bills provided by tax authorities?

Yes

b) refuse the bills provided by tax authorities?

Not in the last 100 years or so!

c) improve the bills provided by tax authorities? Sometimes, but only to a limited extent.

1.4. Is your Parliament able to discuss the bills thoroughly? No

1.5. Is there sufficient knowledge of tax law in Parliament? No

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? Often, despite detailed drafting.

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? Often – their general advice is usually clear and helpful. (They don't have legal "competence" in the sense of being able to bind the taxpayer though.)

2. Relationship between the Parliament and the Domestic Tax Courts

2.1. Are there independent (Tax) Courts in your country entitled to control legislation?

The courts do not control legislation – they apply it unless it is in breach of EC or human rights law.

2.2. If "yes", do they control tax legislation:

If at all, ex post

2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards?

Not applicable

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law?

It may in the case of law contrary to directly effectively EU law. In a situation in which an individual's human rights under the Human Rights Act are breached, if the court cannot construe the domestic legislation so as to give effect to the rights, the court may make a declaration of incompatibility. It cannot override legislation.

3. Relationship between the Tax Administration and the Domestic Tax Courts

3. 1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration?

Yes

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? No.

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)?

Often.

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? Very often

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision? - sometimes -

b) Does it try in another similar case to convince the Court to decide in a different way?
sometimes

c) Does it try to influence the Parliament to change the law? sometimes

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases?

never

e) Does it try “to hide” such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? never – judgments are published independently of HMRC.

If possible, please add statistics to the answers!

I am unaware of such statistics.