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Article 12

United States of America v. Harden, [1963] S.C.R. 366; 63 D.T.C. 1276; (1963) 41 D.L.R. (2d) 721; (1963) 44 W.W.R. 630

H. L. E. W.

United States of America v. Harden, [1963] S.C.R. 366; 63 D.T.C. 1276; (1963) 41 D.L.R. (2d) 721; (1963) 44 W.W.R. 630.

In this decision, the Supreme Court of Canada speaking through Cartwright J. restated the well-established principle that one country does not enforce the revenue laws of another unless there is a specific agreement to the contrary. It is submitted that this decision extends the principle so that it now reads that one country will not enforce, either *directly* or *indirectly,* the revenue judgments of another.

The appellant government was attempting to enforce a judgment of an American district court for the recovery of over $600,000 in income taxes against the respondent who had since become a resident of the province of British Columbia. The case was brought to trial in British Columbia[1] and an appeal was taken by the appellant to the British Columbia Court of Appeal.[2] The Supreme Court of Canada followed the two preceding courts and dismissed the appellant's claim.

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3 [1945] S.C.R. 62.

4 On this subject see P. A. Crépeau, *De La Responsabilité Civile Extra-Contractuelle En Droit International Privé Québecois,* (1961) 39 Can. Bar Rev. 3.

1 (1961) 35 W.W.R. 654.

2 (1962) 40 W.W.R. 428.

The appellants based their claim on three arguments: first, that although Canada would not recognize a claim for taxes by a foreign government it would enforce a judgment of a foreign court based on the claim; secondly, that Canada would enforce a foreign agreement for valuable consideration to pay an amount in satisfaction of the claim for taxes; and finally, that the trial judge erred in setting aside the writ without allowing the action to proceed to trial.

Cartwright, J. who wrote the judgment for the Supreme Court of Canada held that all the contentions of the appellant were invalid. The learned judge further held that:

> . . . the application of the rule that foreign states cannot directly or indirectly enforce their tax claims in our courts is not affected by the taking of a judgment in the foreign state, and that the liability to pay tax does not become converted into a contractual obligation . . .[3]

The authority given for these statements is the decision of Lord Somervell of Harrow in the case of *Government of India, Ministry of Finance (Revenue Division) v. Taylor*,[4] a decision of the House of Lords.

It is interesting to note that in the *Taylor* case (supra) the appellant was claiming for taxes due, not on the basis of a foreign judgment, but simply as a creditor in the voluntary liquidation of a company which was registered in the United Kingdom but which had previously carried on business in India. Secondly, in the judgments of both Lord Keith of Avonholm and Lord Somervell of Harrow, heavy emphasis was placed on the previously unreported decision of Kingsmill Moore J. in the case of *Peter Buchanan Ld. and Macharg v. McVey*[5] in the High Court of Justice of Eire.

This latter case, like the *Taylor* case, involved a *direct* claim by the Scottish government against the defendant for taxes due under the Finance Act of 1943. Kingsmill Moore J. dealt exhaustively with the applicable law on the enforcement of foreign revenue legislation and then dismissed the claim of the Scottish revenue authorities. This decision was subsequently approved by the Supreme Court of Eire.[7] In his judgment, Kingsmill Moore J. pointed out that:

> Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaintiff that must be considered but the substance of the right sought to be enforced . . . I cannot see why the same rule should not prevail where it appears that the enforcement of a right claimed would indirectly involve the execution of the revenue law of another state. . .[6]

It would appear that this concept of the enforceability of foreign revenue legislation was adopted without reserve by Cartwright J. and the Supreme Court of Canada in the case under review. However, it should be remembered that both in the *Buchanan* case and the *Taylor*

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[3] [1963] S.C.R. 366 at p. 371.
[4] [1955] A.C. 491 at pp. 514 and 515.
[5] Reported as a note in [1955] A.C. 516.
[6] *Ibid.*, at p. 527.
[7] *Ibid.*, at p. 530.

case, the claims sought to be enforced were *direct* claims by foreign governments for revenue, whereas in the case under review, the claim was *indirect* in the sense that it was based on a foreign judgment.

Viscount Simonds in his decision in the *Taylor* case pointed out, in reference to the rule of not recognizing foreign revenue legislation that:

> . . . It is possible that the . . . [principle] . . . might, if applied without discrimination, lead to too wide an application of the rule; for as Lord Tomlin pointed out in *In re Visser*[8] there may be cases in which our courts, although they do not enforce foreign revenue law, are bound to recognize some of the consequences of that law. . .[9]

Cartwright J. obviously preferred to accept the dictum of Kingsmill Moore J. instead of the comments of both Viscount Simonds and Lord Tomlin because he stated that it was the duty of our courts to go behind the form of the foreign judgment and determine the substance of the claim on which it is based.[10]

In conclusion, it is submitted that this decision which extends an old principle should be viewed with caution. It is further submitted that the reasons for the basic principle itself may be open to question in the future because the effect of the principle is to permit tax evasion by those people who are astute enough to flee a jurisdiction with their property before the revenue officials of that jurisdiction apprehend them or seize their property. Thus it would appear that the extension of the principle of not recognizing foreign revenue judgments, either directly or indirectly, is inconsistent with present efforts to encourage international co-operation in the field of taxation in particular and with modern views in the area of conflict of laws generally.

H.L.E.W.