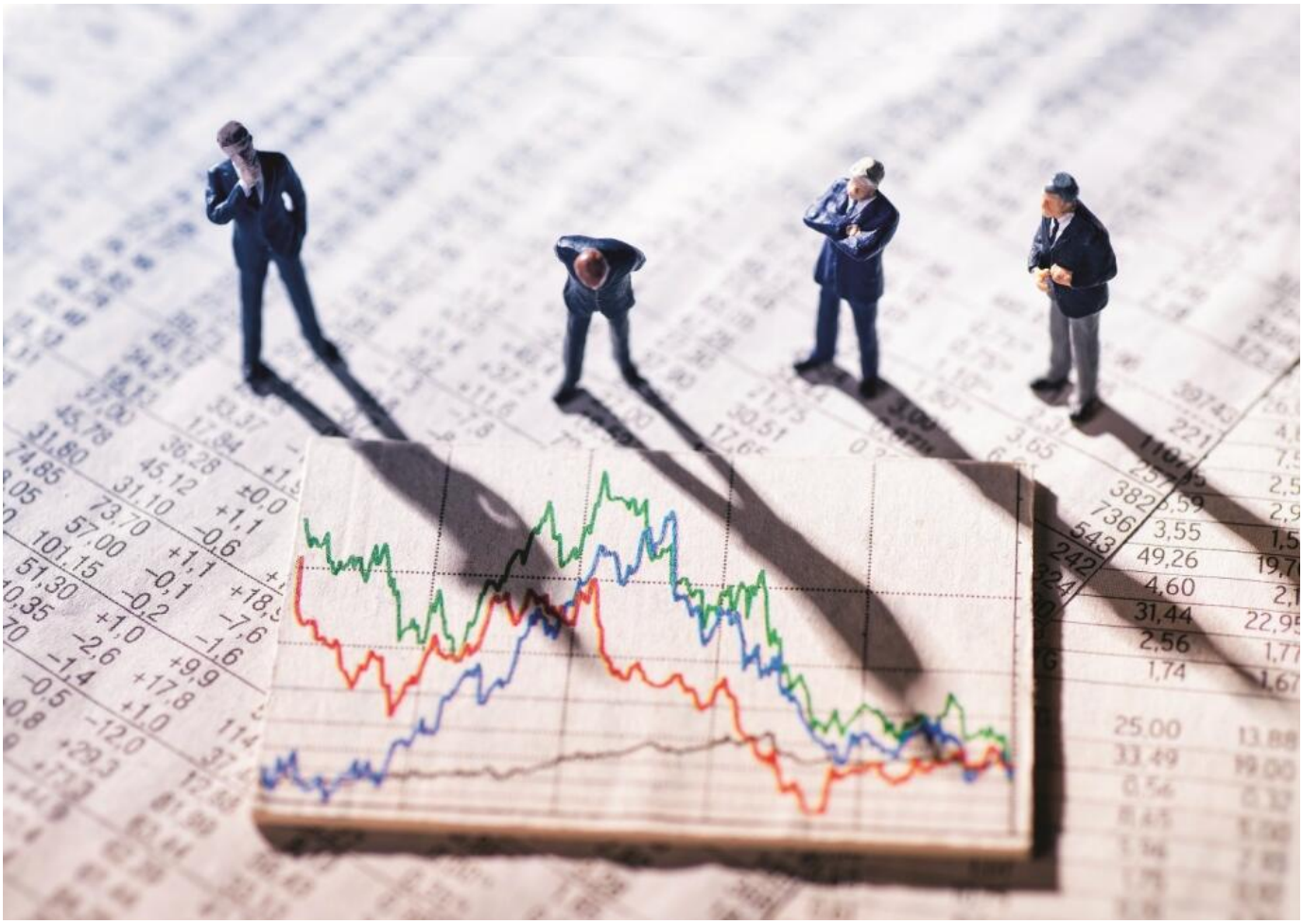
Fair exchange?

Management of taxes



01 April 2019

Harriet Brown considers HMRC's information powers in an international context

Key Points

What is the issue?

HMRC have extensive information powers. These are contained primarily within Finance Act 2008, Schedule 36. These information powers are important for a

number of reasons, not least because they allow HMRC to obtain information that facilitates tax collection within the UK. These allow HMRC to obtain information not only from taxpayers but also from third parties.

What does it mean to me?

HMRC's information powers are becoming increasingly important in the context of the UK's international agreements touching upon exchange of information. Their scope is also open to challenge.

What can I take away?

The recent case of *Jimenez* [2017] EWCA 2585 (Admin) is a clear example of how these domestic provisions are difficult to apply in a more international context.

HMRC have extensive information powers. These are contained primarily within Finance Act 2008, Schedule 36. These information powers are important for a number of reasons, not least because they allow HMRC to obtain information that facilitates tax collection within the UK. These allow HMRC to obtain information not only from taxpayers but also from third parties. They are discussed in 'On or off the record?' by George Gillham and Hartley Foster, *Tax Adviser*, 1 May 2017.

However, they are becoming increasingly important in the context of the UK's international agreements touching upon exchange of information. Their scope is also open to challenge. The recent case of *Jimenez* [2017] EWCA 2585 (Admin) is a clear example of how these domestic provisions are difficult to apply in a more international context.

Introduction

HMRC's information powers are increasingly relevant in an international context. This is because of two separate, though interlinked, concepts. First, in the past states have been unwilling to interfere in the tax collection of other states. This has been enshrined in the UK (and in most other countries in the world) in the principle in *Government of India, Ministry of Finance v Taylor* [1955] AC 491 which states that '… a foreign government cannot come here—nor will the courts of other countries allow our Government to go there — and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he

belongs'. There has over time been much argument as to the scope of this rule. Does it prevent a foreign revenue authority proving in a bankruptcy where it is a minor creditor or bringing ancillary proceedings in order to facilitate tax collection?

This article examines a recent challenge to HMRC's exercise of its Schedule 36 information powers in relation to a person resident outside the UK, in part on the basis that those powers infringe this common law principle.

The second relevant concept is the changing international approach to collection of tax internationally. The starkest examples of this are the Common Reporting Standard and FATCA – both of which provide frameworks for exchange of information automatically between jurisdictions that are party to the agreements. (Most developed countries already participate in, or are committed to participating in CRS. The USA is a notable exception, but has acknowledged the need to achieve equivalent levels of exchange within the FATCA framework.)

Neither FATCA nor CRS allow collection of tax using the courts of another jurisdiction, but they do facilitate tax collection from non-residents by provision of information which could be argued to come within the principle in *Government of India*. Similarly, tax information exchange agreements allow for exchange of information that HMRC must provide (and obtain that information if it does not already have it) on request from a third party.

Thus, Schedule 36 – which has been updated regularly since its inception, in no small part because of the need to be able to cooperate with revenue authorities of other jurisdictions – is very important, particularly as to how it applies in the context of these international provisions.

Do information powers infringe the principle in Government of India?

Jimenez addressed a situation where HMRC had – according to the High Court (the matter was heard by the Court of Appeal at the end of 2018 but a decision is awaited) – exceeded its jurisdiction by giving a notice under Schedule 36 to the claimant in Dubai (a Schedule 36 notice is a formal demand for certain information and/or documents needed for HMRC to check that person's tax position, or the tax position of a third party). Mr Jimenez challenged the decision to issue an information notice to him by judicial review.

Government of India is relevant because Schedule 36 makes no mention of its territorial limits. In this respect the court quoted *Clark (Insp of Taxes) v Oceanic Contractors Inc* ([1983] 2 AC 130) where it was explained by Lord Scarman that:

> 'It is well-settled law that English legislation is primarily territorial … The principle was recognised and formulated (admittedly in language which now has echoes of the world which has departed) by the Court of Appeal in [Re Sawers, ex p Blain (1879) 12 Ch D 522, [1874–80] All ER Rep 708]...'

Put into the language of today, the general principle being there stated is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming into the United Kingdom, whether for a short or long time, have made themselves subject to British jurisdiction. Two points would seem to be clear: first, that the principle is a rule of construction only…

The principle in *Government of India* is therefore an important restriction on the interpretation and application of UK legislation. In the same case Lord Wilberforce explained:

> '[The territorial principle], which is really a rule of construction of statutes expressed in general terms and which, as James LJ said a "broad principle", requires an inquiry to be made as to the persons with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?' [Often referred to as the *Masri* principle. The general principles at play in *Jimenez* can be summarised as:
>
> - the principle in *Government of India* provides an important limit to the principle of statutory construction which provides that, unless there is clear indication to the contrary, an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters;
> - the *Masri* principle is one of statutory construction — in essence unless a contrary intention appears a legislature is presumed, rebuttably, only to have legislated a jurisdiction which it can enforce; and
> - the application of the *Masri* principle is likely to result in variable results dependent on the facts of the case and the '"grasp and intendment" of the

legislation in question.'

In *Jimenez*, HMRC had asserted that the legislation in question gave them a right to serve notice on Mr Jimenez in Dubai simply because he owed tax in the UK – was a 'taxpayer' and it did not matter where he was, or whether or not he was resident in the UK or elsewhere only. In finding that HMRC had exceeded their powers Charles J said (at para 40):

> 'I accept the submission of the claimant that the question whether a taxpayer notice can be given to a British national who is resident or living abroad must be assessed by considering Sch 36 as a whole and not by isolating taxpayer notices. This accords with the proper approach to the interpretation and application of legislation because it addresses the territorial limits on the giving of taxpayer notices in their statutory context (see, for example, para [55] of Derrin [2016] STC 1018). It does not preclude a different conclusion being reached in respect of taxpayer notices and other information notices, but it does require the justification of such a conclusion as a matter of statutory construction.'

What does this mean for you?

The principle in *Government of India v Taylor* has long been an important one protecting taxpayers from action by foreign governments in their jurisdiction of residence, *inter alia*. As can be seen from *Jimenez*, and indeed *Derrin* this principle is being restricted by legislation and statutory interpretation (although in *Jimenez*, on its facts, the High Court found for the taxpayer). Of course, this is a permissible restriction; common law principles can be altered – or completely removed – by subsequent legislation.

It is no longer straightforward to say that requests/demands from foreign revenue authorities are unenforceable. Many – such as requests for information – are likely to be confirmed by the English courts not to infringe the principle. This means that it cannot be relied upon as a basis for failure to comply with such a request or demand. Similarly, legislation, particularly that originating in international treaties, simply removes some of the reach of the principle.

A good example is the EU directives on mutual assistance in the field of direct taxation. These directives – and the UK legislation arising from them – mean that,

inter alia, EU states can (at least at present!) ask HMRC to collect tax on their behalf. The principle simply should not apply in such circumstances because of the legislative ‘override’.

Many double tax treaties contain provisions for cooperation, and of course both FATCA and CRS require an exchange of information which, absent their provisions, could be said to infringe on the principle. The significant ‘whittling down’ of the range of the provision by both the courts through application of statutory interpretation, and legislation are indicative of the current global trend for cooperation in tax matters. This is inevitable – and should be welcome – in the light of increasing globalisation.

However, it is a matter that advisers should treat with care. When advising on the possibility of enforcement or cooperation it is essential to consider not only domestic provisions but also any in specific treaties with the jurisdiction in question. These might include double tax treaties or tax information exchange agreements. In relation to information exchange, it is also important to be aware of the provisions of – in particular – CRS which will mean that HMRC will have information from other jurisdictions and vice versa. In short, this is an additional layer of complication when advising the internationally mobile and it is no longer the case (if ever it was) that obligations and information in other jurisdictions can be largely ignored by UK tax advisers.