THE REVENUE RULE: A COMMON LAW DOCTRINE FOR THE TWENTY-FIRST CENTURY

BRENDA MALLINAK*

The revenue rule, a common law doctrine with origins in the eighteenth century, is a battleground in the twenty-first century as criminal and civil courts address liability for acts of smuggling that contravene revenue laws of foreign governments. In its modern form the revenue rule generally allows courts to decline entertaining suits or enforcing foreign tax judgments or foreign revenue laws; but in the context of the present litigation, the scope of the rule is far from certain. This Article presents the evolution of the common law rule in English courts and its adaptation by American courts and examines the application of the revenue rule in the twentieth century by common law jurisdictions. The Article traces the revenue rule from its beginnings as a judicial refusal to allow private parties to negate their contracts on the basis of a violation of foreign laws through its evolution into a judicial refusal to allow a foreign government to enforce its tax laws and raise revenues through the domestic judiciary. Additionally, the Article detours shortly into the revenue rule's place in the relationships between sister states in the United States. Finally, the Article analyzes a criminal case in which the United States Supreme Court recently considered the scope of the revenue rule and a civil case remanded to the Second Circuit by the Supreme Court in light of the ruling in the criminal case.

Having established the viability of the doctrine, the Article addresses the use of treaties to circumvent the rule. The Article concludes that treaties are underutilized as a mechanism to allow collection of tax judgments originating in one jurisdiction when enforcement is sought in a second jurisdiction, and that the reluctance demonstrated by the U.S. Senate and the Executive Branch to enter

---

* B.A., M.S.M., Case Western Reserve University; J.D. University of Richmond School of Law; LL.M., Georgetown University Law Center.

treaty agreements to facilitate cross-border tax collection precludes judicial interference.

The revenue rule is one basis of defense in criminal wire fraud prosecutions and civil Racketeer Influenced and Corrupt Organizations (RICO) actions. These actions and the lack of treaty collection procedures have resulted in a debate within the legal community regarding the foundation of the doctrine and its continued viability. This Article presents the main arguments on both sides of the debate. Finally, the Article concludes that the revenue rule has an important role in the realm of international relations and should not be discarded merely because it causes some untoward results in the smuggling cases. The Article discusses other methods of tax collection and why their use relieves courts of the necessity for examining the revenue laws of foreign nations to enforce foreign tax judgments or to assist in the collection of taxes.

I. FROM WHENCE THE DOCTRINE COMES

The earliest reported case referencing the revenue rule was decided in 1729.[1] In *Attorney General v. Lutwydge*, import duties were sought on tobacco sold at Dumfries, Scotland in an English court.[2] The Attorney General argued that "the question now did not depend upon the residence of the parties, but upon the nature of the matter for which the bond was given."[3] Lord Chief Baron Pengelly, in agreement with the Attorney General's description of the action, held that "[b]efore the union this court had no jurisdiction of the revenues in Scotland, and therefore the question is, whether the statute is not exclusive of us, since it is giving a farther jurisdiction to them who had it exclusive of us before."[4] The English court was unwilling to enforce a bond executed in Scotland for Scottish duties on tobacco, because the obligation was a foreign tax obligation.[5]

During the remainder of the eighteenth century, English courts addressed the applicability of the laws of foreign nations with respect to the enforcement of commercial transactions. In *Boucher v. Law-*

1. Att'y Gen. v. Lutwydge, (1729) 145 Eng. Rep. 674 (Ex. Div.).

2. *Id.*

3. *Id.*

4. *Id.* Scotland and England were separate countries until the Act of Union constitutionally united Scotland and England into the Kingdom of Great Britain in 1707. NORMAN DAVIES, THE ISLES, A HISTORY 624-27 (Oxford Univ. Press 1999).

5. *Id.*

son[6], Justice Lee, in his concurring opinion, stated: "[T]he right of an English subject cannot be altered by the general law of any other country."[7] Lawson, the ship owner, hired Fletcher, to serve as master of his ship. Fletcher accepted a parcel of Portuguese gold from Boucher for delivery in London.[8] Portugal's law proscribed the export of gold.[9] Boucher, who was ready to pay the freight charges, sought delivery from Lawson, who failed to deliver.[10] Lawson pled he did not possess the gold, and that it was "usual when any gold is exported from Portugal to this kingdom, for the master of the vessel to take the whole freight to his own use, without accounting for any part of it to his owners."[11] In other words, Lawson claimed that Fletcher had made off with the gold.

As a defense against the claim of master/servant liability, Lawson offered the illegality of the export of gold under Portuguese law.[12] Lord Chief Justice Hardwicke explained that "trade prohibited by the laws of England is of material consequence, and it is said that the parties in that case shall receive no relief, as they are both *participes criminis*."[13] But upon consideration of a foreign law, Lord Hardwicke posited that "goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this kingdom which would be of very bad consequence."[14] Because the law was Portuguese, Lawson could not raise it in his defense before an English court. Lord Hardwicke concluded: "[I]t does not seem that the unlawfulness of this trade in Portugal, since it is lawful in England, will have any effect on the determination of this case."[15] Thus, the enforcement of a commercial contract was separated from consideration of foreign laws criminalizing the subject of the contract.

Lord Mansfield's famous utterance, "no country ever takes notice of the revenue laws of another," occurred in an action in assump-

---

6. (1734) 95 Eng. Rep. 55, 55 (K.B.).
7. *Id.* at 56.
8. *Id.* at 53.
9. *Id.*
10. *Id.*
11. *Id.*
12. (1734) 95 Eng. Rep. 55, 55 (K.B.).
13. *Id.* at 55.
14. *Id.* at 55-56.
15. *Id.* at 56.

sit to enforce payment on a contract for the delivery of tea.[16] Holman contracted to deliver tea to Johnson in Dunkirk, France, and Johnson intended to smuggle the tea into England in violation of England's tea tax.[17] Johnson, without proof that Holman and his partner were party to the smuggling scheme, offered as a defense the illegality of smuggling the tea into England.[18] Lord Mansfield, under England's choice of law rule, applied the law of Dunkirk and found a valid contract complete upon delivery.[19] Lord Mansfield noted that the law of contract in Dunkirk would not take notice of England's revenue law regarding the tea, and, with the concurrence of three other judges, discharged the rule for a new trial.[20] Domestic revenue laws were not sufficient to void a contract construed under foreign commercial law. An English court, applying French law to a contract case, ignored an English tax provision to enforce the contract.

Again in 1779, Lord Mansfield applied the revenue rule in *Planche v. Fletcher*.[21] Planche sued an insurance company for failure to pay a claim upon seizure and condemnation of goods shipped from England to France.[22] Because French customs duties were quite high on goods imported from England, shipping documents indicated that the ships stopped in Ostend before sailing to France, thus avoiding part of the French duties.[23] Fletcher claimed fraud on the underwriters, because the ship was intended to go only from London to Nantz, without stopping in Ostend.[24] Lord Mansfield found no fraud since the practice "in this case was proved to be the constant course of the trade, and notoriously so to everybody."[25] He further stated that "[o]ne nation does not take notice of the revenue laws of another."[26] Yet, the decisions in these cases lacked supporting rationale and simply offered the proposition that revenue laws were not to be considered.

---

16. Holman v. Johnson, (1775) 98 Eng. Rep. 1120, 1121 (K.B.).
17. *Id.* at 1120.
18. *Id.*
19. *Id.* at 1121.
20. *Id.* at 1122.
21. (1779) 99 Eng. Rep. 164, 164 (K.B.).
22. *Id.*
23. *Id.* at 164-65.
24. *Id.* at 164.
25. *Id.* at 165.
26. *Id.*

Although not usually cited as an example of one of the first appearances of the revenue rule, *Lutwydge* most closely annunciates the modern version of the rule that one nation does not enforce a revenue judgment of another nation.[27] The other three cases discount both foreign and domestic revenue laws in determining whether a plaintiff is entitled to have his commercial contract enforced despite some taint of illegality. A concern for the vitality of trade and the certainty of contractual trade agreements appears to outweigh the English courts' concern with the enforcement of revenue laws. That the subject of these cases are tea that is intended to be smuggled, illegally exported gold, and false shipping documents is of particular interest in the twenty-first century when the smuggling of cigarettes and alcohol gives rise to criminal and civil actions in U.S. courts and the use of the revenue rule as a defense.[28] The scope of the revenue rule is broadest at this juncture, and stands for both the proposition that the domestic or foreign revenue laws of a state will not be allowed to interfere with commercial obligations and domestic courts will not enforce the collection of foreign taxes. This Article next examines how courts continue to employ the revenue rule and its evolution in the United States and other common law jurisdictions.

II. THE REVENUE RULE IN EARLY AMERICAN JURISPRUDENCE

A. Early Cases

The earliest consideration of the revenue rule in the United States occured in state court in 1806. In *Ludlow v. Van Rensselaer*, the Supreme Court of New York recognized the revenue rule.[29] Ludlow sought enforcement in an action of assumpsit of a promissory note issued by Van Rensselaer in Paris.[30] The note did not bear a stamp required under French law. The maker of the note, Van Rensselaer, resided in New York, and the note was to be paid in New York.[31] The court, relying in part on *Holman v. Johnson*, held, "[a]s we do not sit here to enforce the revenue laws of other countries, it is perfectly immaterial, in a suit before us, whether or not the note was

27. (1729) 145 Eng. Rep. 674, 674 (Ex. Div.).
28. *See* discussion *infra* Part V.
29. 1 Johns. 93, 94 (N.Y. 1806).
30. *Id.* at 93.
31. *Id.*

stamped according to the laws of *France*."[32] The New York court, like the English courts, was unwilling to allow a party to default on an agreement or contract based on a defense that a foreign revenue provision was violated.

The revenue rule impacted court decisions in the United States when individual states sought enforcement of tax levies against sister states. State courts adopted the revenue rule as part of the common law heritage inherited from England, and generally were reluctant to involve themselves in the enforcement or evaluation of sister state tax laws. Maryland and the City of Baltimore sought enforcement of a judgment entered by the highest court in Maryland from a New York resident who demurred and invoked the revenue rule.[33] The New York court, after analyzing taxes as contractual obligations, held that "it is a principle universally recognized that the revenue laws of one country have no force in another."[34] The demurrers were sustained.[35]

An attempt to collect inheritance taxes from non-residents fared no better.[36] A resident of Colorado died in New York, and his will was probated in New York.[37] Colorado had no notice of the proceedings and no provision was made to pay Colorado transfer taxes.[38] Colorado asserted a tax liability against the executrix and the beneficiaries.[39] The New York court first addressed the constitutional due process implications of Colorado seeking to extract a tax on property located outside its borders.[40] The New York court then admonished Colorado that it is a "well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another."[41] The court applied a rule crafted to address ju-

---

32. *Id.* at 95.

33. Maryland v. Turner, 132 N.Y 173, 174 (1911).

34. *Id.* at 176 (citing Marshall v. Sherman, 42 N.E. 419 (N.Y. 1895)).

35. *Id.*; *but see* Henry v. Sargeant, 13 N.H. 321, 332-33 (1843) (recognizing the revenue rule but accepting jurisdiction over a case seeking damages from the assessors and selectmen of the town of Chester, Vermont upon the assertion that the town incorrectly computed the Plaintiff's property tax while he resided there and imprisoned him for non-payment. The court awarded damages in the amount of the taxes).

36. Colorado v. Harbeck, 133 N.E. 357, 360 (N.Y. 1921).

37. *Id.* at 358.

38. *Id.*

39. *Id.*

40. *Id.* at 358-60.

41. *Id.* at 360.

dicial consideration of foreign revenue laws, and applied it to the relationships between domestic states to disallow a state court from enforcing tax collection efforts of a state seeking taxes from the first state's residents.

Court cases decided through the 1920s demonstrate an attitude in the judiciary that a state's ability and decision to tax its residents was a matter left up to each state. Yet, the courts, generally applied the revenue rule, which originally addressed foreign taxes, to excuse enforcement of cross-border tax obligations between states. Against this background of state court judgments, the Second Circuit addressed the effort by one state to collect taxes in a second state, and for the first time a justification for the revenue rule appeared.[42] Shortly thereafter, the United States Supreme Court issued an opinion that limits the revenue rule in the interstate context through the application of a constitutional requirement.[43] First, the Article examines the Second Circuit case setting forth the rationale for the revenue rule. The Article then presents the Supreme Court's abrogation of the revenue rule between sister states.

B. Learned Hand in *Moore v. Mitchell*[44]

Moore, the treasurer of Grant County, Indiana, brought suit in federal court in New York seeking payment of a tax liability from executors of a taxpayer's will.[45] Indiana assessed taxes for a twenty-three year period of residence prior to the taxpayer's death, which occurred while he was resident in another state.[46] Judge Manton, in affirming the dismissal of the action, found the effort by Indiana to collect taxes in New York "repugnant to the settled principles of private international law, which preclude one state from acting as a collector of taxes for a sister state, and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another."[47] Manton stated that the taxing power of a state is limited by the Fourteenth Amendment of the Constitution and held, "Indiana's political subdivision, Grant County, is limited in the payment of taxes to property found within its boundaries."[48]

---

42. Moore v. Mitchell, 30 F.2d 600, 600 (2d Cir. 1929).
43. Milwaukee County v. M.E. White Co., 296 U.S. 268, 268 (1935).
44. *Moore*, 30 F.2d at 600.
45. *Id.* at 601.
46. *Id.*
47. *Id.* at 602.
48. *Id.* (citing Colorado v. Harbeck, 232 N.Y. 71 (1921)).

Circuit Judge Learned Hand, in a concurring opinion, expressed for the first time a rationale for the revenue rule that is cited by both domestic and foreign courts:

> Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are [e]ntrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.[49]

The English cases and the early American cases that apply the revenue rule do not offer a justification for ignoring the revenue laws of other jurisdictions beyond a desire not to interfere with commercial transactions and a reliance on the common law doctrine. Judge Hand presented the first attempt to establish the rationale behind the doctrine. First, Judge Hand noted the separation of powers problem inherent in the court's examination of the revenue statute of a foreign state and asserted a court was not the proper government entity to review the statutes of a foreign state.[50] Second, the court would have to reach a decision about the validity of the foreign law, and thus run the risk of declaring the revenue law of another state unenforceable within the jurisdiction of the court. This would violate the concept of comity. Although the decision in *Moore* did not survive the Supreme Court's decision requiring states to extend full faith and credit to sister state tax judgments, Hand's reasoning is often quoted by domestic and foreign courts to support application of the revenue rule in the international context.[51]

---

49. *Moore*, 30 F.2d at 604 (Hand, Cir. J., concurring).

50. The power to carry on foreign affairs is vested by the United States Constitution in the executive and legislative branches. U.S. CONST. art. II, § 2, cl. 2.

51. *See* discussion *infra* Part II.C and Part III.

C. Full Faith and Credit: *Milwaukee County v. M. E. White Co.*[52]

On certificate from the United States Circuit Court of Appeals for the Seventh Circuit, the Supreme Court answered the question presented regarding whether tax judgments of sister states are entitled to Full Faith and Credit,[53] and whether recovery can be denied in state or federal courts "merely because it is for taxes."[54] Milwaukee County brought suit in federal district court in Illinois to recover under a judgment against M. E. White Company for business license taxes assessed under Wisconsin law.[55] The district court dismissed the cause of action on the ground that the suit was brought to enforce revenue laws of Wisconsin in the district court of Illinois.[56] The decision, however, was narrowed to judgments for taxes:

> For present purposes, we will assume that the courts of one state are not required to entertain a suit to recover taxes levied under the statutes of another, and confine our inquiry to . . . whether they must, nevertheless, give full faith and credit to judgments for such taxes.[57]

It is noteworthy that revenue statutes of sister states are not granted full faith and credit, but rather the decision is specifically addressed to judgments for taxes. Judgments based on tax liabilities are not open to inquiry under this decision except on limited grounds: (1) the court issuing the judgment was without jurisdiction, (2) the judgment debt was previously discharged, (3) the cause of action resulting in judgment for which the state of the forum has not provided a court, and (4) possibly fraud.[58]

This abrogation of the revenue rule in the face of a judgment does not, however, apply to foreign judgments. The purpose of the Full Faith and Credit Clause was to change the status of states as completely independent actors and make the states "integral parts" of one nation.[59] The Supreme Court's abrogation of the revenue rule only after a judgment has been entered in the taxing state may be ex-

---

52. 296 U.S. 268, 268 (1935).

53. U.S. CONST. art. IV, § 1, cl. 1.

54. *M. E. White Co*, 296 U.S. at 279.

55. *Id.* at 269-70.

56. *Id.* at 270.

57. *Id.* at 275.

58. *Id.* at 275-76 (listing cases with holdings that form exceptions to the rule that a state must recognize the judgment of a sister state).

59. *Id.* at 276-77.

plained by the principle of comity articulated by Judge Hand.[60] If the taxing state has procured a judicial judgment, the taxpayer has received due process and the enforcement of the judgment, as opposed to determining the tax that should be due under a sister state's revenue laws. This removes the enforcing court from an obligation to review the taxing state's statute. The enforcing court is not put in the position that concerned Judge Hand of having to sit in judgment of the wisdom or fairness of another state's revenue laws. Rather, the laws are presumed fair once a judgment has been entered by a court. In light of *M.E. White Co.*, it is clear that state court judgments for taxes are enforceable in sister states, and the enforcement of mere levies or assessments rests in the state court's discretion.[61]

The Supreme Court only recently issued an opinion in a criminal case considering the revenue rule and remanded to the Second Circuit a case that required the application of the revenue rule in the context of a suit for taxes, directly or indirectly sought, by a foreign state.[62] To assess the vitality of the revenue rule in the international sphere one must look first to lower court decisions in the United States and, by analogy, other common law jurisdictions to trace its evolution. The Supreme Court considered these domestic and foreign decisions when it determined the applicability of the revenue rule to criminal prosecutions.[63]

III. REVENUE RULE IN THE TWENTIETH CENTURY

A. Common Law Jurisdictions Outside North America

British courts have dealt with the revenue rule in two distinct permutations: the enforcement of contracts when a revenue rule im-

60. *See* Henry v. Sargeant, 13 N.H. 321, 332-33, 338 (1843). A New Hampshire court required the clerk of Chester, Vermont, to testify regarding the preparation of tax lists. The court found the lists improperly prepared and entered a judgment for a tax refund to Henry. This was a clear violation of the revenue rule's purposes as articulated by Hand: the court undertook an analysis of a sister state's taxing authority and taxing procedures and issued a judgment based on a finding of shortcomings therein. *Id.*

61. *See, e.g.*, Oklahoma *ex rel.* Oklahoma Tax Comm'n v. Neely, 282 S.W.2d 150, 151-52 (Ark. 1955); Detroit v. Gould, 146 N.E.2d 61, 63-64 (Ill. 1957); Ohio *ex rel.* Duffy v. Arnett, 234 S.W.2d 722, 726 (Ky. 1950); State *ex rel.* Oklahoma Tax Comm'n v. Rodgers, 193 S.W.2d 919, 927 (Mo. Ct. App. 1946); State Tax Comm'n v. Cord, 404 P.2d 422, 425 (Nev. 1965); Buckley v. Huston, 291 A.2d 129, 131 (N.J. 1972); Nelson v. Minn. Income Tax Div., 429 P.2d 324, 325 (Wyo. 1967).

62. *See* Pasqunatino v. United States, 125 S. Ct. 1766, 1766 (2005); European Cmty. v. RJR Nabisco, 125 S. Ct. 1968, 1968 (2005).

63. *Pasqunatino*, 125 S.Ct. at 1175 and n.7.

pacts the legality of the undertaking, and actions that directly or indirectly seek revenue for a foreign state. The first set of cases falls under the early decisions by Lord Hardwicke and Lord Mansfield that revenue laws are not considered by other states. The British courts did not apply the revenue rule to salvage agreements to sell goods that were intended to be smuggled in contravention of the foreign state's export restrictions or a ban on the goods intended for import.[64] Contracts would be found void as against public policy after the argument raising the revenue rule was discounted since the prohibition and export control laws at issue were not revenue laws.[65] The U.S. ban on alcohol and Indian export law aimed at South Africa did not raise revenues for the legislating countries, and the ruling courts, as a matter of public policy, declined to enforce the contracts underlying illegal acts. Additionally, the cases questioned whether the earlier decisions enforcing contracts despite their illegality under the non-revenue laws of the nations where the transactions occurred—if tried currently—would not result in a different outcome in part because of changing public policy concerns.[66] The dicta from the early cases has survived as a common law doctrine with far reaching ramifications and continued application by the British courts. Yet, as discussed below, the decisions rendered in the early cases establishing the rule have been undermined by the House of Lords.

The British courts preserved the doctrine in the context of revenue laws. The British courts stand firmly behind Lord Mansfield's statement that "no country ever takes notice of the revenue laws of another."[67] An English court construed an action brought by the Municipal Council of Sydney for property assessments as an action "in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue

64. Foster v. Driscoll, [1929] 1 K.B. 470, 515 (A.C. 1928) (appeal taken from Eng.) (British citizens including a member of Parliament entered into a contract to purchase whiskey for import into the United States during prohibition. The Court found the United States law was not a revenue law and the contract void as against public policy); Regazzoni v. Sethia, [1958] A.C. 301, 302 (H.L. 1957) (appeal taken from Eng.) (Sethia agreed to sell Regazonni jute bags for import into South Africa in contravention of Indian export laws. Sethia repudiated the contract and Sethia sued for enforcement. The House of Lords found the contract unenforceable under *Foster v. Driscoll*).

65. *See Foster*, [1929] 1 K.B. at 515; *Regazzoni*, [1958] A.C. at 322.

66. *See Regazzoni*, [1958] A.C. at 320-22; Gov't of India v. Taylor, [1955] A.C. 491, 513-14 (H.L. 1955); *Foster*, [1929] 1 K.B. at 515-16. One of the early cases, for instance, involved smuggling gold from Portugal in violation of Portuguese export laws. Boucher v. Lawson, (1734) 95 Eng. Rep. 55, 55 (K.B.).

67. *Holman*, 98 Eng. Rep. at 1121.

laws of another," despite the statute's provision for a cause of action to pursue the claim under Australian law.[68] The court noted that "it has always been held that an action will not lie outside the confines of the last-mentioned State," and dismissed the appeal to be properly pursued in the courts of Australia.[69] Courts extended the revenue rule to analogous laws that generated revenue for the foreign state.

The King of Greece sued for funds held by a British bank to satisfy payments due on currency exchanges; the court dismissed the suit because, "[i]t is perfectly elementary that a foreign government cannot come here . . . and sue a person found in that jurisdiction for taxes levied."[70] When the Queen of Holland sought to collect succession duties through the English legal system, the court posited, "[t]he question is really, are the English Courts to be collectors of taxes for foreign governments?"[71] The court answered the question by finding that *Municipal Council of Sydney* established the rule, and it was also a well recognized rule for over two hundred years that courts will not collect foreign taxes.[72] Based on these precedents, the revenue rule squarely stands for the idea that courts will not act as collection agencies for foreign governments seeking taxes assessed against citizens within the court's jurisdiction. These cases were decided with little discussion of the rationale behind the rule. The House of Lords remedied this in a suit brought by the Indian government.

In 1955, the Government of India sought income and capital gain taxes from a company that failed to pay its taxes upon liquidation. The House of Lords applied the revenue rule despite "remarkably little authority upon the subject" and set forth three justifications for the rule.[73] Lord Keith asserted that national sovereignty precluded the collection of taxes for another nation positing "that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one

---

68. Mun. Council of Sydney v. Bull, [1909] 1 K.B. 7, 12 (A.C. 1908) (appeal taken from Eng.) (A British resident owned property upon which improvements were made by the city, and a law was passed that assessed each property owner for a share of the cost of the improvements. The law allowed an action to be brought against the owner of the property for the cost.).

69. *Id.* at 12-13.

70. King of the Hellenes v. Brostrom, [1923] 16 Lloyd's List L.R. 190, 193 (appeal taken from K.B.D.) (Eng.).

71. Queen of Holland v. Drukker, [1928] 1 Ch. 877, 879 (appeal taken from Eng.) (The Queen was a creditor of the estate on property transferred in England under the will of a Dutch citizen).

72. *Id.* at 883-84.

73. Gov't of India v. Taylor, [1955] A.C. 491, 504-14 (H.L. 1955).

State within the territory of another . . . [is] contrary to all concepts of independent sovereignties."[74] Based on Judge Hand's opinion in *Moore*, Lord Keith considered that scrutiny of a foreign state's revenue law may offend the state and, therefore, should be avoided.[75] Lord Somervell offered a third justification based on administrative difficulties stating that "[i]f one considers the initial stages of the process, which may . . . be intricate and prolonged, it would be remarkable comity if State B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of State A."[76] These justifications have been adopted to replace the blanket statement made by Lord Mansfield as sufficient to restrain courts from accepting jurisdiction over cases brought by governments to collect tax liabilities arising in foreign states.

An Irish court, a common law jurisdiction, and a British court have extended the doctrine to apply to the indirect collection of taxes for a governmental entity. Whether the suit is initiated by the government as a cause of action for bankruptcy[77] or a third party seeks to avoid payment on a contract because taxes will be assessed by a foreign government, courts in common law jurisdictions have relied on the revenue rule to decline jurisdiction over the bankruptcy and order payment on the contract.[78] The justifications enunciated in *Taylor*

---

74. *Id.* at 511. Extradition is available for taxpayers who commit criminal violation of revenue rules. *See* Zagaris, *infra* note 196.

75. *Id.* at 511-12.

76. *Id.* at 514.

77. *Peter Buchanan Ltd. v. McVey*, [1954] Ir. 89 (1951) (S.C.). Bankruptcy proceedings were brought against a Scottish Company by the Scottish government. The only debt was taxes that resulted from a retroactive 100% tax on excessive profits. The owner of the company paid off the commercial debts of the company and moved to Ireland with the remaining funds without paying the tax. The Irish Court found the transfer of the assets fraudulent but were unwilling to consider the retroactive revenue statute under the analysis of Judge Hand. *Id.* at 105. The court further justified its adoption of the rule:

> Nor is modern history without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighbouring communities but would run counter to their political aims and vital interests. Such laws have been used for religious and racial discrimination; for the furtherance of social policies and ideals dangerous to the security of adjacent countries; and for the direct furtherance of economic warfare. So long as these possibilities exist, it would be equally unwise for Courts to permit the enforcement of the revenue claims of foreign States.

Id. at 107 (Moore, J.).

78. In *Rossano v. Mfrs. Life Ins. Co.*, (1963) 2 Q.B. 352 (Eng.), Rossano, an Egyptian businessman, took out endowment policies when war threatened Egypt in 1940. At the maturity of the policies he attempted to collect two policies in London as provided in the contracts. The insurance company refused payment because payment to Rossano was illegal under Egyptian law without permission of the Egyptian authorities and garnishee orders were served by Egyptian revenue authorities and were not satisfied. The court held that there was no direct or indirect

support this comprehensive practice of declining to engage in an evaluation of the revenue laws of a foreign state or acting as a collection mechanism for foreign revenue agencies. These justifications include: (1) comity precludes sitting in judgment of foreign states' public laws, (2) enforcement of taxes of another state is an extension of that state's sovereignty, and (3) courts should avoid the administrative difficulties of interpreting another state's revenue laws.[79] Canadian and United States courts adopted this reasoning when assessing circumstances appropriate for the application of the revenue rule.

B. Canada

The Supreme Court of Canada applied the revenue rule in *United States v. Harden*.[80] The United States sought enforcement of a tax judgment entered in federal district court in California against a United States citizen residing in British Columbia.[81] The British Columbian court refused to enforce the judgment, relying on the three reasons articulated in *Taylor* to justify its decision.[82] The Supreme Court upheld the lower court's refusal of jurisdiction and dismissed the appeal.[83]

In 1992, the Alberta Court of Appeal relied on *Harden*, *Taylor*, and Hand's opinion in *Moore* to refuse indemnification of an executor of an United States' estate for transfer taxes on property in Canada.[84] Despite criticism of *Harden*, Canada considers the enforcement of tax judgments to be outside the jurisdiction of the judicial system. The United States considered the Canadian interpretation of the revenue rule when it first faced the issue.

C. United States

As noted above, the only ruling related to the enforcement of foreign revenue laws in the United States was issued by a state court in 1806.[85] The court adopted Lord Mansfield's idea that a foreign

---

enforcement of revenue laws of a foreign country, and the payments due under the policies were to be paid to Rossano in England. *Id.* at 377.

79. Gov't of India v. Taylor, [1955] A.C. 491, 511-12 (H.L. 1955).

80. [1963] 41 D.L.R. 2d 721.

81. *Id.* at 722; *but see supra* text accompanying notes 101-05 setting forth treaty terms altering this outcome.

82. *Id.* at 724-26.

83. *Id.* at 727.

84. Stringham v. Dubois, [1992] 135 A.R. 64, 68-71 (Alta. Ct. App.).

85. Van Rensselaer, 1 Johns 93, 94 (N.Y. 1806).

revenue law should not interfere with the enforcement of a commercial contract.[86] By the late twentieth century, it was clear that the law of the forum state controls a suit by a foreign state to collect a tax judgment.[87] Additionally, domestic courts generally recognize foreign judgments when general principles of comity, as set forth in the Supreme Court's decision in *Hilton v. Guyot*, are met.[88] Yet, the enforcement of a judgment for tax liability was not addressed until the late twentieth century.[89]

Canada sought enforcement of a certificate of assessment that had the same effect as the judgment of a court for taxes assessed against Oregon residents who engaged in logging in British Columbia and then failed to pay the logging tax on the income.[90] The Ninth Circuit recognized that tax judgments were considered under the revenue rule, and that recognition of a foreign judgment was based on reciprocity with the claiming jurisdiction.[91] Additionally, the Ninth Circuit reported that no other case of a foreign government seeking enforcement of a tax judgment had been presented to an American court, attributing this to the strength of the revenue rule.[92] The court relied on Judge Hand's discussion of the purpose of the revenue rule to find justification for not enforcing a foreign tax judgment.[93] The court also examined a Supreme Court case declining to interfere with

---

86. *Id.*

87. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (deciding the law of the forum state governs an action in diversity); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (applying conflicts of law rules of the forum state to actions in diversity).

88. Comity between nations would require a recognition of a foreign judgment:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Hilton v. Guyot, 159 U.S. 113, 202-03 (1895). The modern version of these requirements have been codified in the Uniform Foreign Monetary Judgments Act, *see infra* note 279.

89. British Columbia v. Gilbertson, 597 F.2d 1161, 1164 (9th Cir. 1979).

90. *Id.* at 1162.

91. *Id.* at 1163-64. The court found the lack of reciprocity sufficient to refuse to recognize British Columbia's judgment. *See also* discussion of *Harden, supra* text accompanying notes 80-83.

92. *Id.* at 1164.

93. *Id.* at 1164-65.

the application of a penal law by a foreign country and discussions by two Justices of the revenue rule in the same context.[94] The Ninth Circuit concluded:

> The revenue rule has been with us for centuries and as such has become firmly embedded in the law. There were sound reasons which supported its original adoption, and there remain sound reasons supporting its continued validity. When and if the rule is changed, it is a more proper function of the policy-making branches of our government to make such a change.[95]

It seems clear that to present a tax liability for collection it must be reduced to a judgment that would be recognized under state law.[96] As noted by both Judge Hand and the Ninth Circuit, the decision to recognize tax judgments from foreign governments should rest with the legislature and/or the executive branch of government.[97] Tax treaties are the proper mechanism for creating reciprocal recognition of judgments for tax liabilities.[98] Bilateral agreements regarding recognition of such judgments address the concerns raised by Hand in *Moore* and by *Taylor*.[99] This solution has not, however, been widely adopted by the United States.

IV. TREATIES

The revenue rule can be abrogated in an agreement between the United States and another country through a treaty.[100] The United States has entered into income tax treaties with many countries providing for information exchange, but only five treaties provide for general assistance in collecting tax judgments against citizens of the contracting nations.[101] Early treaties with Denmark, France, Sweden,

---

94. *Id.* at 1165 (citing the majority opinion and Justice White's dissent regarding the reluctance of courts to give effect to revenue laws of foreign countries. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413-14, 448, 450 n.11 (1964)).

95. *Id.* at 1166.

96. This is true in the interstate context also, although some states have permitted actions for tax assessments without requiring that they be reduced to judgment. *See* cases cited *supra* note 61.

97. Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929); *Gilbertson*, 597 F.2d at 1166.

98. *See e.g.*, Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 115 (2d Cir. 2001).

99. *Moore*, 30 F.2d at 604; Gov't of India v. Taylor, [1955] A.C. 491, 511-12, 514 (H.L. 1955).

100. *See Gilbertson*, 597 F.2d at 1165.

101. *Canada*, 268 F.3d at 115-16.

and the Netherlands provided for tax collection assistance.[102] These treaties were ratified in the 1930s and 1940s, but by 1947 the Senate was not entirely pleased with collection efforts on behalf of the French government.[103] Consequently, the terms of the treaty with France were amended in 1949 to limit enforcement requests to collect taxes owed to the requesting state only and not to allow the requesting state to pursue collection efforts against the citizens of the requested state.[104]

In 1951, the Senate declined to ratify provisions negotiated by the executive branch that provided for collection assistance in treaties with Greece, Norway, and South Africa.[105] Subsequent agreements with Canada, Sweden, Denmark, and the Netherlands have articles that provide:

> 2. In the case of applications for enforcement of taxes, revenue claims of each of the States which have been fully determined may be accepted for enforcement by the other State and collected in that state in accordance with the laws applicable to the enforcement and collection of it own taxes. The State to which application is

---

102. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, U.S.-Neth., art. 31, Dec. 18, 1992, 32 I.L.M. 457 (1993) (entered into force Dec. 31, 1993); *see also* Protocol Amending the Convention With Respect to Taxes on Income and on Capital of September 26, 1980, U.S.-Can., art. 15, Mar. 17, 1995, 2030 U.N.T.S. 236 (entered into force Nov. 9, 1995) [hereinafter *Canada-U.S. 1995 Protocol*]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, U.S.-Den., art. 27, Aug. 19, 1999, S. Treaty Doc. No. 106-12 (entered into force Mar. 31, 2000): Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital, U.S.-Fr., art. 28, Aug. 31, 1994, 1963 U.N.T.S 67 (entered into force Dec. 30, 1995); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, U.S.-Sweden, art. 27, Sept. 1, 1994, S. Treaty Doc. No. 103-29 (entered into force Oct. 26, 1995).

103. Senator Smith , a member of the Senate Foreign Relations Committee, in a floor statement in 1948 discussed the concern the Senate had with the treaty with France:

> [I]n 1947 attention was focused on the mutual collection assistance provisions of the treaty with France, and the Committee discovered that there had been developed . . . a number of objections as to the way by which, under the convention, our country undertook to collect taxes for the government of France. This matter was of such concern that we held a number of hearings [and recommended consultation between individuals, businesses and interest groups concerned about the treaty and State Department representatives]. We discovered that there had been embodied in the convention certain methods of collection of taxes which we as a subcommittee felt were not desirable, and at our request the whole matter was reviewed again by the State Department representatives.

Staff of the Joint Comm. on Internal Revenue Taxation, 1 *Legislative History of United States Tax Conventions* 1152 (1962) (cited in *Canada*, 268 F.3d at 116).

104. *Canada*, 268 F.3d at 116 (citing Staff of the Joint Comm. on Internal Revenue Taxation, 1 Legislative History of United States Tax Conventions 1152 (1962); Supplementary Protocol to the Convention about Double Taxation and Fiscal Assistance, May 17, 1948).

105. *Id.* at 116-17 & n.13.

> made shall not be required to enforce executory measures for which there is no provision in the law of the State making the application.
>
> 3. Any application shall be accompanied by documents establishing that under the laws of the State making the application the taxes have been finally determined.
>
> 4. The assistance provided for in this Article shall not be accorded with respect to the citizens, corporations, or other entities of the State to which application is made, except in cases where the exemption or reduced rate of tax granted under the Convention to such citizens, corporations or other entities has, according to mutual agreement between the competent authorities of the State, been enjoyed by persons not entitled to such benefits.[106]

This article limits the collection efforts undertaken by the parties to collect tax claims presented by the requesting country against its own citizens and does not provide a mechanism for collecting taxes owed to the foreign government by a citizen of the other State. The application of the treaty with Canada under this article was presented in a case brought by a Canadian citizen seeking to have a tax lien imposed by the Internal Revenue Service upon a request by the Canadian government set aside.[107] The court reviewed the provisions of the treaty and refused to interfere with the tax lien as proper under the terms of the treaty.[108] The treaty obligation created an exception to the revenue rule that the court properly recognized.

The United States Model Income Tax Convention of September 1996 contains no general provision for assistance in collection of foreign tax judgments or claims.[109] Likewise, the United States has ratified the Organization for Economic Cooperation and Development (OECD) Convention on Mutual Assistance in Tax Matters only with a reservation to Article 27[110] that provides for assistance in collecting

---

106. *See* Convention for the Avoidance of Double Taxation, U.S.-Neth, *supra* note 102 at art. XXX. The language here is quoted from the treaty with the Netherlands; the wording of the other treaties with Canada, Sweden, and Denmark varies slightly but the content is virtually identical.

107. Tesher v. United States, 246 F. Supp. 2d 297, 299 (S.D.N.Y. 2003).

108. *Id.* at 299-300.

109. Attorney Gen. of Can v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 118 n.4 (2d Cir. 2001).

110. Article 27, paragraph 3 provides:

> When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person, who at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

tax judgments and claims.[111] The vitality of the revenue rule is demonstrated by the reluctance of the Senate and the State Department to enter into agreements that abrogate the revenue rule and provide for collection of tax claims except under limited circumstances and not against citizens of the United States with tax liabilities in arrears to foreign countries. The mechanism for so doing is available as demonstrated in the early twentieth century treaties with France, Sweden, and the Netherlands, and as demonstrated in the OECD Convention on Mutual Assistance; but it is clear that the legislative and executive branches of the government are presently unwilling to enter into broad enforcement agreements.

The judiciary, limited by the revenue rule, cannot *sua sponte* engage in the recognition of foreign tax claims. The reluctance of the executive and legislative branches may represent an underutilization of treaties to facilitate the collection of United States taxes from persons who are citizens of the United States, or a fear that the provision would be used primarily against United States residents. But the present treaty protocol of the United States disallows the collection of foreign tax debts or foreign tax judgments against United States citizens. The reverse is also true as to the United States' ability to collect taxes through foreign court systems. This reluctance may be due, in part, to the reasons that support the revenue rule: a reluctance to accept foreign revenue laws as in keeping with the United States public policy stance and a desire to avoid an evaluation of a foreign revenue law that risks offending the foreign state. The inclusion of collection procedures for foreign taxes also presents the problem that the laws in place when the treaty was signed may change and public policy issues may again assert themselves after the ratification of the treaty. It is clear that the executive and legislative branches working together could abrogate the revenue rule through treaties yet they are unwilling to do so.

V. CURRENT CASES

By the end of the twentieth century, it became clear that courts in the United States recognize the revenue rule as a common law doctrine that permits courts to decline jurisdiction over attempts by a foreign sovereign to collect tax debts without a specific agreement between governments. This settled doctrine reasserted itself in the last

---

Phillip Burgess, *Globilization Comes to Tax Collection*, 34 TAX NOTES INT'L, 645, 650 (2004).

111. *Id.*; *Canada*, 268 F.3d at 118.

decade of the twentieth century as a defense to suits brought against persons involved in illegal activities. The high taxes imposed on cigarettes and alcohol create a temptation to the dishonest to circumvent the duties and pocket what would otherwise be revenue to a foreign government. Federal statutory provisions allow at least two avenues of attack against smuggling operations engaged in by United States citizens. If the parties communicate over interstate wires, they can be prosecuted in federal court for violation of the wire fraud statute.[112] Or the parties injured can pursue relief under the Racketeer Influenced and Corrupt Organization Act (RICO) statute.[113] Defendants in both criminal and civil suits have invoked the revenue rule as a bar to the judicial proceedings. The Supreme Court issued an opinion that considered the scope of the revenue rule in a criminal case and, upon a petition for certiorari, remanded one of the RICO suits to the Second Circuit for reconsideration.[114]

A. RICO Cases

R.J. Reynolds Tobacco Holdings, Inc. (Reynolds), in response to the Canadian government's doubling of the tobacco tax, engaged in elaborate schemes that involved exporting Canadian cigarettes and tobacco under false declarations, manufacturing the tobacco into Canadian cigarettes in Puerto Rico and then smuggling the cigarettes through free-trade zones or Indian reservations back into Canada.[115] Canada brought an action in a United States court under the U.S. civil RICO statutes[116] seeking damages from Reynolds based on lost

---

112.

> 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 . . . . 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 . . . .

18 U.S.C. § 1343 (2000).

113. 18 U.S.C. §§ 1961-68 (2000).

114. Pasquantino v. United States, 125 S.Ct. 1766, 1766 (2005); European Cmty v. RJR Nabisco, 125 S.Ct. 1968, 1968 (2005).

115. *Canada*, 268 F.3d at 106-07. R.J. Reynolds' Canadian distribution subsidiary and several individuals pled guilty to mail and wire fraud relating to the smuggling activities that are the subject of Canada's RICO suit.

116. 18 U.S.C. § 1962 (2000). Section 1962 provides, in pertinent part:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

tax revenues and additional law enforcement costs.[117] The Second Circuit affirmed the dismissal of the suit for failure to state a claim, as a suit based on the avoidance of foreign taxes was precluded under the revenue rule.[118] The Second Circuit first determined the validity of the revenue rule and then acknowledged the rationales advanced in federal and foreign cases prevented Canada from utilizing the RICO statutes to recover its revenue losses or the cost of enforcing its revenue laws in United States courts.[119] A "long standing common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated claims of other sovereigns" supported a finding of validity.[120] Despite the lack of a Supreme Court case addressing the revenue rule in the international context, the court found that the Supreme Court had acknowledged the continuing validity of the doctrine in a number of decisions cited by the court.[121] International acceptance of the revenue rule included Canada, as made evident in the Canadian Supreme Court's decision in *Harden*, where the rule was invoked to prevent the enforcement of a United States judgment for taxes.[122]

The court adopted the three grounds for adhering to the revenue rule articulated in *Taylor*. First, the "rule prevents foreign sovereigns from asserting their sovereignty within the borders of other nations."[123] As Judge Hand explained in *Moore*, the concept of comity prevents courts from reviewing the public policy underlying a nation's choice of revenue law.[124] The court noted that addressing such public policy concerns "could embroil United States courts in delicate issues

---

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. *Id.*

117. *Canada*, 268 F.3d at 105-06.

118. Attorney Gen. of Can. v. R. J. Reynolds Tobacco Holdings, Inc., 103 F. Supp. 2d 134, 144 (N.D.N.Y. 2000); Fed. R. Civ. P. 12(b)(6).

119. Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 109 (2d Cir. 2001).

120. *Id.*

121. *Id.* (citing, inter alia, Sun Oil Co. v. Wortman, 486 U.S. 717, 740 n.3 (1988) (Brennan, J., concurring); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413-14 (1964)).

122. *Canada*, 268 F.3d at 111 n.5 (citing *Harden*, [1963] S.C.R. at 371).

123. *Id.* at 111-12 (citing *Sabbatino*, 376 U.S. at 448 (White, J., dissenting on other grounds)).

124. *Id.* at 112 (citing, *inter alia*, *Moore*, 30 F.2d at 604 (L. Hand, J., concurring).

in which they have little expertise or capacity."[125] Without any discussion, the court noted that past rulings suggested that an analysis of foreign revenue laws was difficult, a ground for the rule advanced in *Taylor*.[126]

Having recognized the rule, the court acknowledged that governments could arrange to aid each other in the collection of tax debts; but, under the concept of separation of powers, this needed to be accomplished by the executive and legislative branches:

> [E]xtraterritorial tax enforcement directly implicates relations between our country and other sovereign nations. When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations policy that are assigned to - and better handled by—the political branches of government.[127]

The court recognized the restriction in the Canadian-U.S. 1995 Protocol as only limiting requests for "finally determined" revenue claims against the requesting country's citizens.[128] The court properly noted two impediments under the treaty to judicial enforcement of the tax liability: (1) the treaty barred collection of Canadian tax from a United States citizen or corporation; and (2) the taxes sought were not finally determined under a judicial procedure within Canada.[129] Despite the fact that Canada was not asking for direct enforcement of a tax liability, it is clear that the revenue rule precludes indirect efforts to collect a tax.[130] The court concluded by expressing its regret that it was unable to right an alleged wrong but found itself "without license to abandon unilaterally the centuries-old, albeit sharply attacked, revenue rule."[131]

Judge Calabresi attacked the decision and the revenue rule in his dissent and opined that the RICO statutes allowed suits based on lost tax revenue because the damages were based on a United States statute and not on Canadian revenue laws.[132] Calabresi examined the justifications presented by the majority for the revenue rule and found

---

125. *Id.* at 113 (finding the tobacco tax based on Canada's public health concerns and at least arguably contrary to the interests of some United States citizens and raising other hypothetical examples where foreign public policy would diverge from American interests).

126. *Id.* at 112; *see* Gov't of India v. Taylor, [1955] A.C. 491, 514 (H.L. 1955).

127. *Canada*, 268 F.3d at 113-14.

128. *Canada-U.S. 1995 Protocol*, *supra* note 102, art. 15, ¶ 8, 2.

129. *Canada*, 268 F.3d at 120-21.

130. *Id.* at 130-31.

131. *Id.* at 134.

132. *Id*. at 135 (Calabresi, J. dissenting).

them not applicable to Canada's use of the RICO statutes. Sovereignty, according to Judge Calabesi, is not and cannot be implicated by a suit brought under a U.S. statute.[133] The dissent also asserted that separation of powers is not violated if a suit is brought under legislation enacted by the United States Congress and signed into law by the President.[134] Calabresi noted, with approval, the use of foreign revenue laws to determine the extent of damages and recognized it as the strongest argument against entertaining the suit.[135] Nevertheless, Calabresi found that this obstacle was overcome by the Second Circuit's rejection of the argument in the context of criminal prosecutions under the wire fraud statute.[136] Calabresi concluded that he cannot "join an opinion that applies an old and dubious common law rule, in ways that have nothing to do with its roots or rationales, in order to limit an Act of Congress that the Supreme Court has repeatedly applied in the broadest possible ways."[137]

Although Judge Calabresi makes valid arguments regarding the scope of the RICO statutes and the reduced perception of an extension of sovereignty by a foreign government into United States courts when a statute passed by the legislature and signed by the executive invites suit by those injured by a conspiracy, the majority has the better position. Despite the breadth of the RICO statutes, they do not address the direct or indirect collection of foreign taxes, although the revenue rule existed at the time the statutes were enacted. Collection of foreign taxes under the RICO statutes presents the same problems that direct suit for enforcement of a judgment presents: The court is faced with deciding whether a foreign revenue law should be upheld in a domestic court without significant input from the other branches of the government, and the court is placed in the position of having to decipher foreign revenue laws and risk offending foreign states. Without clear intent in the RICO statutes that the legislature and ex-

133. Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 136 (2d Cir. 2001).

134. *See id.* at 136-37 (noting that the courts are merely implementing foreign policy as decided by the other branches).

135. *Id.* at 137.

136. *Id.* at 137-38. *See* United States v. Trapilo, 130 F.3d 547, 549 (2d Cir. 1997) (finding a scheme nearly identical to the present acts to defraud the Canadian government of tax revenue cognizable under 18 U.S.C. § 1343 (2000), the wire fraud statute, because success was not required for prosecution); United States v. Pierce, 224 F.3d 158, 165 (2d. Cir. 2000) (finding the same, but court held prosecution must prove a property right—the right to revenue—of which Canada could be defrauded).

137. *Canada*, 268 F.3d at 140.

ecutive branches intended courts to undertake such analysis and decision-making tasks, the revenue rule stands to protect the courts from those undertakings. The RICO statutes, as concluded by the majority, run afoul of the separation of powers and comity concerns of the revenue rule.[138] To a lesser extent, the difficulty of interpreting foreign revenue laws was also presented, but the panel as a whole was less concerned with this aspect.

Canada was not the only victim of the tobacco companies' smuggling schemes, and other governments brought RICO suits seeking redress for their lost taxes. The Republics of Ecuador, Belize, and Honduras made allegations of wide-spread smuggling operations and brought suit against Philip Morris in the Eleventh Circuit, which adopted the revenue rule as the law of that circuit and found that, in civil RICO and state common law actions, abstention was required.[139] The European Community and the Republic of Columbia initially won a motion to dismiss based on a defense of the revenue rule in a civil RICO action against Philip Morris, RJR Nabisco, Inc. and Japan Tobacco, Inc. in the Eastern District of New York.[140] The court's ruling that "the revenue rule is not implicated in this case," was made without benefit of the Second Circuit's ruling in *Canada*, and the district court found the revenue rule applicable under the earlier Second Circuit decision to disregard the revenue rule in federal wire fraud and mail fraud prosecutions.[141] A renewed motion to dismiss was granted when the district court acquiesced, as it must, to the Second Circuit's ruling in *Canada*.[142] On appeal,[143] the European Community asserted that Congress abrogated the revenue rule as applied to the RICO statutes when the PATRIOT Act[144] was enacted.[145] The Second Circuit found no clear intent by Congress to abrogate the reve-

138. *Id.* at 126, 134–35.

139. Honduras v. Philip Morris Cos., Inc., 341 F.3d 1253, 1261 (11th Cir. 2003).

140. European Cmty. v. RJR Nabisco, Inc., 150 F. Supp. 2d 456, 459 (E.D.N.Y. 2001).

141. *Id.* at 471.

142. European Cmty. v. Japan Tobacco, Inc., 186 F. Supp. 2d 231, 241 (E.D.N.Y. 2002).

143. European Cmty. v. RJR Nabisco, Inc., 355 F.3d 123, 127 (2d Cir. 2004), *cert pending*. Judge Calabresi was assigned to the panel hearing this case and, although he continued in his belief that *Canada* was not correctly decided, he recognized that he was bound by the precedent established in that case. *Id.* at 132; n.4.

144. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

145. *European Cmty.*, 355 F.3d at 127.

nue rule and, upon the reasoning set forth in *Canada*, the district court's decision was affirmed.[146]

A petition for certiorari was recently filed in the United States Supreme Court presenting the question of the applicability of the revenue rule to "claims brought under U. S. domestic law seeking equitable relief to enjoin and remedy smuggling schemes based in the United States."[147] The petition asserts that the Second Circuit breaks new ground by applying the revenue rule to a suit that does not directly seek taxes but instead seeks injunctive and equitable relief, and that the revenue rule is not applicable to suits bought under U.S. domestic law.[148] Since courts, including the Second Circuit, apply the revenue rule to attempts to collect taxes both directly and indirectly, the argument that the Second Circuit's ruling denied the Plaintiffs equitable relief does not appear to raise a serious challenge to the dismissal of the European Community's and the Republic of Columbia's claims. But, as requested in their petition for certiorari, the Supreme Court awaited its decision in the federal wire fraud cases before deciding whether to hear argument in the RICO cases.[149]

B. Wire Fraud Cases

A conviction for wire fraud requires proof of a scheme to defraud and use of wire communication to further that scheme.[150] Wire fraud violations are limited to schemes that attempt to deprive another of money or property.[151] In 1994, federal prosecutors in Maine indicted Native Americans who used Indian reservations as staging grounds for liquor smuggling activities into Canada, thereby depriving Canada of excise and sales tax.[152] In *United States v. Boots*, the First Circuit reversed the convictions for wire fraud imposed by the

146. *Id.* at 132-35.

147. Petition for Writ of Certiorari at i, European Cmty. v. RJR Nabisco, Inc., 125 S. Ct. 1968 (2005) (No. 03–1427). The petition suggested that the petition be held for the outcome in, United States v. Pasquantino, 336 F.3d 321 (4th Cir. 2003) (en banc) *cert. granted*, 124 St. Ct. 1875 (2004), a federal wire fraud case. *Id.* at 27. The Fourth Circuit overturned a panel decision in an en banc rehearing to find the revenue not implicated and the Supreme Court affirmed. *See infra* discussion part V(B).

148. Petition for Writ of Certiorari at 8–11, European Cmty. v. RJR Nabisco, Inc., 125 S. Ct. 1968 (2005) (No. 03–1427).

149. *Id.* at 8; *European Cmty.*, 125 S.Ct. at 1968.

150. 18 U.S.C. § 1343 (2000); United States v. Bollin, 264 F.3d 391, 407 (4th Cir. 2001).

151. McNally v. United States, 482 U.S. 350, 356 (1987).

152. United States v. Boots, 80 F.3d 580, 583-84 (1st Cir. 1996).

district court.[153] The court, in finding the revenue rule applicable, discerned that the conviction did not enforce the revenue laws of Canada, but "upholding defendants' section 1343 conviction would amount functionally to penal enforcement of Canadian customs and tax laws."[154] The court looked at two justifications for the revenue rule: comity and separation of powers. The court held that in order to uphold the convictions it would have to consider challenges made by the defendants to Canadian law and determine if such laws were valid, and then determine how the statutes operated in the case before it, a violation of the revenue rule's rationale against interfering with the public laws of a foreign state, or comity.[155] As to separation of powers, the court noted that the federal smuggling statutes punish "such activities only if the foreign government has a reciprocal law."[156] The participation of the executive branch in bringing the prosecution was insufficient to satisfy the separation of powers concern and a decision as to whether conduct is criminal (because it is aimed at a particular country) cannot be left solely to prosecutorial discretion.[157] The First Circuit found no proof of a scheme to defraud another of money or property was possible in a scheme to evade excise and sales taxes when the revenue rule excluded consideration of the revenue laws of a foreign country.[158] Later courts find this to be a misapplication of the revenue rule and come to different results.[159]

At the same time as *Boots* was wending its way through the First Circuit, federal prosecutors indicted Trapilo and others under the federal wire fraud statute for smuggling alcohol and cigarettes through a Mohawk reservation in upstate New York.[160] The district court granted the defendants' motion to dismiss the indictment in reliance on *Boots*, and the Second Circuit reversed and remanded.[161] The Second Circuit briefly considered the revenue rule and noted that its purpose was to maintain the separation of powers between the branches of government and international relations properly be-

153. *Id.* at 595.

154. *Id.* at 587.

155. *Id.*

156. *Id.* at 588; *see* 18 U.S.C. § 546.

157. *Boots*, 80 F.3d at 588.

158. *Id.* at 587.

159. *Trapilo*, 130 F.3d at 547; United States v. Pasquantino, 336 F.3d 321, 324-25 (4th Cir. 2003) (en banc), *cert. granted*, 124 S. Ct. 1875 (2004).

160. *Id.* at 549.

161. *Id.* at 553.

longed to the executive and legislative branches.[162] The court decided the common law revenue rule was not properly implicated by the wire fraud statute because "at the heart of the indictment is the misuse of the wires in furtherance of a scheme to defraud the Canadian government of tax revenue, not the validity of a foreign sovereign's revenue laws," and "identity and location of the victim and the success of the scheme is irrelevant."[163] Upon a scanty review of the rule, the court found that the federal statute proscribed criminal activity within the United States, and the fact that the fraud was aimed at a foreign government's revenue laws did not negate the fraudulent act within the United States.[164]

A third wire fraud persecution addressed the circuit split between the First and Second Circuits. The First Circuit decision, implicating the revenue rule and reversing wire fraud convictions when the purpose of the fraud was to evade Canadian taxes on liquor, was disregarded in the Second Circuit's holding that the federal wire fraud statute is complete unto itself without consideration of foreign revenue statutes. This dichotomy was present in a wire fraud case brought in Maryland.[165] The United States indicted David and Carl Pasquantino and Arthur Hilts for the use of interstate wires to facilitate an alcohol smuggling scheme originating in Maryland.[166] The defendants profited from the illegal transportation of alcohol into Canada and the sale of that liquor on black markets without payment of the Canadian excise and sales tax.[167] The defendants were convicted at trial of wire fraud in a scheme not unlike those tried in the First and Second Circuits.[168]

The district court denied a motion to dismiss under the reasoning of *Boots*, but the appellate court reversed those convictions agreeing with the First Circuit that, under the revenue rule, upholding the convictions "would amount functionally to penal enforcement of Canadian customs and tax laws."[169] The majority members of the panel

---

162. *Id.* at 552-53.

163. *Id.* at 552.

164. *See id.* at 552-53.

165. United States v. Pasquantino, 305 F.3d 291, 293 (4th Cir. 2002).

166. *Id.*

167. *Pasquantino*, 336 F.3d at 324-25.

168. *Id.*

169. *Pasquantino*, 305 F.3d at 296 (quoting *Boots*, 80 F.3d at 587). It is notable that Judge Gregory wrote the decision to which E.D.Va. Judge Lee, sitting by designation joined, but Senior Judge Hamilton, the author of the en banc opinion affirming the convictions, dissented. *Id.* at 292, 299.

based their application of the revenue rule on Hand's rationale of comity, which states that United States courts should not be required to review foreign revenue statutes and, additionally, the courts should avoid the interpretation and application of foreign laws.[170] In the dissent, Judge Hamilton took the view of the Second Circuit that the revenue rule is not implicated in the prosecution by the United States of fraud within the United States when the purpose of the fraud is to defraud another state of property, and it is incidental that the property is tax revenues.[171]

The court granted an *en banc* rehearing of the decision, and Senior Judge Hamilton wrote the majority decision affirming the convictions.[172] The court framed the issue as whether "application of the common law revenue rule precludes prosecution under the federal wire fraud statute, 18 U.S.C. § 1343, for use of interstate wires for the purpose of executing a scheme to defraud a foreign sovereign of its property rights in accrued tax revenue."[173] The court first relied on section 483 of the Restatement (Third) of Foreign Relations Law for a definition of the revenue rule: "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states."[174] The court reviewed the decisions in *Boots*, *Canada*, and *Gilbertson* and found common rationales for the revenue rule.[175] First, comity suggested that courts should not subject foreign public laws to judicial scrutiny, as sovereignty protects the court of one nation from the obligation to further the national interests of another nation, and the doctrine of separation of powers requires the judicial branch to not interfere in matters of foreign policy.[176]

The reading of the revenue rule presented by the defense was broader and based on the early English cases, *Holman v. Johnson* and

---

170. *Id.* at 297-98.

171. *Id.* at 299-300 (Hamilton, S. Cir. J., dissenting).

172. *Pasquantino*, 336 F.3d at 324.

173. *Id.*

174. RESTATEMENT (THIRD) of FOREIGN RELATIONS LAW of the UNITED STATES § 483 (1987). This definition seems rather limited as it is addressed solely at judgments and does not contemplate matters in which the revenue laws of another country are implicated, a central part of the courts' historical decisions where the issue of whether the revenue laws of a foreign state should influence the jurisdiction or decision of the court.

175. United States v. Pasquantino, 336 F.3d 321, 327 (4th Cir. 2003) (en banc), *cert. granted*, 124 S. Ct. 1875 (2004).

176. *Id.*

Planche v. Fletcher.[177] The defense reading required that no court ever recognize a revenue law of another state.[178] The court easily disposed of this characterization: the early statements were dicta—in *Holman*, the statement was made in a discussion of the choice of law issue and in *Planche*, the issue was fraud in England, not whether the consideration of French import taxes was required.[179] The court instead looked to the formulation of the revenue rule in 1952, when the wire fraud statute was enacted.[180] The court characterized the rule as permissive and not mandatory, and the force of the rule was addressed at foreign tax judgments, not to the non-recognition of foreign revenue laws.[181] Under this reading, foreign revenue laws are not subject to the Restatement, just judgments based on foreign tax judgments.[182] The court concluded that the First Circuit erred in *Boots*, and wire fraud prosecutions do nothing to enforce tax judgments or revenue laws of the victim state and, as a result of this characterization of the revenue rule and the criminal charge, the revenue rule is inapplicable in a wire fraud prosecution.[183]

The court next considered the rationale often offered that the revenue rule protects the doctrine of separation of powers. The disinclination of courts to usurp the power of the executive and legislative branches by engaging in foreign policy was not implicated because Congress enacted the wire fraud statute that encompassed fraud in foreign commerce against money or property, and the executive branch participated in the prosecution by indicting the defendants and prosecuting the suit.[184] The doctrine of separation of powers was respected in the wire fraud prosecution, according to the court, by this degree of participation by the other branches of the government.[185] The majority of the en banc court affirmed the convictions on rehearing.

---

177. *Id.* at 327-29.

178. *Id.* at 328.

179. *Id.* at 329.

180. *Id.*

181. *Pasquantino*, 336 F.3d at 329.

182. *Id.* at 330 n.3.

183. *Id.* at 331.

184. *Id.*

185. *Id.* Whether Congress contemplated use of the wire fraud statute to allow foreign governments to seek damages based on lost revenues is part of the question before the Supreme Court.

Judge Gregory, who wrote for the majority in the underlying opinion, dissented in an opinion joined by Judge Michael.[186] First, Judge Gregory pointed out that the First Circuit and the Second Circuit are diametrically opposed in their application of the Restatement's definition of the revenue rule.[187] To overcome this difference in interpretation, Judge Gregory accepted Lord Mansfield's statements as persuasive evidence of the breadth of the revenue rule.[188] The dissent concluded that, because a violation of the wire fraud statute requires proof of a scheme to deprive another of property, and the property that satisfied the statute was the Canadian tax on the smuggled liquor, proof relating to Canadian revenue laws was required.[189] The court would then be in the position of analyzing the revenue laws of a foreign state, exactly what the revenue rule seeks to prevent.[190]

A petition for certiorari was granted, and the United States Solicitor General framed the question as "[w]hether the wire fraud statute, 18 U.S.C. § 1343, prohibits schemes to use the interstate wires in the United States to defraud a foreign government of tax revenue."[191] The Supreme Court issued a decision affirming the Fourth Circuit and upholding the convictions.[192]

The Petitioners argued that the only harm presented by the smuggling scheme was the loss of Canadian tax revenues, and there was no harm in the United States.[193] In support of the claim that no prosecution was proper in the United States, the Petitioners argued that (1) the smuggling statute required reciprocity that is not present in this case;[194] (2) the Canada-United States Treaty provides for assistance only upon presentation of a judgment and never against United

186. *Id.* at 338, 343 (Gregory, Cir. J. dissenting).

187. United States v. Pasquantino, 336 F.3d 321, 339 (4th Cir. 2003) (en banc), *cert. granted*, 124 S. Ct. 1875 (2004). (Gregory, Cir. J. dissenting).

188. *Id.* at 340 (Gregory, Cir. J. dissenting).

189. *Id.* at 341 (Gregory, Cir. J. dissenting).

190. *Id.* at 341-42. The dissent also noted that the sentencing guidelines calculated sentences for a wire fraud conviction based on the amount of loss suffered by the victims, a calculation that requires computation of the tax due to the Canadian governmental entities. *Id.* at 342-43 (Gregory, J. dissenting).

191. Brief for the United States in Opposition at I, Pasquantino v. United States, 125 S. Ct. 1766 (2005) (No. 03-725).

192. *Pasquantino*, 125 S. Ct. at 1781.

193. Brief for the Petitioners at 5, Pasquantino v. United States, 125 S. Ct. 1766 (2005) (No. 03-725).

194. *Id.* at 29, 45-46.

States citizens;[195] (3) extradition is a more appropriate measure to collect foreign taxes;[196] and (4) the revenue rule is violated by the wire fraud prosecution.[197] In support of these arguments, Petitioners averred the revenue rule's concern with separation of powers is violated because the wire fraud statute as a mechanism for enforcing foreign revenue laws is a radical revision of international relations in a way not considered by Congress.[198] Additionally, Petitioners asserted that comity is violated when the courts determine foreign tax liability, as they must when a wire fraud case is based on the avoidance of foreign taxes.[199] Finally, convictions based on common law fraud could not be supported by failure to pay taxes to a foreign sovereign and failure to declare goods imported into a foreign country.[200] As reported in the Fourth Circuit's *en banc* decision, Petitioners rely on an overbroad reading of the revenue rule to foreclose any suit in United States courts that intersects, no matter how slightly, with a foreign revenue law and does not adequately address the modern version of the rule[201] as a total defense from prosecution.

The Government responded that the wire fraud statute prohibits any scheme executed through interstate wires that has as its purpose to defraud another, and that Congress did not provide exceptions.[202] The domestic criminal prosecution, according to the Government, does not seek to enforce foreign revenue law or a claim to foreign tax revenue.[203] The Government avers that proof of the existence of foreign revenue laws does not violate the revenue rule as it does not en-

---

195. *Id.* at 47-49.

196. *Id.* at 46-47 and n.52; *see* Bruce Zagaris, *U.S. Efforts to Extradite Persons for Tax Offenses*, 25 LOY. L.A. INT'L & COMP. L. REV. 653, 682-83 (2002) (summarizing the U.S.-Canada Extradition Treaty terms regarding tax offenses).

197. Brief for the Petitioners, *supra* note 193, at 9-27.

198. *Id.* at 34.

199. *Id.* at 38-40.

200. *Id.* at 33-36.

201. *See* William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 179 (Winter 2002).

> The revenue rule underwent a metamorphosis in the twentieth century. It changed from a rule for sustaining the validity of contracts that violate foreign law into a rule that bars foreign governments from collecting their taxes. Its original rationale of promoting trade was abandoned. Instead, we find today essentially three justifications for the revenue rule: (1) that enforcing foreign law is burdensome; (2) that scrutiny of foreign law might cause offense to foreign nations; and (3) that foreign law is a violation of the forum's sovereignty.

202. Brief for the United States at 6, Pasquantino v. United States, 125 S. Ct. 1766 (2005) (No. 03-725).

203. *Id.* at 11-17.

tail enforcement directly or indirectly of a foreign public law.[204] Separation of powers is maintained because the executive acts through the prosecutor and sovereignty is respected as there is no assertion by Canada of authority in the United States courts.[205] The Government asserted that the court would not have administrative problems with determining the magnitude of the loss since courts are generally adept at determining laws of other jurisdictions.[206] As to the revenue rule's concern for comity, the Government pointed out that, since the prosecutor determines which cases to bring, the courts are relieved of determining the merits of the foreign taxing system and, if the decision to prosecute is unclear, the Department of Justice can confer with the Department of State.[207] This argument was the Government's weakest since courts are generally reluctant to assume the Government's assessment of the law is accurate without an independent inspection of the underlying statutes or common law rule, whether the implicated law is domestic or foreign.[208]

The Supreme Court issued a decision affirming the Fourth Circuit's *en banc* decision, affirming Defendant's convictions for wire fraud.[209] Justice Thomas, who wrote the majority opinion, framed the issue as whether "a plot to defraud a foreign government of tax revenue violates the federal wire fraud statute."[210] Justice Thomas answered that query in the affirmative stating: "the plain terms of § 1343 criminalize such a scheme, and because this construction of the wire fraud statute does not derogate from the common-law revenue rule, we hold that it does."[211] To determine if the wire fraud statute derogates from the revenue rule, the Court looked to the state of the revenue rule in 1952 when the wire fraud statute was enacted to see if the revenue rule clearly barred such a prosecution.[212] Justice Thomas

---

204. *Id.* at 16-22.

205. *Id.* at 22-24.

206. *Id.* at 25-27.

207. *Id.* at 23-24.

208. Petitioner's reply brief reiterated the scope of the revenue rule as quite broad and the wire fraud statute as narrow and then attacked the government's expansive view of executive branch powers as insufficient to eliminate the significant separation of powers challenge to the court's power to decide a case resting on the violation of foreign state's revenue law without participation from Congress. Reply Brief for the Petitioners at 8, Pasquantino v. United States, 125 S. Ct. 1766 (2005) (No. 03-725).

209. Pasqunatino v. United States, 125 S. Ct. 1766, 1781 (2005).

210. *Id.* at 1770.

211. *Id.*

212. *Id.* at 1774. The Court initially considered whether petitioner's satisfied the elements of the crime of wire fraud. The two elements challenged: (1) whether they engaged in a scheme

described the revenue rule, saying that, "at its core, it prohibited the collection of tax obligations of foreign nations."[213]

The Court considered the rulings in *Colorado v. Harbeck*, *Maryland v. Turner*, and *Moore v. Mitchell*, in noting that the revenue rule prohibited "the enforcement of tax liabilities of one sovereign in the courts of another sovereign." [214] Additionally, the Court considered the decisions by other common law jurisdictions.[215] The Court found these cases different from the present prosecution because the prosecution was not a suit to recover a tax liability for a foreign government but a suit brought by the United States to punish criminal conduct in the United States.[216]

The Court next considered the petitioner's argument that the revenue rule applied to indirect actions for foreign taxes.[217] After considering the opinions issued in *Peter Buchanan Ltd. v. McVey* by the Irish court and the decision issued by the House of Lords in *Government of India v. Taylor*, the Court found that these cases, and the other cases cited by the petitioners, did not "involve a domestic sovereign acting pursuant to authority conferred by a criminal statute."[218] The Court concluded that, although the revenue rule was extended by courts in the twentieth century beyond its core prohibition against enforcement of foreign tax liabilities, it could not say with "any reasonable certainty whether Congress in 1952 would have considered this prosecution within the revenue rule."[219] The Court gave scant consideration to Petitioner's argument that the eighteenth century Eng-

---

or artifice to defraud and (2) whether the object of the fraud was property in the victim's hands, were found by the Court to be satisfied by the smuggling operation undertaken by the petitioners. *Id.* at 1771-73.

213. *Id.* at 1775.

214. *Id.* at 1775 and n.7.

215. Pasqunatino v. United States, 125 S. Ct. 1766, 1775 and n.8 (2005) (citing to *Her Majesty the Queen v. Gilbertson*, 597 F.2d 1161, 1163–64 (9th Cir. 1979) and *Peter Buchanan Ltd. v. McVey*, [1955] Ir. 89 (S.C. 1951)).

216. *Pasquantino*, 125 S. Ct. at 1775.

217. *Id.*

218. *Id.* at 1776.

219. *Id.* at 1777. The Court also considered petitioner's argument that the Mandatory Victims Restitution Act, 18 U.S.C.A. § 3663A(c)(1)(A)(ii) (Supp. 2004), that required restitution to the victim, Canada, made the collection of taxes the object of the suit. The Court quickly dismissed this argument because the suit advanced the Government's interest in punishing internal criminal behavior and the award of restitution was to "mete out appropriate criminal punishment for that conduct." The Court ruled that, if awarding restitution were found to be contrary to the revenue rule, the appropriate course would be to construe the restitution statute to not allow such payments rather than assuming that the enactment of the restitution law repealed the wire fraud statute as to fraud against foreign governments. *Id.*

lish cases, *Boucher v. Lawson* and *Planche v. Fletcher*, stood for the proposition that indirect enforcement of foreign revenue laws is at the heart of the revenue rule by recognizing that the revenue rule developed into a "very different" doctrine by the twentieth century.[220]

Next the Court evaluated whether the rationales advanced for the revenue rule in the twentieth century by Hand and the House of Lords are violated by the prosecution of the smugglers under the wire fraud statute.[221] First, the Court considered whether the prosecution posed a risk of requiring the court to evaluate the statutes of a foreign sovereign.[222] The Court perceived little risk of international friction since the executive branch of the government, the branch responsible for foreign relations, brought the suit and presumably evaluated the impact such action brought to bear on relations with Canada. The fact that the prosecution required a court to recognize a foreign revenue law to determine if there was a violation of domestic law did not violate the revenue rule.[223] Second, the Court considered whether the prosecution furthered the governmental interests of a foreign state but held that prosecution under the wire fraud statute was authorized by the Congress and the Executive "irrespective of the object of the fraud," and there was no risk of advancing Canada's policies illegitimately.[224] Finally, the Court found the court competent to interpret foreign statutes under Federal Rules of Criminal Procedure 26.1 and noted that a prosecution witness provided uncontroverted testimony regarding the Canadian taxes the petitioners sought to avoid.[225] The opinion concluded by remarking that, "[i]t may seem odd use of the Federal Government's resources to prosecute a U.S. citizen for smuggling cheap liquor into Canada. But the broad language of the wire fraud statute authorizes it to do so," and the Court of Appeals' decision was affirmed.[226]

Justice Ginsburg wrote a dissent in which Justice Breyer joined, with Justice Scalia and Justice Souter joined in part.[227] Justice Ginsburg and Breyer expressed concern over the broad reading given to

---

220. *Pasquantino*, 125 S. Ct. at 1777.

221. *Id.* at 1779.

222. *Id.* at 1780 (citing Hand's concurrence in *Moore*, describing the delicacy of the task of reviewing a foreign state's statute and deciding whether it should be enforced).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Pasquantino*, 125 S. Ct. at 1781.

227. *Id.*

the wire fraud statute by the majority.[228] Justice Scalia and Justice Souter joined the dissent's assertion that the prosecution before the court implicated the revenue rule, and that Congress's enactment of the wire fraud statute did not displace the rule.[229] The dissent found that the revenue rule was violated because restitution to the victim, Canada, was required under the Mandatory Victims Restitution Act.[230] Because restitution is mandatory when a defendant is convicted of wire fraud, the dissent asserted that the revenue rule would thereby be violated when the foreign sovereign's revenue law was enforced by the domestic court, and therefore Congress did not intend the wire fraud statute to cover a scheme to defraud a foreign government of taxes.[231] Based on its difficulty with the intersection of the Mandatory Victims Restitution Act and the wire fraud statute, coupled with concerns about whether the scope of the wire fraud statue encompassed a scheme to defraud a foreign sovereign of taxes, the dissent would have applied the rule of lenity and would have reversed the judgment of the Court of Appeals.[232]

The Court's opinion setting forth the scope of the revenue rule in 1952 when the wire fraud statute was enacted gives some indication of the scope of the revenue rule presently. The eighteenth century version that refused contemplation of a foreign statute that interfered with domestic trade was not a viable construction in the twentieth century. A revenue rule that allows a court to decline to consider a case brought for the direct or indirect collection of taxes seems to remain a modern version of the rule, but as the court noted there remains uncertainty regarding the "indirect" recognition of foreign revenue laws.[233] The Court's refusal to permit criminal activity within the United States that the executive branch chose to prosecute to escape punishment under the auspices of the revenue rule conforms to

---

228. *Id.* at 1781-86. The dissent relied in part on the reasoning advanced by the First Circuit in *United States v. Boots*, 80 F.3d 580 (1996).

229. *Id.* at 1786.

230. *Id.* at 1787. At sentencing, the prosecutor did not urge the trial court to require restitution because the government felt it was not appropriate when the victim was a foreign government defrauded of tax revenue. At oral arguments, the Government stated that restitution should be ordered, and such restitution did not infringe upon the revenue rule. *Id.*

231. *Id.*

232. *Pasquantino*, 125 S. Ct. at 1787-88. The dissent also noted that the U.S. Sentencing Guidelines determine sentences for wire fraud based on the loss suffered by the victim. In a footnote, the dissent suggested that the petitioner should be resentenced in light of the Court's decision in *Booker v. United States*, 125 S. Ct. 738 (2005), finding the guidelines unconstitutional and advisory at best. *Pasquantnio*, 125 S. Ct. at 1783 n.5 .

233. *Id.* at 1779.

the United States' strong intolerance for undertakings that are illegal under domestic law.

C. Scope of the Revenue Rule in Current Controversies

In *Pasquantino*, the Court found that a wire fraud prosecution did not implicate the revenue rule's concern that courts will become involved in international relations best left to the other branches of government, that courts will be placed in the position of making public policy decisions about foreign revenue laws at the risk of offending foreign governments, or that courts will have to exhaust excessive judicial resources in comprehending foreign revenue laws.[234] A criminal fraud that occurred partially within the United States in violation of a federal statute was not allowed to escape prosecution because the harm intended was aimed at a foreign government and its public law for the collection of revenue. The Court's decision did not place new limits on the revenue rule. Neither did the opinion expressly state the full scope of the revenue rule.

The Court did state that it expressed no opinion on the civil RICO suits and whether such suits will fall afoul of the revenue rule because they are attempts by foreign governments to collect taxes from smugglers.[235] As defined in its most narrow reading, the revenue rule does not permit a foreign sovereign to utilize the courts of the United States to directly or indirectly collect taxes due under its revenue laws or to enforce a tax judgment.[236] The RICO suits are clearly an attempt to indirectly collect excise taxes on smuggled cigarettes. As discussed in Part VII, the continued existence of the revenue rule depends in part of the availability of collection methods other than legal action in a foreign jurisdiction for collection of taxes. The use of civil RICO suits in United States courts would appear to be only one option open to governments who are attempting to collect taxes from corporate smugglers, and United States courts have properly held that the revenue rule precludes such suits.

---

234. *Id.* at 1778-80.

235. *Id.* at 1771 n.1.

236. *Contra* Brendan Delany, Note and Comment, *Bucking the Trend Toward EC Competence: An American Court Responds to a Suit by the European Community*, 21 J.L. & COM. 209, 213-18 (Spring 2002) (reporting that Judge Garaufis (E.D.N.Y.) in his July 2001 decision found the revenue rule not implicated in the suit and finding no separation of powers impediment); European Cmty. v. RJR Nabisco, Inc., 150 F. Supp. 2d 456, 484 (E.D.N.Y. 2001).

VI. ARGUMENTS FOR ABANDONING THE REVENUE RULE

A number of authors have opined that the revenue rule is no longer desirable in the changed contemporary atmosphere of international relationships and the prevalence of international commerce. These arguments are presented, and then, in Part VII, the case for the retention of the revenue rule is made. The arguments of each author are considered against a characterization of the revenue rule as a mechanism for protecting courts from involvement in international relations and decisions best left to the executive and legislative branches of government, a rule that prevents courts from rendering decisions that offend foreign governments by discounting or negating their public laws, and a defense against the inordinate expenditure of judicial resources in parsing meaning from foreign revenue laws.

A. The Discussion in the United States

An early article defined three bases for the revenue rule: historical precedent; tax rulings, which are similar to penal laws that are denied enforcement in foreign jurisdictions; and judicial scrutiny of foreign revenue laws, which is injurious to foreign relations, as described by Hand in *Moore*.[237] The author found the historical justification unpersuasive in part because the world's economies interact more frequently, and are more interdependent than they were when the rule was first enunciated.[238] Additionally, to the extent the justification of the rule was protectionism, "the effect of the revenue rule as a whole to encourage domestic commerce at the expense of other jurisdictions arguably has the long term harmful effect of reducing United States markets abroad."[239] This rationale for the rule appears, if at all, in Lord Hardwicke's original comment that:

> If it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this kingdom, which would be very bad consequences to the principal and most beneficial branches of our trade, and is not a present day rationale.[240]

---

237. Barbara A. Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, 22 GA. J. INT'L & COMP. L. 609, 612 (Fall 1992).

238. *Id.* at 617-18.

239. *Id.* at 618.

240. Boucher v. Lawson, (1734) 95 Eng. Rep. 55, 55-56 (K.B.).

The article further notes that the expansion of the revenue rule from a disinclination to consider foreign revenue laws in suits regarding commercial contracts does not support prohibition of the recognition of foreign tax judgments.[241] It is noted that revenue laws are not like penal laws and should not be denied recognition on the same basis.[242] Finally, the issue of sovereignty is found not relevant because foreign states are seeking the enforcement of a judgment, and the forum court should enforce the judgment from the taxing jurisdiction without examination of the foreign law supporting the judgment; this acceptance of a foreign revenue judgment would avoid interference with foreign sovereignty.[243] This failure to examine the underlying revenue statute is justified by the presumption that taxes rarely conflict with the enforcing state's public policy since all states impose revenue laws.[244] The article concludes by advocating the enforcement of judgments for foreign taxes but not actions for the collection of assessments not reduced to judgments in the taxing state's jurisdiction.[245]

This author did not have benefit of the arguments made in the RICO and wire fraud cases and additionally does not carefully consider the international repercussions from the enforcement of a tax judgment from a foreign country based on a revenue law that is antithetical to United States public policy. Although the Restatement adopts acceptance of foreign tax judgments alone, and not suit for tax liabilities, it describes the revenue rule as discretionary.[246] Silver does not offer a sound argument for not allowing courts the discretion to decline enforcement under the revenue rule if the underlying revenue statute is perceived to present difficult policy issues rather than risk offending a foreign sovereign.

In a more current article by Kovatch, the revocation of the revenue rule is contemplated because the author found Judge Hand's jus-

---

241. Silver, *supra* note 237, at 618-19.

242. *Id.* at 619.

243. *Id.* at 621-23.

244. *Id.* at 623-24. This view is not shared by the judges that heard the RICO and wire fraud cases. *See Pasquantino*, 305 F.3d at 297 n.9 (contrasting evasion of Canada's liquor tax with evasion of tax revenues from Iraq or Afghanistan or the evasion of a tax imposed by Canada on the importation of Bibles); *Canada*, 268 F.3d at 113 (considering a tax on the sale of United States newspapers, an exorbitant tax on machinery manufactured in the United States, a tax to deter sales of an American product, or an immigration tax on a religious group).

245. Silver, *supra* note 237, at 629.

246. RESTATEMENT (THIRD) of FOREIGN RELATIONS LAW of the UNITED STATES § 483 (1987).

tification resting on comity insufficient under present standards that require a generic foreign judgment to be "repugnant to the fundamental notions of what is decent and just in the State where enforcement is sought."[247] The standards imposed on the enforcement of foreign judgments are enforced, and occasionally courts decline to enforce the judgments.[248] Comity would be respected because the public policy doctrine is widely accepted by other nations.[249]

Kovatch asserts that those who engage in transactions in a state receive benefits from the state and that persons should, under the notion of reciprocity, contribute to the operation of the government of that state, and recognition of judgments that represent this obligation prevent the United States from becoming a tax haven.[250] Finally, Kovatch asserts the revenue rule encourages United States citizens to renounce their citizenship and, despite the enactment of section 877 of the Internal Revenue Code, enforcement is not possible under the revenue rule and those expatriates escape liability.[251]

Kovatch's comparison of foreign judgments resting on revenue laws with generic foreign judgments is well taken, and the Restatement allows courts to enforce foreign revenue judgments. His argument based on reciprocity is valid, but the enforcement of foreign revenue laws is best undertaken in the country where the liability is incurred to protect courts from incursions into foreign public laws. Finally, Kovatch seems to advocate the repeal of the revenue rule so that other countries will grant reciprocity to the United States in its attempts to collect taxes from expatriated United States citizens. This problem would appear to lend itself to treaty terms rather than the abrogation of the revenue rule so that the United States does not find itself enforcing revenue laws of foreign states against foreign nationals as a matter of reciprocity.

Another article attacks the revenue rule because tax claims under appropriate treaties would not be subject to attack as invalid or in violation of the forum state's public policy.[252] Courts would be free of

247. William J. Kovatch, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265, 277-78 (Winter 2000) (quoting Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981)).

248. *Id.* at 278-79.

249. *Id.* at 279-80.

250. *Id.* at 281-83.

251. *Id.* at 283-84; I.R.C. § 877 (2000).

252. Vitaly S. Timokhov, *Enforcing Tax Judgments Across Borders: How Collection Assistance Can Overcome Limitations of the Revenue Rule (Part 2)*, 14 J. INT'L TAX'N 20, 22-23 (Sept. 2003).

making such evaluations because any challenge would be an encroachment by the judicial system on the prerogative of the executive branch, and the revenue rule could, in the face of such treaties, be abolished.[253] The use of treaties to shape the extent one government is willing to permit its courts to enforce judgments imposed under another government's revenue laws has been undertaken by the United States to the extent the Senate Foreign Relations Committee is comfortable with the arrangement. But treaties do not negate the usefulness of a rule that protects courts from involving themselves in matters they discern best left outside the judicial process.

B. The Revenue Rule as Perceived by Foreign Writers

The revenue rule is also attacked in international journals. A British legal scholar advocates abandonment of the revenue rule and application of choice of law rules to revenue claims as they are to other claims and that indirect suits for taxes should be decided on the basis of private law rights that are not impacted by the fact that enforcement of the rights may result in the collection of taxes by a foreign state.[254] Briggs asserts that the revenue rule appears to sanction the evasion of taxes, and a contractual claim for taxes should be considered under the choice of law regime where "claims will be characterized; and choice of law will follow. No separate exclusionary rule will be needed."[255] In private suits, if equity exists between the parties the court would not lack jurisdiction and could enforce duties even if, as a result of the enforcement, a foreign state would consequently collect tax revenue and "[p]rivate law rights should not be poisoned by the existence of a public law interest."[256] Briggs' makeover would permit the choice of law mechanism to prevent a foreign state from coming to a domestic court and enforcing a revenue law but would allow a broad range of private suits. Suits seeking payments of debts that would, in whole or part, pay taxes owed to a foreign government would no longer be subject to the revenue rule, and the unsatisfactory result of some earlier British cases where courts refused to hear cases because a foreign government stood to benefit from tax collection if the plaintiff won, would be avoided. There is strong appeal to the idea of narrowing the revenue rule so that private parties could ad-

253. *Id.* at 23.

254. Adrian Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, 2001 SING. J. LEGAL STUD. 280, 295-96 (Dec. 2001).

255. *Id.* at 296.

256. *Id.* at 297.

vance cases that have only a tangential tax element, and such cases should not be precluded by concern for relationships between sovereigns.[257] Briggs fails to address the concern United States courts express regarding the RICO cases and the fact that the cases require the courts to compute the lost tax revenues to calculate the proper scope of damages, and the implicit recognition such computation would offer to the revenue laws of a foreign state outside the terms agreed to in treaties.

An Australian scholar reviewed the history of the revenue rule, noting that it was adopted by Australia as part of English common law.[258] Burgess suggests that allowing reciprocal enforcement of revenue debts would benefit both countries involved in an international collection effort because it would allow reciprocal revenue debt collection.[259] Burgess suggests that of the enforcement mechanisms available, revenue judgments should be enforced under the statutes permitting recognition of civil judgments, or alternatively the OECD treaty creates a framework in the Convention of Mutual Assistance in Tax Matters to require assistance in the collection of member nation's foreign tax debts.[260] Burgess generally assumes that collection of foreign tax debts in domestic courts is based on comity and, as long as the revenue law is not repugnant to the public policy of the country where enforcement is sought, courts should recognize revenue judgments of foreign courts.[261] It is this caveat, that the law is not repugnant to the public policy of the country in which the court sits, that is the foundation of the idea that courts should not be making that determination in an action in law.

Two Spanish scholars advocate adopting international bilateral agreements to assist in the collection of tax liabilities.[262] One author dismissed the present reluctance to enforce tax judgments because of the "need to prosecute fiscal fraud and control [tax] evasion."[263] The other author stated the revenue rule is "anachronistic and leads to jurisdiction-hopping, displacing the tax burden of citizens who avoid

257. *Id.* at 298.

258. Burgess, *supra* note 110, at 645.

259. *Id.* at 648.

260. *Id.* at 649-52.

261. *Id.* at 645-46.

262. Franciso Alfredo Garcia Prats, *Mutual Assistance in Collection of Tax Debts*, 30 INTERTAX 56, 58-59 (2002); Amparo Grau, *Mutual Assistance for the Collection of Tax Claims*, 28 INTERTAX 241, 245-46 (2000).

263. Prats, *supra* note 262, at 59.

paying their taxes."[264] This author suggests extending the United States constitutional doctrine of full faith and credit internationally, as the United States Supreme Court did with tax judgments between domestic states.[265] These discussions did not evaluate the rationale underlying the revenue rule including the reluctance of courts to undertake roles reserved for the legislative and executive branches of government but rather address a method for arriving at agreements that can increase the efficiency of tax debt collection.[266]

Finally, an English practitioner, in reaction to the United States RICO cases, evaluates the foundations of the revenue rule.[267] Baker asserts sovereignty is more a description of the rule than an explanation, and comity is not a concern in a world where courts routinely review laws of foreign jurisdictions in private law suits.[268] He notes that the RICO case decisions rested on the idea of separation of powers.[269] Baker asserts that to abrogate the revenue rule "risks undermining our existing framework for international taxation" but observes that this is currently under consideration in the European Union.[270] The Amendment to the European Mutual Assistance Directive, which required compliance by June 30, 2002, abrogated the revenue rule among the European Union member states, and Article 27 of the EOCD Model Treaty provides for assistance in the collection of tax debts and allowed adoption of tax collection assistance terms in treaties.[271] Baker asserts that abrogation of the revenue rule facilitates taxation of non-resident citizens.[272] Although Baker dismisses the revenue rule as lacking in sound basis, he fails to solve the problem of courts addressing foreign tax laws on a policy level.

Although these arguments for the abandonment of the revenue rule offer alternative existing structures to permit courts to enforce

---

264. Grau, *supra* note 262, at 243.

265. *Id.* at 243.

266. *See, e.g.*, Grau, *supra* note 262, at 245-46.

267. Philip Baker, *Changing the Norm on Cross-border Enforcement of Debts*, 30 INTERTAX 216, 216 (2002).

268. *Id.*

269. *Id.*

270. *Id.* at 216-17.

271. *Id.* at 217; *see* European Council Directive 2001/44, 2001 O.J. (L 175/117).

272. Baker, *supra* note 267, at 217; Baker posits two examples where abrogation of the revenue rule would result in fairer results and better administration of the tax system: (1) abrogation eliminates the need for departure taxes on appreciated assets removing from taxing jurisdictions prior to a recognition event; and, (2) a method for taxation of exercised stock options that were received in another country and exercised in a second would result. *Id.* at 217-18.

revenue judgments and claims, the analysis by the authors does not address the public policy issues that concern United States courts. Courts are concerned with the interpretation of foreign revenue law and, more importantly, with the problem of enforcing a tax that offends United States public policy through an unreasonable tax on United States products, a tax on activities encouraged or permitted in the United States, or a discriminatory tax under United States sensibilities. This concern is expressed as a matter of comity, a desire not to embarrass a foreign state by impugning its statutes.[273]

Nor do the authors define the rationale that supports courts entering into the realm of international relations regarding recognition of revenue laws in other states. Courts are reluctant to decide that a specific foreign revenue law is not subject to enforcement when the executive and legislative branches have not had the opportunity to consider the impact of such a decision in conversations with foreign governments. Part VII advocates the retention of the revenue rule as sound judicial policy that alleviates the need for judges to make foreign policy decisions.

VII. CONCLUSION: THE REVENUE RULE STILL HAS A ROLE TO PLAY

The Restatement of Foreign Relations Law offers a narrow definition of the revenue rule: "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines or penalties rendered by the courts of other states."[274] This is the rule that led to the decisions by the Canadian Supreme Court in *Harden* and the Ninth Circuit in *Gilbertson*. This rule is subject to abrogation by treaty, but the United States has declined to open its judicial system to the enforcement of foreign tax judgments in this manner.[275] This version of the rule rests squarely on the rationales offered by Judge Hand and by the House of Lords in *Taylor*. It restrains the judicial system from examining and passing judgments on the revenue laws of another state, it prohibits foreign states from extending their sovereign will into the courts of another state, and it

273. *See* Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929); Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 113 (2d Cir. 2001); United States v. Pasquantino, 305 F.3d 291, 297 n.9 (4th Cir. 2002).

274. *See supra* note 174.

275. *See* discussion *supra*, Part V.

eliminates the need for courts to master the intricacies of a foreign revenue system.[276]

But the argument against the revenue rule is in part based on the idea that it is unfair to allow those who have avoided a tax obligation in a foreign state to escape enforcement in the state where they are located. This may be a valid argument in a few estate tax cases where the estate consists of fungible assets that are easily transported. It is less applicable under current taxing regimes for excise and income taxes for several reasons. First, a taxpayer will generally have sufficient property in the taxing state that gave rise to the revenue that those assets can be attached by the taxing authority. This perception is based on the fact that the only case seeking tax from United States citizens for unpaid taxes resulted from a logging operation where the product was removed from Canada, and one can assume no facility or assets remained in Canada after the timber was removed. But this is not the normal characterization of a business subject to tax in a foreign jurisdiction, and assets of some description would presumably be available for attachment. Additionally, the majority of businesses maintain ongoing relationships within the country to which they owe taxes.

Second, when the income is passive and no assets other than an investment in intangibles, stocks, bonds, bank accounts or other instruments exist, nations use withholding tax to collect the tax due from the investor.[277] Enforcement in the United States is aided by a code provision making withholding agents personally liable for the amount required to be withheld.[278] The ability of the state where revenue is created to collect taxes owed to it seems sufficient to permit the sovereign state to administer its tax collection system within its own borders, without any ongoing need to revert to a foreign judicial system to enforce judgments.

---

276. James Eustice attributes to Learned Hand the observation:

> In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but is within my power, if at all, only after the most inordinate expenditure of time.

James S. Eustice, *Tax Complexity and the Tax Practitioner*, 45 TAX L. REV. 7, 7 (Fall 1989). The effort required to parse the meaning from foreign statutes would, one assumes, be every bit as daunting a task.

277. In the United States the withholding tax is provided for under I.R.C. §§ 871, 881 (2000).

278. I.R.C. § 1461 (2000).

Enforcement of revenue judgments under the rules regulating the enforcement of other judgments requires that due process concerns be satisfied, including that the party against whom the judgment has been entered was served with notice of the debt and subjected himself to personal jurisdiction of the foreign court.[279] The concern that persons would flee the jurisdiction and seek safe harbor in the United States as a tax evader would not be solved by a scheme that required the tax evader to appear in the foreign jurisdiction to have a judgment for taxes entered against him. If the tax evader violated the revenue laws of a state, that state's course of action would lie in an extradition proceeding if the offense was a serious criminal offense.[280]

Under the broader definition of the revenue rule, cases brought to enforce tax liabilities that have not been reduced to a judgment or cases alleging liability in a civil suit for damages based on the amount of tax avoided are dismissed in United States courts. These decisions narrow Lord Mansfield's absolute standard of total non-recognition that allowed enforcement of contracts based on undertakings that violated revenue laws. The standard has eroded, but it exists in a less virulent form in United States and British courts. Foreign states are precluded from indirect enforcement of revenue laws as seen in *Drukker*, *King of Hellenes*, *Taylor*, and *Municipal Council of Sydney*.[281] This modern construction of the rule properly excludes suits by foreign governments under the RICO statutes for unpaid taxes. Governments can seek prosecution within their own borders and rely on domestic civil enforcement of tax liabilities to collect tax from evaders. A sophisticated smuggling scheme such as that alleged in the cigarette company cases involves actors with businesses in the victim countries. Lost revenues can be recovered from the domestic actors. Non-corporate smugglers can be reached through domestic criminal indictments and, if necessary, extradition suits.

The concern that underlies, at least in part, the revenue rule is that courts are reluctant to engage in evaluation of another state's decision to raise revenue in any particular way or to discourage or en-

279. Uniform Foreign Money-Judgments Recognition Act, § 4(b) (1963). Section 4(b) provides that a foreign judgment need not be recognized if (1) there was lack of sufficient notice; (2) there was fraud in obtaining the judgment; (3) the foreign judgment is repugnant to public policy; (4) the judgment sought to be enforced conflicts with other judgments; (5) the parties agreed to a different proceeding that the one before the foreign court; or (6) the forum court was "seriously inconvenient." *Id.*

280. *See* Zagaris, *supra* note 196, at 682-83.

281. *See supra* notes 68-76 and accompanying text.

courage behavior through social engineering in the tax system. States have sufficient "hooks" to catch tax evaders within their own borders or to capture tax on income before it leaves the country, and these mechanisms weigh against interference by the judiciary of another country. The revenue rule, as described by the Second and Fourth Circuit, fulfills its function as a means of protecting courts from (1) interfering with the foreign relations function of the executive and legislative branches of government, (2) allowing United States courts to become enforcement arms of foreign governments in revenue matters, and (3) rescuing courts from the necessity of considering the validity and the intricacies of foreign revenue laws.[282] The Supreme Court described the purposes of the revenue rule: (1) "judicial evaluation of the policy laden enactments of other sovereigns," (2) separation of powers when the executive is "the sole organ of the federal government in the field of international relations," and (3) the competency of the courts to "examine the validity of unfamiliar tax law schemes."[283] Although the Court's decision was narrowly focused on the revenue rule as a defense in a wire fraud prosecution, the Court accepts the broad rationales that underlay the common law rule.

The revenue rule fills, in the twenty-first century, a role necessary to protect the judiciary from making decisions better left to the other branches of government and immersing itself in the intricate and sensitive area of tax enforcement for other nations. In a world with far more international contact and far greater reliance on international trade than Lord Mansfield could imagine when he first attempted to protect British trade and British courts from the vagaries of foreign revenue laws, the revenue rule stands on firm ground and should not be abandoned or modified so that courts must deal with matters best left to others. Whether the courts ultimately adopt this stance will be seen as the Second Circuit re-evaluates its decision in the *European Community* decision.[284]

---

282. As discussed in Part V C, violations of United States laws should not be subject to the revenue rule because the criminal behavior occurred in the United States and the defense that an act to defraud a foreign government of revenue cannot constitute a crime in the United States offends a sense of justice that is an older common law concept than the revenue rule. As noted, the Supreme Court affirmed convictions for wire fraud when the object of the fraud was avoidance of Canadian excise taxes on alcohol at least in part under this reasoning.

283. Pasqunatino v. United States, 125 S. Ct. 1766, 1779-80 (2005).

284. European Cmty. v. RJR Nabisco, 125 S. Ct. 1968, 1968 (2005).