Historically, the UK courts’ have refused co-operation in the recovery of taxes by other jurisdictions. This was confirmed in the case of Government of India, Ministry of Finance (Revenue Division) v Taylor and Another [1955] AC 491.

However, no tax practitioner will have failed to notice the ever increasing UK and worldwide trend for the exchange of information and provision of mutual assistance in the recovery of taxes, which has been gradually eroding this basic principle.

Although the UK has participated in some form of EU cross-border mutual assistance in relation to the recovery of taxes since as far back as 1976, the scope of such assistance has recently been consolidated and widened by EU Directive 2010/24/EC (concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures) (MARD 2010). This was enacted into UK law on 1 January 2012 with what would otherwise have expected.

As a result, not only are the less compliant likely to be much more exposed to foreign tax claims but also the more diligent. Moreover, even practitioners acting as executors or trustees could be faced with tax bills that they may not otherwise have expected.

Overview of current mutual assistance agreements

MARD 2010 imposes an obligation on the UK to, inter alia, assist any Member State of the EU in the recovery of tax debts. Many of the key features of MARD 2010 were already present in the predecessor directive (EU Council Directive 2008/55/EC (MARD 2008), enacted into UK law in 2008). However, MARD 2010 broadened the scope of taxes so that, essentially, all taxes are covered (including inheritance/estate duty type taxes) as well as all penal charges arising in relation to the same.

The Convention was enacted into UK law in its original form first in May 2008 and subsequently (with the 2010 amending protocol) in October 2011. It imposes a very similar obligation on the UK, to assist any signatory state in the recovery of all tax claims (other than customs or other import/export duties). Significantly, one of the amendments made by the 2010 amending protocol was to open the Convention to signature by countries outside of the CoE and EU – paving the way for greater worldwide assistance in the collection of taxes. The chart of signatures to, and ratifications of, the Convention on the OECD’s website provides a snapshot of the geographical breadth of the Convention.

The UK’s basic principle of non-co-operation is, in reality, a thing of the past

Article 27 was first introduced in 2003 in the OECD Model Tax Convention and is increasingly being adopted by the UK in new and existing double tax agreements. To date, the UK has entered into such agreements with the Faroes, Mexico, New Zealand, the Netherlands, Oman and (just last month) Liechtenstein. Article 27 again imposes an obligation on the UK to assist the relevant country in the recovery of tax claims. Although, double tax agreements based on the OECD model tend to relate to just income and capital gains (and not, for example, inheritance or estate taxes), Article 27 (in its unamended form) is not restricted to those taxes.

Limitations to the UK’s obligation to assist in the recovery of taxes

There are some limitations to the UK’s obligation to assist in the recovery of taxes under the above mentioned arrangements. As a general theme, the UK will not pursue a
claim for foreign taxes if that claim is contested by the taxpayer. If the claim is time barred (always determined according to the laws of the ‘applicant state’), the claim cannot be pursued either. In addition, there are the limitations set out in the table.

The UK has chosen to keep the debt recovery provisions of its double tax agreements as wide as possible

The commentary to Article 27 envisages that contracting states would tailor it to their particular needs (for example by limiting claims to residents of the contracting states, limiting the age of a claim, or limiting the taxes covered by the article) and, in doing so, would limit the scope of the mutual assistance in the recovery of taxes. However, it would appear that (to date) the UK has chosen to keep the debt recovery provisions of its double tax agreements as wide as possible. It is presumed here that there may have been memoranda of understanding (not in the public domain) exchanged with the contracting states that limit the scope to some extent in practice. This is certainly supported by references in HMRC’s Debt Management and Banking Manual, to certain limitations on the age and value of a claim enforceable in the UK, which cannot be found in the relevant double tax agreements.

### Practical issues
Retrospective or retroactive? It is not clear whether a foreign tax authority could pursue a claim for tax where the claim arose before the

### Limitations to the UK’s obligation to assist

<table>
<thead>
<tr>
<th></th>
<th>MARD 2010</th>
<th>The Convention</th>
<th>Model Article 27</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Time</strong></td>
<td>Five years.</td>
<td>15 years.</td>
<td>No express time limit. However, see HMRC manual DMBM560410–560440, which suggests that HMRC has agreed a maximum age limit through memoranda of understanding.</td>
</tr>
<tr>
<td><strong>Value</strong></td>
<td>€1,500.</td>
<td>None, except where the claim is against a deceased’s estate, in which case the claim is limited to the value of the estate or the value received by the beneficiary concerned.</td>
<td>No express de minimis. However, see HMRC manual DMBM560410–560440, which suggests that HMRC has agreed minimum thresholds through memoranda of understanding.</td>
</tr>
<tr>
<td><strong>Claim can be contested</strong></td>
<td>N/A</td>
<td>No assistance until the claim cannot be contested (for non-residents of applicant state).</td>
<td>No assistance until the claim cannot be contested.</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td>Recovery of the claim would create serious economic or social difficulties for the UK.</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>Claim is at variance with the laws and administrative practice of either of the contracting states.</td>
<td>Claim is at variance with the laws and administrative practice of either of the contracting states.</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>Claim is contrary to public policy.</td>
<td>Claim is contrary to public policy.</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>Claim is contrary to generally accepted taxation principles or to the provisions of a double tax agreement, or of any other convention which the requested state has concluded with the UK.</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>Claim discriminates against a UK national (as compared with a national of the applicant state).</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>The applicant state has not pursued all reasonable measures of collection available under its laws or administrative practice.</td>
<td>The applicant state has not pursued all reasonable measures of collection available under its laws or administrative practice.</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>The administrative burden for the UK is clearly disproportionate to the benefit to be derived by the applicant state.</td>
<td>The administrative burden for the UK is clearly disproportionate to the benefit to be derived by the applicant state.</td>
</tr>
</tbody>
</table>
UK’s ratification of the relevant arrangement. Certainly, MARD 2010 is silent on the point. However, at least in that case, it is clear that the UK will not entertain claims that are more than five years old. The Convention is not altogether clear on this point either; as (by the 2010 amending protocol) the default position is that the Convention has effect for tax claims arising after the Convention entered into force in the applicant state, but allowance is made for states to agree that the Convention may apply to earlier tax periods. Finally, the commentary to Article 27 (para 14) specifically makes the point that Article 27 can be used for revenue claims that arose before the relevant double tax agreement entered into force, unless specifically amended.

Choice of agreement to suit: Both MARD 2010 and the Convention make provision for the co-existence of similar arrangements without limitation. The net result is that there is a layering of mutual assistance agreements in existence. Therefore, to the extent that a country is a member of the EU and/or a signatory to one or more of the Convention and a double tax agreement (containing Article 27) with the UK, that country will be able to choose which arrangement suits it best in order to recover its taxes in the UK, the Netherlands being a prime example (being a party to all three arrangements). This will mean that limitations under one arrangement will not necessarily restrict a foreign tax claim being brought in the UK (if another, wider, arrangement is available).

Jurisdiction: If HMRC is presented with a petition for assistance in the enforcement of a foreign tax claim, it will assume that the claim is a valid one and commence enforcement proceedings. However, it is not beyond the realms of possibility that claims will be raised where liability is not clear cut. Unfortunately, any attempt to contest a claim would need to be brought in the country in which the tax liability originally arose – which could be inconvenient and costly for a UK resident taxpayer. Only where there is a question over HMRC procedure, may the taxpayer invoke the jurisdiction of the UK courts.

Where does this leave the taxpayer and his advisers?
It is not known how often the UK has had to exercise its duties under the various mutual enforcement of taxes arrangements. However, it can only be assumed that the frequency is likely to increase as budgets tighten and taxing authorities seek to raise more revenues, leaving the taxpayer more exposed than ever to foreign tax claims. This is particularly so, now that the scope of taxes subject to a potential claim has widened with the enactment of MARD 2010, and now that the Convention has been opened up to other non-CoE/OECD countries.

Limitations under one arrangement will not necessarily restrict a foreign tax claim being brought in the UK

Safeguards for taxpayers
It is hard to recommend particular safeguards to an unexpected foreign tax claim. However, some suggestions include:

- Meticulous record keeping (to provide ammunition against an unfounded claim if necessary);
- Reliance on HMRC practice (as to, for example, age and value of claims), as stated in its manuals;
- Seeking tax clearances abroad, to the extent available;
- Seeking insurance to cover potential claims; and
- In the case of practitioners acting as executor for a deceased client’s estate:
  - Considering use of a limited company as executor in place of the practitioner (albeit accepting the limitations of non-contentious probate rules 36(4)(d));
  - Ascertaining whether the deceased had significant business or personal interests outside of the UK (in order to form a view on the level of risk) before accepting office;
  - Making enquiries in jurisdictions where the deceased had business or personal interests – first as to whether an agreement on the mutual enforcement of taxes is in place and second whether the deceased left any outstanding tax liabilities; and
  - Seeking indemnities from beneficiaries (to the extent the beneficiaries are worth the value of the indemnity).

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