

THE EQUALITY PRINCIPLE IN UNITED KINGDOM TAXATION

LAW

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There is no equality principle in United Kingdom taxation law.

There is a temptation to leave this Chapter simply with the bold statement in the previous sentence. However, it would be a little unforgivable if one did not elaborate slightly on that statement.

That there is no equality principle in UK tax law may seem startling for a continental European lawyer brought up with the idea that such a principle must exist. However, if one thinks a little bit further about the United Kingdom and its constitutional background, the answer is really not surprising.

The key point is that the United Kingdom has not and has never had a written constitution. As such, the United Kingdom does not have (in any normal, modern sense) a Bill of Rights enshrining principles such as equality before the law. Thus there is no constitutional basis for a principle of equality. There is also no constitutional basis for a challenge to UK tax legislation on grounds of incompatibility with constitutional norms.

To say that the United Kingdom has no written constitution is not to say that we have no constitutional law. We do have, but it is not enshrined in a

written constitution. We have constitutional documents - including such documents as the Magna Carta of 1297. We also have a Bill of Rights of 1688 but that document predates any notions of democracy or equality between persons. The draftsmen of the 1688 Bill of Rights would have been initially amused at the idea that all persons should enjoy equal rights in taxation. On further thought, they would have become quite worried at such a radical concept.

In the absence of a written constitution, the United Kingdom has not in the past enjoyed any constitutional review of legislation. We do not have a constitutional court. It is only within recent years that the United Kingdom courts have had the power to declare that a Statute of Parliament may not be enforced, and then only on grounds of incompatibility with European Community Law¹. The United Kingdom courts are also to have power to issue a declaration of incompatibility between statutes and rights guaranteed by the European Convention on Human Rights under the new Human Rights Act of 1998 (which will go into force some time in the year 2000).

Aside from these limited possibilities for judicial review of legislation, the traditional approach of the English constitution has been to recognise the doctrine of Parliamentary sovereignty. Under this doctrine, Parliament is

¹ See R. v. Secretary of State for Transport ex parte Factortame, Case C-213/89 [1990] ECR I-2433.

entirely sovereign and its legislation, duly enacted, cannot be challenged on any grounds, including on grounds of inequality of application.

Thus, for example, if the United Kingdom Parliament were to enact that slightly balding, red-headed, over-weight tax lawyers (I have no-one particular in mind when I write this) were to pay a tax rate twice that applicable to other mortals, then under traditional doctrine this law would be valid and no challenge might be mounted.

Given this weight of constitutional principle, it is really not surprising to the UK tax lawyer that there is no principle of equality in taxation. What is really surprising is that such a principle exists in other European countries. It is only in reading other Chapters in this book that the United Kingdom tax lawyer realises what we have been missing over all these years. Perhaps something good may yet come out of the harmonisation of tax law within Europe.

By way of illustration, one can see something of a flavour of the approach of the United Kingdom courts in a case called Inland Revenue Commissioners v. The National Federation of Self-Employed & Small Businesses Limited². The background to that case was that the Inland Revenue had identified that many casual workers on newspapers in London had not been paying tax for a number of years under the system for deduction of tax at source. The Revenue introduced a new system but in so doing agreed in effect

to give an amnesty for tax that had not been paid in previous years to those employees who joined the new system. The National Federation, which was an association of the self-employed and small business people, sought judicial review of the Revenue's administrative decision on grounds that the Revenue had acted unlawfully by granting an amnesty to one group of taxpayers to the detriment of the general public. The House of Lords rejected the National Federation's claim. The House of Lords noted that income tax was a tax placed under the "care and management" of the Commissioners of Inland Revenue. As part of that care and management function, the Commissioners were entitled to exercise a discretion in the collection of tax. That might involve granting an amnesty to certain taxpayers. So long as the Commissioners acted within the scope of the law, their discretion could not be challenged.

While the absolute statement which commences this Chapter still remains a general principle, it is appropriate to point out that - to a very limited extent - an approach which has some aspect of the equality principle is beginning to creep into the United Kingdom tax law. This is occurring in a number of ways.

First, Article 14 of the European Convention on Human Rights requires that the rights guaranteed by the Convention should be enjoyed without

² [1981] STC 260, House of Lords

discrimination. The Convention is not yet part of the United Kingdom domestic law, but will become so within the next two years.

Provisions of United Kingdom tax legislation have been struck down on grounds that they breach the obligation of non-discrimination. A recent example is the case of McGregor v. United Kingdom³ which concerned the additional personal allowance granted to a husband who care for an incapacitated wife, but not to a wife who cares for an incapacitated husband in similar circumstances. Mrs. McGregor took her challenge to the European Commission of Human Rights on grounds that the failure to grant her this additional allowance was discriminatory. She won before the Commission, and the United Kingdom legislation has been amended.

A duty of non-discrimination is also imposed with respect to the United Kingdom's exercise of its competence in tax matters by virtue of the Treaty of Rome. Any discrimination which interferes with the enjoyment of fundamental rights by those entitled to protection of Community law, and which cannot be justified, would be incompatible and could be struck down.

Finally, though the United Kingdom has not recognised a principle of substantive equality in tax law, a principle of procedural fairness or equality

³ Decision of the European Commission not yet reported.

has been recognised for many years. This is generally seen as part of the principle of natural justice which those exercising judicial or quasi-judicial functions must observe⁴. The principles of natural justice reduce themselves to two cornerstones. First, the principle *audi alteram partem*: that a person adversely affected by a decision has a right to be heard before the decision is final. This guarantees an equal right to a hearing. The second principle is *nemo debet esse iudex in propria causa potest*: a body should not sit to try an issue if a member of that body has an interest in the outcome.

These principles of natural justice have been recognised in the context of administration, including by the revenue departments, for many years. However, they do not touch on the question of substantive equality.

Through the European Convention on Human Rights and through European Community law, concepts such as equality in taxation are beginning to find root in the UK taxation system. However, the United Kingdom lags a long way behind continental European countries in this respect. This publication is therefore of particular interest to UK tax lawyers since it shows to them where developments may come in the future. It introduces to us a whole area of jurisprudence of our near neighbours which is totally lacking in the jurisprudence of our own country.

⁴ See, for example, Jones & Thompson, Garner's Administrative Law (Butterworths, 1996, 8th Edition), pp.240FF.