TAX COMPLIANCE AND THE REVENUE RULE IN PROSECUTIONS FOR WIRE AND MAIL FRAUD

A. Introduction: the Revenue Rule

The "revenue rule" is a "well-settled principle of international law that one nation's courts will not enforce the tax claims of another jurisdiction".[1] The US Court of Appeals for the Second Circuit has recently held, however, that using US foreign or interstate telecommunications to devise a scheme to defraud a foreign revenue authority is wire fraud under US law. In *United States* v. *Trapilo*[2] the Second Circuit reversed the dismissal of indictments against alleged smugglers charged with using telephones and fax machines to effect tax-evasive importation of alcohol into Canada. Under *Trapilo*, which conflicts with a contrary First Circuit decision on almost identical facts,[3] the entire breadth of US wire and mail fraud precedent may apply to punish violations of foreign tax laws. Moreover, the decision substantially erodes the revenue rule.

Under the traditional formulation of the revenue rule, courts will "not lend their assistance to the enforcement, directly or indirectly, of foreign tax liabilities".[4] The rule has been widely adopted in common law and other countries, although it has been criticised as "facilitating fiscal evasion by itinerant taxpayers".[5] The rule is observed or approved, entirely or partly, in Australia,[6] Canada,[7] England,[8] France,[9] Ireland,[10] the Isle of Man,[11] Jersey,[12] Scotland,[13]

1. *Askanase* v. *United States* (*In re Guyana Development Corp.*), 189 B.R., 393, 396 (Bankr. S.D. Tex. 1995).

2. 130 F.3d 547 (2d Cir. 1997), cert. denied *sub. nom Pierce* v. *United States*,—U.S.—, 119 S.Ct. 45, 142 L.Ed.2d 35 (1998).

3. *United States* v. *Boots*, 80 F.3d 580 (1st Cir.) cert. denied, —U.S.—, 117 S.Ct. 263, 136 L.Ed.2d 188 (1996).

4. *In re State of Norway's Application (No.2)* [1990] 1 A.C. 723.

5. A. R. Albrecht, "The Enforcement of Taxation Under International Law" (1953) 30 B.Y.I.L. 454, 462. See also Richard E. Smith, "The Non-Recognition of Foreign Tax Judgments: International Tax Evasion" (1981) Ill. L.R. 241, 242 (arguing that the revenue rule encourages tax fraud by providing an "attractive and expedient means of evading the revenue laws of a foreign nation").

6. *Permanent Trustee Co. (Canberra) Ltd* v. *Finlayson* (1963) 122 C.L.R. 338 (Austl.)

7. *United States of America* v. *Harden* (1963) 41 D.L.R. 2d 721 (Alta.).

8. *Government of India* v. *Taylor* [1955] 1 All E.R. 292.

9. In *idem* [1955] 1 All E.R. 292, 302, Lord Somervell quotes *Pillet's Traité de Droit International Privé*, para. 674, thus: "Les jugements rendus en matière criminelle ne sont pas les seuls qui soient soumis à la loi de la territorialité absolue. Les jugements rendus en matière fiscale ne sont eux non plus susceptibles d'aucune exécution à l'étranger, et l'on n'a même jamais songé à la possibilité de faire exécuter sur le territoire de l'un d'eux une sentence relative aux droits fiscaux de l'état qui auriat été rendue sur le territoire d'un autre."

10. *Peter Buchanan Ltd* v. *McVey* [1954] I.R. 89.

11. *In re Tucker* [1988] F.L.R. 323.

12. *In re Tucker* [1988] F.L.R. 378.

13. *Metal Industries (Salvage) Ltd* v. *Owners of the S.T. "Harle"* 1962 S.L.T. 114.

South Africa[14] the United States,[15] and other countries.[16] The rule has also been incorporated into statutes and international agreements for the enforcement of judgments.[17] In addition, many countries which have not specifically adopted the rule would probably apply the rule under principles of reciprocity,[18] at least against those which have adopted it.

The revenue rule developed originally in contract actions in the context of whether the affirmative defence of illegality is to be determined by the law of the forum or the law governing the contract. In the first such case an aggrieved merchant sought to recover the value of a gold shipment from a shipowner who refused to deliver the gold to the merchant once it had arrived in London from Portugal. Among the shipowner's contentions was that the illegality of the contract under Portuguese law prevented the merchant from suing for the value of the gold in England. Lord Hardwicke rejected the argument, holding that although "the carrying on of a trade prohibited by the laws of England is of material consequence" to the enforcement of the contract, the fact that the "goods are prohibited to be exported by the laws of a foreign country" is not.[19]

The reverse scenario—a legal foreign contract being part of a scheme intended to circumvent the law of the forum—presented itself in *Holman* v. *Johnson*, in which Lord Mansfield first articulated the famous dictum that "no country ever takes notice of the revenue laws of another".[20] *Holman* was the first in a series of cases[21] somewhat similar to the cases on which the US Court of Appeals has divided. In each of the early cases a foreign vendor sold goods to a buyer intent on smuggling the goods into England and sued for the price; although the sales were licit where made, the buyer in each case asserted that the illegality of the smuggling scheme under English law prevented the seller from recovering the purchase price in an English court. Lord Mansfield, however, characterised the action in *Holman* as one "brought merely for goods sold and delivered at

14. *Comm'r of Taxes* v. *McFarland* 1965(1) S.A. 470 (Witwatersrand Local Div.).

15. E.g. *HM the Queen ex rel. British Columbia* v. *Gilbertson*, 597 F.2d 1161 (9th Cir. 1979) (applying Oregon law); *United States* v. *First National City Bank*, 321 F.2d 13, 23–24 (2d Cir. 1963), aff'd on reh'g *en banc*, 325 F.2d 1020 (2d Cir. 1964), rev'd on other grounds, 379 U.S. 378 (1965) (following federal common law).

16. F. A. Mann, "Prerogative Rights of Foreign States and the Conflict of Laws" (1954) 40 Grotius Soc. Transactions 25, 28 n.8 (citing decisions from courts in Austria, Belgium, Denmark, Egypt, Germany, Italy and Sweden).

17. The EC Convention of 27 Sept. 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by virtue of Art.1(1), does not extend to "revenue, customs, or administrative matters". Similarly, the Uniform Foreign Money-Judgments Recognition Act excludes judgments for taxes. See e.g. Fla. Stat. ch.55.602(2) (1997); N.Y. McKinney's C.P.L.R. §5301(b) (1996). At the time of writing, 30 of the United States have adopted the UFMJRA.

18. Japan requires reciprocity: Minsoho 200(4). Common law countries do not traditionally impose a requirement of reciprocity for the enforcement of foreign judgments. E.g. *Adams* v. *Cape Industries* [1990] 1 Ch. 433, 552. Section 4(b) of the Uniform Foreign Money-Judgments Recognition Act does, however, contain such a requirement.

19. *Boucher* v. *Lawson* (1734) 95 Eng. Rep. 53, 55–56 (KB). For a modern example of the same problem and the same result, see *Holmes* v. *Mangel*, 72 B.R. 516 (Bankr. S.D. Fla. 1987).

20. (1775) 98 Eng. Rep. 1120, 1121 (KB).

21. See also *Clugas* v. *Penaluna* (1791) 100 Eng. Rep. 1122 (KB); *Bernard* v. *Reed* (1794) 170 Eng. Rep. 290 (KB).

Dunkirk";[22] he refused to allow the buyer's intent to smuggle the purchased goods to affect the seller's remedies under the contract because France, he concluded, would not take notice of English revenue laws. Consequently, the contract, legal under the law of France, where delivery and payment were made, was not rendered illegal by the subsequent import of the contracted for goods into England in violation of its revenue laws.

Lord Mansfield repeated the dictum four years later in *Planche* v. *Fletcher*,[23] in which a ship insurer argued that a fraudulent scheme by the insured, designed to avoid French imposts on English goods, constituted fraud and negated the insurer's obligation to pay. The ship carrying the goods intended to sail directly from London to Nantes; however, because the direct passage would attract high French duties, the ship carried false clearances showing delivery at Ostend and false bills of lading from Ostend showing delivery at Nantes. The ship was on the passage to Nantes without having gone to Ostend when the insured goods were seized under letters of reprisal.

Lord Mansfield found that, notwithstanding the attempted tax evasion, the insurer was not deceived as to the risk of seizure by the false documents showing delivery at Ostend; the insurance policy was written for delivery to Nantes and ships carrying English exports bound for France customarily cleared out for Ostend without going there. He went further, however, opining that no cognisable fraud had been committed upon the French customs—who were not a party—because "no country ever takes notice of the revenue laws of another". The rule, which began as a conflict of laws rule, thus expanded through Lord Mansfield's extravagance into a rule of general policy and has been followed—with "slavish repetition and indiscriminate application", according to one critic[24]—ever since.[25]

B. Exceptions to the Rule

Although the rule is stated in very broad and seemingly absolute terms, several judicial exceptions have emerged in a variety of jurisdictions.[26] Under the first, the revenue rule is frequently not applied in proceedings in which its application would cause foreign creditors solely to bear the cost of the disallowed revenue claim. Two New York cases, *Re Hollins*[27] and *In re Estate of Gyfteas*,[28] have,

22. *Loc. cit. supra* n.20.

23. (1797) 99 Eng. Rep. 164 (KB).

24. Albrecht, *op. cit. supra* n.5, at p.461. Even in its early years, however, the rule was not adhered to absolutely. See e.g. *King of Spain* v. *Oliver*, 14 F.Cas. 572 (D. Pa. 1816) (determining liability for Spanish import duties); *Alves* v. *Hodgson* (1797) 7 Term. Rep. 241 (refusing to permit recovery on a foreign note on which foreign documentary stamp tax had not been paid).

25. See authorities cited *supra*. nn.3–16, See also, e.g., *Brokaw* v. *Seatrain UK Ltd* [1971] 2 Q.B. 476; *A.-G. for Canada* v. *William Schulze & Co.* 1901 S.L.T. 4; *Moore* v. *Mitchell*, 281 U.S. 18 (1929).

26. A few limited treaty exceptions also exist. E.g. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, 18 Dec. 1992, US–Netherlands, Art.31, 32 I.L.M. 457 (undertaking assistance in the collection of tax in the assisting State, but prohibiting collection against citizens, corporations, or other entities of the assisting State unless, according to mutual agreement, an undeserved treaty benefit was conferred allowing it to escape tax).

27. 139 N.Y.S. 713 (App. Div.), aff'd 106 N.E. 1034 (1930).

28. 320 N.Y.S. 2d 540 (App. Div. 1961).

therefore, each permitted foreign tax claims to be paid out of a local probate estate where they would otherwise have been payable exclusively from the foreign estate and at the expense of foreign beneficiaries. In each case, the court refused a US legatee's request to be paid free of tax and in violation of the tax law of the deceased's domicile.[29] Similarly, one Canadian court has allowed a foreign revenue claim in insolvency proceedings because "Canadian creditors should not be accorded a windfall to the bankrupt's estate on the basis of a public policy rule against the enforcement of foreign revenue statutes".[30]

Under the second exception, which is substantially similar to the first, the rule is often not applied where its application would deny foreign non-tax creditors a remedy to which they would be entitled in the absence of the foreign tax claim. Australian,[31] South African[32] and Manx[33] courts have, therefore, permitted involuntary bankruptcy proceedings to continue even though one of the petitioning creditors in each case was a foreign revenue claimant. In the South African case the court permitted an English trustee to administer the assets of the South African debtor although 94 per cent of the claims were held by the Inland Revenue. Both the first and second exceptions are based on the equitable principle that foreign creditors should not suffer loss merely because courts will not enforce foreign tax claims.

A Florida court created what may be called the third exception—defalcation—when it allowed the enforcement of a lien against real property by an English receiver appointed at the request of the British Customs and Excise.[34] The owner of the Florida property had been convicted in England of fraudulently failing to pay collected value added tax. When the UK government, on the receiver's behalf, sought to enforce the order vesting title to the property in the receiver, the convicted taxpayer asserted that the revenue rule barred the action; the Florida court rejected the argument summarily. The court conceded that the "source of the money" owed was "United Kingdom taxing policy" but concluded the nature of the obligation as a tax "became irrelevant upon defalcation and the United Kingdom simply became a judgment creditor of the funds illicitly held".[35] Although this case has been criticised by commentators[36] and may have been overruled by Florida's adoption of the Uniform Foreign Money-Judgments Recognition Act,[37] it stands for the proposition that a claim for taxes collected and

29. See also *Re Lord Cable* [1976] 3 All E.R. 417, 433–434 (denying injunction prohibiting estate trustees from transmitting probate funds from the UK to India where failure so to transmit would render the trustees personally liable for unpaid Indian estate duty and would violate Indian exchange control legislation).

30. *Re Sefel Geophysical Ltd* (1988) 54 D.L.R. (4th) 117 (Alta. QB).

31. *Ayres* v. *Evans* (1981) A.L.R. 129.

32. *Priestley* v. *Clegg* (1985)(3) 950 (Transvaal Provincial Division).

33. *In re Tucker* [1988] F.L.R. 323.

34. *Bullen* v. *Her Majesty's Government of the United Kingdom*, 553 So. 2d 1344 (Fla. Dist. Ct. App. 1989). The underlying judgment is reviewed in *Regina* v. *Garner* [1986] 1 W.L.R. 73.

35. *Bullen*, *idem*, p.1345.

36. Philip Baker, "The Transnational Enforcement of Tax Liabilities" (1993) British Tax Rev. 313, 315; John F. Avery-Jones, "Enforcement of Foreign Revenue Debts" (1990) British Tax Rev. 109.

37. Fla. Stat. ch.55.602(2) (1997). The case *may* have been overruled. The UFMJRA

fraudulently diverted by one obligated to collect the tax and pay it over to the revenue authority may be treated in the same manner as a claim for ordinary defalcation.

C. Trapilo *and* Boots

The Second Circuit, in *United States* v. *Trapilo*, has found a legislative fraud exception to the revenue rule under the federal wire fraud statute. In doing so, it has rejected the holding by the First Circuit in *United States* v. *Boots* that wire fraud does not encompass an attempt to defraud a foreign government of tax. In each case, the court was required to decide whether a scheme—devised and implemented in part through the use of telecommunications in the United States—to defraud Canadian and provincial authorities of tax revenue by smuggling goods into Canada without paying excise taxes may violate 18 U.S.C. §1343,[38] the US wire fraud statute.[39] The cases raise the same issue Lord Mansfield addressed in *Holman* and *Planche*—the extent to which courts should decide disputes arising from the import of goods into a foreign country in violation of that country's customs laws. However, they contain the added complication that using wires to implement or devise the smuggling scheme is a crime under the law of the country from which the goods are to be smuggled. The two circuits reached opposite results.

In *Boots* the defendants were convicted of using US telecommunications to further a scheme to defraud the Canadian authorities of excise taxes on tobacco by smuggling it into Canada through a Native American reservation at the border. The defendants argued that defrauding foreign taxing authorities is not cognisable under the wire fraud statute because the common law revenue rule prohibits the indirect enforcement of foreign tax laws.[40] The First Circuit upheld the rule and reversed the conviction, holding in part that because the object of the scheme "was exclusively to defraud a foreign government of customs and tax revenues",[41] the scheme fell outside the scope of the wire fraud statute. The court

excludes judgments for taxes; however, under the logic of *Bullen*, a judgment for fraudulently diverting trust fund taxes may not be a judgment for taxes.

38. 18 U.S.C. §1343 provides: "Whoever, having devised or intending to devise any scheme or article 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, radio, or television 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 not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

39. In neither case were the defendants indicted for smuggling. US law does penalise the smuggling of goods into a foreign country, but only if the foreign country has a reciprocal law. 18 U.S.C. §546. The *Boots* court expressed no opinion as to whether Canada has such a law. 80 F.3d 588, n.13.

40. The defendants also urged three other grounds for error: (1) that their alleged violation of a State bribery law by bribing a Native American law enforcement officer could not provide the basis for finding a violation of the Travel Act, U.S.C. §1952; (2) that, due to the interference of federal statutes with tribal sovereignty, they could not be convicted of a wire fraud in conspiring to deprive another tribe of the services of its police chief; and (3) that the court improperly refused to instruct the jury on their good faith belief in an aboriginal right to free international trade of their sacred product. *idem*, pp.584–585.

41. *Idem*, p.586.

acknowledged that precedent supported convictions for defrauding foreign persons and corporations and domestic tax authorities[42] but found that prosecution for defrauding foreign governments of tax revenue is subject to "constitutional and prudential considerations".[43]

The court concluded that a conviction for attempting to defraud Canada of tax revenue would "amount functionally to penal enforcement of Canadian customs and tax laws".[44] The court held that in order to determine whether the defendants intended to violate Canada's tax laws, it would have to make a finding on their challenges to, and therefore on, the validity of Canada's tax laws. It would be inappropriate, the court reasoned, for a US court to rule on the validity of Canada's revenue laws because they are "positive rather than moral law [which] directly affect the public order of another country";[45] further, they are "laws with which this country may or may not be in sympathy and over which, in any event, we have no authority".[46] The court held, therefore, that ruling on foreign tax laws would raise "issues of foreign relations which are assigned to and better handled by the legislative and executive branches of government".[47]

In *Trapilo* the government appealed against the dismissal, based on *Boots*, of an indictment for laundering the proceeds of a scheme, almost identical to the *Boots* scheme, to defraud the Canadian government of excise taxes on alcohol. The Second Circuit was required to decide whether the scheme and its perpetration through US telecommunications could constitute a violation of the wire fraud statute and therefore be an illegal activity the proceeds of which would be governed by the money laundering statute. The defendants invited the court to follow *Boots* and hold that the revenue rule prevents the wire fraud statute from applying to attempts to defraud foreign States of taxes. The Second Circuit declined the invitation, holding the wire fraud statute is sufficiently definite in its application that it overrides the common law rule.

The Second Circuit reversed the dismissal, stating that the plain language of the wire fraud statute condemns "*any scheme* to defraud where interstate or foreign telecommunications systems are used".[48] This language, the court concluded, renders the "identity and location of the victim ... irrelevant" because the "statute reaches any scheme to defraud ... whether the scheme seeks to undermine a sovereign's right to impose taxes, or involves foreign victims and governments".[49] Because the statute on its face "neither expressly nor impliedly ... precludes the prosecution of a scheme to defraud a foreign government of tax revenue", the common law rule "provides no justification for departing from the plain meaning of the statute".[50]

42. *Idem*, p.587 n.12.
43. *Idem*, p.587.
44. *Ibid.*
45. *Ibid.*
46. *Ibid.*
47. *Ibid.*
48. *Supra* n.2, at p.551 (emphasis in original).
49. *Idem*, p.552. The court noted that using wires to execute a scheme to defraud a foreign government is generally cognisable under §1343, relying on *United States* v. *Gilboe*, 684 F.2d 235 (2d Cir. 1982) (upholding conviction of defendant who devised to defraud People's Republic of China of money for grain shipments).
50. *Trapilo*, *idem*, p.551. This reading is consistent with the Supreme Court's increasing

The court also reasoned that it need not rule on the *validity* of Canada's tax laws, contrary to the First Circuit's suggestion, because the wire fraud statute punishes any misuse of wires through any scheme to defraud, whether successful or not. Consequently, the court concluded that the prosecution for attempting to defraud Canadian tax authorities "does not draw our inquiry into forbidden waters reserved exclusively to the legislative and the executive branches of our government".[51] The court did not specify, however, when and how it is appropriate to ascertain *whether* a defendant schemed to violate a foreign tax statute nor did it address the thorny issues which arise from its rather cursory and almost tacit application of the act of State doctrine.

An enquiry into whether a party has violated or attempted to violate foreign tax law is not flatly barred by the revenue rule; contrary to Lord Mansfield's expansive statement, courts may take notice of the revenue laws of other countries. In *Hollins* and *Gyfteas* the New York courts determined that the requested payments of legacies would have violated British and Greek inheritance tax laws, respectively. Further, the Irish Supreme Court has held that the consequences of a foreign tax law may be considered; it applied the Scots wartime excess profits tax in an action for an account against a company director to determine whether dividends paid to a director were paid *intra vires* and in compliance with Scots company law.[52] To the extent necessary, therefore, a court may rule on whether the scheme did or would have violated a foreign tax law; under *Trapilo*, however, it need not determine whether the law is valid.

Applying a foreign tax law in a wire or mail fraud prosecution without regard to its validity raises issues as to the proper relation between the revenue rule and the act of State doctrine. The revenue rule and act of State doctrine have been described as "wholly at odds" with each other;[53] however, the revenue rule and act of State doctrine are both methods of mandatory judicial abstention[54] whereby courts refuse to adjudicate questions of foreign public law.[55] Under the revenue

emphasis on plain-reading interpretation. See e.g. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–242 (1993); *Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454 (1987). This reading is also supported by a reading of the mail fraud statute which declines to relieve a defendant on federalism grounds from criminal liability for defrauding a State: "the focus of the statute is on misuse of the Postal Service, and Congress clearly has authority to regulate such misuse of the mails". *United States* v. *Mirabile*, 503 F.2d 1065, 1067 (8th Cir. 1974).

51. *Trapilo*, *idem*, p.553.

52. *Peter Buchanan, Ltd* v. *McVey* [1954] I.R. 89, 98–100 (rejecting original statement of revenue rule that "no country ever takes notice of the revenue laws of another"). See also *Korthinos* v. *Niarchos*, 184 F.2d 716, 719 (4th Cir. 1950) (allowing deduction from judgment of seamen's wage payment for Greek taxes required to be withheld).

53. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 450 n.11 (1964) (White J, dissenting).

54. In *W. S. Kirkpatrick & Co.* v. *Environmental Tectonics*, 493 U.S. 400, 406 (1990), the Court characterised the act of State doctrine as "not some vague doctrine of abstention but a 'principle of decision binding on federal and state courts alike' ". However, in that case, the Court found no foreign sovereign act and, therefore, found error in the trial court's dismissal of the case merely because it might have embarrassed a foreign government. To the extent, therefore, that the act of State doctrine requires the trial court not to decide the issue of foreign law whilst exercising its jurisdiction, it is a specific and compulsory abstention doctrine.

55. *Idem*, p.409; *Sabbatino*, *supra* n.53, at p.421.

rule, US courts irrebuttably presume invalid all foreign tax laws, just as they deem foreign penal laws invalid.[56] Under the act of State doctrine, US courts irrebuttably presume foreign sovereign acts valid,[57] including foreign public laws.[58] The *Boots* court refused to allow an attempted violation of Canadian revenue laws to constitute an element of a US crime because the court would have run the risk, however slight, of being required to declare the foreign tax law invalid, which is precisely what the revenue rule is intended to avoid. The *Trapilo* court likewise avoided this risk but only by reading the wire fraud statute in such a way as to render irrelevant the validity of the foreign tax provision. In doing so, it elevated the Canadian customs statute to the status it would have under the act of State doctrine were it a public non-revenue Act—irrebuttably presumed valid.

Although no party in either case argued that the Canadian tax laws were in any way infirm, the inability of a criminal defendant to challenge the validity of such levies would raise serious concerns in the application of the US wire and mail fraud statutes. Even under the relatively strict ethical standard for wire and mail fraud prosecutions,[59] an attempt to defraud must seek to deprive another of legitimate and valuable rights.[60] An attempt to defeat a liability under an invalid tax law cannot, therefore, be an attempt to deprive the taxing authority of money or property because "[m]anifestly, whether or not taxes are legally due and owing to a state depends on the valid laws of that state".[61] If no tax is legally due and owing, no attempt to deceive in order to avoid an alleged tax can constitute fraud. Further, relieving the prosecution of its burden of showing an attempt to deprive another of a legitimate right may violate the Fifth Amendment, which imposes on the government the obligation to prove every element of a crime beyond reasonable doubt.[62]

In addition to criminalising violations of possibly void foreign laws, *Trapilo* has other very profound implications for compliance with foreign tax laws. First, although *Trapilo* addressed a scheme to deprive a foreign government of excise taxes, no principled reason exists why the wire fraud statute would not also apply to foreign sales, value added, estate and other taxes. Second, if the wire fraud statute encompasses attempts to deprive foreign governments of tax revenue, the federal mail fraud statute, the relevant language of which is substantially identical

56. *Sabbatino*, *idem*, p.450 n.11 (White J, dissenting).

57. *Idem*, pp.416, 450 n.11 (White J, dissenting).

58. *Grass* v. *Credito Mexicano, S.A.*, 797 F.2d 220, 222 (5th Cir. 1986) (refusing to decide validity of Mexican currency regulations); *Frazier* v. *Foreign Bondholders Protective Council, Inc.*, 125 N.Y.S. 2d 900, 903 (App. Div. 1953) (refusing to question legislation of Peruvian Congress); *Wells Fargo & Co.* v. *Tribolet*, 50 P.2d 878, 881 (Ariz. 1935) (refusing to decide validity of legislation of Sonoma State).

59. See text at *infra* nn.73–76.

60. *United States* v. *Goss*, 650 F.2d 1336, 1341 (5th Cir. 1981). See also *United States* v. *Gafyczk*, 847 F.2d 685, 689–690 (11th Cir. 1988) (reversing conviction under 18 U.S.C. §121 for attempting to defraud US Customs by using false bills of lading and shippers' export declarations where evidence showed only avoidance of obligations to Italy and failed to show any "pecuniary or property loss to the United States").

61. *Arkansas Corp. Comm'n* v. *Thompson*, 313 U.S. 132, 142 (1941).

62. *In re Winship*, 397 U.S. 358, 364–365 (1970). At least one precedent supports the view that, the act of State doctrine notwithstanding, a US court may enquire into the validity of a foreign public law the violation of which is an element of a crime under US law. *United States* v. *Mitchell*, 985 F.2d 1275 (4th Cir. 1993). The same may apply to the revenue rule.

to the wire fraud statute, no doubt applies as well.[63] Mailing a federal income tax return as part of a scheme to deprive the government of money constitutes mail fraud,[64] as does mailing a State tax return.[65] *Trapilo* would require the same regime to apply to filing foreign tax returns through the US mail.

Third, wire fraud and mail fraud do not require the defendant to have any connection with the United States other than using US mail or telecommunications for the improper communication. Indeed, the defendant need not be in the United States when he or she makes the illicit communication. This is yet another example of US law penalising extraterritorial conduct, for which the United States is frequently criticised, but the courts are not troubled. In *United States* v. *Gilboe*[66] a Norwegian citizen resident in Hong Kong made telephone calls to a shipowner in New York as part of a scheme to defraud the People's Republic of China of payments for grain shipments; the calls to the United States were misuse of wires in the United States and formed a sufficient basis for jurisdiction and conviction. Under *Trapilo*, therefore, a non-resident alien may engage in electronic or postal communication with a person—associate, accountant, employee, etc.—in the United States in furtherance of an attempt to minimise foreign tax; if this attempt rises to the level of dishonesty required under either statute, he or she may be liable to prosecution in the United States.

Finally, the relatively minor degree of dishonesty required to create criminal liability for wire or mail fraud gives rise to one of the most disturbing implications of *Trapilo*—the application of this ethical standard to international tax compliance. Both the mail and wire fraud statutes are extremely broad in defining and proscribing inappropriate behaviour. Although specific intent to defraud is required,[67] the scheme need not succeed to run afoul of the statute.[68] The offensive mail or wire communication need not deceive the victim[69] or even be false.[70] The communication may be criminal although it neither is directed toward the victim of the fraud[71] nor causes actual injury.[72]

Consequently, *Trapilo* criminalises in the United States a degree of fraud which may not be criminal in the foreign country in which the tax is to be paid. The fraudulent intent under either statute need not be to commit an act which would

63. *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987).

64. *United States* v. *Miller*, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), cert.denied, 430 U.S. 930 (1977); *United States* v. *Regan*, 713 Supp. 629 (S.D.N.Y 1989).

65. *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975) (mailing cigarettes from North Carolina to mail-order customers in Florida without registering with Florida Department of Revenue and without making any representations as to tax was mail fraud); *United States* v. *Mirabile*, 503 F.2d 1065 (8th Cir. 1974) (mailing false sales and use tax returns to State of Missouri was mail fraud); *United States* v. *Flaxman*, 495 F.2d 347 (7th Cir.), cert. denied, 419 U.S. 1031 (1974) (mailing false occupational tax returns to the State of Illinois constituted mail fraud).

66. *Supra* n.49.

67. *Goss*, *supra* n.60, at p.1341.

68. *Trapilo*, *supra* n.2, at p.552; *United States* v. *Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991).

69. *Lindsey* v. *United States*, 332 F.2d 688 (9th Cir. 1964); *Huff* v. *United States*, 301 F.2d 760 (5th Cir.), cert. denied, 371 U.S. 922 (1962).

70. *Parr* v. *United States*, 363 U.S. 370, 390 (1960); *United States* v. *Brewer*, 528 F.2d 492, 496 (4th Cir. 1975).

71. *United States* v. *Ader*, 248 F.13 (7th Cir. 1922), cert. denied, 260 U.S. 746 (1923).

72. *United States* v. *Jones*, 380 F. Supp. 343 (D.N.J. 1974).

otherwise be criminal; the law "puts its imprimatur on ... acceptable moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in general and business life of members of society' ".[73] Communications designed to advance civil fraud may, therefore, form the basis of wire fraud convictions;[74] indeed, a mere breach of fiduciary duty has been found sufficient to give rise to liability under the wire fraud statute.[75] One judge has criticised prevailing interpretations of the wire fraud statute as criminalising "a would-be swindler's phoning for a pizza to allow him to eat while working".[76] Under this very broad regime, any telephone conversation or postal item relating to an attempt to deprive a foreign government of properly payable tax could give rise to federal prosecution whether or not the attempt was a criminal offence under the governing tax law.

D. Conclusion

United States v. *Trapilo* holds that use of telecommunications in an attempt to defraud a foreign government of tax revenue is a violation of the federal wire fraud statute. In doing so, it announces a very significant exception to the traditional rule that courts will not directly or indirectly assist in the enforcement of foreign tax laws. It also indicates that the Second Circuit does not find in the wire and mail fraud statutes a corresponding exception to the act of State doctrine, although the doctrine itself and the Fifth Amendment seem to require one. Finally, it criminalises in the United States violations and attempted violations of the tax laws of every other jurisdiction in the world, whether such violations are criminal or civil, and whether the laws violated are valid or void, if the attempt is accompanied by a misuse of *merely a use* of US telecommunications or the US postal service.

ROBERT B. CHAPMAN

73. *United States* v. *Keane*, 522 F.2d 534, 545 (7th Cir. 1975) (upholding mail fraud conviction against city alderman for defrauding city and citizens of Chicago by breach of public duty through use of inside information and undisclosed conflict of interest), quoting *Blachy* v. *United States*, 380 F.2d 665, 671 (5th Cir. 1967) (citations omitted).

74. *Gilboe*, *supra* n.49.

75. *United States* v. *Dorfman*, 335 F.Supp. 675, 679 (S.D.N.Y. 1971) (using wires to arrange a kickback for using a position as fiduciary of a pension plan trust by arranging a loan from a pension fund which would not be disclosed to the trust was sufficient to infringe the wire fraud statute).

76. *United States* v. *DiFiore*, 720 F.2d 757, 766 (2d Cir. 1983) (Winters J, concurring and dissenting), cert. denied, 467 U.S. 1241 (1984).