

Landmark Cases in Revenue Law

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• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING
Bloomsbury Publishing Plc
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2019

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A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Snape, John, editor. | De Cogan, Dominic, editor.

Title: Landmark cases in revenue law / edited by John Snape and Dominic de Cogan.

Description: Oxford [UK] ; Portland, Oregon : Hart Publishing, [2019] |
Includes bibliographical references and index.

Identifiers: LCCN 2018038296 (print) | LCCN 2018038552 (ebook) |
ISBN 9781509912254 (Epub) | ISBN 9781509912261 (hardback : alk. paper)

Subjects: LCSH: Taxation—Law and legislation—Great Britain—Cases.

Classification: LCC KD5355 (ebook) | LCC KD5355 .L36 2018 (print) | DDC 343.4104—dc23

LC record available at <https://lccn.loc.gov/2018038296>

ISBN: HB: 978-1-50991-226-1
ePDF: 978-1-50991-227-8
ePub: 978-1-50991-225-4

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY



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Introduction: On the Significance of Revenue Cases

JOHN SNAPE AND DOMINIC DE COGAN

THE EXPRESSION ‘the public services revenue’, or ‘the revenue’ for short, comprises the entirety of sums raised by the government of the state through ‘taxes and duties’ and ‘from the sale of goods and services’.¹ For the UK in 2015–16, those sums totalled £693.9 billion.² The UK’s revenue-levying and expenditure processes are, as in all developed states, structured by legislation. That legislation is both voluminous and complex, especially for the most important category of revenue, namely taxation. Judicial decisions concerning the interpretation and application of revenue legislation, including tax, are known as revenue law cases. What makes a very small number of them ‘landmarks’ is the fact that, every now and again, a case contains discussions of legal and factual issues that for whatever reason become critically important resources for future debate.

The £693.9 billion of public services revenue raised in the UK in 2015–16 was expended on a range of objects,³ all controversial to different people in different ways, in a marketised and highly conflictual public sphere. In broad terms, those who emphasise property rights,⁴ balanced budgets and small government will object in principle to public spending on civil service salaries and overheads; on social welfare; on transfer payments from rich to poor;⁵ on subsidies to utilities, transport undertakings, commerce, industry, and cultural institutions; to public spending on running a large deficit; to interest payments on the

¹ Government Resources and Accounts Act 2000, s 9; HM Treasury, *Whole of Government Accounts: Year Ended 31 March 2016* (HC 2016–17, 254) 49.

² *Whole of Government Accounts* (above n 1) 9; and see the (now repealed) ICTA 1988, s 45.

³ Expenditure exceeds this, of course, but recall that ‘public services revenue’ does not include the proceeds of public borrowing.

⁴ J Locke, ‘Of Civil Government. Book II: Second Treatise’ in I Shapiro et al (eds), *Two Treatises of Government and A Letter Concerning Toleration* (New Haven, CT, Yale University Press, 2003) 161; and see RA Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Cambridge, MA, Harvard University Press, 2011) esp 16–18, for Locke’s place in this liberal legal tradition.

⁵ T Piketty, *Capital in the Twenty-First Century* (A Goldhammer trans) (Cambridge, MA, Harvard University Press, 2014) 477–78.

National Debt, and so on. Especially, they are likely to object to redistribution in the form of direct transfer payments. By contrast, those who emphasise solidarity, individual duties as opposed to rights,⁶ fiscal stimuli and a large state tend to mock balanced budgets as ‘economic illiteracy’. In turn they are likely to accept the various incidents of large government, not simply as a necessary evil, but as virtuous in themselves, giving ‘spiritual depth to economic and political life’.⁷ These incidents make society happier, the argument goes, as well as more moral. Little, if anything, could unite such divergent beliefs about what HM Government now refers to as the ‘public services expenditure’ of public services revenue. Even areas of expenditure that might be thought to unite them turn out to be freighted with incipient conflict: national defence (maintenance of a nuclear weapons deterrent); healthcare (scope and cost at the point of use);⁸ free public education (selectiveness); state pensions (women’s eligibility age); policing (staffing levels); and development aid (the relative claims of expedience and justice).

These types of intense rival political claims are mediated by revenue law in both its ‘raising’ and ‘expending’ sides. On the raising side, revenue law provides for a range of taxes (importantly, income tax, corporation tax, value added tax and national insurance contributions);⁹ for the sale of governmental services, such as local authorities’ charges for development and planning or social care (together totalling £35.5 billion in 2015–16); for other charges, fees and levies, such as prescription and dental service fees (£12.8 billion); and for profits on the sale of public assets, especially (in recent years) those on the sale of shares in banks nationalised since the crisis of 2007–08 (£6.3 billion).¹⁰ On the expenditure side, revenue law helps to structure the payment of civil service salaries, the buying-in by HM Government of goods and services, the provision of subsidies and grants, the payment of interest on sovereign debt, the payment of social security benefits¹¹ and perhaps even the fairness and reasonableness of accounting provisions and depreciation conventions on government assets.¹² What is clear is that, in a broad understanding of revenue law, even social security law and

⁶ Often Christian in inspiration (see, eg, Catholic Church, *Catechism*, rev edn (London, Geoffrey Chapman, 1999) paras 1939–42; and A Briggs, ‘Birmingham: The Making of a Civic Gospel’ in A Briggs, *Victorian Cities* (London, Penguin, 1968)), ‘human solidarity’ – or ‘solidarism’ – was secularised, notably, in Émile Durkheim’s ‘political sociology’ (see A Ryan, *On Politics: A History of Political Thought from Herodotus to the Present* (London, Allen Lane, 2012) 983–84).

⁷ Ryan (above n 6) 983, citing, *passim*, E Durkheim, *Professional Ethics and Civic Morals* (C Brookfield trans) 2nd edn (London, Routledge, 1992).

⁸ For starkly contrasting passions, even about the National Health Service, see Danny Boyle’s choreographed depiction of the NHS at the Olympics opening ceremony (London, 2012, available via YouTube) and media reactions to it (available at: www.bbc.co.uk/news/uk-19025686).

⁹ See, eg, S Adam, J Browne and C Heady, ‘Taxation in the UK’ in S Adam and T Besley et al (eds), *Dimensions of Tax Design: The Mirrlees Review* (Oxford, Oxford University Press, 2010).

¹⁰ HM Treasury (above n 2) 13, 68 (all items in this list).

¹¹ *ibid.*, 49.

¹² *ibid.*

public procurement law may be said to fall within its ambit. Currently, however, the focus of political and societal debate on public services revenue is almost solely on taxation. Public discussion has thereby excluded or distorted a whole range of legitimate other worries,¹³ as well as failing to encourage scholars from drawing relevant analogies between taxation and linked fields. Meanwhile, the issues that taxation raises have a profile greater than could have been imagined even a decade ago. For lawyers, such a transformation of a legal subject from technical preoccupation to a matter of widespread public concern is bound to raise fundamental questions. The ongoing transformation of revenue law, with its implications for tax and welfare, raises fundamental questions like no other subject. The more that discussions of tax and welfare could be linked, the better informed discussions of each would be.

These general points on the nature of revenue law may be elaborated by examining three issues that are of central importance to the book. First, the purposes served by fine-grained legal analysis of revenue law cases. Most public discussion of revenue law is framed in non-jurisprudential terms, and most contributions are not distinctively legal ones. It is important in particular to clarify what detailed legal study of tax cases can add to the study of taxation more generally. Secondly, the role of case law in revenue law and, specifically, the qualities that might give a particular case ‘landmark’ status. In certain other legal subjects, case law forms the bedrock of the subject itself; not so in revenue law, where instead *legislation* has centre stage. Thirdly, whether and to what extent revenue law cases may have wider significance. Tax law in particular has often been presented by lawyers, perhaps opportunistically, from the point of view of the taxpayer. Yet this is far from inevitable. How do the landmark cases on taxation throw light on questions of personal freedom and collective wellbeing respectively? If the emphasis is shifted from the former to the latter, even to a limited extent, the preoccupations of revenue law discussion change correspondingly. Indeed, these decisions may reconfigure fundamental aspects of how we understand our own subject. The strict division that can be made between tax and welfare law on a certain understanding of property rights dissipates if entitlements to benefits and liabilities to taxes are reconceived as equally dependent on law, rather than being referable to some pre-legal property entitlement. In the book as a whole, we do not adopt any editorial view on how these three questions ought to be answered. On the contrary, our objective has been to be highly tolerant of different conceptions of revenue law, accepting a certain open-endedness in the process rather than seeking to over-define the discipline. The contributions to this book illustrate this point by taking a wide variety of approaches to the three questions just set out. This variety is apparent even in respect of what is most significant in denoting ‘landmark’ status, although there is wide agreement that the cases selected are ones that raise perennial questions.

¹³ eg, value-for-money in public asset sales.

I. REVENUE LAW CASES AND FINE-GRAINED LEGAL ANALYSIS

As is to be expected, tax litigation frequently engages fundamental features of revenue law.¹⁴ The compulsory nature of taxation¹⁵ gives rise to cases dealing with the extent of that compulsion, and thus with tax evasion and tax resistance, as well as tax avoidance. The need for legislative authority¹⁶ when taxes are imposed throws up cases concerned with the proper role of Parliament and approaches to interpreting tax legislation. The fact that tax revenues are ultimately paid to the government, or to a governmental agency,¹⁷ occasions cases examining both why and how government brings coercion to bear in tax matters. By contrast, hardly ever do the rights and wrongs of the purposes for which tax proceeds are applied fall for adjudication before a court, which is not the same as saying that legal philosophy has nothing to say about the application of tax revenues.

The main motivations for the detailed study of revenue law cases, and the various approaches that may be taken, are examined in the next section. Here, we merely emphasise that legal and legal historical skills are very much to the fore in the study of revenue law cases, albeit that the study of taxation in general draws on a range of disciplines. Unlike in some other areas of law, however, such skills are not the sole preserve of those who specialise as lawyers and legal historians. Tax specialists originate in a range of disciplinary backgrounds – including law, accounting, economics, history and politics¹⁸ – but they are united by their focus on the close reading and interpretation of legislative texts. Besides, it is not only a lawyer's understanding of binding precedent that informs a contextual understanding of tax cases, but also a sense of how those cases relate to wider historical and political ideas. This, in turn, means that, in revenue law, legal analysis may validly and valuably be undertaken by those who are tax specialists but whose home discipline is not law.

In the legal analysis of revenue law cases, vivid impressions of the implications of the compulsory nature of taxation run like a thread through judicial pronouncements. Indeed, state compulsion has possibly greater resonances in tax law than in any other area of revenue law, except perhaps for those rare occasions when the conditions placed upon welfare claimants come to wider notice.¹⁹ One consolation with tax law is that compulsion is grounded in its

¹⁴ See G Loutzenhiser, *Tiley's Revenue Law*, 8th edn (Oxford, Hart Publishing, 2016) 3–7, esp discussion of *Re Eurig* (1998) 165 DLR (4th) 1, 10.

¹⁵ eg *Armour Packing Co v United States* 209 US 56 (1908); *Brocklebank Ltd v R* [1925] 1 KB 52, CA; *Congreve v Home Office* [1976] 1 QB 629, CA.

¹⁶ Bill of Rights 1689, Art 4; V Thuronyi, *Comparative Tax Law* (The Hague, Kluwer Law, 2003) 70–71.

¹⁷ *Armour Packing Co v United States* (above n 15); Thuronyi (above n 16) 45.

¹⁸ See the contributions to M Lamb et al (eds), *Taxation: An Interdisciplinary Approach to Research* (Oxford, Oxford University Press, 2005).

¹⁹ We owe the observation about conditions imposed on welfare claimants to Shani Wijetilaka, one of Dominic de Cogan's research students.

statutory character, parliamentary consent being the necessary and sufficient condition under which taxes are levied, exemptions detected and reliefs afforded. The volume and intricacy of this statute law contrasts strikingly with the wide administrative discretions conferred on government officials in other areas of revenue law. That said, the contrast between tax and other areas of revenue law may be more apparent than real, since new tax legislation is introduced with alarming frequency and HM Revenue and Customs (HMRC) is closely involved in its design. In any case, it is undeniable that tax legislation exhibits a distinctive complexity and instability. Statutory complexity is widely believed to invite the manipulation of exemptions and reliefs, such as to prevent a tax liability arising in the first place (successful tax avoidance).²⁰ It is also reported to invite non-compliance, such as to encourage non-satisfaction of a liability that has already arisen (tax evasion).²¹ Statutory complexity and instability offends against Adam Smith's certainty maxim for the prudential compliance of tax legislation with natural law.²² It may also offend, directly or indirectly, against Smith's equity maxim, which in turn may give rise to a third category of behaviour typically described as principled 'tax resistance'.²³ However speculative some of these claims may be, the potential links between Smith's maxims are certainly striking.

In many of the near-legends associated with principled refusal to pay various levies (Lady Godiva, Wat Tyler, Beatrice Harraden, Mahatma Gandhi, and so on),²⁴ the conflict between equity and certainty has played a significant part. There is, for example, the strange story of a Newcastle old-age pensioner, Mr Kempton Bunton,²⁵ who in 1961 refused to pay for a television licence on the basis that it constituted a form of indirect taxation.²⁶ His objection was one of regressivity, that the tax was unfair as taking a greater proportion of pensioners' income than would have been taken from people less poor.²⁷ When, subsequently, Mr Bunton (or his son) removed Francisco de Goya's portrait of the Duke of Wellington from the National Gallery, it was with the apparent

²⁰ L Oats, A Miller and E Mulligan, *Principles of International Taxation*, 6th edn (London, Bloomsbury Professional, 2017) 14–16.

²¹ *ibid.*

²² RH Campbell et al (eds), *Adam Smith: An Inquiry into the Nature and Causes of the Wealth of Nations*, 2 vols (Carmel, IN, Liberty Fund, 1981) II, 827 (Vii.b.7). See J Snape, *The Political Economy of Corporation Tax: Theory, Values and Law Reform* (Oxford, Hart Publishing, 2011) 198.

²³ See the wide-ranging compilation in DM Gross, *We Won't Pay! A Tax Resistance Reader* (North Charleston, SC, Createspace, 2008) and RD Huret, *American Tax Resisters* (Cambridge, MA, Harvard University Press, 2014).

²⁴ Gross (above n 23).

²⁵ A Travis, 'Revealed: 1961 Goya "Theft" from National Gallery was a Family Affair' *The Guardian* (30 November 2012), available at www.theguardian.com/artanddesign/2012/nov/30/1961-goya-crime-national-gallery. BBC R4, 'Kempton and the Duke' Afternoon Drama (21 November 2017), details available at www.bbc.co.uk/programmes/b06flmdp.

²⁶ As to which, see *Congreve v Home Office* (above n 15).

²⁷ T Grant, *Jeremy Hutchinson's Case Histories* (London, John Murray, 2015) ch 7; A Hirsch, *The Duke of Wellington Kidnapped: The Incredible True Story of the Art Heist That Shocked a Nation* (Berkeley CA, Counterpoint, 2016).

purpose of eventually redressing this particular balance.²⁸ So compulsoriness does not always seem to outweigh the combination of regressivity and volatility that offends the tax resister. This was so with the failure of the community charge, introduced by the Local Government Finance Act 1988 (LGFA 1988).²⁹ There, civil unrest was directed, not against taxation in general, but specifically against the community charge as a form of poll tax. Nor, in a different way, can compulsion always withstand the intricate tax-avoidance activities of multinational groups.³⁰ By definition, though, what compulsoriness must withstand is tax evasion. All of these activities – tax avoidance, tax evasion and tax resistance – variously illustrate the *absence* of a common sense that taxes in general, or particular taxes, are virtuous in themselves so as to give to political and economic life the spiritual depth referred to at the start.³¹

The principle that taxes are imposed by legislation, rather than by executive fiat, has two clear implications in the legal analysis of revenue law cases and it also raises at least one deep ambiguity. First, the principle makes legislation – statute law created by Parliament – foundational to revenue law. This ancient constitutional principle³² was at issue in the *Case of Ship Money (R v Hampden)*,³³ discussed by Michael Braddick in chapter one. Charles I, having previously been assured by the judges that the principle admitted of some exception, levied contributions by royal prerogative for the provision of ships for national defence. In chapter four, Martin Daunton analyses the story of *Bowles v Bank of England*,³⁴ which carried the principle to its logical conclusion and, in doing so, established beyond doubt the legislative basis of taxation. The principle remains relevant even today to supporters of small government who deplore any attempt to impose taxes without what they regard as sufficient parliamentary involvement. Secondly, the principle of parliamentary taxation expresses the importance of representative consent to taxation and, in so doing, places statutory interpretation at the heart of cases on revenue law. By the same token, it discourages judicial activism. *WT Ramsay Ltd v CIR*,³⁵ discussed by John Snape in chapter ten and one of the most famous of all revenue law cases, has always occupied an uneasy constitutional position. The case sets out a judicial approach to striking down benefits from tax avoidance but is *Ramsay* a case on statutory interpretation only, as the judicial committee of the House of Lords

²⁸ The case became so famous that a copy of the picture appeared in a 1962 Bond film, with Sean Connery remarking: “So there it is,” when he sees it in Dr No’s Jamaican lair. It was actually in a cupboard in Kempton Bunton’s council flat in Newcastle’ (Travis (above n 25)).

²⁹ D Butler, A Adonis and T Travers, *Failure in British Government: The Politics of the Poll Tax* (Oxford, Oxford University Press, 1994).

³⁰ Oats, Miller and Mulligan (above n 20) ch 19.

³¹ See text around n 7 above.

³² Thuronyi (above n 16) 70.

³³ *Case of Ship Money (R v Hampden)* (1637) 3 St Tr 825 (see ch 1 below).

³⁴ *Bowles v Bank of England* [1913] 1 Ch 57.

³⁵ *WT Ramsay Ltd v CIR* (1981) 54 TC 101.

in *Barclays Mercantile Business Finance Ltd*³⁶ seemed to affirm, or a constitutional exception to parliamentary control of taxation? Moreover, despite the unease, judges have shown a certain willingness to develop principles as opposed to applying statute law robotically. *De Beers Consolidated Mines Ltd v Howe (Surveyor of Taxes)*,³⁷ discussed by John Avery Jones and Johann Hattingh in chapter three, is a remarkable instance of statute leaving a foundational concept – that of the ‘residence’ of companies – for determination by the judges. In doing so, the judicial committee based its decision entirely upon the case law of lower courts, one case drawing on German jurisprudence. Again, the Lords Justices in *Conservative and Unionist Central Office v Burrell (HM Inspector of Taxes)*,³⁸ which Victor Baker discusses in chapter twelve, took a similarly audacious approach. They held – creatively – that an unincorporated ‘body of persons’, lacking the mutual undertakings of members, created for non-business purposes, and holding funds subject to a mandate for certain purposes, was not liable to corporation tax. These judicial interpretations of the legislative basis of taxation are important but are hardly obscure.

A deeper question, though, involves our underlying conception of revenue law: as positive law akin to any other type of legislative regulation or as something much deeper, something fundamental to the very fabric of the state itself. There is a rather complex relationship between these conceptions and the ideas of small and large government aired at the beginning. On the one hand, proponents of large government tend to regard revenue law as special in the sense of being an irreducible part of the environment within which individual lives are possible. On the other hand, proponents of small government often emphasise the restrictions that revenue law places on supposedly natural property rights. Curiously, on a practical level, this leads the former to treat tax legislation as *normal* in the sense that it ought to be interpreted purposively in the manner of any other legislation, and the latter to treat it as *exceptional* and deserving of a literalistic interpretation that provides particular protection to property rights. A number of the cases discussed in this book track these issues in a manner that acknowledges the late-twentieth century transformation of the state. In *CIR v Commerzbank*³⁹ and the litigation of which it formed part, discussed by Philip Baker in chapter fifteen, Mummery J ostensibly took a purposive approach to the interpretation of a double taxation agreement. In chapter sixteen, Philip Ridd contends that *Pepper (HM Inspector of Taxes) v Hart and Others*⁴⁰ was the first case to validate a purposive approach to the construction of domestic tax legislation, an aspect of the case that in his view may be even more significant than its statement of the basis on which a court may have recourse to the

³⁶ *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] STC 1.

³⁷ *De Beers Consolidated Mines Ltd v Howe (Surveyor of Taxes)* (1906) 5 TC 198.

³⁸ *Conservative and Unionist Central Office v Burrell (HM Inspector of Taxes)* (1981) 55 TC 671.

³⁹ *CIR v Commerzbank* [1990] STC 285.

⁴⁰ *Pepper (HM Inspector of Taxes) v Hart and Others* (1992) 65 TC 421.

parliamentary record. *Barclays Mercantile*, as discussed by John Vella in chapter eighteen, is a confirmation of the idea that *Ramsay* is really about purposive interpretation.

For the legal analysis of revenue law cases, the fact that taxes are, by definition, paid⁴¹ to the government, or to an agency thereof, is their most obvious public law characteristic. Considerable numbers of revenue law cases are concerned with *how* and *why* a taxing authority exercises its coercive powers. What Smith notoriously called ‘the frequent visits, and the odious examination of the tax-gatherers’⁴² feature heavily in some important cases on revenue law-enforcement procedure.⁴³ The chief interest of such cases to an economist might lie in what they incidentally say about the efficiency, or cost-effectiveness, of the tax or taxes concerned. As the subject of *legal* analysis, though, a close reading of them provides much interpretative insight about the tensions around the revenue discussed at the beginning. An individualistic attitude inclines to taking Smith’s comments at face value; at least certain types of solidaristic attitude do not. Either way, the nexus of government and subject is crucial and the incapacity or other failure of government and its agencies to enforce levies eventually spells the end of the state. This necessity of taxes to the state’s continued existence seems to be WH Auden’s burden in *The Fall of Rome* (1937). Though the poem had contemporary resonances, for us, it neatly pinpoints the dependence of the state and of political order on continued flows of successfully-raised revenue. The poet depicts a collapsing regime, with a people’s morale decaying (‘Fantastic grow the evening gowns’), as ‘[a]bsconding tax defaulters’ are pursued by ‘[a]gents of the Fisc’⁴⁴ along ‘[t]he sewers of provincial towns’.⁴⁵

These points came to the fore in *R v CIR*, *ex parte National Federation of Self-Employed and Small Businesses Ltd*,⁴⁶ discussed by Dominic de Cogan in chapter eleven. It concerned a complaint about the failure by one of the then revenue departments, the Inland Revenue, to enforce tax obligations even-handedly as between employed and self-employed people. The interesting feature of this case is that it can be seen in two different lights. In an individualistic light, the complaint was that the Revenue was acting oppressively against self-employed people and ought not to. In a solidaristic light,⁴⁷ the problem was

⁴¹ Payment is significant and explains why, though an economist might think of inflation as a tax, because it ‘appropriates resources to the government’, inflation is not a tax in legal analysis (see Thuronyi (above n 16) 45).

⁴² Campbell (above n 22) II, 827 (V.ii.b.6).

⁴³ eg, *R v CIR and Quinlan (ex parte Rossminster Ltd and Others)* (1979) 52 TC 160.

⁴⁴ Literally, basket, purse, etc (OED).

⁴⁵ E Mendelson (ed), *WH Auden: Selected Poems* (London, Faber & Faber, 1979) 183. The implication, too, is that the sewers themselves exist only because of (typically local) tax revenues.

⁴⁶ *R v CIR, ex parte National Federation of Self-Employed and Small Businesses Ltd* (1981) 55 TC 133.

⁴⁷ M Loughlin, *Public Law and Political Theory* (Oxford, Clarendon Press, 1992) 110–11 traces the translation of solidarism or solidarity into French public law. See, too, Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (London, Burns and Oates, 2004) 98–101.

that employed people were not pulling their weight and that the Revenue was colluding with them.

While the chosen application of tax proceeds to further one public purpose rather than another is almost entirely a matter of political judgement (whether or not informed by economic analysis) there is at least one revenue law case in which that political judgement has been called in question. This is *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement*,⁴⁸ also known as ‘the Pergau Dam case’.⁴⁹ As Abimbola Olowofoyeku explains in chapter seventeen, ‘the Divisional Court held that the [UK] government’s decision’ to apply revenue in the funding of the eponymous dam in Malaysia ‘was unlawful, causing the UK government considerable embarrassment and diplomatic and international trade difficulties’. However, even in *Pergau Dam*, the judge’s discussion of the issues was confined to whether a given purpose was a proper one. It could not range more widely over questions of possible alternative purposes. Controversies over the full range of alternative purposes are irreducibly political. Judges cannot address these issues, not so much because of the issues’ political nature, but because, unlike Parliament and HM Treasury, judges have no funds to distribute.⁵⁰ Along similar lines, the ultimate decision whether taxes are efficient to collect is a political question, whereas whether revenue collectors acted properly in a particular case is a legal one. Whether the redistribution of societal goods is a proper purpose for taxation is a political question, whereas whether one taxpayer is liable to higher-rate income tax, and another entitled to universal credit, are legal ones. Whether taxation should always have revenue raising as its primary function or whether there are certain situations in which a regulatory function may take precedence are political questions, whereas whether the provisions of a particular environmental tax constitute unlawful state aid or whether a particular good falls within one or other customs classification, are legal ones. Whether taxes should be used for macroeconomic policy purposes, or only for very limited purposes are political questions, whereas whether a local authority is entitled to fix rates of local taxation for ideological reasons is a legal one. The point is that the legal questions in each case are a function of earlier political judgements, or to be more precise the expression of those judgements in revenue statutes. As Snape has argued in detail,⁵¹ this is fundamental to a proper understanding of revenue law as a patchwork of political judgements reduced to legislative form.

⁴⁸ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 All ER 611.

⁴⁹ See T Prosser, *The Economic Constitution* (Oxford, Oxford University Press, 2014) 114–16.

⁵⁰ ‘[T]he judiciary’, writes Martin Loughlin, ‘acquires its legitimacy from an independence derived from its own powerlessness’, and he invokes both Alexander Hamilton, in *Federalist No 87*, and Montesquieu in *The Spirit of the Laws*: ‘The judiciary ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever’ (Hamilton) and ‘[o]f the three powers of which we have spoken, that of judging is in some fashion, null’ (Montesquieu) (see M Loughlin, *Foundations of Public Law* (Oxford, Oxford University Press, 2010) 454, fn 71).

⁵¹ Snape, *The Political Economy of Corporation Tax* (above n 22) esp ch 5.

II. LANDMARK QUALITIES AND REVENUE LAW CASES

The role of the judge in a revenue law case, as most would concede, is primarily to interpret legislation in the light of the facts found. Accordingly, to describe a case as a ‘landmark’ suggests either that there was something special about the interpretative insights of the judges who decided it, or that there was something within the judgments that inspired special interpretative insights in subsequent cases. This last point, as elaborated, has at least three important resonances, to which we will shall return shortly. It is worth considering, though, how observers’ perspectives on revenue law cases may be conditioned by their beliefs about the nature of the revenue and its relation to tax law.

Revenue law cases, as already noted, can be studied with skills developed in various disciplines. For skilled people, personal beliefs about the revenue and its relationship with tax law may be no less important than their study of the cases and the ways in which that study is undertaken. A scholar’s antagonism to some aspect of a revenue law case, whether to one or more of the parties, the decision, the political consequences or something else, may be the precise reason for their interest in the case. A historian, or historically minded lawyer, writing about a constitutionally significant case, such as *Ship-Money* or *Bowles*, may personally deplore the values articulated in it, if not the conduct of the parties. Snape found himself in this position (see chapter ten) in trying to weigh the merits of the losing side’s arguments in *Ramsay*, arguments that he finds deeply unattractive. By contrast, a revenue law specialist seeking to use a case as the basis of an argument before a court or tribunal will be more interested in the doctrinal insights the case offers than any moral ambiguity. Tax accountants engaged in compliance work will simply want to know whether a particular case supports or undermines a particular accounting treatment. For most purposes, however, an understanding of the context of revenue law issues is everything and the impartor of context is history. It was Sir Winston Churchill who once told a gathering of professionals that ‘[t]he longer you can look back, the farther you can look forward. This is not [he continued] a philosophical or political argument – any oculist will tell you this is true’.⁵² To lack this historical background is to have a rule but not to grasp why it exists in the first place.⁵³ A sense of history, as Churchill went on to say, provides people with a ‘greater ... sense of duty ... to ... the society of which they are members’.⁵⁴ It may, for sure,

⁵² WS Churchill, ‘The Royal College of Physicians. March 2, 1944’ in R Rhodes James (ed), *Winston S. Churchill His Complete Speeches 1897–1963*, vol 7 (New York, Chelsea House Publishers, 1974) 6895, 6897.

⁵³ ‘Current politicians are so awful ... because ... they’ve never seriously studied history. Whereas the thing that makes Churchill great is the fact that he’s a great historian’ (David Starkey discussing the performance of Chloe Smith, MP (Economic Secretary to the Treasury) in a television interview with Jeremy Paxman on 26 June 2012, available via YouTube (*BBC R4, Loose Ends* (30 June 2012), details available at www.bbc.co.uk/programmes/b01k9lvl).

⁵⁴ Churchill (above n 52) 6897.

involve reflecting on documents and events, such as Malcolm Gammie's study of the House of Lords appeal files (see chapter six), or it may involve reflecting on the history of ideas. Many of the contributions to the book strive to do both.

To return to the role of the revenue judge, her work is peculiarly sensitive both to factual nuance and legislative complexity, but is also likely to be informed with one or other of the two views of the revenue with which we began. The primarily interpretative role of the judge means that her priority is to resolve disputes in the light of the legislation and, perhaps less obviously, of the factual circumstances that legislative provisions show to be relevant. *Zim Properties Ltd v Proctor*,⁵⁵ discussed by David Salter in chapter fourteen, is a good example of a case that involves a combination of highly abstract legislative provisions and abstruse facts, and a judge – Warner J – willing to extend the scope of the relevant tax by adopting a particular statutory interpretation. The starting point of *Zim* is the kind of statutory wording⁵⁶ that seems to ‘dance before ... [the] eyes in meaningless procession: cross-reference to cross-reference, exception upon exception – couched in abstract terms that offer no handle to seize hold of’.⁵⁷ Moreover, the facts to which *Zim* related seem far removed from anything the legislative wording, or the purpose of the legislature, could have envisaged. The case illustrates how, in relation to the conceptual structure of taxation, the judge is engaged in what is fundamentally a ‘bottom-up’ exercise. The particular dispute is resolved, leaving it to the tax authority, academics and other commentators to argue over whether the ruling supports or impedes a rational understanding of the tax in question. All this is far removed from case in fields governed purely or largely by common law, where judges are deeply conscious that their decision on the facts may have the consequence of refining an existing rule or even creating a new one. In such a context, the judge brings to mind myriad case law precedents, winnowing *rationes* from *dicta* uttered in countless draughty courtrooms, far scattered in time and space. The contrast in conceptions of the judicial role is palpable and has set the culture of revenue law apart even from that of other lawyers. ‘I still recall’, a famous revenue judge once wrote,

the mingled horror and pity which crept into my tutor's voice when commenting on the news that I was ... going into tax chambers ... [N]o respectable lawyer would study tax ... It is ... a subject for eccentrics, weeds and swots ... An English lawyer is a man who has studied the English *common law*.⁵⁸

⁵⁵ *Zim Properties Ltd v Proctor* (1985) 58 TC 371.

⁵⁶ In what is now s 21(1) TCGA 1992.

⁵⁷ Judge Learned Hand, ‘Thomas Walter Swan’ (1947) 57 *Yale Law Journal* 167, 169.

⁵⁸ HH Monroe, ‘Fiscal Statutes: A Drafting Disaster’ [1979] *BTR* 265, 271, quoted, slightly adapted in R Kerridge, ‘The Taxation of Emoluments from Offices and Employments’ (1992) 108 *LQR* 433, 458. In the original, the second sentence precedes the first as quoted, and Monroe's apparently sexist language is actually designed to caricature English institutional attitudes of which, ‘[a]s an Irishman’, he was himself wary (*ibid*).

Furthermore, the specificity and complexity of the revenue judge's task may lead one to conclude that the results to which it leads are completely, or virtually completely, incomprehensible. John Prebble would have us believe this, arguing that even revenue lawyers may be baffled by revenue legislation, creating, as it does, artificial concepts such as 'chargeable gains', 'deemed disposals' and so forth, which are incapable of being understood except by reading across from other similarly artificial concepts.⁵⁹ Bret Bogenschneider invokes Ludwig Wittgenstein,⁶⁰ to argue on the contrary that 'tax law is just as comprehensible as it ought to be', since, '[f]or those that [*sic*] speak the language, it provides the basis for legal actions'.⁶¹ However, each of these arguments is made solely in relation to the logical potential of unmediated legislative texts. Snape prefers to assess the judicial interpretation of tax legislation in the broader context of the function of tax legislation within the state.⁶² He argues that judges disposed to take a somewhat collectivist view of taxation are open to purposive construction, while those of an individualist bent opt for the more literal. A different type of response (because, unlike Snape's, which is interpretative only, it is a normative one) is to observe that the statutory nature of taxation law places a special onus on those responsible for designing and drafting legislation to create and maintain coherence.⁶³ If no existing institutions are capable of ensuring this coherence, it is argued, they ought to be established. This line of thought is significant because it attacks directly the bottom-up mode of reasoning in revenue law, while absolving judges from primary responsibility for it.

In any case, we maintain that 'landmark' status either implies the articulation of distinctive interpretative judicial insights, or that the judicial opinions expressed have inspired special interpretative insights in subsequent cases. What we do not imply, at least in any unguarded sense, is that any of the cases in this book form the basis of a *self-contained* common law or equitable doctrine. This may seem obvious given the statutory basis of revenue law, but the often-discursive approach of judges in revenue cases has often disguised the fact. The traditional free-ranging style of judicial pronouncements in legal systems based on the English common law does not differ greatly depending on whether common law or statutory interpretation is at stake. For example, there is the old question of whether *Ramsay* is simply a case on statutory interpretation

⁵⁹ J Prebble, 'Why Is Tax Law Incomprehensible?' [1994] *BTR* 380; J Prebble, 'Ectopia, Tax Law and International Taxation' [1997] *BTR* 383.

⁶⁰ In L Wittgenstein, *Philosophical Investigations* (trans GEM Anscombe et al), 4th edn (Chichester, Wiley-Blackwell, 2009) *passim*.

⁶¹ BN Bogenschneider, 'Wittgenstein on Why Tax Law is Comprehensible' [2015] *BTR* 252, 256.

⁶² J Snape, 'Legal Interpretation of Tax Law: United Kingdom' in RF van Brederode and R Krevier (eds), *Legal Interpretation of Tax Law*, 2nd edn (The Hague, Wolters Kluwer, 2017).

⁶³ A particularly forceful variant on this argument was put forward by Peter Harris in the unpublished paper 'A 200-page Income Tax Constitution for the UK?' presented at the conference 'Celebrating the End of the Rewrite' (HM Treasury, October 2010), available at www.law.cam.ac.uk/people/academic/pa-harris/39.

or whether it contains an anomalous judicial doctrine for combating tax avoidance. The failure to distil a correct answer to this question has not been for lack of trying; it would be hard to overstate the significance of the case within the culture of tax specialists. Even among non-specialists, as Judith Freedman has written, the case raises glimmers of recognition.⁶⁴ *Ramsay* has been as cited, as scrutinised and rationalised, over the three decades since it was decided, as any common law decision. Despite this, or perhaps because of it, the true meaning of the case remains highly contested. Indeed, this contested quality is in part exacerbated by the differences in background beliefs and experiences discussed above. For example, it is inherent in the nature of a landmark case that Ridd states of *Pepper v Hart* that ‘it was the first occasion on which the House of Lords recognised that purposive interpretation had superseded literal interpretation in relation to tax cases’,⁶⁵ whereas de Cogan would tend to emphasise the continuities in interpretative approach between this and previous House of Lords decisions. The former is a valuable descriptive point for which evidence exists; the latter is an interpretative argument which can be argued against but not disproven. Both scholars are discussing the same case, and the same set of facts, but they cannot even agree on the character of the case’s importance. This in turn offers an indication why the case is worth reading, re-reading and arguing over; in other words, why it is a landmark. Legal analysis draws on many experiences and understandings. Neither law-in-context nor analytical jurisprudence is inferior. The importance of the rigorously analytical mode adopted by Geoffrey Morse, writing about *Mallalieu v Drummond (HM Inspector of Taxes)*⁶⁶ in chapter thirteen, cannot be overstated at a time when legal science and legal education is threatened by a move away from the close scrutiny of legal texts. Moreover, even if a particular case is widely agreed to be seminally important, different commentators will argue for different aspects of the case as betokening landmark status. Even while doing so, some may even acknowledge reasons why the case should not be considered a landmark at all! Our editorial role, with advice from John Avery Jones and Chantal Stebbings, has not involved us in instructing contributors on what perspective they ought to adopt on any such matters. Indeed, the common denominator in the cases explored here, at the highest level of abstraction, may be that they all contain some ‘breath of ... inspiration’⁶⁷ for special insights in later cases. They are precisely the cases that provoke enduring disagreement on what the interpretative insights of the judges

⁶⁴ J Freedman, ‘Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament’ (2007) 123 *LQR* 53.

⁶⁵ See 357, this volume.

⁶⁶ *Mallalieu v Drummond (HM Inspector of Taxes)* (1983) 57 TC 330.

⁶⁷ The reference is to ‘A breath of our inspiration/Is the life of each generation’, from the ‘Ode’ (1873), by Arthur O’Shaughnessy (see, in part, A Quiller-Couch (ed), *The Oxford Book of English Verse 1250–1918*, 2nd edn (Oxford, Clarendon Press, 1939) 1006), as set by Elgar, in *The Music Makers* (Birmingham, 1912).

mean, why they do so, and the extent of their significance. Landmark cases tend to be especially difficult and intractable, and therefore to stand in need of full scholarly elucidation.

From what has been said we might draw out at least four further intriguing resonances. First, because tax statutes are so often replaced or modified, a landmark cannot depend for its status on whether the legislation under consideration remains unrepealed. *Ship-Money* is a landmark case, not because of what it decided – because it was statutorily reversed in 1641 – but because of what it came to stand for, and for the range of issues canvassed in detail in its pages. The *Ship-Money* judges came to epitomise a judiciary supine in the face of royal levies and the case was a totemic warning to succeeding judges minded to help the Crown's argument along in revenue cases. Snape senses, for instance, that judges' unwillingness to interpose a judicial view of profit-measurement on prevailing accounting practice still owes something to institutional memory of the *Ship-Money* judges.⁶⁸ This is notwithstanding the fact that judgments such as *Pennyquick J's*, in *Odeon Associated Theatres Ltd v Jones (HM Inspector of Taxes)*⁶⁹ – as discussed by Judith Freedman in chapter nine – seem to leave open the possibility of judicial intervention. *Ship-Money*, like other landmarks, can only be appreciated from a distance. That distance is such that only history offers.⁷⁰

Secondly, the conflictual and politicised nature of taxation supports our view that landmark status cannot depend, as with certain private law cases, on being universally admired. Universal admiration would, on the basis of what has been said above, deprive a case of landmark status all on its own. Far from being a landmark, it would simply decide a point, which in the context of a field of law based mainly on statute is likely to be mundane. There would be no point revisiting the case over and over again. It would be enough to cite it and move on. Thirdly, the deep variation among our authors not only on the substantive legal issues but on how to tell the stories contained within the cases is, so to speak, a design feature of the book rather than a defect. The fact that their approaches are not the only possible ones, and may even provoke strong reactions in some readers, is intimately linked to our arguments for the landmark status of the cases covered. To put the same point the other way around, a book entitled *Landmark Cases in Revenue Law* is, in a profound sense, the ideal forum in which to showcase the enormous variety of opinions, interests, perspectives and methods used by revenue law specialists. So, then, no one should be surprised to find John Pearce, as a former member of the Office of the Solicitor of Inland Revenue, find hidden subtleties in a case often referred to only as the origin

⁶⁸ Snape, *The Political Economy of Corporation Tax* (above n 22) 95.

⁶⁹ *Odeon Associated Theatres Ltd v Jones (HM Inspector of Taxes)* (1971) 48 TC 257.

⁷⁰ That said, revenue law's role in the state's very existence means revenue law is much older than many other areas of law. Even income tax is a good century and a bit older than the tort of negligence and it is by no means the oldest tax. Nevertheless, the cases covered in this book are newer than in almost any other *Landmarks* book.

of the definition of ‘office’ for income tax purposes.⁷¹ *Great Western Railway Company v Bater (Surveyor of Taxes)*,⁷² discussed in chapter five, turns out to provide a lucid explanation of the original significance of the schedules of income tax. As we discover, schedules did not so much classify income according to its type as provide the very basis of the tax-collection mechanism. No less insightful, though different, is Olowofoyeku’s analysis of *Pergau Dam*. Olowofoyeku is an academic tax and public lawyer, whose meticulous analysis of the case draws on a range of social and political source materials. Ann Mumford (see chapter seven) judiciously and insightfully assesses an impressive variety of source material, in discussing what might otherwise have seemed a rather dry case on the quantification of the value transferred for estate duty purposes, *CIR v Crossman*.⁷³ The chapter refers, for instance, to the journal *Business History*, to an official history of the concern whose shares were the subject of the case, to the background of the protagonists, and to cultural histories of the area in which the brewing company’s premises were situated. Finally, it follows from the contentiousness of many of these cases, and also from the contributors’ diverse approaches, that readers may not necessarily find here their own particular favourite. A notable absentee, for example, is *CIR v His Grace the Duke of Westminster*.⁷⁴ On this case, our editorial decision was that the jurisprudential controversies to which it gave rise were best discussed in relation to those cases that ‘glossed’ it. Rather than being the subject of its own chapter, therefore, the case is discussed in chapters nine and eighteen, in relation to those cases most closely shaped by it, *Ramsay* and *Barclays Mercantile*.

III. THE WIDER SIGNIFICANCE OF REVENUE LAW CASES

Revenue law cases offer a focal point for the nexus between collective wellbeing and personal freedom. How broadly and deeply collective wellbeing is conceived relates, in some sense, to the breadth and depth of a conception of personal freedom. The reader will appreciate immediately that this relationship is the subject matter of centuries of legal and political thought relating, first, to the interplay of the necessity of raising revenue and the subject’s constitutional rights, and secondly, to the nature and scope of revenue law. The position that an observer takes on these fundamental questions is likely to inform her views on whether landmark cases show that revenue law is best conceived as a public law subject, as private law, or whether indeed such dichotomies are best avoided altogether.

⁷¹ ITEPA 2003, s 5(1).

⁷² *Great Western Railway Company v Bater (Surveyor of Taxes)* (1922) 8 TC 231.

⁷³ *CIR v Crossman* (1936) 15 ATC 94.

⁷⁴ *CIR v the Duke of Westminster* [1936] AC 1. See A Likhovski, ‘Tax Law and Public Opinion: Explaining IRC v Duke of Westminster’ in J Tiley (ed), *Studies in the History of Tax Law: Volume 2* (Oxford, Hart Publishing, 2007).

Despite the intellectual traditions just alluded to, the ability of revenue law to pinpoint the nexus between personal freedom and collective wellbeing has not been as widely appreciated as might be expected. The concept of a tax, as analysed earlier, requires political institutions to hold resources in a fiduciary capacity, in the absence of immediately identifiable beneficiaries, and on the basis of a general accountability to the nation's representatives. The echo of these arrangements in charity law, where private persons (trustees or corporations) hold resources to be applied for 'public purposes', is instructive.⁷⁵ With both tax proceeds and charitable funds, the purposes and the mechanics of the arrangement are thought to require the clearest justifications and also the closest scrutiny. The possible justifications for the accumulation of resources by HM Government are, in effect, the justifications for the controversial range of objects discussed at the beginning. Note that few, if any, of those objects straightforwardly satisfy the conception of what economists refer to as a 'public good'.⁷⁶ Nevertheless 'public money for public goods'⁷⁷ is a slogan that is currently gaining ground among populist elements. It appeals in particular to those on the libertarian Right because one way of reading it is to strip back the functions of government, and hence the purposes of taxation, to a bare minimum. It also appeals, though somewhat less so, to those on the hard Left because, suitably widened, the slogan can alternatively be read as justifying radical redistribution through the tax system. Most governing parties have deliberately shunned these stark alternatives:⁷⁸ as is well known, public and private purposes have become closely intertwined. Sol Picciotto sees deeper problems in this state of affairs, writing that 'tax "planning" has become routinized; and ... [multinational groups] in particular can take advantage both of competition [*sc* from states] to offer incentives to attract investment, and opportunities for international avoidance'.⁷⁹ This conflict was at the root of *Cadbury Schweppes and Cadbury Schweppes Overseas*,⁸⁰ discussed by Christiana HJI Panayi in chapter nineteen. *Cadbury Schweppes* was the case in which an Ireland-based subsidiary

⁷⁵ Indeed, in traditional Chancery-speak, charitable trusts are often referred to as 'public purpose trusts', which are in general valid, in contrast with 'private purpose trusts', in general void (see J McGhee (ed), *Snell's Equity*, 33rd edn (London, Sweet & Maxwell, 2017)).

⁷⁶ D Hume, *A Treatise of Human Nature* (first published 1739–40; Oxford, Clarendon Press, 1978) 538–39. See also S Picciotto, *Regulating Global Corporate Capitalism* (Cambridge, Cambridge University Press, 2011) 77: 'Public goods are said to have either or both of two characteristics: they are (a) non-rival in consumption (enjoyment by one person does not detract from enjoyment by another); and (b) non-excludable (it is inherently difficult or impossible to restrict their use or consumption'. See, further, HJ Kiesling, *Taxation and Public Goods: A Welfare-Economic Critique of Tax Policy Analysis* (Ann Arbor, MI, University of Michigan Press, 1992).

⁷⁷ See, eg, DEFRA, 'Once-in-a-Generation Opportunity to Shape Future Farming Policy' (London, 27 February 2018), available at www.gov.uk/government/news/once-in-a-generation-opportunity-to-shape-future-farming-policy.

⁷⁸ Perhaps responding to the imperatives of 'ordoliberalism' (see J Snape, 'Stability and its Significance in UK Tax Policy and Legislation' [2015] *BTR* 561, 566).

⁷⁹ Picciotto (above n 76) 452.

⁸⁰ Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995.

of Cadbury Schweppes in the UK had invoked the fundamental freedoms of the EU treaties, both to claim the benefit of Ireland's very low corporate income tax rate and to shelter group income with a non-UK source. In ruling unfavourably on the validity of the UK's controlled foreign companies' (CFC) regime,⁸¹ the European Court of Justice sought to balance two considerations. The first was the rightness of 'the specific objective of such a restriction', namely 'to prevent conduct involving the creation of wholly artificial arrangements' that did not reflect 'economic reality'. The second was the right of a 'controlled company' actually to establish itself in any EU Member State and to carry on 'genuine economic activities there'.⁸² The outcome was a classic technocratic 'fudge'⁸³ and it has won few supporters either on the libertarian Right or hard Left. At least to some, *Cadbury Schweppes* might be seen as an exemplar of a 'centrist' orthodoxy in which the big controversies around the proper expenditure of revenues were progressively ignored in favour of technocratic arguments over matters of detail and process. In somewhat different ways, the orthodoxy has been accepted by both left- and right- of-centre political parties over recent decades. In the UK, for example, both the New Labour administration and the Conservative–Liberal Democrat Coalition had long accepted the inevitability of so-called 'public–private partnerships' in the provision of public services. The orthodoxy has, though, been decisively rejected on both the populist Right and the populist Left. Britain's Labour Party, under the leadership of Jeremy Corbyn, has called for the bringing 'in-house', that is, the renationalisation, of public services currently supplied under the public–private partnership model, though few think this realistic.⁸⁴ On the other side of the Atlantic, the 2010 Patient Protection and Affordable Care Act ('Obamacare') was created firmly in the spirit of close co-operation between public and private, and President Trump has repeatedly, though so far unsuccessfully, attempted to remove all traces of it.⁸⁵ The UK's reform to its CFC regime in FA 2012, which in various ways embodies a close intertwining of public and private, has become the subject of an EU Commission state-aid investigation. The recent erosion of the centre ground of technocratic orthodoxy is one possible reason why it is possible to find condemnation of the *status quo ante* on both Left and Right. Increasingly, then, the justifications for taxation that commend themselves to partisans of

⁸¹ Then contained in ICTA 1988, ss 747–56 and schs 24–26.

⁸² Case C-196/04 [2006] ECR I-7995, para 76.

⁸³ For some implications of the argument that, especially since 1992, EU law has ordoliberalism, rather than neoliberalism, at its core, see Prosser (above n 49) 11–14 and (regarding tax) Snape, 'Stability and its Significance in UK Tax Policy and Legislation' (above n 78) 566.

⁸⁴ J Ford and G Plimmer, 'Public Service, Private Gain' *Financial Times* (23 January 2018) 9.

⁸⁵ The validity of the so-called 'individual mandate' component in Obamacare was accepted by the US Supreme Court in *National Federation of Independent Business v Sebelius* 132 S Ct 2566, 2600 (2012), not under the Commerce Clause, but pursuant to the taxing competence of the US Congress (see BN Bogenschneider, 'The Taxing Power after *Sebelius*' (2016) 51 *Wake Forest L Rev* 941).

one or other side of these arguments are so varied that it is difficult to identify common ground. That said, perhaps all sides might agree on the necessity for the prevention of corruption in the design and administration of tax laws and the promotion of the broadly based public good of national self-defence. Examples of outright corruption are easily exposed in developed nations under the rule of law, although equivocal examples are much more troublesome. What has been alleged in some quarters as the capture of public policy by the Gupta brothers in South Africa,⁸⁶ for example and, possibly, too, *Pergau Dam*, might be viable examples of the latter. Weaker although still passionate allegations have been against the close involvement of the ‘Big Four’ professional services firms with the design of new tax legislation. The UK’s replacement CFC legislation, introduced in FA 2012 in the wake of *Cadbury Schweppes*, has come in for particularly strong criticism in this respect.⁸⁷ National defence, indeed, provides a strong example of a public good the nature and purpose of which have traditionally commanded wide acceptance. It might be objected that controversies such as the non-renewal of Trident, or the question of what percentage of gross domestic spending should be devoted to defence, show that, even on the latter, there is no consensus. These may be disputes about means rather than ends. On this perspective, taxpayers do not disagree about the existential significance of the British state but on how best to ensure its continued existence. Either way, it is tolerably clear that national defence is typically the paradigm case of common ground between otherwise divergent approaches to public services revenue and expenditure. What underlies these examples and counter-examples is an understanding of how common and individual interests interact and what tax has to do with it.

In drilling down into this last point, we need to pause to reflect on the relationship between collective wellbeing and personal freedom and how, if at all, this relationship comes through in revenue law cases. At stake here are two contrasting ideas. One of them is that *personal freedom* is both foundational and best expressed by the state’s *non-intervention* in the life of the individual. In the dissenting words of the libertarian judge Douglas J in a non-revenue context, ‘[t]he right to be let alone is indeed the beginning of all freedom’.⁸⁸ The other is that *collective wellbeing* is both foundational and best expressed by the very opposite: by the state’s extensive intervention in individual lives. Each finds some expression in the cases discussed within this book. Admittedly, historical and jurisprudential factors mean that judicial opinions consonant with the former are much more frequent, at least in the last three-and-a-half centuries

⁸⁶ D Pilling and J Cotterill, ‘The Selling of South Africa’ *FT Weekend Magazine* (2/3 December 2017) 12.

⁸⁷ R Brooks, *The Great Tax Robbery: How Britain Became a Tax Haven for Fat Cats and Big Business* (London, Oneworld Publications, 2013) ch 4.

⁸⁸ *Public Utilities Commission of the District of Columbia et al v Pollak et al* 343 US 451, 467 (1952).

since *Ship-Money*, than those echoing the latter. Because no two people agree precisely on what personal freedom entails, and because, however it is mapped, tax is crucial to it, these questions have never conclusively been resolved. In fact, it is almost impossible to imagine that they ever will be. Economically liberal ideology which is ultimately traceable (though in different ways) to the political philosophies of both John Locke (1632–1704) and David Hume (1711–76), finds expression in many of the cases. Entirely expectedly, in its insistence on representative consent by legislation to the interference with property rights, *Bowles* is a paradigm of this tradition. Less expectedly, perhaps, so also is *Jones v Garnett (HM Inspector of Taxes)*,⁸⁹ discussed by Glen Loutzenhiser in chapter twenty. Important incidents of the right of property are freedom to dispose of it⁹⁰ and a distrust of purposive statutory interpretation.⁹¹ Sure enough, *Jones v Garnett* vindicates one spouse's right to alienate an income stream in favour of the other (and thereby to take the consequent tax advantage) and it does so by refusing to accept HMRC's strained construction of the relevant legislation. The liberal ideas just illustrated assign a limited role to the state, including its legislation, as being brought into existence primarily to protect property rights. These are in a sense 'natural' and therefore pre-political,⁹² a position which is explicitly rejected in the collectivist view. Instead, the collectivist view regards the state as being the source of rights and views legislation as the means of bringing them into existence.⁹³ 'There'll be creative business leaders', the Shadow Chancellor, John McDonnell MP acknowledged to an interviewer in 2018, 'but actually, when it comes down to it, they can't do anything unless they're part of a collective'.⁹⁴ In revenue law terms, the latter view has the potential exponentially to increase the range of objects that revenue law might seek to promote. Navigating a middle way, Sir Isaiah Berlin (1909–97) referred to 'positive liberty': not simply being let alone (what Berlin called 'negative freedom' or 'negative liberty') but being equipped by the state with the means to act.⁹⁵ Such positive liberty has given rise to the concept of 'basic income'.⁹⁶ With these extremes and one example of a middle way in mind, it is productive to think of 'individualistic' and 'collectivist' ideas – not as alternatives – but as struggling

⁸⁹ *Jones v Garnett (HM Inspector of Taxes)* [2007] UKHL 35; (2007) 78 TC 597.

⁹⁰ K Gray and SF Gray, *Elements of Land Law*, 5th edn (Oxford, Oxford University Press, 2009) 103.

⁹¹ See above (text around n 41).

⁹² See, eg, R Nozick, *Anarchy, State, and Utopia* (New York, BasicBooks, 1974) 174–82.

⁹³ See, eg, L Murphy and T Nagel, *The Myth of Ownership* (Oxford, Oxford University Press, 2000).

⁹⁴ J Pickard, 'Is Britain Ready for John McDonnell?' *FT Weekend Magazine* (3/4 March 2018) 12, 14.

⁹⁵ I Berlin, 'Two Concepts of Liberty' in I Berlin, *Four Essays on Liberty* (Oxford, Oxford University Press, 1969).

⁹⁶ As to which, see G Standing, *Basic Income: And How We Can Make It Happen* (London, Pelican Books, 2017).

tendencies within every system of public finance. The political struggle between ideologies can then be seen, not in terms of a choice between models, but in terms of the emphasis in practice to be placed on the rival ideologies. This analysis has the great benefit of shifting attention away from extreme depictions of revenue law that would be intolerable in practice and that have not survived unimpeded even in communist or hyper-capitalist societies. Instead the focus is placed on the variations of opinion that are most likely to have a concrete influence in developed jurisdictions. For exactly the same reasons, it is a framework that is useful in clarifying the outlook of at least some of the parties to the cases discussed within this book, not to mention judges, officials and indeed our own contributors. Few if any adopt either of the extreme positions, but it is often possible to see individualism or collectivism being brought into slightly sharper relief than the other.

These considerations resonate down the centuries, though bloody struggles over the Crown's need to raise revenue and the constitutional rights of the subject have given way to less bloody but often still violent debates about the nature and scope of the very concept of revenue law. When, in the eighteenth century, Sir William Blackstone (1723–80) described 'the rights of the people of England', he 'reduced [them] to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property'.⁹⁷ The last of these, drawing on Locke, he defined as consisting 'in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land'.⁹⁸ That meant, in turn, that 'no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament'.⁹⁹ By the late nineteenth century,¹⁰⁰ AV Dicey (1835–1922) had developed Blackstone's teaching about rights into a particular threefold conception of the rule of law: 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government';¹⁰¹ 'equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts';¹⁰² and the fact that 'the principles of private law have with us been by the action of the Courts and

⁹⁷ William Blackstone, *Commentaries on the Laws of England* (first published 1765; Oxford, Oxford University Press, 2016) I, 88 (I.1). See HH Monroe, 'The Constitution in Danger' [1969] *BTR* 24, 24–26.

⁹⁸ Blackstone, *ibid.*, 93–94 (I.1).

⁹⁹ *ibid.*, 94.

¹⁰⁰ M Loughlin, *The British Constitution: A Very Short Introduction* (Oxford, Oxford University Press, 2013) ch 5 (esp 88–9); Loughlin, *Foundations of Public Law* (above n 50) 316.

¹⁰¹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885; Carmel, IN, Liberty Fund 1982) 120.

¹⁰² *ibid.*

Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land'.¹⁰³ While these Blackstonian and Diceyan ideas find expression throughout this book, three cases stand out as illustrating different aspects of their views. The story of *Bowles*, already mentioned, involved an action by Bowles against the Bank of England for paying him interest net of income tax without legislative authority. The bank, on the advice of Freshfields, their solicitors, had relied on the Budget resolutions of the House of Commons. The judge, Parker J, held that the resolutions were not enough. An Act of Parliament was required to authorise the net payment. The case was followed briskly by the enactment of the Provisional Collection of Taxes Act 1913, designed to provide the requisite temporary statutory authority for the collection of taxes. While neither Blackstone nor Dicey is referred to in the *Bowles* case report, the latter had, in 1908, affirmed that 'no-one can nowadays fancy that taxes can be raised otherwise than in virtue of an Act of Parliament'.¹⁰⁴ A second, counterintuitive, example is *Farmer v Glyn-Jones*,¹⁰⁵ since it illustrates Diceyan principles in a somewhat backhanded way. 'At stake', as Chantal Stebbings explains in chapter two, was 'the chemist's privilege', namely, whether a qualified chemist and druggist was the 'first vendor' of a 'known, admitted and approved remedy' and thus that the medicine sold was exempt from medicine stamp duty under the Medicine Stamp Act 1812. Although the Divisional Court held, on a literal interpretation, that the chemist was indeed within the exemption, the Revenue's subsequent practice was not only too wide but was the exercise of an unlawful discretion. The case illustrated both the limitations of Dicey's 'judge-made constitution'¹⁰⁶ and the idealism implicit in his statement that 'every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen'.¹⁰⁷ Finally, there is *Baker v Archer-Shee*,¹⁰⁸ analysed by Malcolm Gammie in chapter six. There, the issue was whether money received by Lady Archer-Shee (the life tenant under an American will trust governed by English law) constituted 'income from a foreign possession' (that is to say, the right to due administration of the trust) or income from shares, securities or foreign property. If the former, her husband (Sir Martin Archer-Shee) was liable for income tax only when the amounts were remitted to the UK. If the latter, he was liable for income tax whether they were remitted or not. The judicial committee of the House of Lords, by a bare majority, held that that the amounts were income from shares, securities or foreign property. Sir Martin was taxable on them, even though they had never been remitted to

¹⁰³ *ibid*, 121.

¹⁰⁴ *ibid*, 201.

¹⁰⁵ *Farmer v Glyn-Jones* [1903] 2 KB 6.

¹⁰⁶ Dicey (above n 101) 116.

¹⁰⁷ *ibid*, 114.

¹⁰⁸ *Baker v Archer-Shee* [1927] AC 844.

the UK. Possibly, what *Archer-Shee* illustrates is Dicey's claim that, in interpreting legislation, judges tread a distinctive path, one 'which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments'.¹⁰⁹ In all three cases, indeed, the judges' constitutional propriety highlighted the consequences, for better or worse, of the Diceyan rule of law in the early-twentieth century constitution.¹¹⁰

By the mid-twentieth century, the constitutional values expressed by Blackstone and Dicey were, for many, no longer sufficient. This is because they had nothing to say about the purposes of taxation in a state transformed beyond anything they would have recognised. A radical transformation took place in what is still the most extensive expansion of revenue law, namely the revenue legislation of the 1964–70 Labour government. Significantly, the sweep of theorists to whom this expansion could be traced – Sidney and Beatrice Webb, William Beveridge, John Maynard Keynes, Nicholas Kaldor, Robert Neild and so on¹¹¹ – were not primarily *legal* theorists. The terms of mainstream debate had moved away from Diceyan values.¹¹² At the same time, the legal foundations of the tax system became increasingly divorced from observable commercial phenomena.¹¹³ This was, in part, a result of the sheer range of purposes to which it was put, in part a result of the need to make the system watertight against tax avoidance. One of the most important of these purposes was greater social justice by redistribution through the tax system.¹¹⁴ This had been a source of unease for Friedrich von Hayek and his followers for some time,¹¹⁵ and it remains contentious to this day. The main planks of the transformation were the introduction of corporation tax and capital gains tax (CGT) in FA 1965. *Zim Properties*, already referred to, illustrates the judiciary's willingness to ensure that the base of CGT was robust but fair. The chargeable gains legislation¹¹⁶ states that '[a]ll forms of property shall be assets ... whether situated in the United Kingdom or not'. Warner J held that a claim in negligence against a law firm, regarding a property transaction, was itself such an asset. In turn, the settlement of the claim for £69,000 was a chargeable disposal involving a 'capital

¹⁰⁹ Dicey (above n 101) 273.

¹¹⁰ Interestingly, Terence Rattigan's play, *The Winslow Boy* (1946), was inspired by *Archer-Shee v R*, involving a petition of right for breach of contract, and affirms the values of the Diceyan view of the constitution (see ER Keedy, 'A Petition of Right: *Archer-Shee v The King*' (1939) 87 *U Pa LR* 895; T Rattigan, *Collected Plays*, vol 1 (London, Hamish Hamilton, 1953) 391–92; Dicey (above n 101) 417).

¹¹¹ RC Whiting, *The Labour Party and Taxation* (Cambridge, Cambridge University Press, 2000) esp 43, 107, 160–68, 191.

¹¹² That said, legal scholars did eventually engage with the welfare state thus created, eg: JAG Griffith, 'Comment' [1963] *PL* 401; H Street, *Justice in the Welfare State*, 2nd edn (London, Stevens, 1975); JAG Griffith, 'The Political Constitution' (1979) 42 *MLR* 1.

¹¹³ See text around n 59 above, and n 59 itself, in relation to Prebble's comments. He describes this dislocation as 'ectopic'.

¹¹⁴ Whiting (above n 111) 179–95.

¹¹⁵ FA Hayek, *The Constitution of Liberty* (first published 1960; Abingdon, Routledge, 2006) 266–81.

¹¹⁶ TCGA 1992, s 21(1) (ex CGTA 1979, s 19(1); ex FA 1965, s 19(1)).

sum derived from an asset'.¹¹⁷ As Ridd has explained elsewhere,¹¹⁸ this brought the £69,000 within CGT's scope (the robust aspect) but permitted the deduction of a base cost (the fairness aspect). Interestingly, Ridd attributes 'this broad approach' to the fact that 'Sir Jean-Pierre Warner ... had, prior to his appointment to the Chancery Division, been an Advocate-General [*sic*] in the European Court of Justice'.¹¹⁹

So unexpected was the decision in *Zim*, and so wide-ranging its potential ramifications, that the Inland Revenue eventually responded with an Extra-Statutory Concession (ESC D33), attempting to clarify the circumstances in which *Zim* would apply. This raised its own controversies. Extra-Statutory Concessions had only recently attracted trenchant criticism from judges in the Diceyan mould and particularly from Walton J.¹²⁰ 'One should be taxed by law, and not be untaxed by concession',¹²¹ he said, later adding that in publishing ESCs, the Crown was claiming the prerogative to dispense with laws.¹²² Walton J's association of prerogative levies in the would-be absolutist state of James II, with the discretions of tax administration in the welfare state, is commonly invoked by libertarians. So too is the invocation, also in connection with intolerable discretion, of *Ship-Money* in the reign of James' father, Charles. *Bowles*, decided over 250 years later, and to precisely the opposite effect, just follows the end of a period when hardly any revenue cases came before the higher courts. The main exceptions were stamp duty cases, and then only because '[d]ocuments which ought to be, but were not, stamped, could not be used in any judicial proceeding. And enforcement therefore required a judicial determination on the stamp laws'.¹²³

Whether landmark cases demonstrate that revenue law is best thought of as public law or private law, or that indeed such categories are best avoided, are hard questions. Public law, in David Walker's definition,

comprises the principles and rules which relate to the structure, activities, rights, powers and immunities, duties and liabilities of the State ... save ... in circumstances where the State ... enjoys no special rights or powers.¹²⁴

Private law, at an equally high level of generality,

comprises the principles and rules dealing with the relations of ordinary individuals with one another [traditionally, property, contract and tort], and also those dealing

¹¹⁷ TCGA 1992, s 22(1) (ex CGTA 1979, s 20; ex FA 1965, s 19(3)).

¹¹⁸ P Ridd, 'Statutory Interpretation in Early Capital Gains Tax Cases' in P Harris and D de Cogan (eds), *Studies in the History of Tax Law: Volume 8* (Oxford, Hart Publishing, 2017) 279–80.

¹¹⁹ *ibid*, 280.

¹²⁰ S Daly, 'The Life and Times of ESCs: A Defence?' in P Harris and D de Cogan (eds), *Studies in the History of Tax Law: Volume 8* (Oxford, Hart Publishing, 2017) 170–74.

¹²¹ *Vestey v CIR (No 1)* [1979] Ch 177, 197G.

¹²² *Vestey v CIR (No 2)* [1979] Ch 198, 203F–H.

¹²³ D Williams, 'Taxing Statutes are Taxing Statutes: The Interpretation of Revenue Legislation' (1978) 41 *MLR* 404, 408–09.

¹²⁴ DM Walker, *The Oxford Companion to Law* (Oxford, Oxford University Press, 1980) 1013.

with the relations of the State ... with an individual in circumstances where the State ... does *not* have any special position.¹²⁵

For Dicey, neither the public law/private law dichotomy nor the allocation of revenue law to either category is permissible, since the rule of law requires one law for state and subject alike.¹²⁶ Though possible, a Diceyan position on revenue law is both controversial and difficult to maintain in the face of modern realities. It is possible because the courts in *Bowles*, *Glyn-Jones*, *Archer-Shee* and, surprisingly, *Garnett*, took a Diceyan line. It is controversial because Dicey's position, that of a (liberal) idealist, is partisan.¹²⁷ Dicey's view is/was always hard to maintain in reality, because of the long growth in the administrative state discussed above.¹²⁸ Granted these objections, and being willing therefore to admit the dichotomy, we might nonetheless emphasise that there is an irreducibly private law component to taxation because property rights are foundational to private law and tax necessarily interferes with them. Revenue law might then be *negatively* characterised as the (state) law that, by its very precision, shores up and supports the sharp edges of property law. The nature of revenue law's interference with property rights is quite distinct from that of human rights or equalities law. With revenue law, this interference needs to be concretised and measured in every single case. In passing judgment, the revenue law judge is meticulously mapping the boundaries between public right and private right. With human rights or equalities law, however, it is only in relatively rare cases where that law is engaged and property rights are constrained. For economic liberals and libertarians, this recognition of the intimate connection between property rights, taxation and private law, is transformed into an insistence on the axiomatic nature of property rights. 'Tragically',¹²⁹ though, in UK revenue law, the *quietus* of this particular view was *Ramsay*. As regards the internal workings of property law, the constructive trust case of *Lloyd's Bank plc v Rosset*¹³⁰ might possibly be said to occupy a similar position.¹³¹

That leaves us to examine the claim that, rather than either of the foregoing, the cases tend to illustrate revenue law's public law quality. This claim is often made in other jurisdictions.¹³² From this perspective we would point out that, without revenue law, there would be no United Kingdom of Great Britain and

¹²⁵ *ibid.*, 994. (Both are sophisticated definitions, because they say what public law or private law *does*, not what it *is*.)

¹²⁶ See text around n 99 above.

¹²⁷ Loughlin, *Public Law and Political Theory* (above n 47) 140–53.

¹²⁸ *ibid.*, 153–56.

¹²⁹ "My dear Spencer, I should define tragedy as a theory killed by a fact", HUXLEY', quoted in G Chapman, *A Passionate Prodigality: Fragments of Autobiography* (London, MacGibbon & Kee, 1965) 68.

¹³⁰ *Lloyd's Bank plc v Rosset* [1991] 1 AC 107 (HL).

¹³¹ Despite the foregoing discussion, this suggestion does not go so far as to treat property law as a subset of revenue law.

¹³² See, eg, *Ferrazzini v Italy* [2001] STC 1314, 1319c, 1320g–j; (Thuronyi (above n 16) 60).

Northern Ireland. We might then consider the linked question whether revenue law should be regarded as ordinary positive law or whether it has some special constitutional status. This point needs some careful historically minded thought. A narrow view might be that revenue law is, for the most part, positive law, but that some of it has constitutional status.¹³³ Thus, *Bowles* would involve a ‘constitutional statute’ (the Bill of Rights 1689), whereas *Bater* would not (the Third Rule of Schedule E in the Income Tax Act 1842). Both would, however, be public law cases because of their close engagement with the relationship of tax, citizens and government. A wider view might be that no part of revenue law can be regarded *solely* as positive law; that tax is ‘a set of practices embedded within, and acquiring its identity from, a wider body of political practices’.¹³⁴ On this view, not even the detail of tax legislation could be separated from its contribution to a set of political practices, understandings and relationships that were not exclusively legal and not even exclusively about tax. On this view, too, there would be no intrinsic difference between the statutes in *Bowles*, say, and in *Bater*. Both would be recognised as embedded within broadly the same practices, understandings and relationships. Not only would this obviate the need to sift constitutional statutes from others, it would acknowledge that Schedule E, Rule 3, ITA 1842 had no coherence or morality outside this political and public law context. It would also recognise the interconnection of revenue law and the administrative state, even as far back as the mid-nineteenth century. In our own time, social security legislation underlines this point even more forcefully. This is because, although it benefits poorer people, it also enmeshes them. In short, the poorer you are, the more intimate your connection is with the state. Because revenue law is existential to the state, its public law dimension is not restricted to regulating how HM Government conducts tax policy and promulgates revenue legislation. Instead, revenue law moulds how goods in society are distributed in the furtherance of political decisions. The question, in the broad terms outlined at the beginning, is that of what kind of state this law will shape.

A further resonance between tax and public law is the sense that it is not only the substance of a decision that is important but the sensitivity of the judges to the political consequences of their judgments. This point has rather come to the foreground since the abolition of the General Commissioners and Special Commissioners fundamentally changed the character of tax litigation. Not only has the qualification for hearing revenue law cases been professionalised; under the new system, revenue law issues only fall for consideration by the higher courts once an appeal has been made from a decision of the Upper Tribunal. In future, therefore, tax law is likely to receive more input from tax-trained judges at the lower tiers of the appeals system, and less input from generalist

¹³³ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), para [62]; [2003] QB 151, 186F–G (Laws LJ). Generally, see F Ahmed and A Perry, ‘Constitutional Statutes’ (2017) 37 *OJLS* 461.

¹³⁴ M Loughlin, *The Idea of Public Law* (Oxford, Oxford University Press, 2003) 43.

appeal judges. As Anne Fairpo points out in her discussion of *Edwards (HM Inspector of Taxes) v Bairstow and Harrison*,¹³⁵ older judicial examinations of the courts' review and appellate jurisdictions retain much of their force despite these recent reforms; it still makes sense to refer to this 1955 case as a landmark. Arguments over the circumstances in which a higher court can review the lower court's fact-finding, and when it can substitute its own decision for that of the latter, will continue to involve this case. Meanwhile, the likelihood that the enhanced importance of the Upper Tribunal will foster a distinctive revenue law jurisprudence provides yet another reason for doubting the continued relevance of a Diceyan view of revenue law.

IV. CONCLUDING COMMENTS

A full conclusion would not be fitting for an exploratory essay such as this. However, we would make three very brief concluding points. First, the detailed study of revenue law cases gives wisdom as to the origin and purposes of particular revenue law rules. Secondly, landmark cases are those that, in one way or another, illuminate particularly intractable issues. Thirdly, the significance of that illumination is not limited to the particular rules and principles: it can reveal much about the nature and purpose of a whole system.

¹³⁵ *Edwards (HM Inspector of Taxes) v Bairstow and Harrison* (1955) 34 ATC 198.