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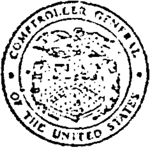
S. Feinstein



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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The Honorable Charles A. Vanik
House of Representatives

Dear Mr. Vanik:

[Review for]

In your recent letter, you referred to the Senate's consideration of the ratification of the United States-United Kingdom Tax Treaty and stated that you are opposed to a number of provisions in the treaty. You are particularly opposed to the consideration by the Senate alone of a measure affecting American tax practices. You state that "The Senate has the power to ratify treaties--but the Constitution also entrusts the House with the power to originate legislation affecting the revenues," and ask for our opinion on the constitutionality and legality of the Senate's approval of the treaty "which would reduce the revenues without the concurrence of the House of Representatives--the supposed originator of revenue measures." You refer to a number of precedents which you believe show that "a tax or commercial treaty which clearly affects the revenues cannot and should not be ratified by one chamber alone."

Additionally, you state that the Congressional Budget Act reaffirms the requirement that both Chambers approve resolutions affecting the level of spending and revenue. You request our analysis of how the Senate's advice and consent to ratification would coordinate with the Budget Act.

The treaty in question, The Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes On Income, was signed at London on December 31, 1975. An exchange of notes was signed at London on April 13, 1976, modifying certain provisions of the convention. On June 24, 1976, the convention was transmitted by the President for the Senate's advice and consent to ratification. On June 27, 1978, the Senate voted a resolution advising and consenting to ratification, with the exception of Article 9(4). Under Section 28 of the convention, it was to enter into force immediately after the expiration of 30 days following the date on which the instruments of ratification are exchanged. However, because of the Senate's Article 9(4) exception, the treaty as modified must be reconsidered by the United Kingdom.

The treaty in question which replaces a tax treaty signed on April 16, 1945, and subsequently amended, is summarized in S. Exec. Rep. No. 95-18, 95th Cong., 2d Sess. 2 (1978) as follows:

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Letter

"The proposed treaty is substantially similar to the existing tax treaty with the United Kingdom, to other recent U.S. tax treaties, and to the model tax treaty of the Organization for Economic Cooperation and Development (OECD). There are, however, several provisions of the proposed treaty which are not found in other U.S. tax treaties. Of particular significance are the new provisions contained in the proposed treaty (1) which provide for a refund by the U.K. to U.S. portfolio and direct shareholders receiving dividends from British corporations of Advance Corporation Tax (ACT) paid by the distributing corporation (Article 10) and allow a U.S. foreign tax credit for the one-half of the ACT which is not refunded to U.S. direct corporate investors (Article 23), (2) which limit the right of states to apportion income of British multinational corporations under the unitary method (Article 9(4)), and (3) which treat the British Petroleum Revenue Tax (PRT) as a creditable tax for U.S. foreign tax credit purposes (Articles 2 and 23)."

As provided in clause 2 of article VI of the Constitution, the Constitution itself, acts of the Congress, and treaties together constitute the supreme law of the land. Neither laws nor treaties are superior to the other, and neither may contravene the Constitution. Article II, section 2, clause 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; * * *." The Constitution places no express limitations on this treaty power.

According to the Restatement (Second) Foreign Relations Law of the United States section 118, Comment a (1965), "If a treaty of the United States is valid * * * in that it deals with matters of international concern and is not in conflict with any express limitations on the powers of the government * * * it is constitutional and no further reference to the Constitution is necessary." Comment b of the same section states that "The treaty power of the United States is not limited by the extent of the powers delegated to the Congress by the Constitution. This follows from the fact that the treaty power is itself an independent power granted to the President and the Senate under the Constitution." Further, the Restatement indicates that while a treaty which by its terms is self-executing is not effective as domestic law where it deals with a subject reserved by the Constitution exclusively to the Congress, "The mere fact, however, that a Congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power." Section 141, comment f.

As to the proper subjects for treaties, Thomas Jefferson in his Manual of Parliamentary Practice reprinted in the Rules of the House of Representatives wrote (section 594) as follows:

> "2. By the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and can not be otherwise regulated.
>
> * * * * *
>
> "4. And also to except those subjects of legislation in which it gives a participation to the House of Representatives. This last exception is denied by some on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others. * * *"

In commenting on the foregoing, Professor Henkin says that--

> "Even in Jefferson's day, as he noted, this limitation was hardly accepted by all. It has now long been dead. Treaties have dealt with many matters that were also subject to legislation, e.g., tariffs and other regulations of commerce with foreign nations; on many subjects treaties and acts of Congress have been alternative means of regulation, one by agreement, the other unilaterally, sometimes on condition of reciprocity. * * *"

L. Henkin, Foreign Affairs and the Constitution (1972), page 149.

Article I, section 8, clause 1 of the Constitution declares that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, * * *." Article I, section 7, clause 1 states that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." After consideration of these provisions House Joint Resolution 132 in 1881 concluded that the treatymaking power of the United States did not extend to treaties which affect the revenue. However, the House Committee on Foreign Affairs in reporting on that resolution stated:

> "The words 'all bills for raising revenue,' in section 7 of article 1 of the Constitution, do not embrace treaties; a treaty is not a bill for raising revenue, and the requirement that 'all bills for raising revenue shall originate in the House of Representatives' is not a limitation upon the treaty-making

> power, but is only a condition imposed on the ordinary law-making power of the Government. * * * The resolution under consideration (H. J. Res. 132) affirms a proposition which, under existing constitutional provisions, can not be sustained."

The resolution was laid upon the table without debate and therefore never became law. 2 Hinds' Precedents section 1525.

In Edwards v. Carter, Civ. No. 78-1166 (D.D. C. April 6, 1978), cert. denied, May 1, 1978, it was held that the transfer of U.S. property interests in the Canal Zone is capable of accomplishment not only by legislation but also by treaty. In its opinion, the Court referred to:

> "* * * certain grants of authority to Congress which are, by their very terms, exclusive. * * * the constitutional mandate that 'all Bills for raising Revenue shall originate in the House of Representatives,' Art. 1, § 7, cl. 1, appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes. * * *"

In U.S. v. Norton, 91 U.S. 566 (1875), the Supreme Court referring to Article I, section 7, clause 1, stated:

> "The construction of this limitation is practically well settled by the uniform action of Congress. According to that construction, it 'has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue.'"

It is not clear from the above court rulings if the limitation which requires bills for raising revenue to originate in the House of Representatives, besides operating to prevent such bills from originating in the Senate, also acts as a restriction on the independent treaty power established in the Constitution. If it does, we believe that the limitation only applies to the imposition of taxes as a primary purpose of the treaty and not to treaties which would incidentally or secondarily have an effect on tax revenues.

Your letter refers to the Blount Resolutions of 1798 which were made in connection with the Jay Treaty with Great Britain (8 Stat. 116 (1794)). In this regard, The Constitution of The United States of America--Analysis and Interpretation, Sen. Doc. No. 92-82, 92d Cong., 2d Sess. (1973) at pages 487-488 states as follows:

"(C)ertain provisions of * * * [the treaty] required appropriations to carry them into effect. * * * A bill was introduced into the House to appropriate the needed funds and its supporters, within and without Congress, offered the contention that inasmuch as the treaty was now the law of the land the legislative branch was bound to enact the bill without further ado; opponents led by Madison and Gallatin contended that the House had complete discretion whether or not to carry into effect treaty provisions. * * * At the conclusion of the debate the House voted not only the money but the resolution offered by Madison [and Blount] stating that it did not claim any agency in the treaty-making process, 'but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or the inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be the most conducive to the public good.' This early precedent with regard to appropriations has apparently been uniformly adhered to.

"Similarly, with regard to treaties which modify and change commercial tariff arrangements, the practice has been that the House always insisted on and the Senate acquiesced in legislation to carry into effect the provisions of such treaties."

In your letter you also refer to a convention with Mexico which was signed on January 20, 1883. The Senate advised and consented to ratification of this commercial treaty but added a reservation that it would not take effect until the laws necessary to carry it into operation had been passed by the Congress and by Mexico, and regulations provided accordingly. On June 17, 1884, Mr. A.S. Hewitt for the Committee on Ways and Means, submitted H.R. Rep. No. 1848, 48th Cong., 1st Sess., on H.R. 7366, a bill to carry into operation the convention with Mexico. The report stated that (page 1):

"The question has been raised whether it would not be competent for the President and Senate alone to enter into treaties which would change the laws for the collection of revenue, but the practice has been uniform, and the House has always insisted, that

where the rates of duty are changed by treaty, the approval of the Congress is necessary for its execution."

It was noted that because of the Senate amendment, the question did not arise regarding the convention with Mexico. The report concluded that:

"The adoption of this amendment by the Senate is a substantial admission, in the nature of a precedent, which may be expected hereafter to govern treaties affecting the revenue."

The bill was never enacted and the treaty did not become effective.

It appears that there has been acquiesence to the insistence of the House of Representatives that treaties modifying tariffs are not self-executing and therefore require congressional implementation. However, it does not appear that this precedent has been extended to tax treaties of the nature of the United States-United Kingdom treaty in question. Neither it nor the 1945 treaty it is to replace provides for congressional implementation, nor has this been required by the Senate in approving the treaties.

Although self-executing treaties similar to the United States-United Kingdom treaty do not require implementation by legislation, the Congress has expressly provided for tax effects of treaty provisions. Section 894(a) of the Internal Revenue Code, 26 U.S.C. § 894(a), provides that "Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle [Income Taxes]." Additionally, section 7852(d) of the Internal Revenue Code, 26 U.S.C. § 7652(d), states that "No provision of this title [the 1954 Code] shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title."

These sections, which take specific cognizance of treaties relating to matters included in the Internal Revenue Code, consider the treaties as being effective in their own right, and conform the appropriate statutes to them. This is an apparent recognition of the self-executing nature of these tax treaties, since nonself-executing treaties are effective as domestic law only by virtue of the required implementing legislation.

In a statement prepared for the Senate Committee on Foreign Relations which was considering the United States-United Kingdom Tax Treaty (S. Exec. Rep. No. 95-18, 95th Cong., 2d Sess. 86 (978)), the Assistant Secretary of the Treasury described the U.S. tax treaty program as follows:

"We have income tax treaties currently in force with 23 countries, as well as with a number of former or present British, Belgian, and Dutch colonies to which the treaties with those countries have been extended. In addition to the treaties before you today, and the two others that are still pending, new or revised treaties with a number of additional countries are currently the subject of negotiations.

"Besides this rather extensive network of income tax treaties, we also have treaties in force with 13 countries dealing with estate taxes and death duties, and in a few cases with gift taxes as well. Several other estate tax treaties are now being prepared for signature.

"We view tax treaties as an important element in the international economic policy of the United States. One of our fundamental objectives is to minimize impediments to free international flows of capital and technology, and this objective is fostered by having the broadest possible network of income tax treaties.

"Among the major impediments to freer capital and technology flows are the rules of national tax systems and their interaction with the systems of other countries. Tax treaties seek to eliminate, or at least mitigate the impact of, these impediments.

"Treaties accomplish this minimization of impediments by a variety of means, the principal ones being the elimination or reduction of double taxation and the elimination, to the extent possible, of discriminatory tax rules which distinguish unreasonably between domestic and foreign investment.

"At the same time, tax treaties also serve policy objectives--for example, the prevention of tax avoidance and evasion, and the fostering of international cooperation between the tax authorities of Contracting States."

The Tax Treaty with the United Kingdom, according to the same report (page 41), will have an impact on U.S. tax revenues, including reduction of withholding taxes on U.S. corporate dividends paid to British direct corporate investors, changes in U.S. foreign tax credits, and possible increases in U.S. taxable income as a result of British corporate tax refunds to American shareholders. It was estimated that

the treaty might result in a 1978 fiscal year reduction of $100 million in U.S. tax revenues (which reflects the retroactive effect to 1975 of certain provisions) and lesser revenues losses in subsequent years.

Nevertheless, the treaty does not establish new taxes but incident to American international economic policy affects taxes already in force. It does not require appropriations and does not provide for or require any kind of implementing legislation. Therefore, the treaty is self-executing and thus effective as part of the law of the land, based on Senate approval.

Your second question is how the Senate's advice and consent to the United States-United Kingdom Tax Treaty coordinates with the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 299.

Section 2 of the Budget Act includes as purposes of the Act:

> "(1) to assure effective congressional control over the budgetary process;
>
> "(2) to provide for the congressional determination each year of the appropriate level of Federal revenues and expenditures; * * *."

As explained in S. Rep. No. 93-688, 93d Cong., 2d Sess. 1 (1974), the Act is "to establish a Congressional budget process, through which all spending decisions will be related to each other and to revenues. * * * How much revenue will be derived from existing tax provisions and should this be increased or decreased?"

A treaty's revenue effects are included in the comprehensive budget process under which spending decisions are related to each other and to revenues. But this does not appear to provide any special opportunity for the House of Representatives to effectively object to the treaty for substantive reasons.

The Budget Act is silent as to whether Senate consideration of a treaty (discussed and voted on by the Senate as a whole, rather than committee action) is subject to the procedural requirements of the Act. The Act does provide that bills and resolutions which increase or decrease revenues are subject to its provisions. A resolution of advice and consent to a treaty, such as the United States-United Kingdom Tax Treaty, if it comes into force will have the effect of increasing or decreasing revenues. We have been informally advised that it is the opinion of both Budget Committees as well as the Congressional Budget Office that this type of resolution is within the procedural purview of the Budget Act as discussed below. Without ruling definitively

on the applicability of the Budget Act procedures to a resolution to ratify a treaty, for purposes of our discussion here we will assume that it is subject to these procedures.

With regard to the first concurrent resolution on the budget, which is to be approved by the Congress by May 15, the Act provides:

> "It shall not be in order either in the House of Representatives or the Senate to consider any bill or resolution * * * which provides * * * an increase or decrease in revenues to become effective during a fiscal year * * * until the first concurrent resolution on the budget for such year has been agreed to * * *." (Section 303(a).)

(But the Congress may approve bills or resolutions that increase or decrease revenues for subsequent fiscal years without regard to this time limit.) Therefore, it would be out of order for the Senate to consider a tax treaty before the Congress approves the first concurrent resolution on the budget if that tax treaty would increase or decrease revenues in the fiscal year to which the resolution applies.

The Act provides, however, that the Senate may waive this restriction by following the procedures set forth in section 303(c). If waiver is granted or if a point of order is not raised, the Senate may consider a tax treaty before approval of the first concurrent resolution, although the treaty would affect revenues that fiscal year.

The Act also provides that after the Congress approves the second concurrent resolution on the budget (by September 15) it shall not be in order for either House "to consider any bill, resolution, or amendment * * * reducing revenues for such fiscal year" if the bill or resolution "would cause revenues to be less than the appropriate level of revenues set forth in such concurrent resolution" (section 311(a)). There is no waiver available as to the second concurrent resolution.

From the foregoing, it appears that under the Budget Act, it is in order for the Senate to consider advice and consent to the United States-United Kingdom tax treaty in the period subsequent to the approval of the first concurrent budget resolution and prior to the approval of the second concurrent budget resolution (May 15-September 15). Consideration of the treaty prior to the first concurrent budget resolution would be subject to a point of order, unless a waiver is obtained. Treaty consideration after the second concurrent budget resolution is subject to a possible point of order if the treaty is held not only to reduce revenues but also to cause revenues to drop below the appropriate level of revenues specified in the second budget resolution.

Where a point of order objecting to consideration of a treaty on the basis that such consideration is not in accord with the above procedural requirements is not made in the Senate, we are aware of no established mechanism by which that point of order could be raised in the House of Representatives.

The treaty (Executive K, 94th Cong., 2d Sess.) was submitted by the President to the Senate on June 24, 1976. It was reported to the Senate by the Committee on Foreign Relations on April 25, 1978, and unfavorably considered by the Senate on June 23, 1978. It was reconsidered and approved, with reservation as to Article 9(4), on June 27, 1978. Since the whole Senate considered the treaty in June 1978, it appears that the Senate considered the treaty resolution during the period (May 15-September 15) provided for in the Budget Act.

Based on our review, therefore, it appears that the Senate's advice and consent to the ratification of the United States-United Kingdom Tax Treaty is in accord with the Constitution and U. S. laws including the Congressional Budget Act of 1974.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States