

The history and development of tax incentives and export controls for the retention and acquisition of manuscripts, archives and books

Part II of II

In addition to the Cultural Gifts Scheme, which is a philanthropic scheme and the Acceptance in Lieu (AIL) scheme which is akin to a sale to the nation there is another incentive available: where sale is unavoidable and an opportunity to use AIL is not there, the tax code offers an incentive to the owner to sell the item to a UK museum. Privately negotiated sales to those bodies listed in Schedule 3 of the Inheritance Tax Act 1984 are exempt from capital taxation – inheritance tax, capital gains tax and from April 2009 corporation tax on companies' gains. Broadly Schedule 3 includes all national museums, those under local authority or university control, the National Trusts, the Friends of the National Libraries, the Art Fund and, from September 2016, those museums and galleries that had been maintained by a local authority or university but are now independent charitable trusts (e.g. Pallant House).

Those which are not listed can still benefit from the tax concession if a Schedule 3 body can “front” the acquisition for them. Such private treaty sales are entirely tax free and the benefit of the tax exemption is shared between the seller and the museum under an administrative arrangement known as the “douceur”. It is usually 25% to the seller and 75% to the museum for objects (10% for land and buildings) but it is negotiable. A higher rate than 25% might be appropriate to provide an adequate inducement for lower value items and a lower one for high value items.

The mechanics of a private treaty sale are simple: the parties agree the sale price and, if relevant, a base value for capital gains tax; a calculation is produced of what is called the Special Price payable by the museum (the price net of tax plus the Douceur) taking into account the seller's tax rates. HMRC is asked to agree the calculation (it does not get involved in the values) and confirm that a sale to the museum at that amount will be tax free. The item either has to have been exempted previously or, if not, be pre-eminent or associated with a building in public ownership.

For items that have been exempted, the Government considers it reasonable to expect owners who have benefitted from conditional exemption to give public institutions the first chance of acquisition by such a private treaty sale if they decide to sell and since 1st September 1982 the undertakings given by owners in return for conditional exemption include a request for them to give the Arts Council three months' notice of sale which is put on its website – the Selbourne library was advertised there before its 2015 sale at Bonham's.

Three months is not a long time and usually the object has already been catalogued by then so not many are the subject of successful acquisitions but there have been a few success stories notably the sale to the British Museum in 2006 of the papers of the Rev. Philip Hunt (1772-1838) which was an archive of documents relating to the Parthenon sculptures which includes the only surviving copy of an Italian translation of the Firman given to Lord Elgin

for excavations in Greece; the John Murray archive to the National Library of Scotland also in 2006; the Londonderry archive to PRONI in 2011; and in 2016 the acquisition of the personal Archive of William Henry Fox Talbot by the Bodleian.

The repercussion of not giving this notice is that if the item is sold to a foreign purchaser, is found to be a national treasure and is deferred from being exported the deferral period is usually increased by a corresponding three months (in the early 1980s the repercussion was an indefinite export stop.

This brings me to the export control procedures for cultural goods. The system began during World War II as part of the measures designed primarily to safeguard the nation's resources and at the same time to prevent the flight of capital abroad. The protection of national treasures was not a specific aim of this war time measure known as the Import Export and Customs Powers (Defence) Act 1939. This allowed the Directors of the national institutions to say that they did not think that it was proper to export a particular object and that, of itself, was sufficient basis to refuse a licence. This worked in a period of war and in the immediate aftermath when trade was limited. By 1949 the system was beginning to break down even if in practice the number of such refusals was small. Between 1946 and 1952 only 32 refusals were made, although how many items were retained in the UK during this period because it was realized export would be refused, is not known.

An appeals procedure was set up – a proto Reviewing Committee – consisting of a Treasury Chairman, representatives of the Board of Trade and the Foreign Office and the director or keeper recommending the refusal along with two other directors or keepers chosen as representing an independent point of view.

Not surprisingly this Committee was seen as too heavily weighted in favour of 'the official side' which was interested in retention. The criticism resulted in the Chancellor of the Exchequer appointing in 1950 a committee, chaired by Lord Waverley (Sir John Anderson) with the task of, "*considering and advising on the policy to be adopted by His Majesty's Government in controlling the export of works of art, books, manuscripts, armour and antiques and to recommend what arrangements should be made for the partial operation of the policy.*" (The other members of the committee were, Anthony Blunt; David Lindsey, the Earl of Crawford and Balcarres (who was Trustee of the National Gallery, the British Museum, Chairman of the Royal Fine Art Commission, National Library of Scotland, the National Trust and the National Art Collections Fund); Hugh Dalton, the Chancellor who had set the Waverley Committee; Vivian Galbraith, the medieval historian, who at the time was Regius Professor of History at Oxford; Christopher Hussey, the architectural historian; and the economist Lionel Robbins.

It reported back in 1952 and "*The Waverley Report on the export of works of art*" still forms the principal basis for the UK's export control procedures.

The first principle that Waverley announced was that if there were to be export controls, and he did consider it appropriate for a country to have such

controls, in every case in which export is prevented, the owner must be assured of an offer to purchase at a fair price. *“We think that the State has a clear right to forbid the export of objects which it regards as of national importance. But we think it has an equally clear duty to see that particular individuals are not unfairly treated as a result.”*

Waverly recommended that only works of art over 100 years of age should come within the scope of the controls, but because of the importance of exchange controls, this recommendation was not implemented. (The war-time controls had imposed a 75 year age limit). For all objects other than manuscripts, documents and archives, he set a monetary limit of above £1,000. (He accepted that this might be too high and that experience could lead to this level being lowered. He also repeatedly states that this £1,000 limit is set with the expectation that purchase grants will be increased significantly so that items below £1,000 would be acquired by public collections by normal methods of purchase.) Again, this was a recommendation for the future as the exchange controls made immediate implementation impossible. Only objects which had been in the UK for over 50 years would be controlled and subject to referral.

Lord Waverly then set out his three criteria which are still the basis of any objection to permanent export:

1. Is the object so closely associated with our history and national life that its departure would be a misfortune
2. Is the object of outstanding aesthetic importance?
3. Is the object of outstanding significance for the study of some particular branch of art, learning or history?

“In considering the question of national importance the needs of the local collections must not be overlooked. The standard may well be lowered on occasions to safeguard some objects desired for a local museum or gallery.”

On the basis that export licensing was not the means of controlling large numbers of objects of low value, Waverley saw no sufficient reason for excepting printed books from the general minimum monetary and age limits of £1,000 and 100 years. *“This limit will catch a few of the most important books: the rest must be regarded as outside the scope of the system.”*

The only area where Lord Waverley thought that some variation to the standard procedures should be applied was to manuscripts, documents and archives.

He saw two sub-categories:

1. items having an intrinsic aesthetic value; and
2. objects valued primarily for purposes of historical, literary, scientific or other research.

The first sub-group he recommended should come under the same £1,000 limit; for the second which Waverley described as, *“the raw material and the basis of research in many fields”* and without which whole tracts of knowledge may remain obscure - he said that this minimum monetary limit would not be

appropriate and he set a zero threshold for them. He also emphasized that to an even greater extent than other objects, documents and archives depend for their value on related material: *a document is usually of significance mainly in relation to other documents and can only be studied profitably with them.*

Professor Galbraith filed a minority report stating that the State in the case of sub-category 2 material should have the right and the means to refuse export for such material even where there was no offer to purchase. The other members of the committee would not recommend such a proposal even where such important material was involved.

However, to alleviate the worse effects of the departure of manuscript material abroad, Waverley recommended that, *“unless specific permission to the contrary had been given, the originals of manuscripts, etc., should never be exported without copies being made and deposited in the appropriate place.”* In addition the report stated, *“the requirement to obtain export licenses for these documents and to deposit copies unless exempted, should therefore apply whatever their monetary value.”*

Waverley recommended that the Reviewing Committee should in future have an independent chairman (not a Treasury official, as had been previously the case and the first such independent chairman would be Lionel Robbins) and that the chairman should be a *“person of standing, experienced in administration and having a recognised interest in the arts.”* In addition, there should be three independent members and that for each case three independent assessors be appointed members of the Committee for the consideration of each case and that one of these should be chosen from an institution outside London. The Director/Keeper objecting to the export was no longer to be a member of the Committee but an applicant stating a case to be decided by the Committee. The exporter was also given the right to appear before the Committee and make representation. The Committee was to provide an annual report of its operations to the Chancellor but to meet in private.

Finally, an Advisory Committee was to be set up representing the broad field of those interested in the operation of the system. This was to include two or three members of the trade.

The Reviewing Committee in 2018 is still very much the body devised by Lord Waverley 65 years previously. Of the c. 30,000 applications for export licenses made each year anywhere between 15 and 35 are referred to the Committee for consideration. Of these, about 75-80% are considered to be objects that meet one or more of the Waverley Criteria and are recommended to the Secretary of State for deferral, to allow time for a matching offer to be made by a UK institution or even a private individual, provided the individual gives certain undertakings to conserve the item and to make it accessible to the public.

Under the UK legislation the current threshold for any document or manuscript (in any case not being printed matter); any archive of manuscripts and documents in any medium, created and/or accumulated by an individual,

family, corporate body or institution, which has survived or been preserved as evidence of their purpose and activities; and any architectural, scientific or engineering drawing produced by hand is zero. The threshold for printed books is £65,000 and there is no UK category for collections of books.

In the annual report for 2015/16, the statistics show that 52 items were referred to the Keeper of Printed Books and the Head of Map Collections at the British Library and 1,647 items were referred to the Curator of the Department of Manuscripts. These latter have a combined value of just over £221m. (A further £5.6 m of printed books and maps were licensed for export). Recent acquisitions of export-deferred books and manuscripts include Ben Jonson's *Workes* (1640) with extensive near-contemporary manuscript annotations to the play *Epicoene or The Silent Woman* which include stage directions, details of props and textual corrections by The University of Edinburgh with assistance from the Friends of the National Libraries, the Friends of Edinburgh University Library and the John R Murray Trust and the acquisition in 2015 by the British Library of the earliest known English translation of Desiderius Erasmus's most popular work, the *Enchiridion militis Christiani*, or 'handbook of the Christian soldier'.

Purchases of export deferred items by Schedule 3 bodies are tax free also, but in such cases, it is not considered appropriate that the *douceur* be included since its rationale is to encourage direct sales to UK public museums. After an export-deferral any owner, rightly, must receive the market price which has been set in the marketplace and so should not financially be out of pocket. However, where a sale to a UK public museum follows, the vendor's tax liabilities reduce the actual cash paid because the sale is tax free and there is no need to add a 'sweetener'. As a result a UK public museum can make a compensating offer to purchase which is set by the fair matching price and any additional elements (for example buyer's premium and VAT usually payable to the agent) but reduced by the total amount of tax that would be payable in the UK by the seller on the sale price.

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