

If you are planning to fly to Italy this summer, you should consider an increase in costs for landing your private jet on Italian soil.

# HOW TO IGNORE THE CHICAGO CONVENTION



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As of March 5th, owners of aircraft used for non-commercial operations in Italy are required to pay an additional landing tax. The new taxation, known as Salva Italia, has been introduced by governmental decree and subsequently converted into law.

The Salva Italia decree contains several measures aimed at reducing the Italian deficit and balancing the budget. One of the measures adopted by the Monti Government has been to tax so-called 'luxury goods', including high caliber cars, yachts and private aircraft.

Unfortunately this includes a tax on Italian registered aircraft and in some cases on foreign aircraft.

At the time of writing this article, several amendments to the law are being discussed. The latest available version of the law provides a taxation for commercial and non-commercial operations. For non-commercial operations, the tax is due on Italian registered aircraft or on foreign aircraft making a



stop-over in Italy of more than 45 consecutive days. The amount due is calculated based on the take-off weight of the aircraft and varies from a minimum of €0.75 per kilogram for aircraft having a take-off weight up to 1,000 kilograms to a maximum of €7.55 per kilogram for aircraft having a take-off weight of more than 10,000 kilograms.

Commercial flights have also been taxed (this taxation is new as it was not included in the original version of the law). This new tax on "aero-taxis" will be paid by each passenger for each leg and it amounts to €100 on legs of less than 1,500km and €200 per leg for legs above 1,500km.

The new tax has been criticized by the European Business Aviation Association (EBAA), the Italian Business Aviation Association (IBAA) and the European Helicopter Association (helicopters are taxed twice as much as airplanes). The EBAA, in coordination with its national and international partners, is acting on several different fronts. EBAA has been busy making contacts with Italian authorities in order to explain the industry's position. More so, the tax services of the European Commission have also been involved as the Italian luxury tax could be in breach of European law.

It is regrettable that the Italian government does not seem to recall what happened with the so-called Soru taxation. Indeed, Salva Italia must give regular travelers to Italy a feeling of *déjà-vu* mixed with an impression of incoherence. Not so long ago, the Italian Constitutional Court, backed by a decision of the European Court of Justice, decided that a tax very similar to the one introduced by the Monti Government was unconstitu-

**VIOLATION**

The Italian luxury tax imposed on aircraft could be in breach of European laws.

tional and in breach of several principles of European law - including the free provision of services and the right of establishment. Following the decision of the Italian Constitutional Court, the luxury tax introduced by the then governor of Sardinia, Mr Soru, on yachts and private jets, was abolished.

It is interesting to note that the case against the law of the Sardinia Region introducing the so-called "Soru Tax" was brought by ... the Italian State. The State not only argued that the tax infringed on established principles of European law - and was backed by the European Court of Justice on this point - but also that the tax did not conform to the State's general principles of taxation. It would be interesting to know what changed in the general principles of European law as well as the Italian rules on taxation that prohibited the 2006 luxury tax but allows for the adoption of a substantially identical tax just six years later.

#### **The Situation in Europe**

The increase of taxation on international aviation is a phenomenon that is rapidly growing in Europe. Increased taxation is often justified by environmental reasons, even though, as we will see here below, revenues generated by such taxation may also be used for 'solidarity' purposes.

Several Member States impose taxation on air passengers. The method of taxation adopted by most European countries is a charge levied per-passenger departing from, or arriving to, an airport located in the territory of the relevant country.

This is how the UK's Air Passenger Duty (APD) works. The duty was introduced in 1994 and, at that time, its amount was so low that no objections were raised by airlines. On December 6, 2006, the Chancellor of the Exchequer announced it was the government's intention to double the amount of APD. The duty has since been increased several times. The duty applies to all passengers, with some exceptions, and it is calculated on the basis of the distance between London and the capital city of the destination country.

The revenues generated by this duty, which at times was purportedly increased for environmental reasons, will not be reinvested in environmental projects. If it was expected that the tax would be criticized by airlines, less



expected was the criticism received by environmentalists who argued that the tax actually encourages air passengers to believe they are doing their bit for the environment, making them less likely to contribute to carbon offsetting schemes.

Following the example of the UK, Ireland introduced its own APD, whose amount is calculated in the same manner as the UK APD. Following the crisis of the Euro-zone, there have been several talks in Ireland to abolish the APD in order to promote tourism. Unfortunately, a deal could not be found between the Irish Government, who proposed to scrap the tax against an obligation of airlines to increase flights to and from Ireland, and the airlines, who indicated that they could not commit to such an increase. The Irish APD therefore stands.

Another interesting example of passenger duty is the so-called Alitalia tax. In 2008, the Italian Government increased an existing Boarding Tax from 1 per passenger to 3 per passenger. The additional amounts levied from the increase of the Boarding Tax have been used to cover the costs of unemployment benefits for former Alitalia's employees. In other words, a perfect example of a solidarity tax. Notwithstanding some pressure from the International Air Transport Association and the European Low Fare Airlines Association, the tax was maintained.

The scope of these taxes varies from the noble aim of protecting the environment to the financing of unemployment benefits of former employees of a bankrupt national carrier. Whatever the reasons for these taxes, their pro-

liferation is certainly not among the aims those who believed in the future of aviation and in the great contribution that a sound aviation industry can bring to the global economy.

#### **The Chicago Convention: *enfant mal-aimé***

It would be useful if the ICAO took an official position on this type of taxation. Indeed, the Chicago Convention of 1944, the backbone of the international aviation community, states:

*"No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon". (Article 15)*

The declared purpose of the Convention is to foster the development of international aviation in a safe and orderly manner and to establish international air transport services operated soundly and economically and on the basis of equality of opportunity. If we read the prohibition of Article 15 in light of the purpose of the Convention, it becomes apparent that the aim of this instrument is to avoid a proliferation of taxes on international aviation - proliferation that would create inequality among operators and impair the sound development of air services.

Suffice it to say, the Convention has been ratified by 191 States. I believe it is legitimate to wonder what the future of aviation would be if each one of these ratifying states would add taxation on flights departing or landing in its territory.

However, even if the purpose of the Convention seems clear, its interpretation has given rise to irreconcilable court decisions.

**MIX-UP**  
Italian PM Mario Monti and his government fail to differentiate aviation and luxury.



## THE DOCKET

### TAXATION ON INTERNATIONAL AVIATION

In the 1990s, the municipality of Zaventem, the town where Brussels' airport is located, introduced a levy to be paid by all passengers departing from or arriving at Brussels Airport. Several airlines brought action against this measure and the Belgian courts, at all levels – including the Council of State and the Belgian Supreme Court - upheld the airlines' position, holding the tax in breach of Article 15 of the Chicago Convention. Specifically, the courts ruled that the tax was charged on passengers 'solely' for the right of entry into, or exit from, Belgian territory.

On the basis of this case law, a recent proposal to reintroduce an air passenger duty in Belgium has been dropped by the Government.

In the Netherlands, the so-called Dutch Ticket Tax, introduced to reduce air traffic and pollution, was subsequently abolished. However, even if the end result is the same as that in Belgium, the reasons are different. Even though Dutch courts held that the Dutch Ticket Tax was not in breach of the Chicago Convention, the tax was subsequently abolished. Indeed, as indicated at the time by Jos Nijhuis, president of Schiphol Airport, the introduction of the tax had the immediate consequence of a decrease in air traffic from Schiphol to neighboring countries.

Low cost airlines started operating from Belgium or Germany and tour operators started selling travel packages that included departing airports located in surrounding countries. Following the deterioration of the economic conditions of Schiphol airport, the tax was finally abolished in 2009.

The introduction of the Dutch Ticket Tax was challenged in court. Dutch judges upheld the validity of the tax and structured their final decision on the basis of the reasoning followed by the English High Court in the case concerning the UK Air Passenger Duty.

However, the UK's High Court decision has been heavily criticized by scholars as being UK-centric and as misapplying general principles of



interpretation of international treaties. Even though the reasoning followed by the High Court may be criticized on several grounds, it shows how different courts may get to opposing conclusions even when confronted with the position adopted by other courts. Indeed, the High Court, examining Belgian case law, dismissed it, stating: *"I confess to not following all of its reasoning. While according it all due respect, I regret that it does not lead me to alter my conclusion"*.

#### Are We Heading Towards 191 Different Local Taxes?

The fact that different judges have reached opposing and irreconcilable positions on the interpretation of the prohibition of Article 15 indicates that there is still some work to be done to promote a coherent interpretation of this international treaty.

A key role could be played by the International Civil Aviation Organization, the international body created by the Chicago Convention. ICAO could issue clear guidance on what type of taxation is prohibited under the Chicago Convention. Indeed, current ICAO guidelines on taxation and charges have proved to be silent on this issue.

The European Court of Justice, in its very controversial decision on the validity of the directives extending the EU Emission Trading Scheme to the aviation industry, has recently indicated that the European Union is not bound by the Chicago Convention. This decision alone then implies that European institutions are not compe-

tent for the interpretation of the Convention.

ICAO should therefore step in and bring some clarity to the issue. This might help national legislators when considering the adoption of new taxation on aviation activities, as well as judges when confronted with interpretative issues.

An increased role by ICAO in clarifying the meaning of the prohibition of Article 15 could also be coupled with a campaign to increase awareness of the effects that taxation on aviation has not only on operators, but also on airports. In particular for Business Aviation, often mistakenly considered as 'luxury' aviation by legislators, it is important to be able to indicate the exact consequences an increased taxation has on the aviation industry as a whole, i.e. not only on aircraft operators, but also on airports.

The example of the Netherlands is particularly interesting as the Dutch Ticket Tax was abolished not because of a purported damage to the airlines, but because of the heavy loss of traffic experienced by Schiphol airport.

I would also venture to say that this type of taxation on international aviation should be systematically challenged. As clearly shown by the judgment of the English High Court, the existence of taxes similar to the ones challenged has been construed as additional evidence that nothing can be reproached to such taxation - Inaction has been interpreted as acquiescence.



**MEDIATION**  
ICAO could step in to highlight the negative effects of Italy's proposed "luxury" tax on Business Aviation.

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