Panel 1: Perspectives on Taxpayer Rights: A Multidisciplinary Approach to Good Governance and Legal Remedies

The role of taxpayer rights in influencing taxpayer compliance behavior and serving as a foundation for tax administration can be analyzed from many different perspectives, including anthropology, economics, law, and psychology. Moreover, the press and other media play a vital role in protecting taxpayer rights. Applying principles and methodologies of several disciplines (e.g., qualitative methods, surveys, and lab and field experiments, investigative reporting, legal analysis), this panel will explore the protection of taxpayer rights by good governance (by analyzing scenarios of voluntary compliance) and legal remedies (by analyzing scenarios of litigation involving taxpayers and tax authorities).

A Tax Journalist's Perspective

Robert Goulder, Senior Tax Counsel • Tax Analysts • Arlington, Virginia, United States

As a columnist for *Tax Analysts*, I have the unique opportunity to wear two hats: that of journalist and that of attorney. This perch allows one to critique specific practice areas through the prism of taxpayer rights. The subject matter doesn't necessarily lend itself to sensational headlines, but it does touch on the essential social compact between the state and the citizens. To that end, my remarks will examine two topics with implications for good governance and the availability of legal remedies.

Query 1: Are Taxpayer Rights Marginalized Under Whistleblower Programs?

The IRS maintains an organized whistleblower program that allows informants to come forward with previously undiscovered information about taxpayer noncompliance. As an inducement, the informant is able – under certain circumstances – to receive a financial reward based on the amount of revenue eventually collected. The statutory authority is found in Internal Revenue Code section 7623(b). The program includes ample protections for whistleblowers, including anonymity. The trouble arises with the related carveout affecting taxpayer confidentiality—including the regulations under section 6103(n) that allow disclosure of return information as part of written contracts between the IRS and whistleblowers. Here, then, is a sanctioned process in which access to confidential information is transferred to a third party who is by no means neutral in its orientation. Make no mistake, informants obviously hope to find "dirt" on which they can base a lucrative award claim. The regime appears to foster a proverbial fishing expedition, causing us to ask whether whistleblower rights operate to the detriment of taxpayer rights. The Taxpayer Bill of Rights mentions the right to be informed. Accordingly, we might ask at what point in the process a taxpayer has the right to be informed that it is the subject of a whistleblower investigation, and that the IRS has shared confidential return information with adverse parties. There are additional issues here concerning documentation, audits, and evidentiary privileges that add further layers of complexity to the picture.

Query 2: Are Taxpayer Rights Compromised When the State Actor Is Not the Sovereign, but a Multilateral Body That Assumes the Role of Tax Administrator?

What happens when taxpayer rights are infringed upon by non-state actors positioning themselves as supranational tax administrators? A case in point would be the infrastructure that exists in Brussels. The European Union is not a sovereign. It doesn't impose taxes per se. But who can deny that the European Commission asserts dominion over the economic lives of taxpayers across Europe and beyond, such that their legal duties and obligations are profoundly affected. The state aid cases come to mind. While it's not my intent to argue for or against the merits of these claims, I am compelled to comment on how procedural aspects of these disputes raise concerns relevant to rights and remedies—most notably in connection with finality and detrimental reliance. In each state aid case there is a revenue body and a taxpayer, and no quarrel between them. The EU member state makes no contention that the taxpayer owes unpaid tax; it regards the taxpayer as fully compliant. Yet claims are made for billions of euros in back taxes. The alleged wrongdoer, the revenue body, suffers no direct ill consequence of violating EU law – that burden is entirely passed on to the taxpayer. A stunning disconnect between who was allegedly at fault and who picks up the tab. Ironically, the wrongdoer experiences a substantial economic windfall if it were to lose the case. This is less a critique of the EU state aid prohibition itself and more an indictment against the ancillary provision requirement recoupment of perceived benefits from taxpayers. Essentially, the state aid case can be viewed as an unprecedented penalty mechanism – a forceful remedy without the establishment of a predicate offense. Secondarily, the technical grounds for identifying "selective

treatment" seem to depend entirely on the retroactive application of sui generis legal interpretations. In other words, there seems to be a distinct incarnation of the arm's-length standard and profit attribution doctrines that exists solely for purposes of adjudicating this case and nothing else. Frankly, that seems difficult to reconcile with TBOR language regarding certainty and equal application of the law.

Why Ethnography? Taking Taxpayers Seriously

Lotta Björklund Larsen, Research Fellow • Linköping University, Linköping, Sweden

What are 'taxpayer rights'? Legally, such rights have national definitions as in the US where the IRS has adopted the 'Taxpayers Bill of Right' and adapted them to the Internal Revenue Code. Taxpayers rights varies with jurisdictions but a salient question is how to understand how they are interpreted in practice? Thinking with Nina Olson's statement that 'at their core, taxpayer rights are human rights' it might be beneficial to lift our gaze and pay attention to how such rights are interpreted. In practice.

There is a current trend among tax administrations around the world to proactively engage and involve taxpayers. In these processes, tax administrations engage stakeholders outside their own organizational boundaries to further their institutional interests, and thereby 'distribute' their powers of enforcement. Concrete examples of this kind of engagement are tax administrations initiated collaborations with accountants, lawyers, unions, employer associations, the media, politicians, and the general public.

This presentation addresses how an anthropologist would approach researching such collaborations drawing on a recent project on cooperative compliance in the Nordic countries. These initiatives have been introduced by tax administrations in most OECD countries in order to proactively engage taxpayers, businesses, and third parties in the name of efficiency and increased compliance. Yet, if these initiatives reach their goals is contested. For example, in the Nordic countries we saw indications on very different responses to these cooperative compliance initiatives; on their 'success'. Why did these initiatives play out so very differently in these otherwise quite similar countries?

Applying an anthropological gaze means approaching an issue holistically. It also means taking into account the views and actions of all stakeholders having an impact on the issue studied. To understand the outcome of these cooperative compliance initiatives we thus engaged with all stakeholders having a say. We read all the documents (policies, rules and regulations) as well as research and media debates, and we interviewed those who authored these documents. We participated in meetings between tax administrations and taxpayers and spoke at length with participants in these collaborations; contact persons, tax advisors, CFOs and lawyers but also with other stakeholders in interest organizations. Our research is conducted with an ethnographic gaze in order to understand the views and actions of all stakeholders. They all have the right to be taken seriously.

Studying Tax Behavior: An Overview of Current Research Methods

Jerome Olsen • University of Vienna • Vienna, Austria

Many different scientific disciplines deal with the topic of taxes (e.g., law, economics, psychology, philosophy). Empirical tax research is most interested in answering what motivates individuals to pay (or not to pay) their tax liabilities. But individual taxpayers usually take their filing decisions in private, which is a challenge for researchers, as the decision making process is not directly observable. Different empirical research methods therefore aim at assessing underlying motivations, attitudes, and perceptions that drive tax decisions.

Focusing on a psychological perspective, I will review current research methods used to understand individuals' tax behavior. I will not only discuss pros and cons of each approach, but will also provide brief empirical examples. The research methods include interviews and focus groups, free association techniques, surveys, and field and lab experiments. Furthermore, I will discuss the advantages and limitations of providing researchers with access to individual taxpayers' primary data.

One common differentiation in empirical research is made between qualitative and quantitative methods. Qualitative methods try to understand individuals' subjective views. Interviews and focus group techniques along with free association techniques represent qualitative methods that are often applied in tax research. They are most helpful in the beginning of knowledge generation when approaching a new research question and aim at developing concepts and identifying possible relationships and hypotheses.

Quantitative methods measure the magnitude of a postulated relationships and test concrete hypotheses. Among these, surveys and experiments are most frequently used. Surveys are questionnaires that measure explicit self-reports on predefined answering scales and assess individual attitudes. Experiments try to mimic real-life decision settings in a controlled environment to study perceptions and

behavior of participants. By systematically varying the absence or presence of selected attributes in different conditions and randomly assigning individuals to these conditions, researchers can test causal effects that cannot be directly observed in the field. Such systematic variations are most often implemented in the laboratory but can also be applied in the field.

Irrespective of any single method's potential for a given research question, there will always be limitations which are either inherent to the method or stem from measurement error. Therefore, credibility and reliability of research results can best be increased by approaching the same question with multiple research methods; a concept called triangulation. Policy makers are thus advised to, whenever possible, strive for research insights from multiple sources.

Corporate Taxpayers, Procedural Fairness, Trust, and Legal Certainty in the Context of Co-Operative Compliance

Diego Quiñones, Esq. Dphil (c), LLM, APCLB, Partner • Quiñones Cruz Abogados • Bogota, Colombia

In light of the Panel's focus on multidisciplinary approaches to the role of taxpayer rights in influencing taxpayer compliance behaviour, the presentation will center on what mixed-methods empirical research carried out among a sample of tax directors of large corporate taxpayers in the United Kingdom and in Colombia can reveal about the interaction between co-operative compliance programmes for this type of taxpayers, procedural fairness, trust, and legal certainty, and through them, taxpayer voluntary compliance.

The research in question starts from the premise that regulation meant to increase taxpayer compliance can see its *validity* strengthened if legal prescriptions are grounded on a thorough understanding of the regulatees' social and personal norms, and the way in which in these are materialised in the manner in which large corporations and their tax directors understand corporate tax, behave in relation to its compliance, and relate with the tax administration –collectively, the corporations' *tax culture*–.

Whilst co-operative compliance's validity is hypothesized to be affected by multiple variables in three different levels: A *macro* (country-specific) level, where variables such as trust in the tax administration and assessment of the administration's power are at play; the *meso* level (organisation-specific), and, a *micro* level (individual-specific) level, this presentation examines what findings can tell us about how different factors connected with a taxpayer right, legal certainty, and a set of taxpayer rights, procedural fairness, influence trust in the administration, and the means in which this might affect compliance.

Results indicate that, in the case of the UK, while findings of eroding trust in HMRC and its CRMs (Customer Relationship Managers) and objections concerning the administration's business understanding and the Business Risk Review[1], which are connected primarily to procedural fairness and/or to legal certainty, raise concerns regarding the future of the co-operative compliance model; there are other factors like the presence of compliance-minded and risk-averse personal and social norms and positive comparative evaluations of the administration which assist taxpayers in having broadly positive assessments of the relationship with the administration and that allow for high levels of trust in tax authorities.

On the contrary, Colombian findings present a very mixed panorama: On the one hand, overwhelmingly negative assessments of the administration's goals and ethics, its competence, business understanding and *power* -this last factor being fundamental for procedural fairness- combine with structural weaknesses associated legal certainty in order to produce critically low levels of trust in the tax authorities, something which conflicts with co-operative compliance. On the other hand, there are several other findings which show support for co-operative compliance's validity: Responses show alignment between tax director views about the ideal relationship between corporate taxpayers and the objectives seen as important for the administration to pursue and the elements of co-operative compliance. Moreover, interviews signal that corporations in Colombia are increasingly concerned about tax reputational risk, that public perception is taken into account when devising tax strategies and tactics, that tax teams are devoting more time to compliance than other areas and are having a more collaborative interaction with other corporate teams, and that tax is being considered alongside -as opposed to prior to or after- other variables in the business decision-making cycle. This introduces the question of whether co-operative compliance could or should be introduced in a context of low trust as a mechanism to bolster procedural fairness and legal certainty, and thus, raise inter-party trust and, ideally, compliance.

1 The procedure used to gauge taxpayers' risk profile and calibrate administrative response.

Panel 2: Preventing Disputes 1: Developing Early Warning and Intervention Systems

Effective and efficient tax administrations create systems and processes that not only identify suspicious situations that give rise to tax evasion but also potential taxpayer rights violations and address those problems at their outset, before they grow into major dilemmas. This panel will explore aspects of tax administration that pose long term challenges but could be mitigated through early intervention and action, e.g., identifying at-risk taxpayers and interventions to avoid bankruptcy; resolving issues before they come to audit (e.g., U.S. Compliance Assurance Program and cooperative compliance), and creating a tax agency culture that accepts the value of identifying situations that present significant risks not only for tax authorities but also for taxpayers (e.g., agency overreaching).

The Early Warning System: A Cooperative Multi-Disciplinary Approach for a Dynamic Relationship Between Taxpayers and Agencies to Avoid Bankruptcy

Alessandro Baracco • University of Padua • Padua, Italy

The recent global crisis has tested the tightness of the business system, causing the failure of those companies weaker or not prepared enough to face market changes. The *ex post* analysis of the financial statements of bankruptcy procedures allows us to highlight a significant point: even before the Non-Performing Loans of Banks, the first real "big creditor" in insolvency procedures turns out to be the State, since the taxpayer in crisis tends to favor the payment to other stakeholders (e.g. employees, strategic suppliers, banks), rather than the payment of tax debts.

Identifying the symptoms and supporting taxpayers to prevent and avoid the crisis emerges, therefore, as a mandatory choice for Tax Agencies, as it aims to preserve the general interest of the/a regular collection of taxes.

This implies the development of a cooperative culture in the relationship between taxpayers and Tax Agencies that, starting from the compliance in the present and the past, turns its attention to the risks of the future.

It is the time to move towards an enhanced relationship between Tax Agencies and Taxpayers, made of disclosure, transparency and mutual trust, and based on settled systems and processes capable of preventing a crisis before it may become irreversible.

Strict vigilance against delayed payments is a key tool to prevent companies from becoming insolvent, but it is not enough. An active assistance should be given by public agencies to taxpayers in financial difficulties. In terms of maximizing the results for both parties, all available tools (e.g. tax deferrals, graded multiple payments, tax agreements) must be used, in a different way however, focusing on a "forward-" rather than a "backward-looking" approach.

On the other side, taxpayers must improve their governance by adopting effective control systems in order to timely detect and facilitate a full and clear information disclosure with tax authorities.

This paper presents the case of the ongoing reform of the Italian Bankruptcy Law, which also focuses on the implementation of an effective early warning system: the challenge is to prevent insolvency by identifying specific indicators of the crisis (financial, economic and assets indexes drawn up every three years by the National Council of Chartered Accountants), defining the "significant and repeated" delays in payments that must be reported by internal auditors and qualified public creditors (e.g. Tax Agencies). Will the reform reach that crucial goal, as a fundamental item of an updated, long-term and multidisciplinary approach?

At national and international level, in fact, it has already proved to be one of the most challenging scientific approaches providing significant evidence of improvements in terms of the achievement of a "double win" situation, where taxpayers and Tax Agency can maximize their mutual goals, enhancing a cultural change.

Cooperative Compliance; What is at Stake for the Large Corporate Taxpayers?

Professor Karen Boll • Copenhagen Business School • Copenhagen, Denmark

Looking at large corporate taxpayers in any jurisdiction there are a number of formal tax rules and obligations guiding the taxation practices of these. Nonetheless, all national tax agencies have challenges with getting the large corporate taxpayers to follow the rules and obligations, to administrate grey areas or with maintaining a general high level of compliance. This presentation focusses on a specific program used by some tax agencies to regulate the compliance of these large corporate taxpayers. This program is called *Cooperative Compliance*. A significant number of tax agencies in the global North have adopted Cooperative Compliance programs or similar

regulatory initiatives to steer, manage and control the taxation practices of selected large corporate taxpayers. Cooperative Compliance builds on the idea that there should be proactive dialogue and collaboration between inspector and inspectee. The presentation will tune in on a number of qualitative interviews with large corporate taxpayers in Denmark—all being part of the program—and present what is at stake for them in this 'collaboration' with the tax agency. While tax compliance should be created voluntarily in a constructive and proactive alliance between these large corporate taxpayers and the tax agencies, this is not always that happens due to various conflicts, time pressures and role ambiguities.

Developing Early Warning and Intervention Systems

Ali Noroozi, Inspector-General of Taxation • Australian Government • Sydney, Australia

'Prevention is better than cure,' so the old adage goes and in the realm of modern tax administration, it bears even more significance as tax touches many facets of modern life and business. This paper examines early warning and intervention systems, in the Australian context, for identifying and addressing issues before they unnecessarily escalate into major problems.

It is neither possible nor desirable for the revenue authorities, such as the Australian Taxation Office (ATO), to conduct a full audit on each taxpayer. As a result, risk-based strategies are now the norm. The Inspector-General of Taxation (IGT) has examined a range of these strategies. A key challenge is to effectively target the highest risk taxpayers whilst minimising adverse impacts on those that are compliant. Such ATO strategies include the use of benchmarking and data matching as well as annual compliance agreements, pre-lodgment compliance reviews and justified trust.

Given the risk-based approach and the reliance on voluntary compliance, there is a need to provide certainty to taxpayers through guidance from revenue agencies, particularly given the growing complexity of tax systems. The IGT has considered ATO advice and guidance and their adequacy in a number of reviews. It has also considered whether the right balance has been struck between binding advice and non-binding guidance. Furthermore, the IGT has advocated for early engagement between the ATO and taxpayers through such means as in-house facilitation to resolve disputes as early as possible and cost effectively. The ATO's implementation of these initiatives has produced pleasing results. Where disputes turn on complex legal issues, the IGT has recommended that judicial guidance be sought, by way of declaratory proceedings, to break the impasse.

Debt matters are particularly contentious between taxpayers and the ATO. The IGT has examined relevant ATO strategies and noted that progressively tougher approaches to taxpayers who are in financial distress are unlikely to yield desired outcomes. The IGT has encouraged making greater use of the ATO's vast data holdings to identify taxpayers at the highest risk of financial distress and take earlier, more frequent and proportionate debt recovery action, minimising the need for firmer action at a later time. The ATO has also been making greater use of research on behavioural insights to understand the reasons for tax debt accumulation and developed internal tools to assess business viability and debt serviceability.

Ensuring that taxpayers are treated fairly and reasonably is crucial to building confidence in the tax system and fostering voluntary compliance. The IGT has examined a range of issues in this regard and acknowledged the calls from certain stakeholders for the enactment of additional legislative taxpayer rights or a legislated taxpayers' charter. Whilst legislated rights would provide the highest degree of protection, it is unlikely to be of significant assistance to taxpayers who do not have the funds to seek enforcement of such rights. The IGT has concluded that, before any further enforceable remedies are considered, some administrative measures could be implemented to realise significant improvements including ensuring that the taxpayers' charter is at the forefront of the ATO's interactions with the community and its performance against the charter principles is publicly reported.

Another important aspect of promoting voluntary compliance, through equitable treatment of taxpayers, is the provision of an independent and effective mechanism for addressing taxpayer complaints. The investigation of such complaints may also reveal emerging issues, the early examination of which may prevent their escalations into major problems in the tax system. The IGT has recently been conducting three reviews on such emerging themes and will increasingly draw upon complaints data in developing future programmes of reviews.

Panel 3: Preventing Disputes 2: Taxpayer Rights in the Administrative Phase

The conduct of administrative stages of a tax dispute, before issuance of a legally determinative notice, can influence taxpayer compliance behavior in the immediate instance and in the future. The imbalance of power, particularly with respect to low income taxpayers, can cause incorrect results or unnecessary disputes. Similarly, overly burdensome administrative procedures may lead taxpayers who have not violated the law to accept paying a proposed tax adjustment in order to avoid any waste of time or damage to reputation. This panel will explore how tax agencies can incorporate protection of taxpayer rights (including the taxpayer's right to be heard and to have government actions be no more intrusive than necessary) into their early administrative procedures, and how agencies can bring about such cultural change.

Trust and Time: Lessons from Cooperative Compliance

Lynne Oats • University of Exeter Business School • Exeter, United Kingdom

How can we design tax administrative systems to prevent disputes from arising while respecting taxpayer rights? Both trust and time are key, and practical experience in the realm of large business cooperative compliance arrangements offer some useful insights into the mobilisation of trust in regulation. Much of the focus on taxpayer rights is, quite rightly, on vulnerable, low income taxpayers, but we must not lose sight of the need to also protect the rights of larger taxpayers, whose interactions with tax agencies often entail larger amounts of revenue and therefore significant risk.

Trusting appears to be a powerful element of the relationship between taxpayer and tax authority, yet in the social sciences, trust, and its role, is a contested concept. Layers of trust permeate the relationship; between individuals, between individuals and organisations, between organisations, between regulators, regulated and intermediaries acting between the two. Trust in abstract systems and trust in experts are also important, as are the various dimensions of trust: trust as an obligation and as confidence (Braithwaite (1998), trustworthiness as competence and as goodwill (Searle et al 2011). Importantly, trusting is a dynamic concept, changing over time and requiring considerable effort to build, maintain and, where necessary, repair.

Trust forms the foundations of the regulatory pyramid (Braithwaite 1998) on which cooperative compliance regimes are based. It is often conceived of as something possessed as a cognitive or behavioural attribute, for example in the slippery slope framework. In the context of medium and large business, however, the dynamics are different and organisational culture becomes relevant.

Co-operative compliance initiatives encompass a range of arrangements designed around the core concept of collaboration for mutual benefit, including real time working and a commitment to mutual understanding. Originally named 'enhanced relationships', although subsequently rebranded in the wake of accusations of 'cosy deals', they have been implemented with varying degrees of success. In the Netherlands, the arrangements first introduced in 2005 are encapsulated in the phrase 'justified trust', in which the tax agency places trust in businesses that demonstrate willingness to develop and maintain robust internal control systems in relation to tax compliance obligations. In return, outstanding issues are resolved and real time working implemented in which discussions of tax liabilities are ongoing.

Lessons from experience with large business co-operative compliance arrangements include a better understanding of the fragility of trust in this context, in particular the trust of the taxpayer in the tax agency's capacity and willingness to reciprocate in terms of transparency and responsiveness. Evidence suggests the importance of trust between individuals within business and individuals within the tax agency which are built up over time. The prospects for extending large business co-operative compliance arrangements to smaller taxpayers and even individuals, would seem to be slight in light of the increasing squeeze on tax agency resources experienced in most countries. On the other hand, the development of a culture of mutual trust can potentially pave the way for smarter ways of co-operative working, perhaps through the growing use of disruptive technologies.

Protecting Taxpayer Rights in the IRS Administrative Appeals Process

Andrew Roberson • McDermott Will & Emery LLP • Chicago, Illinois, United States

The ability to pursue an administrative appeal within the Internal Revenue Service (IRS) before engaging in litigation is an important right in the United States tax system. The mission of the Appeals Office is to resolve tax disputes, without litigation, on a basis that is fair and impartial to both the government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the IRS. Historically, the Appeals Office has been highly effective, resolving around 90 percent of the tens of thousands of tax disputes that come before it each year.

Despite its success, the Appeals Office currently faces many challenges. There have been deep funding cuts in recent years and the number of Appeals Officers has steadily declined due to retirements (without replacement), resulting in increased workloads and longer resolution times. Additionally, there have been several changes to the Appeals process which negatively impact various taxpayer rights, including: (1) The Right to Challenge the IRS's Position and Be Heard; (2) The Right to Appeal an IRS Decision in an Independent Forum; and (3) The Right to a Fair and Just Tax System.

The traditional Appeals process involves filing a formal written protest letter disputing the findings made by the tax examiner (either through a field audit or a correspondence audit). The tax examiner presents first and then the taxpayer presents. Historically, the tax examiner would not be present during the taxpayer's presentation. The taxpayer and the Appeals Office would then attempt to negotiate a settlement based on views on hazards of litigation.

One of the challenges facing taxpayers, mainly low-income taxpayers, is the Appeals Office's position on in-person conferences. In-person conferences are provided in field audit cases, but are not offered for correspondence audits. Correspondence audits typically involve low-income taxpayers and can involve issues for which explanations and credibility are vital. Conducting the conference remotely put a taxpayer at a disadvantage; for example, the taxpayer cannot see how the Appeals Officer is reacting to a position and it may be difficult for the parties to engage in productive discussions on matters involving complex factual or legal issues.

Another problem stems from the recent decision to allow the tax examiner to participate in the taxpayer's portion of the Appeals conference. As noted above, historically the tax examiner presented and then left the room. Under the new changes, the tax examiner may be present during the taxpayer's presentation and oftentimes is asked for additional input. Many tax practitioners have opposed this approach, noting that the examiner's continued participation may jeopardize the Appeals Officer's impartiality and independence and be harmful to the negotiation process. And the expanded role of the examiner and IRS counsel may result in fewer resolved cases and more litigation.

The right to appeal a tax examiner's findings is crucial to the protection of taxpayer rights. The IRS needs to ensure that its administrative appeal process remains fair and impartial and protects those rights.

Panel 1: Burden of Proof in Tax Disputes

Who bears the burden of proof can be the determinant in the outcome of a case, and can influence a taxpayer's perception of the fairness of the tax system and his future compliance. In what circumstances should there be presumptions of correctness or deemed facts? When should the burden work in favor of or against the taxpayer? Should the burden shift when taxpayers have engaged in abusive transactions? How should the burden operate where the tax agency has violated its own procedures or acted in abuse of discretion?

Burden of Proof in Tax Disputes

Porus Kaka, Senior Advocate • Mumbai, India

1. **Burden of Proof in Tax Proceedings Historically:**
   - In Classical Jurisprudence, the norm has been that the Burden of Proof to seek, to tax an item as "income" is on the revenue, whereas to seek to fall under an "exemption" lies on the tax payer.
   - A brief run-through of some of the leading Anglo-Saxon cases on this point.

2. **Right to Privacy and the Burden of Proof:**
   - There is a major Constitutional Case underway in India before a 5-member full Bench of the Supreme Court, which concerns the obligations of Citizens and Taxpayers on mandatorily complying with Biometric Identification Cards in many areas, including Tax filing. (I hope the Judgment is out by the time of the Conference.)

3. **Burden of Proof in Documentation:**
   - Examining the changing obligations of documentation in tax filings.
   - End of Secrecy – Legal or otherwise!

4. **Shifting-sands of Burden of Proof:**
   - GAAR – How the burden continuously shifts in favour of the Revenue domestically.
   - BEPS – Mandatory disclosure rules – Dispute Resolution – Is the pendulum of the Burden of Proof, in International Tax, equally balanced as we enter the BEPS era.

5. **Burden of Proof – Outside the Courtroom!**
   - Panama and Paradise papers

6. **Privilege – Extremely Privileged!**
   - The shrinking Rule of Privilege in Tax Proceedings globally.

Burden of Proof in the United States Tax Court

Honorable Paige Marvel, Chief Judge • United States Tax Court • Washington, DC, United States

Civil tax litigation in the United States takes place in several possible venues. The vast majority of civil tax litigation is filed in the United States Tax Court (Tax Court), a legislatively created (Article I) court that began life as the Board of Tax Appeals, an executive branch agency.[1] This abstract focuses on the burden of proof rules that apply in the Tax Court.

The allocation of the burden of proof in the Tax Court is grounded historically in the common law, but those common law principles have largely given way to statutory provisions in the Internal Revenue Code and to rules governing burden of proof in the Rules of Practice and Procedure promulgated by the Tax Court.[2] The burden of proof provisions and rules are relatively simple to state but are sometimes difficult to apply.

In general terms, the burden of proof in the Tax Court is comprised of two essential parts:

1. the initial burden of production, which requires the party carrying the burden of persuasion, typically the taxpayer, to come forward with sufficient credible evidence on an issue of fact to permit the Tax Court to decide the issue in that party's favor if no other evidence is offered, and

2. the ultimate burden of persuasion, which requires the party bearing the burden of proof to convince the Court by evidence in the record sufficient to satisfy the required standard or level of proof (e.g., preponderance of the evidence or clear and convincing evidence) that that party's litigating position is the correct one.

As a general rule, the burden of proof in Tax Court proceedings, which includes the initial burden of production and the ultimate burden of persuasion, is placed on the taxpayer. Rule 142. There are, however, some exceptions to the general rule. The Commissioner of Internal Revenue, who is a named party (respondent) in every case filed in the Tax Court, bears the burden of proving fraud by clear and convincing evidence, a higher standard of proof.

Section 7454(a); Rule 142(b). The Commissioner also bears the burden of proof as to persuasion in foundation manager cases (sec. 7454(b) and Rule 142(c)), in transferee liability cases (sec. 6902(a) and Rule 142(d)), with respect to a new matter, an increase in deficiency, or affirmative defenses asserted in the Commissioner's answer (Rule 142(a)(1)), and with respect to any item of income of an individual taxpayer which the Commissioner reconstructed solely through the use of statistical information on unrelated taxpayers (sec. 7491(b)). Other specialized provisions of the Code may impose a different burden of proof or a different standard of proof on a particular party (see, e.g., sec. 534 and Rule 142(e) [accumulated earnings tax]; sec. 357(b)(2) [assumption of liabilities in connection with certain exchanges]).

As part of the Internal Revenue Service Restructuring and Reform Act of 1998, the United States Congress modified the general burden of proof rules applicable to Tax Court litigation to enable a taxpayer to shift the burden of proof as to persuasion to the Commissioner under certain circumstances. Section 7491(a)(1) provides that "If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by [the Code], the Secretary shall have the burden of proof with respect to such issue."[3] In order to qualify for a shift in the burden of proof on a factual issue, a taxpayer must satisfy the requirements of section 7491(a)(2): (1) the taxpayer must have complied with all applicable substantiation requirements; (2) the taxpayer must have maintained all required records and cooperated with reasonable requests by the IRS for witnesses, information, documents, meetings, and interviews; and (3) if the taxpayer is a partnership, corporation, or trust, the taxpayer must meet the net worth requirement of section 7430(c)(4)(A)(ii). Needless to say, a shift in the burden of proof under section 7491(a) does not occur often nor does it dictate the result in cases where a shift occurs.

Section 7491 also changed the burden of proof rules relating to penalties, additions to tax, and additional amounts imposed by the Code. Section 7491(c) provides that, notwithstanding any other provision of the Code, the Secretary shall have the burden of production with respect to any individual's liability for a penalty, addition to tax, or additional amount (collectively, penalty or penalties). This provision requires the Commissioner to carry the initial burden of producing evidence to show that the individual taxpayer is liable for any penalty. Once the Commissioner has done so, the individual taxpayer must come forward with evidence that he or she is not liable for the penalty or that he or she had a defense to the imposition of the penalty such as reasonable cause/good faith. See, e.g., sec. 6664(c), (d). If the Commissioner satisfies his or her burden of production under section 7491(c), the individual taxpayer must carry the ultimate burden of proof as to persuasion on any penalty issue. Section 7491(c) applies in cases involving individual taxpayers and does not apply to corporations or other taxable entities.

Like the Code, the provisions and rules that allocate the burden of proof between litigating parties in the Tax Court are complicated in theory and in application. Some of the complexity is the direct result of the legislative efforts to make the Federal tax controversy process fairer to taxpayers. Whether those legislative efforts have been successful is still being debated in the United States.

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1 The large percentage of cases filed in the Tax Court can probably be explained primarily by the fact that the taxpayer does not have to pay the alleged tax liability first in order to file suit. A small percentage of civil tax cases are filed in the United States district courts or in the United States Court of Federal Claims as refund actions (and sometimes in the United States bankruptcy courts). To establish jurisdiction in a refund action, the taxpayer filing the action first must pay the tax and then sue for a refund.

2 Unless otherwise indicated, all rule references are to the Rules of Practice and Procedure of the United States Tax Court and all section references are to the Internal Revenue Code, Title 26 of the United States Code, as amended.

3 The term "Secretary" means the Secretary of the Treasury and is often used in tax legislation to refer to the Treasury Department, which includes the Internal Revenue Service (IRS) and the Commissioner of Internal Revenue.

Panel on Burden of Proof in Tax Disputes

Professor Peter Wattel[1] • University of Amsterdam; Advocate General • The Netherlands Supreme Court • Amsterdam, The Netherlands

Main rules on the division of the burden of proof in (i) Netherlands Tax Procedure and (ii) CJEU Case Law in tax matters

A. Netherlands Tax procedure; evidential rules of thumb:

- The regular burden of proof means having to demonstrate facts as plausible;
- The qualified burden of proof – which only affects the taxpayer, not the tax administration – means having to demonstrate facts convincingly: the assessement issued by the tax administration is presumed tob e correct unless the taxpayer proves convincingly that and to which extent it is incorrect;
- The qualified burden of proof (on the taxpayer) applies if (i) Statute law so specifically provides (e.g. for the rebuttal of the legal presumption that an employer-provided lease car is also used substantially for private purposes); (ii) the taxpayer (iia) did not file correctly or (iib) did not correctly comply with a request to make books, documents or data available for inspection or to provide information, or (iic) did not keep accounts correctly (the tax administration will have to demonstrate under the normal rules of evidence *that* the taxpayer did not comply properly);
- The party alleging a fact bears the burden of proof (the party which has an interest in their plausibility, must prove the facts alleged by them). This implies:
- The taxpayer must prove the facts which reduce his tax liability, especially eligibility for deductions, exemptions, credits, refunds, etc.;
- The tax administration must prove the facts on the basis of which it adjusts a taxpayer's return or his self-assessment: the facts which increase the tax liability;
- If the tax administration issues an addittional tax assessment, it must demonstrate new facts unknown to it at the time of its initial assessment which justify such additional assessment;
- The party relying on an exception to the main rule bears the burden of proof;
- The party relying on facts which deviate from what one would normally expect, bears the burden of proof;
- The party contending that an until then stable situation has changed, bears the burden of proof;
- The party which is in the best position to provide evidence bears the burden of proof;
- The party creating evidential straits or obstructing disclosure of relevant facts, bears the burden of proof;
- Evidence illegally or irregularly obtained is not automatically excluded for tax procedure purposes, especially not if it was not the tax administration but another government agency, e.g. the police, gathering evidence improperly; it is only excluded in case of manifest overstepping of competence or violation of fundamental rights or fundamental procedural rules or if the quality of the evidence is flawed by the irregularity;

B. Netherlands Substantive Tax Law: Fictitious Income and Legal Presumptions

Substantive tax law is crammed with fixed amount provisions and rebuttable or irrebuttable presumptions, e.g. on cadastral income from an occupier-owned dwelling. There are too many to go into, but the most controversial one, challenged in Court by many thousands of small savings account holders and by the Union of Taxpayers, even before the European Court of Human Rights, is the co-called 'box 3' of the personal income tax act, presuming – without the possibility of rebuttal – that everyone derives a yield of at least 4% on his savings and portfolio investments, even though the interest on savings accounts and government bonds has been close to zero or even negative for many years already. Case pending.

The Supreme Court quashed as incompatible with the Right to property (Article 1 Protocol 1 ECHR) a Statute provision barring access to court where the real value of a private dwelling was lower than the tax administration's assessment, but less than 10% lower than that tax value (this provision *always* worked to the detriment of the taxpayer);

C. Netherlands Administrative Practice: 'Horizontal Supervision':

The tax administration pursues a policy of 'horizontal supervision', initially only for stock-quoted companies, the idea being that these can least afford having to publish in their accounts pending tax disputes with uncertain outcome involving large financial interests; later

also for non-quoted companies. Horizontal supervision means that the company and the tax administration conclude a 'covenant', based on 'transparency, mutual understanding and trust', in which the company undertakes to put – and keep – its tax house in order (disclosure of all (possible) fiscal skeletons in its closets, timely notification of any new tax issues to the tax administration; application of an effective tax control framework, etc.) in consideration of which the tax administration limits its auditing and its information requests, swiftly answers questions, is prepared to resolve issues swiftly by mutual agreement (within the framework of Statute law and case law), pays out tax refunds promptly, undertakes to issue final assessments as soon as possible, etc. Although hard numbers lack, the general impression is that horizontal supervision significantly reduced the number of tax issues reaching the tax courts, especially issues of profit determination for tax purposes and corporation and dividend taxation issues.

D. Some EU law peculiarities

- The CJEU recognizes the (administrative) 'rights of the defense', meaning that if any national administration which implements EU law is minded to issue an administrative decision (such as a tax assessment) which is likely to substantially affect the position of the addressee, the addressee must be heard prior to issuance in order to give them a genuine opportunity to put forward their view and to correct misunderstandings and mistakes. This means that in principle, prior to the imposition of any VAT or customs duties assessment, the taxpayer must be heard. If not, the assessment may be void if correct hearing could have lead to a different outcome. Hearing the addressee in a later administrative (objections) phase is not good enough, unless filing administrative objections automatically suspends the collection of the tax. The funny consequence is that in indirect taxation (EU harmonized) a prior hearing is required, whereas in direct taxation (not harmonized), it is not.
- The CJEU held that the Directive on Administrative Assistance (DAC) does not serve to alleviate the burden of proof national tax law puts on the taxpayer applying for a credit for underlying foreign tax: a member State is not required to use its powers under DAC to help a taxpayer providing evidence of the amount of corporation tax paid abroad by the company whose dividends the taxpayer received, not even if that means that the taxpayer is not going to get, for lack of proof, the credit they are entitled to and will thus be discriminated against as compared to a taxpayer receiving domestic dividends. DAC is there for the tax administrations, not for the taxpayers.
- The CJEU allows exclusion of categories of cases from EU law benefits because of their risk of tax avoidance (BEPS), but it requires (i) these categories to be defined objectively and relevantly (in the light of the real risk of abuse or tax base disintegration), (ii) the tax administration to provide *prima facie* evidence of that real risk, and (iii) the taxpayer to be given a real opportunity to provide evidence of genuine business reasons for artificial looking cross-border arrangements. For a finding of abuse of (EU) rights, a subjective test (intent) and an objective test (defeat of object and purpose of the law) must be satisfied. Object and purpose of the (EU) law relied on by either the taxpayer or the tax administration are not susceptible to proof. The question of whether object and purpose of a rule are defeated, is a question of law, not of fact, and the answer to that question is not, therefore, dependent on the production of evidence by the tax administration or by the taxpayer. Questions of law must be answered by a court ex officio; that is its core business: explain the law.

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1 Professor of EU Tax Law, ACTL, University of Amsterdam; Advocate-General, Supreme Court of the Netherlands. The Hague; State Councillor Extraordinary, Council of State of the Netherlands, The Hague.

Panel 2: Penalties Theory and Administration: A Multidisciplinary Analysis

This panel builds on our first panel by analyzing the theory and administration of tax penalties, including the principle of proportionality, from the perspective of several disciplines. What types of penalties and initiatives, including nonmonetary penalties such as publication of names of evaders, are effective deterrents of noncompliance? Do automatic or strict liability penalties deter or increase noncompliance? What safeguards should be in place before a penalty is imposed or applied? With respect to what penalties should the tax agency bear the burden of proof for justifying penalty imposition? How does penalty administration affect taxpayers' trust in the tax system?

Structuring and Administering Civil Tax Penalties[1]

Eric Lopresti, Attorney Advisor • Taxpayer Advocate Service • Washington DC, United States

In theory, an increase in penalty rates should increase compliance. However, there is little real-world evidence that they do. Disproportionate penalties could reduce compliance, if they are perceived as unfair. They could reduce trust for the government and crowd out intrinsic motives to comply, eroding compliance norms and tax morale. They could also increase disputes, and encourage the

tax agency and the judiciary to strain to avoid applying them, thereby reducing economic deterrence. Overly severe penalties could also result in over-deterrence (*i.e.*, reducing the effectiveness of tax incentives), make it difficult to preserve marginal deterrence (*i.e.*, the notion that greater transgressions should trigger larger penalties), and inflict more collateral damage when misapplied.

Some governments have turned to strict liability and nonmonetary penalties instead. In theory, a lower strict liability penalty could generate the same amount of deterrence as a higher fault-based penalty because it is more likely to be imposed. However, strict liability penalties may be viewed as unfair when applied to those who made reasonable efforts to comply in good faith. While strict liability penalties may also seem easier to administer, any apparent administrative savings may be illusory, as penalizing those who acted reasonably probably encourages controversy.

Moreover, even fault-based penalties can be administered as de facto strict liability penalties when taxpayers have the burden to show they are not at fault. For example, when a tax agency automates penalty assessments and requires the taxpayer to prove they should not be penalized, it creates a de facto strict liability penalties for those who do not or cannot respond, while burdening those who do. Thus, the automated administration of penalties could pose risks to tax compliance that policymakers may not have considered.

Nonmonetary penalties (*e.g.*, disclosing the names of those with delinquencies or revoking their licenses) are more likely to seem unfair, especially when first introduced, because they are not the norm. They also pose greater social costs than fines. However, empirical evidence suggests that visible nonmonetary penalties could improve tax compliance.

Procedural protections could minimize social costs and mitigate the risk that penalties will be perceived as unfair. When taxpayers have relevant information and the government does not, requiring the government to prove the taxpayer was at fault could make civil audits more intrusive. As an alternative, however, some governments only impose nonmonetary penalties if the taxpayer: presents an egregious case (*e.g.*, a large or repeated delinquency); allowed the liability to be assessed and is not appealing; has been notified that the penalty may apply to him or her; and has declined to pay, declined to establish he or she cannot pay, and has declined to enter a reasonable payment plan or compromise. These protections may blunt economic deterrence; however, they help ensure penalties are not imposed against those who want to comply. With sufficient procedural protections, it may be worth considering visible nonmonetary penalties as substitutes for overly severe penalties and strict liability penalties.

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1 The principal author of this discussion is Eric LoPresti, Senior Attorney Advisor to the National Taxpayer Advocate. It does not necessarily represent the views of the Taxpayer Advocate Service, the IRS, the United States, or any other person or organization.

Compliance and Tailor-Made Supervision: The Effects of Trust, Audits and Support

Professor Jacco Wielhouwer • Vrije Universiteit Amsterdam • Amsterdam, Netherlands

In optimizing compliance, regulators face the challenge of balancing trust, support, and deterrence. The optimal balance depends on reasons for (non-)compliance. Compliance is enforced when the motivation to comply comes from the risk of being audited and penalized; compliance is voluntary when these aspects play no role. For many people, the motivations can be a combination of both. Ideally, supervision is tailored based on these motivations. In this presentation I will discuss possibilities and risks of deterrence and support based on three recent studies.

Theory suggests that voluntary compliance initially increases with enforcement (justice to non-compliance), but reduces when enforcement is further increased (it may crowd out intrinsic motivations and signal distrust). Enforced compliance increases with deterrence. Results of a recent empirical study show that indeed too much auditing may backfire: compliance first increases, but subsequently decreases with the level of enforcement. Optimizing compliance thus requires strategies that balance audits, penalties, trust, and support preferably based on the individual's motivations. Supervisors may most easily tailor their strategies by differentiating the audit rate and the level of support. These two are dealt with in the second and third part of this presentation.

Trust-based regulation – in which auditing occurs at a lower rate until agents are found to misuse trust – can increase compliance and reduce costs even in case of fully calculative agents. Crucial for efficiently implementing trust-based regulation is the regulated agent's time horizon. So even in the absence of possible benefits due to the fact that trust may reciprocate and instigate intrinsic motivations, trust-based regulation can be beneficial. Tailor-made supervision dependent on the agent's time-horizon can be efficient and effective. Higher penalties make such a differentiated audit strategy less feasible.

In the third part, I discuss the results of a recent field experiment in which an authority signals a regulatory strategy with a high or low level of support merely by its communication. By manipulating the invitation letters to submit mandatory self-assessments, we investigate

the effect of the signaled regulatory strategy on the quality of the reported information (comprehensiveness, precision, and voluntary reporting). The results show that a more supportive strategy is not necessarily positive. In the examined setting (financial intermediation) the average reporting quality is actually lower under the more supportive alternative, which stresses that the optimal balance between support and deterrence can be context-specific. In line with the theoretical results in the second part, we find that agents with a long time horizon do react positively on the more supportive strategy.

Taken together, although many people advocate supportive regulatory strategies, these should be applied with care and tailored based on the motivations of the regulated agent. Theoretical and empirical evidence suggests that the agent's time horizon is an important characteristic to get insight into and subsequently use in tailoring supervision strategies. More trust-based and cooperative supervision strategies between regulators and regulatees can be efficient and effective when both foresee a long-term relationship.

Panel 3: The Right to Appeal to an Independent Forum: Taxpayer Access to Appeals and Mediation

Taxpayer access to administrative and judicial appeals varies across countries, although independent review of tax agency decisions is a key aspect of procedural justice. How should an administrative appellate division be designed to ensure its independence from the tax agency? Should taxpayers be required to exhaust all administrative remedies prior to accessing judicial forums? Should alternative dispute resolution, including mediation, be a precondition to litigation, and how can ADR techniques be applied earlier in the tax administration process?

The Right to Appeal to an Independent Forum: Taxpayer Access to Appeals and Mediation

Honorable Eugene Rossiter, Chief Justice of the Tax Court • Ottawa, Ontario, Canada

A. Overview of the tax appeal process in Canada

The Canadian tax system is based on the principle of self-reporting and self¬ assessment, one which depends upon the honesty and integrity of the taxpayers for its success.[1] Generally, the taxpayers file a tax return and the body that administers tax law for the Government of Canada, the Canada Revenue Agency ("CRA"), processes the tax return as filed. The CRA then issues a notice of assessment. Usually, the taxpayers do not dispute their own filling and accept the outcome of the notice of assessment. However, the CRA has the ability to later audit the taxpayers within a particular limitation period. Such audit can lead in the issuance of a notice of reassessment if CRA decides that the tax return is not accurate.

In the event that the taxpayers do not accept the result of their notice of assessment or reassessment, they typically have ninety days to send a Notice of Objection. That objection is an administrative appeal within the CRA, in front of its Appeals Branch. The taxpayers must explain why they disagree with the assessment or reassessment, and include the relevant facts and documents to support their position. The Appeals Branch must conduct a fair, impartial and independent review.

In the case that the Appeals Branch denies the objection of the taxpayers, a notice of confirmation will be issued. The taxpayers may then appeal to the Tax Court of Canada. The taxpayers have the option to file an appeal under either the Informal Procedure, or the General Procedure, where the rules of evidence differ. However, it is exclusively after objecting to an assessment or a reassessment that taxpayers can appeal to the Tax Court of Canada. The Tax Court of Canada has an exclusive jurisdiction over matters that relate to income tax and value-added tax.[2] However, the role of the Tax Court of Canada is limited. It can only determine the validity and correctness of the assessment or reassessment. Remedies with respect to the process by which an assessment or reassessment was issued, for instance the legality of actions of tax officials during the audit of taxpayers, have to be sought in front of another court, the Federal Court. Moreover, collection action by the CRA is suspended until the Tax Court of Canada renders a decision. However, "large corporations" are required to pay half of the assessed amount before filing their Notice of Objection.

B. Internal appeal process and dispute resolution mechanisms

The internal appeal process within the CRA is fairly clear-cut. During the audit stage, as well as during the review of the objection by the Appeals Branch, there is ongoing communication between the CRA and the taxpayers. The taxpayers have the opportunity to resolve disputes through discussion and negotiation with the CRA.[3] CRA keeps thorough notes of communications with the taxpayers. These

notes are all available pursuant to a request with respect to two Canadian acts[4] . Those acts aim for a greater transparency within the CRA, as they provide a right of access to information in records under the control of a government. The CRA further makes available to the public an extensive amount of administrative publications, which set out some of CRA's assessing positions and interpretations of provisions of Canadian tax legislation. These publications therefore help prevent tax disputes in a certain degree.

In the event that taxpayers feel that they were not treated properly by the CRA at the audit or at the objection stage, they have the ability to go to an independent forum to submit a complaint. Indeed, taxpayers can submit a complaint to the Office of the Taxpayer Ombudsman ("OTO") when they are not satisfied with the way a service-related complaint was handled by the CRA. The OTO only reviews complaints after all of the CRA internal complaint resolution mechanisms are exhausted. The OTO operates at arm's length from the CRA, but its jurisdiction extends only to service¬ related complaints regarding violations of the rights set out in the *Taxpayer Bill of Rights*.[5] *The Taxpayer Bill of Rights* describes the treatment that taxpayers are entitled to when they deal with the CRA, as it protects taxpayers from undue delays, poor or misleading information, staff behaviour, or mistakes which could potentially result in a misunderstanding. Some of the rights that pertain to a tax audit are worded as follows:

- Article 5: The right to be treated professionally, courteously, and
- Article 6: The right to complete, accurate, clear, and timely
- Article 9: The right to lodge a service complaint and receive an explanation of CRA's
- Article 10: The right to have the costs of compliance taken into account when administering tax

As for mediation and arbitration, Canadian tax legislation does not exclude, nor provide for such alternative dispute resolution techniques.[6] In 2007, the CRA released an administrative publication with respect to mediation of tax disputes. [7] This publication provides that, where at the objection stage the Appeals Branch and the taxpayers have not been able to reach a settlement, the taxpayers are entitled to consider utilizing mediation rather than appealing to the Tax Court of Canada. However, because mediation is a cooperative discussion process, the mediator cannot bind the parties and impose a settlement. In 2009, the CRA stated that mediation requests are very rare across the country: only one mediation has been completed since the inception of the program.[8] With respect to arbitration, as to where the parties agree to be bound by the decision of an arbitrator, there have been no CRA administrative publications on the matter, and therefore no indication of its use in Canada. However, one must keep in mind the general rule in Canada that there cannot be any compromised-basis settlement. [9] Settlements must be on principle. The settlements are therefore limited to the application of the law to the facts or interpretation of the facts. Having said that, the principles can be very flexible when it comes to money. This rule is lax at the audit stage, but tends to be stricter in the path going to the Tax Court of Canada.

Furthermore, if the taxpayer and the CRA agree, they can make a reference to the Tax Court of Canada for a determination of a question of law or fact, even at the audit stage, before a notice of assessment is issued.[10]

Additionally, Canadian legislation has put in place different mechanisms for taxpayers to be absolved of liability for tax, interest or penalties. First, taxpayers can submit a request for the CRA to waive or cancel all or any portion of any penalty or interest otherwise payable under Canadian tax legislation. [11] Second, taxpayers can seek an order under the *Financial Administration Act*, [12] where the Governor in Council (ultimately a branch of the Canadian government) may remit any tax or penalty where it considers that the collection of the tax or the enforcement of penalties is unreasonable or unjust. [13] However, these two mechanisms are only applicable to exceptional cases where fairness commands to relieve taxpayers from a situation that is contrary to common sense. Yet, the discretion is entirely left to the appropriate authority, as the legislation contains no criteria on how to waive interest and penalties or on how to remit tax and penalties.[14] Also, these mechanisms can work as an alternative to, or in juxtaposition with, the tax appeal process.

Finally, where taxpayers consider that actions of the government of Canada, and/or actions of a treaty partner, result in taxation not in accordance with provisions of the relevant tax convention, i.e. situations of double taxation, the taxpayers can request competent authority assistance.[15] To do so, taxpayers in Canada have to file a claim to the Canadian Competent Authority. If that claim is justified and cannot be resolved unilaterally, the Canadian Competent Authority will negotiate with the other competent authority in a principled, fair and objective manner to relieve taxpayers from double taxation, by way of the mutual agreement procedure ("MAP"). The MAP is the dispute resolution mechanism established under a tax treaty for the competent authorities to resolve cases involving the application of a treaty. The MAP is only the product of negotiation between the competent authorities of two states. The competent authority process is not adversarial, as it requires the cooperation of taxpayers to succeed. In the event that the MAP is successful, the agreement reached between the Canadian Competent Authority and the other competent authority will not be imposed on the taxpayers. The taxpayers

can always reject the agreement and pursue another avenue of recourse. In 2014-2015, of the 170 MAP cases that were resolved by the Canadian Competent Authority, 115 cases were categorized as negotiable, which means that negotiations with another tax administration were required.[16] Of the 115 cases negotiated with other tax administrations, 94% of taxpayers obtained full relief from double taxation, 3% obtained partial relief, and 3% did not obtain relief. Moreover, as opposed to the situation in Canadian tax legislation, there is a mandatory binding arbitration procedure under the MAP, where negotiations by competent authorities have failed to resolve a particular tax treaty issue.[17] However, for now, such arbitration procedure is only in effect between the Canada and the United States.[18] There is an agreement with the United Kingdom concerning the application of mandatory binding arbitration, which is not yet in force, and provisions in the tax convention with Switzerland that will allow arbitration.

1 *R. v. Mckinlay Transport Ltd.* , [1990] 1 SCR 627.

2 *s 12 Tax Court of Canada Act*, RSC 1985, c T-2.

3 David W. CHODIKOFF and Laura ETHERINGTON, Canada, in *Tax litigation – Jurisdictional comparisons,* Thomson Reuters, 2013.

4 The *Access to Information Act*, RSC 1985, c A-1, and the *Privacy Act*, RSC 1985, c P-21.

5 GOVERNMENT OF CANADA, RC17 – *Taxpayer Bill of Rights Guide: Understanding Your Rights as a Taxpayer*.

6 Ken SKINGLE, Deborah MELAND, Geoff LLOYD, and Pauline CHELMSFORD, "Alternative Dispute Resolution for *Tax Disputes: International Perspectives*," in 2012 Tax Dispute Resolution, Compliance, and Administration Conference Report (Toronto: Canadian Tax Foundation, 2013), 11:1-18.

7 CRA VIEWS, Conference, 2007-0240201C6 – *Mediation of tax disputes*, June 2007.

8 MEMBER ADVISORY, 2009 CRA *Tax Roundtable*, May 2009.

9 *CIBC World Markets Inc. v. Canada*, 2012 FCA 3.

10 s 173 *Income Tax Act*, RSC 1985, c 1 (51 Supp).

11 s 220(3.1) *Income Tax Act*.

12 *Financial Administration Act*, RSC 1985, c F-11.

13 *Ibid*., s 23(2).

14 Richard. G. FITZSIMMONS, *Resolving Tax Disputes*, 2"d Edition, CCH Canadian Limited, 2004, at p. 112.

15 GOVERNMENT OF CANADA, Information Circular 71-17R5 – *Guidance on Competent Authority Assistance Under Canada's Tax Conventions*.

16 GOVERNMENT OF CANADA, Mutual Agreement Procedure – *Program Report 2014-2015*.

17 GOVERNMENT OF CANADA, *Memorandum of Understanding Between The Competent Authorities of Canada and The United States of America*, 2010.

18 Jeffrey SHAFER and Daryl BOYCHUK, "Understanding the Competent Authority Process," *Report of the Proceedings of the Sixty-Eighth Tax Conference*, 2016 Conference Report (Toronto: Canadian Tax Foundation, 2017), 20:1-15.

Tax Mediation, Administrative and Judicial Appeals in Mexico: A Quick Overview

Edson Uribe[1]**,** Subprocurator General • Prodecon • Mexico City, Mexico

In Mexico there is a close relationship between tax mediation, administrative appeal and judicial litigation. Through this abstract I will briefly describe how these procedures coexist, as well as the main advantages and limitations to access each one of them.

Although taxpayers can mediate, appeal and litigate the different phases of an audit, precisely in that chronological order, what is set forth in this abstract will not follow that structure. For a better understanding of the subject, I consider necessary to refer first the type of acts and route of challenge that is followed in Mexico, both in an administrative and judicial instances, and then make a more detailed reference to the mediation procedure in tax audits called "Conclusive Agreements", including its statistics from January 2014 to December 2017. In this way, the scope of the interaction between these three procedures will be clearly identified.

Once this clarification has been made, it must be said that the acts of tax nature that can be contested in Mexico, administratively and judicially, are very broad. In general terms, taxpayers can dispute any act of tax authority that causes them harm as long as they are "definitive"; this means that through these acts is resolved the particular situation of the taxpayer involved.

The most common disputes between the tax authorities and taxpayers revolve around the imposition of fines for breach of obligations, acts of enforced collection, refusal to refund taxes and the determination of tax debts as a result of an audit.

These last kind of acts are the only ones which will be referred in this note, since it is precisely during tax audits when taxpayers can

request the referred fiscal mediation procedure, in case of not agreeing with the findings of the authority. In other words, it leaves out of the scope of this note the analysis of the acts that although they can be challenged, they are not the outcome of a fiscal audit.

Although it may seem obvious, it must be said that in Mexico taxpayers have the obligation to calculate the taxes for which they are responsible. Consequently, the tax authority has legal powers to perform audits in which not only can verify the rate and amount of paid taxes according to law, but also review if taxpayers complied with the formal obligations under their charge. According to the Federal Tax Code, the three variations through which a tax audit may operate are the following: field audit, desk audit and electronic review

In the case that the authority ends any of these audits by issuing a resolution in which it is determined that the taxpayer omitted the due payment of taxes, he has the option to appeal it administratively or go directly to the tax court.

If taxpayer chooses the administrative appeal, the complaint letter is addressed to the Legal Area of the Mexican Tax Administration, which is a unit other than the one that performed the audit. This is relevant since this instance, although it is processed before the Tax Administration itself, the particular revision of the act is carried out by an official who did not participate at all in the review process; even, as a rule, the professional profile of the person who resolves the appeal tends to be more legal than accounting.

Opting for the administrative appeal before going directly to tax trial has two great advantages for taxpayers 1) It is allowed to provide all the evidence it deems necessary to prove its arguments regardless of whether or not it was offered during the audit; 2) The execution of tax collection is suspended without granting a guarantee as long as the appeal is not resolved.

If the result of the administrative appeal is unfavorable, the claim must be filed before the Federal Court of Administrative Justice, who is in charge of resolving the tax judgments in Mexico. Contrary to what happens in the administrative way, the taxpayer during the trial: 1) Can not offer more evidence than that was showed in the audit, which significantly limits their defense and; 2) It must guarantee the tax credit to avoid the seizure of authority, what in practice is very expensive.

It should be noted that in Mexico, once the administrative appeal or tax trial has been filed, there is no possibility of resorting to alternative means of dispute resolution. The only alternative tax mean that exists is the aforementioned mediation procedure, which takes place, as mentioned, exclusively during the tax audits.

In the event that the Administrative Court issues an unfavorable judgment, the taxpayer could go to a Circuit Tribunal to review the decision. If that judgment is confirmed, it can be appealed to the Supreme Court of Justice as long as the tax conflict identified during the audit involves an aspect of constitutionality. The decisions of the Supreme Court cannot be challenged.

There are interesting aspects of tax litigation in Mexico that will not be discussed in this note, given how brief it must be, but which will be addressed at the conference on May 3rdand 4th 2018 in Amsterdam, and in the complete article that I will send for publication.

One of these aspects is the new "*substance over form tax trial*" which will be described in detail. Other issues that will be mentioned is how fast/slow is the resolution of the trials, the percentages for or against the taxpayer, percentages of judgments regarding substance/form matters, integration of the Courts/Tribunals, profile of the judges and technical tax specialization showed in rulings.

I anticipate that they will not be very encouraging news for taxpayers in Mexico. In fact, most of the relevant tax stakeholders in Mexico, including the Taxpayers Ombudsman Agency, PRODECON, acknowledge that tax litigation is currently in crisis. An example of this is that, in the opinion of the First Chamber of the Supreme Court of Justice, a taxpayer who is subject of a tax audit does not enjoy the presumption of innocence even when said privilege is recognized as a human right not only in the Mexican Constitution but in various International Treaties.

Domestic Tax Mediation

The "Conclusive Agreements Procedure" appeared in 2014 with its incorporation to the Federal Tax Code. It is the first Alternative Dispute Resolution Procedure (ADRP) in tax matters in Mexico.

This domestic ADRP is a mediation entrusted to a third independent party represented by PRODECON[2]. The core of mediation is the tax effects that the authority gives to the facts or omissions detected during an audit and can involve aspects related to the interpretation of norms and assessment of evidence.

Therefore, in case taxpayer does not agree with the position set by the authority during the audit regarding the compliance of his tax obligations, may appear before PRODECON to express the reasons of dissent and propose the tax effects in which his opinion should be given to his tax situation.

It is important to mention that is mandatory for the authority to appear before the mediation procedure requested by the taxpayer before PRODECON; but as in any other ADRP, it is optional for the tax authority to accept or refuse the taxpayer's proposal for a Conclusive Agreement.

The Conclusive Agreement Procedure is normed by just six articles of the Federal Tax Code, which makes it essentially flexible and it is ruled by the principles of celerity and immediacy. The procedure lacks mayor formalisms and assumes the good faith of the parties in trying to find a consensual solution to a disagreement derived from an audit. Obviously the search for consensus between the parties necessarily supposes a procedure without rivalry.

It is important to say that this procedure does not constitute an instance, a means of defense or arbitration; it is about an ADRP which incorporates an active mediation of an independent organism, PRODECON, between tax authority and taxpayer so that the conflict may be overcome via consensus and always according to law.

The intention is not to have winners or losers; what is sought is a way to overcome the conflict following a "win-win" premise and for this, it is vital that the parties negotiate with the mediation of PRODECON. It is definitely not a space where ideas or visions are imposed but rather an area for finding coincidences that allow overcome differences.

In this procedure tax debts are not negotiated; on the contrary, this mediation finds a place prior to the calculation of such tax debts, when the audit procedure is ongoing and always before there is a definite position on the tax situation of the taxpayer.

A point that shows the flexibility before mentioned, is the freedom that the taxpayer has to request a Conclusive Agreement from the moment the audit procedure begins and before it is notified of a tax debt. In his request, the taxpayer is not obliged to present all of the observations that the tax authority shows in the audit, but is free to choose those which it deems necessary to submit to the mediation.

It is important to mention that the Conclusive Agreements do not set any kind of legal precedent; this undoubtedly creates an environment of trust between authorities and taxpayer to present solution proposals that seek exclusively solve the conflict at hand.

All the postures, offers or acceptances made in this procedure can not be taken as positions that may compromise any past or future tax years.

Start of the procedure

The taxpayer must file a Conclusive Agreement request before PRODECON, pointing out the reasons for the dissent and the tax effects that in his opinion must be given to the facts or omissions detected during the audit.

Suspension of deadlines

With the filing of the Conclusive Agreement all deadlines regarding the audit are suspended. This is relevant, since such suspension allows the authority not to finish the audit according to previous deadlines and, in fact, it creates an ideal environment in which the case may be analyzed in detail and with the needed time.

Exhibition of evidence

The taxpayer may present all kinds of proofs to give support to his proposal as long as the procedure is not finished. Notwithstanding, it is important to make clear that the lack of preclusion that rules this mediation does not imply that it can drag on indefinitely since, PRODECON, as the ruler of the procedure must look for celerity.

Notification to the authority and response

Once the request for a Conclusive Agreement is filed, PRODECON must give notice to the authority so that in a 20 days term it files its response. The tax authority may accept the proposed terms, propose a different solution, or not accept any agreement.

If there is an agreement, whether total or partial, PRODECON elaborates the clauses for the covenant and submits it to both parties so that they can offer observations or suggestions in a 3 days term. Afterwards the parties are called to sign the agreement in the presence of a PRODECON representative. When the tax authority proposes a diverse solution, the taxpayer is notified so that it may accept or refuse the proposal in a 5 days term.

Once the taxpayer receives the proposal from the authority, he may modify his original proposal by presenting a counter offer. It is important to say that he is not subject in any strict way to his original proposal which was offered in the request for an agreement, but rather he can change it or adequate it in order to achieve a consensus with the authority.

PRODECON may call the authority and the taxpayer to clarify any specific point in the conflict or discus it in depth.

These reunions are a space for negotiation headed by a PRODECON representative (here we can find the active mediation mentioned above). In this space the parties have the opportunity to exchange points of view in reference to the interpretation of tax provisions as well as technical and accounting points. These reunions are very useful in creating consensus. Said reunions are generally carried out at a PRODECON office, though they may also be carried out in the tax authority´s offices.

It is possible that an agreement can be reached on only some of the findings made by the authority; in this case, the authority may notify the tax debt to taxpayer based on those issues which are not part of the consensus, and the he keeps the right to challenge this burden through any means of defense. In case the tax authority does not accept the signing of the Conclusive Agreement, it must mention exhaustively the reasons and foundations that support said refusal.

In this case, when it is impossible to achieve agreements, PRODECON close mediation procedure and the suspension of deadlines is lifted, so the authority may continue the audit.

Legal consequences of the Conclusive Agreement

Once signed the Conclusive Agreement, the tax effects stipulated applies immediately and it is not necessary any other legal act or action to go in force.

Both, taxpayers and tax authorities, signing agreement have complete legal certainty on the consensus reached, because all means of defense against a Conclusive Agreement are proscribed. In other words, signed issues are absolutely binding.

The parties cannot challenge the result of a Conclusive Agreement on courts because is the result of their own will. This characteristic is not foreign to ADRP´S precisely because the objective of this kind of mechanisms is to find a final and definitive resolution of the case involved.

Statistics, Tax Mediation.

1. From 2014 to 2017, PRODECON received **7,304** mediation requests.
2. **50%** of such procedures are already finished.
3. **2 out of 3** requests ended with total or partial agreements.
4. Large Taxpayers Unit: **500** cases (Financial Sector, International Audits, Transfer Pricing)
5. Average cycle of time for cases concluded: **9** months.
6. Mediation is an obstacle for tax collection? T**axpayers have paid through this procedure more than 1 billion USD.**

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1 *Deputy Chair, Mexican Tax Ombudsman Agency, PRODECON. Member of the United Nations Subcommittee on the Mutual Agreement Procedure, Dispute Avoidance and Resolution. Executive Board Member of the International Fiscal Association, Mexican Branch.*

2 In Mexico the protection of the taxpayers rights is entrusted to PRODECON: a public organism created by Congress which though it is part of the Federal Administration, it is not dependent from the tax collection body. It has an autonomous budget, which allows it to carry out actions without pressure of any sort. This organism, known as the federal *tax ombudsman* started operating in 2011, but until 2014 when the Federal Congress approved the "Conclusive Agreements", it can act as a mediator between the tax authority and taxpayers during an audit.

Taxpayer Rights from the Perspective of Developing Countries

Belema Obuoforibo, Director • IBFD Knowledge Center • Amsterdam, The Netherlands

The presentation will address this issue from the perspective of developing countries. The focus here will be on Africa, with main attention given to four selected African jurisdictions. These are: Kenya, South Africa, Ghana, and Nigeria. Other African jurisdictions will be mentioned in passing, mainly as points of comparison.

The presentation will take the following approach:

- An overview and analysis of the legal provisions (in those selected countries) for access by the taxpayer to an independent appellate body; and
- The practical difficulties, if any, that could prevent the taxpayer actually availing of that right.

The following points are summarized briefly below. In the interests of brevity, only a summary is given.

1. Selected jurisdictions – brief summary of the legal provisions

General point: It is worth noting at the outset that most common law jurisdictions provide for the possibility of *judicial review*. I will make a general point about that. However, the rest of the presentation will focus elsewhere: on the existence (or otherwise) of an independent appellate body to which a taxpayer may have redress, and one which also examines the substance of the tax dispute in question. This latter point is what is addressed below.

a. Kenya

A taxpayer who disputes an assessment of the Kenya Revenue Authority (KRA) may, in the first instance, lodge an objection with the KRA. If the matter is not resolved to the taxpayer's satisfaction, further appeal may be made to a Local Committee or Tribunal. In order to have the appeal heard by either body, the taxpayer should have paid 100% of the tax in dispute (in the case of income tax; for VAT, the stipulated percentage is 50%). If the matter is not satisfactorily resolved, the taxpayer may appeal to the High Court. From there, the next step is to the Court of Appeal.

The relevant rules are set out in the Income Tax Act and the Tax Procedures Act. KRA has also published a Taxpayers' Charter informing taxpayers of their rights in this respect.

During the presentation, I will highlight any particular points of interest and controversy within the relevant law.

b. South Africa

Where a taxpayer disagrees with a determination by the South Africa Revenue Service (SARS), the taxpayer may request reasons for the determination, object to it, or appeal against it. SARS is obliged to provide reasons (where this has been requested), or consider the objection or appeal, where relevant. SARS may also consider whether the matter is suitable for alternative dispute resolution (ADR), and, if it considers it so suitable, it may take steps to initiate ADR.

Both parties may initiate ADR, but ultimately it is for SARS to decide whether a particular issue is suitable for ADR.

There are also provisions for a dispute to be referred to the Tax Board or Tax Court.

If the taxpayer has exhausted all the SARS channels for dealing with the issue, the taxpayer may bring the case before the Tax Ombud. In exceptional circumstances, the Tax Ombud may get involved even while proceedings within SARS have not been exhausted.

The Tax Ombud is empowered to deal with matters pertaining to poor service by SARS, poor administrative handling of matters, and ignoring of taxpayer rights. The Ombud's recommendations are non-binding, but a party that chooses not to accept the recommendations should give reasons for the non-acceptance.

While the process is ongoing, the taxpayer is obliged to pay only the amount of tax that the taxpayer accepts to be due.

During the presentation, I will highlight any particular points of interest and controversy within the relevant law.

c. Ghana

Ghana provides very briefly in its law (the Income Tax Act 2015) that a taxpayer who is dissatisfied with an assessment may lodge an Objection with the Commissioner General. If the taxpayer does not agree with the Commissioner General's decision, or if the Commissioner General has failed to give a decision within the stipulated time (i.e. 90 days), the taxpayer may appeal to the High Court. The taxpayer may not go directly to the High Court unless the Commissioner General has made a decision, or has failed to make a decision within the stipulated time (*Arghyrou v Commissioner of Income Tax*). Thus the Objection procedure must first run its course before the taxpayer may proceed to the High Court (see also *Fynhout case*).

During the presentation, I will highlight any other particular points of interest and controversy within the relevant law.

There has been much discussion in Ghana about whether the Alternative Dispute Resolution Act 2010 may be applied, such that mediation, for example, could take place between the Ghana Revenue Authority (GRA) and a taxpayer. Scholars have made the point that tax disputes are not included in the list of matters expressly excluded by the Act from the scope of ADR. They argue that this leaves open the door for GRA to adopt mediation as a means of resolving disputes with taxpayers.

d. Nigeria

A taxpayer who is dissatisfied with a decision of the tax authorities may file an Objection with the relevant tax authority (RTA). If the RTA refuses to amend the assessment, it will file a notice of refusal to amend (NORA). The taxpayer may then (within 30 days) appeal the NORA at the Tax Appeal Tribunal (TAT).

Controversy over the jurisdiction of the TAT to determine tax disputes: The issue of the jurisdiction (and even the legitimacy) of the TAT has been litigated in several cases of late. In a recent case, it was held that, in issues relating to tax disputes, the Tax Appeal Tribunals (TATs) have concurrent jurisdiction with the Federal High Courts (*Standard Trust Bank Plc v Chief Emmanuel Olushola*). Even further, in a 2013 case at the Federal High Court, the TATs were actually declared to be unconstitutional, and ordered to be disbanded (*TKSJ II Construces Internacionales & Anor v Federal Inland Revenue Service*). The Federal High Court held that the jurisdiction of the TATs conflicted with the exclusive jurisdiction of the Federal High Court. This issue appears now to have been settled, following the 2017 Court of Appeal decision in *CNOOC Exploration & Production Nigeria Ltd. & Anor. v Nigerian National Petroleum Corporation & Anor*. In this case, the Court of Appeal held that the TAT has the jurisdiction to determine tax disputes.

I will highlight any other particular points of interest and controversy within the relevant law.

2. Exercising one's right to appeal – practical difficulties

The presentation will also highlight some of the main practical difficulties faced by taxpayers in accessing their rights to appeal to an independent body. These could include difficulties within the law itself, as well as particular matters arising from the administration of the legal provisions. Some of these difficulties could be experienced in any jurisdiction, but are exacerbated in the case of developing countries.

The main such difficulties are as follows:

- The requirement (in certain cases) that the taxpayer pay upfront the disputed tax (or a significant portion thereof);
- The absence of the option for alternative dispute resolution (ADR);
- The large backlog of cases facing the appellate body. This is a chronic problem in developing countries, and can significantly hamper access to justice for the taxpayer;
- Patchy access (by the taxpayer) to information about taxpayer rights;
- The constitution (i.e. the make-up) of the appellate bodies – how truly independent (from the tax authorities) are they? What safeguards are in place to ensure true independence?

3. Bonus idea

If time permits, it would be good to say something brief about a particular jurisdiction that does not have any legal provisions at all for an independent appellate body. If such a jurisdiction exists in Africa, it would be good to comment on it, and specifically on this point: if the taxpayer is without remedy under law, how is the situation addressed in practice?

The Right to Appeal to an Independent Forum

Maria Teresa Soler, Tax Law Professor, Former Taxpayers' Advocate (Spain) • Madrid, Spain

- According to Spanish Tax Law, it is possible to review a tax act before judicial bodies once the administrative via is tired out (Art. 25 of the *LJCA*). The administrative review is carried out through Economic Administrative Courts. These economic-administrative bodies, which enjoy functional independence, are structurally part of the Administration. In this regard, the ECJ considered them as judicial bodies for preliminary ruling purposes (Case *Gabalfrisa*, 21 March 2000).

  Although such requirement does not impede the exercise of the right to legal protection, it can imply a limitation which is, however, grounded on a legitimate aim: to relieve courts increasing their efficacy and allowing the Administration to review its own acts without the need to go before courts. Recently, the ECJ (Case *Puskar*, 27 September 2017) has stated that Article 47 of the Charter of Fundamental Rights of the European Union is not against a domestic norm which requires the administrative via is tired out before going to court, provided that the right to legal protection is not disproportionately affected.
- The tax debt should be paid before appealing, although it is possible to ask for the suspension of the procedure providing assurances. In case of challenging a tax penalty, the act will be suspended with no need to provide assurances.
- At the judiciary level, the taxpayer has the option of resorting to Court within two months after the notification of the decision of the administrative review (or so-called negative silence). The taxpayers has the right to free legal aid in cases stated in Law 1/1996 (10 January 1996)

- In order to appeal before the High Supreme Court (*Tribunal Supremo*) the cassation system, created by the Law 7/2015 and modified by the *LJCA*, has replaced, since 22 July 2016, the amount requirement by the so-called "*interés casacional*" which implies the reinforcement of the possibility to access to the cassation appeal. According to the Supreme Court, the so-called "*interés casacional*" regarding the need to tire out the administrative via for going to court exists when only unconstitutionality or illegality of the norm is claimed, or in such a case, an judicial appeal might be directly claimed as the Administration could not make a pronouncement on the unconstitutionality or illegality of the norm.
- Moreover, before the aforementioned procedures (both administrative and judiciary), there are some formulas aimed to approximate the positions of the Administration and taxpayers such as audit documents with the agreement of the Tax Administration and the taxpayer ("*actas con acuerdo*", "*actas de conformidad*"), advance pricing agreements or even binding tax consultations. The Tax Administration is competent in order to review *ex officio* its own decisions in cases of nullity or repeal; in this respect, the role (by means of an advice) of the Taxpayers' Ombudsman – in Spain a legal body (*Consejo para la Defensa del Contribuyente*) – regarding the repeal of tax actions can be highlighted. However, it is not currently available a facultative and specialized tax arbitration as it occurs in other jurisdictions.

Panel 4 part 2**:** A Conversation with the Advocate General

An introduction to the Court of Justice of the European Union, and how the Court has contributed to the development of taxpayer rights protections under EU law.

Taxpayer Rights - Challenges for the Court of Justice of the European Union

Prof. Dr. Juliane Kokott, LL. M., S.J.D., Advocate General • Court of Justice of the European Union • Luxembourg

Introduction: The ECJ and its Advocates General

Taxpayers Rights

I. Balancing Fundamental Freedoms (Artt. 34 f., 45, 49, 54, 56, 63 TFEU) and the Protection of Tax Revenues

ECJ, Judgment of 13 December 2005, Marks & Spencer, C-446/03: Freedom of establishment does not preclude national legislation preventing a resident company from deducting losses incurred in another Member State by a subsidiary established in that other Member State, unless those losses are "final".

- "final"?

II. Taxpayers' Fundamental Rights

Art. 51 EU Charter of Fundamental Rights: "1. The provisions of this Charter are addressed to the institutions … of the Union … subsidiarity … and to the Member States only when they are implementing Union law…."

1. Fundamental Rights and the Exchange of Data

a. Right to a Legal Remedy (Art. 47 EU Charter)
ECJ, judgment of 16 May 2017, Berlioz Investment Fund, C-682/15: The alessandro
courts of one Member State may review the legality of requests for tax information sent by another Member State. That review is limited to verifying whether the information sought is not – manifestly – devoid of any foreseeable relevance to the tax investigation concerned.
- Principle of mutual trust?

b. Collection and Use of Evidence/Data Protection (Artt. 7, 8 EU Charter)
ECJ, judgment of 21 December 2016, joined cases Tele2 Sverige et al., C-203/15 and 698/15: "1. Article 15 (1) of Directive 2002/58/EC…read in the light of Articles 7, 8 and 11 and Article 52 (1) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data … 2. … must be interpreted as precluding national legislation governing the protection and

security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union."

- Automatic indiscriminate storage and automatic exchange of bulk tax data?

2. Right to Equality (Artt. 20, 21 EU Charter)

a. VAT Directive

b. Direct Taxes

c. State Aid Law – prohibition to favor "certain undertakings"

3. Fundamental Right to Legal Certainty and Protection of Legitimate Expectations

a. Problems with Regard to the Definition and Recovery of Fiscal State Aid

ECJ, judgment of 21 December 2016, joined cases World Duty Free et al, C-20/15 and C-21/15, no. 88: "… the Court has previously ruled that a tax measure from which solely undertakings that carried out specified transactions benefited, and not undertakings in the same sector that did not carry out those transactions, could be classified as selective, there being no need to assess whether that measure was of greater benefit for larger undertakings".

b. Fight against Tax Avoidance and Abuse

ECJ, judgment of 18 December 2014, joined cases Italmoda et al, C-13/13, C-163/13 and C-164/13, holding: "… 2. Sixth Council Directive… must be interpreted as meaning that it is for the national authorities and courts to refuse a taxable person, in the context of an intra-Community supply, the benefit of the rights to deduction of, exemption from or refund of value added tax, even in the absence of provisions of national law providing for such refusal, if it is established… that that taxable person knew, or should have known, that, by the transaction relied on as a basis for the right concerned, it was participating in evasion of value added tax committed in the context of a chain of supplies…"

III. Conclusions