

IFA Congress 2015 Basel

Outline Subject 2 – 3rd April 2013

**Taxation and fundamental rights:  
taxpayers' procedural rights in a globalised world**

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## **1 Introduction to the Topic**

In recent years, the relationship between human rights and taxation, or in a broader sense between fundamental rights and taxation, has captured increasing attention whether based on international treaties (e.g. ECHR<sup>1</sup> or ICCPR<sup>2</sup>) or constitutional, statutory or case law. One can assume that almost every state has a constitutional charter or laws dealing with basic rights, so that their relationship with taxation will come into play. Further, most of the states will have signed some of the international treaties guaranteeing fundamental rights.

Human or fundamental rights are often divided into substantive and procedural rights. The substantive rights, such as the ability-to-pay principle, the right to property, etc. have so far been often discussed at conferences and in the literature and are not the focus of this subject.

The procedural dimension of fundamental rights needs further attention and is the object of this subject, which focuses on the effective **protection of taxpayers' rights in practice**. Every country will have experience as to how taxpayers' rights – e.g. the right to challenge a decision of the tax authorities, or the right to confidentiality – are protected in practice. The aim is to survey that experience, compare the existing practices and draw lessons from them.

## **2 Methodology, objectives and scope of the research**

The methodology will be an examination of how a range of taxpayers' rights are protected in the countries submitting branch reports. The aim will be to identify:

- a) Best practice in the protection of taxpayers' rights from the experience evidenced in the reports; and

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<sup>1</sup> European Convention of Human Rights.

<sup>2</sup> International Covenant on Civil and Political Rights.

- b) Possibly to develop minimum standards for the protection of taxpayer's rights

This is part of a process of standard setting by which practical principles and guidelines can be developed for the effective protection of tax payers' rights.

Although all types of taxes give rise to issues of protecting taxpayers' rights, to make it more manageable and comparable between countries, the main focus will be on direct income taxes both for individuals and legal entities. If, however, there are particularly interesting issues relating to VAT/GST or other taxes, branch reporters will be asked to highlight them in an appendix to their branch report. The reports will be asked to consider both resident and non-resident taxpayers' rights, and there will be a particular emphasis on international issues (e.g. safeguarding information subject to cross-border exchange; taxpayer participation in mutual agreement procedure).

### **3 The contents of the branch reports**

Each branch reporter will be asked primarily to write a report answering a series of factual questions relating to how taxpayers' rights are protected in practice in that reporter's country. We are particularly interested to learn of examples of exceptionally good practices (in terms of effective protection of taxpayers' fundamental rights), and how they operate. Where particular rights are adequately protected, but there is nothing especially effective about the protection, reporters will be asked simply to explain what happens in their country.

The Appendix to this outline identifies some of the areas of rights which will be considered, though obviously these will be expanded upon in the final questionnaires.

What this project is not about is an opportunity to mount attacks on revenue authorities or take up *causes celebres* where rights have been inadequately protected, except if the country concerned has addressed the problem and come up with a solution. The purpose is to identify good practice, not bad practice. If a branch reporter considers that a particular right is inadequately protected in that country, the report might mention what the problem is, and the reporter is then invited to offer a possible solution.

It is also possible that we will establish a closed-access networking site to allow branch reporters to exchange information and thoughts about the subject.

### **4 The ideal branch reporter**

The ideal branch reporter (or reporters) would have a passionate commitment to the protection of taxpayers' rights (or be willing to develop such a passionate commitment), as well as significant experience of what happens in practice in the reporter's country. This might suit a senior tax adviser with a consolidated experience in private practice in this field, or an academic (with practical experience in this field), but it might also suit someone inside the revenue authorities who is passionately committed to the protection of taxpayers' rights (some tax officials being more passionate about protection of taxpayers' rights than advisors or academics).

The “dream team” might be a pair of reporters, one from private practice or academia, and one from inside the revenue authorities, who know exactly what happens in practice in their country.

The nightmare (from the point of view of the general reporters) would be someone who wants to write only about the theory of human rights and taxation, or who has no practical experience, or who wants to write about their *bête noire* of a particular perceived breach of taxpayers’ rights.

## 5 Conclusion

“Taxation and fundamental rights: taxpayers’ procedural rights in a globalised world” is a topic on which all branch reporters should be able to write an interesting and worthwhile branch report.

The (ambitious) goal for the general report and the panellists will be to develop internationally recognized guidelines on the protection of taxpayer’ rights, respecting a balance between the legitimate needs of the tax authorities to administer and enforce tax laws and the equally legitimate interest of the taxpayers in effective legal protection. This will be the start of a fascinating project, and it should be exciting to be part of the gathering of evidence to support this process of standard setting.

### Appendix: possible areas for focus

Among others, the general reporters may include in their questionnaire the following questions that should be analysed from the aspects of law, implementation in practice, and case law, following the same order in which taxpayers would have to face them, namely from the time in which they file a tax return to that when a case is judged by a Court:

- a. Assessment procedure: taxpayers’ obligation to cooperate and tax authorities’ instruments to receive information and documents both from the taxpayer and third parties necessary to assess the taxpayer; consequences of non-compliance for the taxpayer.
- b. Tax secrecy and data protection: confidentiality of the information provided by the taxpayer to the tax administration; access to the taxpayer’s data and information by other authorities of the state, by the public, etc.
- c. Change of practice: requirements for a change of practice by the tax administration and/or by the courts; information of the taxpayers of a change of practice (in particular if the administration changes its practice), transitional period for changes in practice.
- d. Prohibition of retroactivity: both with regard to a change of law and a change of practice.
- e. Participation in tax legislation: opportunity for all involved or interested people, in particular business, industrial or trade associations, political parties, trade unions, academics, etc. to give their views on proposed amendments to the law.
- f. Prohibition of contradictory behaviour: relevance of the prohibition of contradictory behaviour both for the tax administration and for the taxpayer, consequences of a contradictory behaviour.

- g. Burden of proof and level of the burden of proof: who bears the burden of proof? Is it split between the taxpayer and the tax administration, i.e. burden of proof for taxable income on the tax administration and for deductible expenses on the taxpayer?
- h. Questions on temporal issues: Prohibition of denial and delay of justice, both denial and delay by the administration and the courts; time-limits for assessment and for a reopening of an assessment; requirements for a reopening or re-examination of a final assessment in favour or at account of the taxpayer.
- i. Right to a fair trial: right to be informed, assisted and heard; right to remain silent and the right to abstain from self-incrimination; right to appeal in tax matter; right to receive a written substantiated decision; *reformatio in peius*; alternative dispute resolution; rules on the bearing of costs (court costs, legal fees, expenses of the administration, etc.).
- j. Observation of court decisions by the tax administration; application of a court decision to all similar cases. Settlement of disputes out of court.
- k. Protection of rights in cross-border exchange of information: is the taxpayer informed? Opportunity to challenge the exchange? Protection of confidentiality, and restrictions on use of the information.
- l. Rights in competent authority proceedings: how can the taxpayer participate in the proceedings? Methods to ensure an effective outcome.