

Legal Consequences of Late Judgment by Court

"Justice delayed is justice denied"

Introduction panelists

Panel:

- **Haerang Lee** (Korea)
- **Peter Panuthos** (United States)
- **Massimo Scuffi** (Italy)
- **Caroline Vanderkerken** (Belgium)
- Chair: **Alexander Bosman** (Netherlands)



Topics

1. What is a late or untimely decision by the Court?
2. What are the consequences of late or untimely decisions?
 - A. Compensation for damage suffered by the taxpayer in the event of 'undue delay'
 - B. Disciplinary measures or sanctions
3. How to prevent late decisions?

1. What is a late or untimely decision by the Court?

Panuthos

Legal Framework

The Tax Court, like other U.S. Federal Courts, does not have formal statutes requiring when a decision must be issued.

- A case is deemed submitted when all the evidence including testimony and documents have been submitted and the trial record is closed
- Before submission of a case there are several deadlines
- How long it takes for a decision to be issued may depend on:
 - The type of case (i.e. large, multi-issue cases versus single issue, small tax cases)
 - Fully Stipulated cases
 - Whether post-trial briefs have been ordered by the Court
 - Bench Opinion authority for immediate decisions
 - Pending litigation in the U.S. Tax Court, Courts of Appeal or other courts

1. What is a late or untimely decision by the Court?

Panuthos

Legal Framework

Are there differences between “regular” and penalty cases?

- The U.S. Tax Court does not treat cases involving tax deficiencies and penalties in any different ways.
- U.S. statutes and case law make clear that penalties are treated like taxes, thus the determination and assessment of penalty litigation proceeds identically.

1. What is a late or untimely decision by the Court?

Panuthos

Procedures in Some State Courts

Certain state courts of appeals—like California, Minnesota, and Massachusetts—have regulations requiring judges to issue decisions within a certain amount of time after a case is submitted.

- California
 - California requires decisions be issued within 90 days or a judge's pay will be docked
- Minnesota
 - Minnesota requires decisions to be issued within 90 days
- Massachusetts
 - Massachusetts requires case to be decided within 130 days after argument or after submission without argument

1. What is a late or untimely decision by the Court?

Lee

Legal framework for assessing late judgements

- **The Constitution**; “All citizens shall have the right to a speedy trial”.
- **The Civil Procedure Act** outlines the timeframes for judgement, but provisional
 - Art 199. Judgments issued within five months of lawsuit filing
 - Art 207(1) Judgments pronounced within two weeks after pleadings, maximum four weeks for complex cases.
Apply to Administrative litigations including tax cases [Administrative Litigation Act 8(2)]
- **Regulations on the management of long-term unresolved cases**;
 - Definition of long-term unresolved cases
 - District court cases; after 2.6 years from the date of receipt
 - Appellate court cases; after 1.6 years from the date of receipt
 - Judges' responsibilities:
 - Providing reasons and plans twice a year within the internal system
 - Chief Judge reports to Court Administration biannually
- **The pre-litigation stage is not included in the period of ‘undue delay of a trial’**
 - Taxpayers can initiate litigation after completing administrative remedies, with provisions for initiating litigation if administrative examination remains unresolved after 90 days.

1. What is a late or untimely decision by the Court?

Lee

Causes for late decisions in Korea

Despite being recognized for expeditious procedures and cost-effectiveness (World Bank report 2016, 2017), the Korean judicial system faces challenges with trial delays.

- **The Covid-19 pandemic**
- **The Frequent movement of judges;** Exceptions exist and modifications are being made
 - District courts; rotate their assignments every 1-2 year and move to a different court every 2-4 years
 - High courts; rotate their assignments every 2-3 years and move to a different high court 5 years after
- **Changes in the average age of judges and their lifestyle**

1. What is a late or untimely decision by the Court?

Vanderkerken

Definition: what ?

- Reasonable time-requirement: art. 6(1) ECHR (however Ferrazzini 12 July 2011); art. 6(2) ECHR (criminal nature)/other provisions: art. 47 CFREU – fundamental principle in Belgian judicial law
- Case law? ECHR Vegotex International 3 November 2022 (13 years of procedure); Cass. 21 September 2019, Nyobe
- Distinction between administrative part/judicial part of procedure: administrative phase: principles of sound administration
- Causes: inadequacy between workload and capacity to treat appeals/attitude of parties, no infringement

1. What is a late or untimely decision by the Court?

Vanderkerken

Definition

- Distinction between cases of pure administrative nature/criminal nature
- In general: “right to a fair trial”
- Administrative nature: Ferrazzini: no direct application of art. 6(1) ECHR
- However: measures to speed up procedures : direct appeal to tribunal (1st instance) if no decision on administrative appeal after 6 months: art. 1385undecies Judicial Code/art. 747 Judicial Code: case management/requirement of administrative appeal before judicial appeal/administrative mediation

1. What is a late or untimely decision by the Court?

Vanderkerken

Cases of a “criminal nature”

- The so-called “Engel”-criteria
- Based on: ECHR Engel/Netherlands 8 June 1976
- Pure determination of “civil rights” or criminal in nature?
- When “criminal”: ?
 - 1) criminal law or (disciplinary) administrative law or both?
 - 2) nature of the offence
 - 3) severity of the punishment (“meant to harm”)
 - 4) all of these criteria considered as a whole
 - 5) later confirmed in tax cases for “fiscal administrative charges”

1. What is a late or untimely decision by the Court?

Vanderkerken

Definition

- Assessment: “reasonable time”: factual approach, no specific time limit
- Administrative review: included in assessment of “processing time” of appeal
- Difference between appeals of a purely tax nature and assessment with “criminal” component: in last case: art. 6(2) ECHR applies: influence on “remedy”: comparison with cases and remedies of a purely criminal nature

1. What is a late or untimely decision by the Court?

Scuffi

Italian Judicial system

Tax disputes in Italy are managed by part-time honorary judges (legal and technicians) working in tax Courts of first instance (103) and second instance (21) which decide into panels of three members on the claims against taxation and denied refunds.

The tax jurisdiction is exclusive and under the control of legitimacy of the Court of Cassation that is a “general” Supreme Court of last instance dealing with each sort of cases.

However, tax litigation is normally heard by a special division deciding into a panel of five members the appeals against the judgements of the Courts of second instance.

The recent reform of the Italian tax justice (L.130/2022) intended to gradually replace the current honorary judges by recruiting – through public competition – career judges deployed in a smaller number of locations.

Italian tax proceedings do not require lengthy preliminary investigations because are essentially documentary and end – on the merits – in a couple of public hearings (or in closed session) by means of information and communication tools.

1. What is a late or untimely decision by the Court?

Scuffi

Legal framework

The due process of law must guarantee appropriate decision times.

The right of every person to be tried in a reasonable time is established in:

- art. 111 of the Italian Constitution
- art. 6 of the European Convention on Human Rights
- art. 47 of EU Treaty of Fundamental Rights

These rules, having identical wording, do not indicate time limits beyond which the length of a procedure should be considered excessive and unreasonable.

Besides, they have no direct application.

The law provisions implementing the constitutional rule (“Pinto” Law 89/2001 on “fair compensation” amended by Law 208/2015) follow the strict interpretation adopted by Strasbourg Court (Ferrazzini case) and don’t apply to tax proceedings because do not concern “civil rights and obligations” but (public) tax policies.

A residual application in tax matters is only provided by the national case law for the proceedings relating the execution of definitive decisions not involving the tax determination, for those relating to tax credits not contested in their existence, for refunds of unduly paid taxes, for tax sanctions whose affliction is similar to a criminal penalty.

1. What is a late or untimely decision by the Court?

Scuffi

The “Pinto” provisions stipulate that the reasonable deadline in civil/criminal proceedings is respected if the trial does not exceed 3 years in first instance, two years in appeal and one year before the Court of Cassation (overall 6 years).

1. What is a late or untimely decision by the Court?

Scuffi

State of trials

Time limits are generally respected in tax disputes on the merits (which include cases involving either tax deficiencies or penalties): trials before tax Courts last over 1 year in first instance and 2 years in appeal.

Even the waiting times for the decision in the lower Courts are adequate to those established by law (30 days from the deliberation): they range between 50 and 60 days.

The real criticism occurs in the legitimacy phase.

The tax division of the Court of Cassation is equipped with a staff of about 50 full-time career judges but they are absolutely insufficient to deal with contingencies of 10,000 appeals a year with a load around 45,000 pending proceedings.

It follows that times for setting up a trial in the Supreme Court are extremely dilated with an average wait of at least 4 years or more.

1. What is a late or untimely decision by the Court?

Bosman

- Legal framework in tax cases developed by Supreme Court
- ‘Overview judgment’: Supreme Court 19 February 2016, ECLI:NL:HR:2016:252
- Undue delay; principle of legal certainty; Article 6 ECHR
- Reasonable term; basic principles:
 - Objection and appeal District Court: **2 years** (objection: 6 months / appeal: 18 months)
 - Court of Appeal: **2 years**
 - Supreme Court: **2 years**
 - Start: receipt of notice of objection
 - Ending: decision in main proceedings
 - Expeditious handling of case in one phase may compensate overrun in other phases

1. What is a late or untimely decision by the Court?

Bosman

- Special circumstances, e.g.:
 - Complexity of case
 - Influence of taxpayer or representative
 - Multiple requests to postpone hearing
 - Agreement of taxpayer to suspend proceedings
- Suspension of term for pending request preliminary ruling ECJ (or other relevant courts)
- COVID: only reason for delay if hearing was initially planned during first lockdown period (March-May 2020)

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2.A. Consequences: Compensation for damage suffered by taxpayer

Bosman

Consequences of 'undue delay'

- In case of undue delay: in principle assumption that taxpayer suffered immaterial damage due to tension and frustration
- Tax authority or State ordered to pay compensation for damage
- In addition to reduction of penalty, if applicable
- Irrelevant: whether the appeal is unfounded, whether taxpayer insisted on expeditious treatment, chances of success, whether taxpayer engaged in reprehensible or unlawful conduct
- Possible exception in case of very limited financial interest (€ 15)

Amount of compensation

- **€ 500 per six months** by which reasonable period is exceeded, rounded up
- Regardless of amount of tax
- If several cases are decided jointly: same subject? If so, the € 500 rate is charged only once

2.A. Consequences: Compensation for damage suffered by taxpayer

Bosman

Recent developments

- Discussion on calculation of immaterial damage in cases of “no cure no pay” firms
- Lower courts deviating from Supreme Court’s established case law

2.A. Consequences: Compensation for damage suffered by taxpayer *Scuffi*

There are some judicial remedies in the event of undue delay (that represents a “denial of justice”).
The legal actions must always be taken by the taxpayer against the State.

The "Pinto" Law 89/2001 provides for a basic indemnity (liquidated by the Court of Appeal) of no less than 400 euros and no more than 800 euros, for each year that exceeds the reasonable term of the proceedings.

However - as mentioned - such law provisions does not find general application in tax field.

The civil liability of the judge for denial of justice (in any type of proceedings) is provided for by “Vassalli” Law 117/1988 (as amended by Law 18/2015).

Such liability occurs when the judge omits, delays, refuses an act of his office 30 days from the request for a reminder to the Court.

The liability is always “indirect” because the legal action must be taken against the State which will have right of redress against the magistrate (who acted with willful misconduct or inexcusable negligence) with a maximum deduction of half of his salary.

2.A. Consequences: Compensation for damage suffered by taxpayer

Scuffi

Financial damages (that must be proven) and moral damages (that are presumed unless proven otherwise) are compensable in amount depending on the complexity of the case and the behavior of the parties.

The law 639/96 also stipulates the administrative accounting liability of any public employee who has caused damage to the Treasury.

2.A. Consequences: Compensation for damage suffered by taxpayer

Vanderkerken

- Undue delay: damages ? leads to “government responsibility” (civil liability): “unlawful act”: damages by way of compensation: ! Not necessarily equal to amount of tax due
- Jurisdiction: tax court, no separate procedure
- Interests “cease” in case of administrative appeal (after 6 month delay): art. 414 IRC
- Other damages: e.g. longtime appearance of tax due in balance sheet of company : impact on solvency : all to be included and to be proven (civil liability)
- Which part of government: depends on the author of the government “fault”
- No special system which provides for specific amounts of damages

2.A. Consequences: Compensation for damage suffered by taxpayer

Vanderkerken

- “State liability”: not an easy proof: which part of the government?
- Trias politica
- Who is “responsible”: ***trias politica*** model, includes a legislature, an executive, and a judiciary power
- Legislative power: ?
- Executive power: ?
- Judiciary power: ?
- Fault-principle
- Causality?

2.A. Consequences: Compensation for damage suffered by taxpayer

Vanderkerken

- No simple answer at this moment
- Fault-principle: way in which the state should organise judiciary appeal against taxes levied
- Necessity to speed up procedures

2.A. Consequences: Compensation for damage suffered by taxpayer *Lee*

- **No statutory compensation available** to a litigant for delayed decisions
- **Suspending execution** is rarely granted for monetary recoverable damage in tax cases. So taxpayers usually pay taxes before bringing a lawsuit.
- If a tax disposition is revoked through trial, **the payed tax is refunded with additional sum** [the national tax refund surcharge rate, 2.9% per year]
- **Litigation under the National Compensation Act** is theoretically possible but challenging to realize
 - required to prove the amount of damage as well as the intentional or near-intentional gross negligence of judges
 - never been granted

2.A. Consequences: Compensation for damage suffered by taxpayer *Panuthos*

There is no compensation available to a litigant and little recourse for delayed decisions

- While some states—such as California—may dock a judge's pay for delayed decisions, there is no compensation to the parties.
- For taxpayers, interest continues to run from the due date of the tax return to the date of payment. Thus, a taxpayer may have to pay additional interest when a decision is delayed.
- For the government, they do not have access to funds that potentially should be in their coffers.

2.A. Consequences: Compensation for damage suffered by taxpayer

Panuthos

There are also downsides to delays for the government.

- Delay adversely affects the tax authority in that funds that should be in the government coffers are not there.
- Additionally, as an enforcement agency, it is important for the tax authority to have transparent, settled decisional law on issues so taxpayers can ensure they are and remain in compliance.

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2.B. Consequences: Disciplinary measures or sanctions

Scuffi

The “direct’ responsibility of the magistrate is disciplinary (and penal).

The unjustified delay in the filing of judgments extended beyond one year leads to disciplinary measures charged against the defaulting judge on instance of the President of the Tax Court to which the judge belongs and/or of the Ministry of Economy and Finance.

The proceedings begin - with all the defense warranties - before the High Council for tax justice (self-governing body of the tax justice).

The penalties that can be imposed are:

- written warning (for the slightest transgressions)
- censure (lack of industriousness if habitual)
- suspension from judicial functions (and salary) from 1 month to two years (serious and repeated delay in the exercise of official duties)
- dismissal (for the most serious offences)

The sanctioned judge naturally undergoes “demerit notes” in the future assessments for the career advancement. Criminal prosecution for omission of official acts is always reserved (art. 328 criminal code).

2.B. Consequences: Disciplinary measures or sanctions

Panuthos

What sort of disciplinary sanctions are there if any?

Complaints about a Tax Court judge's delay in rendering a decision or ruling is not cognizable misconduct except if there is an improper motive in delaying a particular decision or there is a habitual delay in a significant number of cases.

2.B. Consequences: Disciplinary measures or sanctions

Lee

- Taking **disciplinary measures** against judges is theoretically possible but rare in practice
- Habitual delays without any special reason can be considered as a disadvantage during the **reappointment evaluation**.
 - Reappointment of Judges in South Korea, every ten years
 - Annual performance assessment by chief judge
 - Consideration of various factors, including statistics

2.B. Consequences: Disciplinary measures or sanctions

Vanderkerken

- No knowledge of such measures...
- Not impossible
- However: government should provide means to quickly solve cases, write judgments (IT, registrars, refendaries, ...)
- President of court has competence to initiate procedures against judges
- “Slow judges”: a few cases are known
- Disciplinary procedure: no interference of taxpayer
- In Belgium: special disciplinary courts

2.B. Consequences: Disciplinary measures or sanctions

Vanderkerken

- Why would a judge who operates within a pre-disposed legal system (e.g. requirement to “answer” to all arguments invoked) be liable if he or she performs professional duties according to standard?
- Isn't it the obligation of the State to provide all necessary means to judges to be able to execute legal function in best possible way (e.g. investments in IT, appointment of “referendaries”, etc.)

2.B. Consequences: Disciplinary measures or sanctions

Bosman

- Disciplinary measures against individual judges in theory possible, for instance if confidence in judiciary is seriously undermined by judge's actions
- Suspension, dismissal, disciplinary measure such as reprimand
- Imposed by Supreme Court at request of Attorney General
- No experience in relation to 'undue delay'

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3. How to prevent late decisions?

Vanderkerken

- More staff necessary, huge delays, problem of budget federal state (is no priority)
- Management of “role”: timely verifications of cases to “clean” roles
- Active participation of parties in preparation of cases: timely request for further written memoranda (art. 747 Judicial Code)
- Procedural rule to be softened : necessity of “reply” to every argument (is however reason for annulment in cassation procedure: some voices heard that this should be softened in procedural law/limits on pages of arguments (arguments written in over f.i. “200” pages no exception, not “forbidden”, voices heard that this should be limited)
- However: necessity to “reply” to argument: no necessity for judge to write “Phd-thesis” in decision on all arguments invoked by parties: swift and adequate reply to arguments may also lead to saving time

3. How to prevent late decisions?

Lee

- The Korean **Judiciary is making active efforts** to expedite the judicial process
 - Workshops of judges; example of Suwon District Court
 - Conducting research services outside
 - TF inside working on to improve the legal proceedings
- **Increasing staffing** by hiring more legal researchers (law clerks)
- **Addressing the frequent movement of judges**; Allowing working for 5-10 years in less-preferred areas
- **Using internal computer network**; Enabling notification functions between upper and lower courts regarding the termination of related cases, helping streamline the decision-making process

3. How to prevent late decisions?

Panuthos

The Chief Judge and Clerk of the Tax Court administer case inventory and seek to balance the assignment of work.

- The assignment process depends upon several different circumstances including the number of cases in a Judge's inventory.
- The Court internally circulates a list or report of submitted cases reflecting the timing of those submissions. This report is view by all Judicial Officers.
- Judges are made aware that if they have a backlog of opinion that there are remedies available.

3. How to prevent late decisions?

Scuffi

The Italian legislator (with the contributions from Judiciary) is actively making many efforts to expedite trials. In the last two years (and currently) the lawmaker has prepared a series of regulatory and procedural interventions to improve the quality of the decisions (introducing the new role of professional judge working full time) and to reduce the amount of disputes (especially those pending in the Supreme Court) ensuring decisions in due times.

Some examples:

- single judge in disputes up to 5,000 euros;
- attempt at compulsory mediation with the Revenue Agency for disputes up to 50,000 euros before going to the Court;
- wider use of conciliation tool entrusted to the judge in every degree of the proceedings;
- enhanced computerization and “remote” setting of hearings (pandemic era provided many suggestions from this point of view);
- content limits to defense documents (no more than 50 pages) for disputes up to 500,000 euros with repercussions on litigation costs in the event of non-compliance.

Above all it is necessary to set up by law a Tax Court of legitimacy dedicated exclusively to deal with tax matters with an adequate workforce and rigorous access restrictions.

3. How to prevent late decisions?

Scuffi

The current preventive admissibility filter and the legislative provisions for settlement pending disputes paying a portion of the tax debt without penalties and interest do not appear suitable measures for achieving the National Recovery Plan objective of reducing – by more and faster decisions – litigation before the Court of Cassation by at least 40%.

3. How to prevent late decisions?

Bosman

- Tax cases:
 - Staffing
 - Case management
 - Digital litigation
- Generally: Program “timely justice” (2020-2023, extended by 2 years until 2025)
 - Purpose: reducing processing time and backlog of cases
 - Satisfied litigant, predictable steps, better communication
 - Schedule and plan more effectively and use management information to monitor workflows
 - Local implementation
 - Experiments such as “catch-up chamber” (not for tax cases)

Questions?