



*Substantive Session on
Conclusive Force of Declarations of
Foreign Authorities*

Facing secrecy clauses:
The French administrative Judge's
point of view

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Introduction

- Judges are faced with the issue of secrecy clauses in **two different types of litigation**:
 - Actions for annulment
 - Tax litigation

- To what extent can the Tax Judge:
 - **Have access** to that information ?
 - **Use** that information?

Part 1: Accessing the information

- Issue: **scope and consequences** of secrecy clauses towards Tax Judges themselves.
- Three main types of secrecy clauses:
 - Type 1: disclosure only to “persons or authorities **(including courts and administrative bodies) concerned with**” the assessment or collection of taxes



(1989)



(2008)

Part 1: Accessing the information

- Type 2: Disclosure only to “persons **(including courts or administrative bodies) involved in** the assessment or collection ... ”



(1967)

- Type 3: Disclosure only to “persons **involved in/ in charge of** the assessment or collection ... ”.



(1957)



(1959)



(1973)

Part 1: Accessing the information

- Type 1 and Type 2 Conventions:
Access of courts to the information exchanged is **specifically stipulated**.
- Type 3 Conventions: the *Weissenburger Case* (CE, 26th January 2011, n° 311808)
 - Treaty clauses stipulating that the information exchanged shall be disclosed only to the persons involved in assessment or collection of taxes, **even if they do not specifically include courts**, do not preclude communication to the Judge.

Part 2: Using the information

- The process has to be **adversarial**.
- Can this principle be **reconciled with secrecy** clauses precluding communication of the information to the Taxpayer ?

French Tax Authorities



Tax Judge



Taxpayer

2.1. Three conceivable options

- the Judge **may read** the contents of the declarations made by Foreign Authorities, **without communicating** them to the Taxpayer
- the Judge must **refuse to read** the contents of the information exchanged
- the Judge **may read** the foreign declarations **and communicate** them to the Taxpayer.

2. 2. *Minister vs. SA Diebold Courtagé*

- CE, 13th October 1999, n° 191191
 - **Communication** to the Taxpayer of the information produced by the Tax Authorities

French Tax Authorities



Tax Judge



Taxpayer

- **No theory** at this stage

2.3. *Société Sparflex*

- CE, 4th June 2008, n° 301776
 - The Judge can give his ruling only on the basis of documents communicated to both parties
 - Two options:



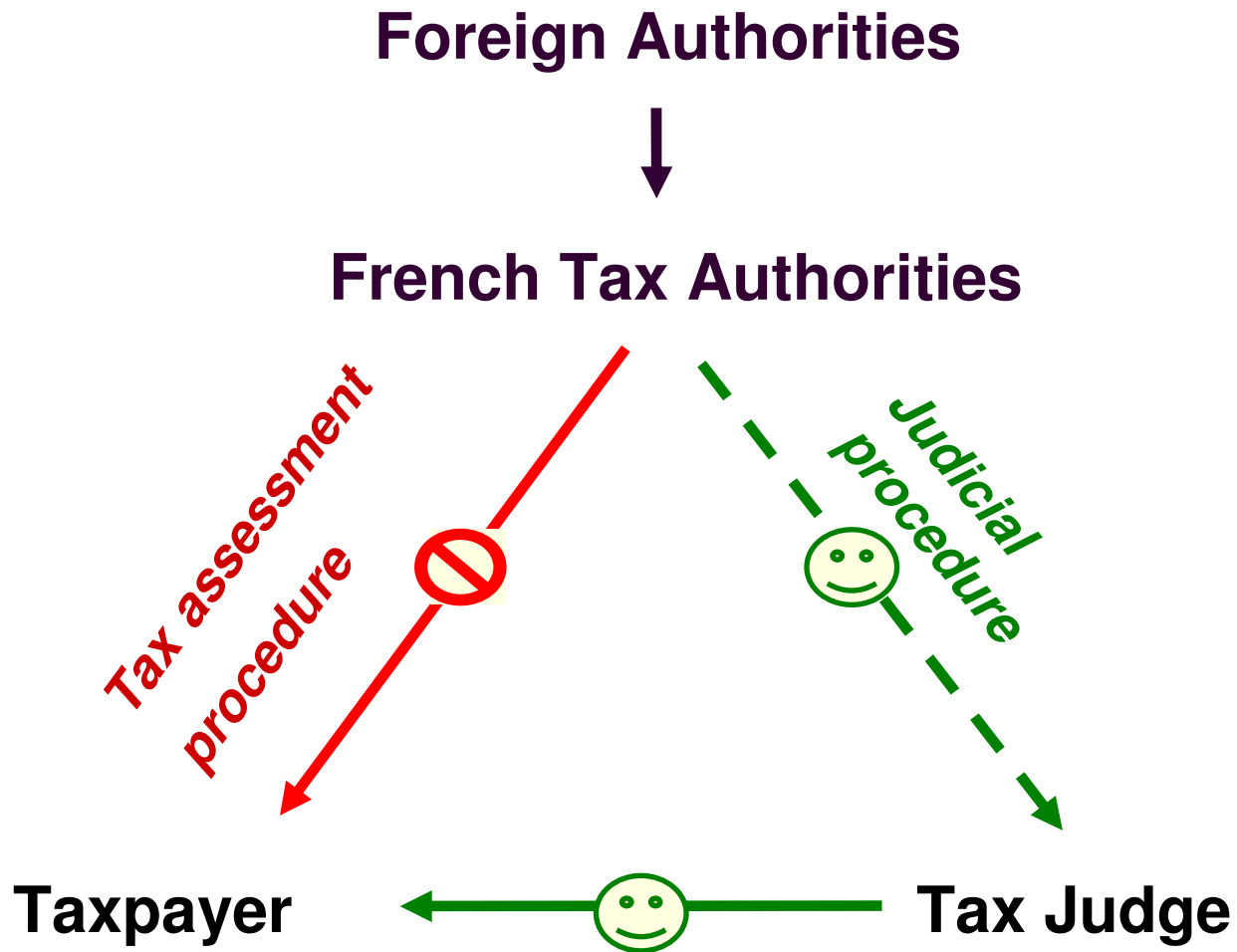
2.4. *Weissenburger*

- CE, 26th January 2011, n° 311808
 - **Expansion** of the *Sparflex* case-law to cases in which courts are not specifically included
 - **Clarification** of what happens when French Tax Authorities, having been asked by the Judge to produce the information, refuse to give in.

To summarize...

- The choice lies with Tax Authorities :
 - Either they **produce** elements obtained from foreign authorities: the Judge will **communicate** them to the other party and **take** them **into account**.
 - Or **they refuse** to produce these elements to the Judge: they **run the risk to lose** the case.

To summarize...



Acknowledgement

- *The IATJ and all the organisers of the Assembly*
- *The French Council of State, including President Philippe Martin*
- *Thank you for your attention!*

