

# International Association of Tax Judges

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## Obtaining Evidence and Information

# International Association of Tax Judges

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## The Panel

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- Clement Endresen (Norway)



- Annette Kugelmüller-Pugh (Germany)



- Massimo Scuffi (Italy)



- Michael Beusch (Switzerland; Chair)



## The Methodology of the Session

- Comparative approach on selected issues
- Short introduction from the Panelists to the situation in their jurisdiction (in an alphabetical order)
- Discussion (among the Panelists and all Members)
- Everything out of a Court perspective
- Topics
  - “Background” – General Framework
  - Obtaining evidence/information by the taxpayer him/herself
  - Obtaining evidence/information by third parties / other (government) authorities

## “Background” – General Framework (France 1)

### **Tax assessment**

- Income tax, wealth tax, gift and inheritance taxes : self-declaration
- Corporate tax and VAT : self-assessment
- Local taxes : administrative assessment

## “Background” – General Framework (France 2)

### Burden of proof

- A critical question

Cf. the Champaign-Case (CE, 4/3/1987, n° 66841 vs. n° 67874) : How many cups out of a 75 cl-bottle ? 😊

- Presumption of regularity attached to the taxpayer’s declaration. Burden of proof therefore on the party (administration or taxpayer him/herself) which intends to dispute its validity...

... unless the taxpayer only can be expected to hold available evidence (CE, 20/6/2003, n° 232832)...

... and given that, in practice, an absolute proof is not required.

- Many special legislations lay down particular rules of evidence (e.g. CGI art. 238 A on profit shifting to attractive tax jurisdictions)

## “Background” – General Framework (France 3)

### The Court

- Prior administrative complaint (LPF art. R\*. 190-1), which shall be introduced before the end of the second year following the assessment.
- If unsuccessful (negative decision, in full or in part ; or absence of a response within six months), taxpayer has a right to apply to the competent court to resolve the dispute. Action to be brought within two months.
- In first instance as well as in appeal, the Court is a judicial body of full jurisdiction, entitled with the power to quash in all respects, on questions of fact and law, the decision of the administration. The supreme court (Conseil d'État or Cour de cassation), then, rules as a judge of cassation.
- Written procedure (LPF, art. R\*. 202), oral hearing being, in practice, largely devoted to the conclusions of the advocate general.

## “Background” – General Framework (Norway 1)

### Self-declaration

- The principle of self-declaration has been retained. Taxation depends on taxpayers providing all relevant information to the tax office.
- The self-declaration principle has survived the introduction of pre-completed tax returns for wage earners, etc. In 2015, 3.4 million taxpayers received pre-completed tax returns from the tax office.
- Even where the tax return is unopened, the taxpayer remains fully responsible both for the correctness and completeness of the information that the tax assessment is based on.

### Administrative Appeal

- A taxpayer may appeal any individual decision made during the tax assessment process, as well as the tax assessment itself.
- The Tax Appeal Tribunal will consider all aspects of the case and will take into consideration new facts – if any.

## **“Background” – General Framework (Norway 2)**

No tax court – but the ordinary courts, including The Supreme Court, also try tax cases.

In tax cases, the courts’ involvement is, in principle, limited to try the validity of the administrative tax assessment. The courts do not reassess. Thus, they either find that the tax assessment is invalid or uphold the assessment.

The courts will decide the factual basis for taxation, when in dispute, and the interpretation of the tax law and its application. The courts are not bound by the parties’ understanding of the law.

The courts may always set aside a tax assessment due to abuse of discretion, but, fortunately, this is a rare occurrence.



## **“Background” – General Framework (Norway 3)**

A taxpayer may not, as a main rule, introduce a new factual basis. The facts need to be identified on his tax return or later upon an appeal. For the courts no new evidence may be submitted unless there is a good reason.

(To the extent that the case involves tax surcharges, there is no limitation on the introduction of new relevant facts or evidence.)

New legal arguments are not restricted and may be introduced at any stage – even for the first time before the Supreme Court – provided that the relevant facts were introduced during the administrative phase.

## “Background” – General Framework (Norway 4)

What happens after the court has made its decision?

Starting out with the obvious: If the tax has been paid, the taxpayer will be refunded any excess amount paid, with interest.

When the tax authorities' general interpretation of the tax law is found to be incorrect, however, the court decision may have far-reaching consequences. When the tax assessment is invalid due to an incorrect understanding of the tax law (not only its application) corrections will have to be made for all taxpayers who has been incorrectly assessed due to this mistake. Corrections will be made for the last three tax-years. The manner in which corrections are made will differ. I shall illustrate this with two examples.

## **“Background” – General Framework (Norway 5)**

### Evidence

No formal rules on the weight of evidence. The courts decide based on what they find are the most likely factual situation.

The courts do nothing to find and present relevant evidence for the facts; it is for the parties to argue their case as best they can. (If they really cannot, the courts must try to give some guidance, but the courts will not do what the parties should have done.)

### Conciliation

Conciliation is not formally a part of tax procedure, but of course the dialogue between the taxpayer and the tax authorities may well lead to a basis for taxation acceptable to both sides. For the courts: Less than in most other areas of the law. For The Supreme Court; certainly not at all.

## “Background” – General Framework (Germany 1)

- **Income tax (self-employed), corporation tax:** Filing of a tax declaration;  
Statement of facts as a basis for tax assessment by Inland Revenue;  
no self-computation of tax liability
  
- **VAT/income tax (employment):** Self Assessment; computation of  
tax liability; electronic filing of a tax return; automatic checks by Inland Revenue
  
- **Burden of Proof:**
  - Taxable Receipts (e.g. earnings): Inland Revenue
  - Deductible costs (e.g. business expenses): Taxpayer

## “Background” – General Framework (Germany 2)

- **Proceedings:**

- Free administrative procedure: “Einspruchsverfahren”: Complete legal review of the case by different department at Inland Revenue; decision for or against taxpayer (“reformatio in peius”)

- If unsuccessful: Right to file a claim to tax court of first instance within 1 month

- **Court review:**

- Court of first instance: facts

- Court of appeal: law

## “Background” – General Framework (Germany 3)

- **Court procedure:**
  - Written exchange of arguments at procedural stage
  - Oral hearing optional

## **“Background” – General Framework (Italy 1)**

In Italy, tax disputes are dealt with by specialized judges working in tax Courts of first and second instance, which decide in panels of three members appeals concerning the imposition of taxes and the denial of tax refunds.

The Court (double instance) review concerns questions of facts and/or questions of law .

Taxation involves subjective rights and therefore falls also under the (ultimate) control of legitimacy of the Supreme Court (Corte Suprema di Cassazione).

The CSC fundamentally decides only on questions of law without (re) considering the facts of a dispute as established by the Courts on the merits.

## **“Background” – General Framework (Italy 2)**

The Tax Administration has the burden of proving the tax claim; the taxpayer has the burden of proving the absence of taxation requirements or the presence of requirements for a lower taxation.

The Tax Act does not support the presumption of validity. However a fact is considered proved if it is not fully contested.

Judicial actions relating to disputes not exceeding EUR 50,000 in value are submitted to an administrative complaint and mediation attempt procedure before the tax authorities, which is a preliminary requirement to be included in the appeal before activating the jurisdiction of the tax Court.

The appeal therefore works as preliminary administrative recourse in view to provoke a reconsideration of the tax claim and reach a settlement with the taxpayer avoiding the judgment.



## **“Background” – General Framework (Italy 3)**

The witness evidence is not allowed In tax proceedings even when necessary to know the relevant facts of the case.

The prohibition, validated by the Italian Constitutional Court, is inconsistent with the case law of the European Court of Human Rights which considers such ban incompatible with the right of defense when it is extremely difficult or impossible for the taxpayer to produce documentary evidence.

Ultimately in tax litigation the Court proceeding is purely written even if it is provided on demand for an oral hearing between the Revenue Agency and the taxpayer

In such occasion conciliation is also possible before the judge.

## “Background” – General Framework (Discussion)

- Self-assessment <-> Self-declaration: which system is easier to handle for judges in every day Court life (according to your experience) ?
- “Court has to find facts and figures on its own motion” (Germany pink 2) - “A fact is considered proved if it is not fully contested” (Italy blue 2): Do these remarks prove to be consistent with your system ?
- Does your system know conciliation before tax-authorities or even tax courts ? How do you feel about ?

## Obtaining evidence/information by the taxpayer (F 1)

### Obligations of the taxpayer

#### ➤ Income tax :

- Yearly tax returns
- Documents to be attached (or retained for possible control) only when specifically required by law (e.g. work-related expenses to be deducted in computing the taxable income of employees, CGI art. 83, or philanthropic donations that give right to a tax rebate, CGI art. 200)

#### ➤ Corporate tax :

- Accounting records to be kept for six years (LPF art. L. 102 B)

## Obtaining evidence/information by the taxpayer (F 2)

### Non-compliance

- Non-compliance with declaration requirements exposes to :
  - increased tax base (add-on rate : 10 %, 40 % or even 80 %) ;
  - where relevant, taxation on a discretionary basis (“taxation d’office”) associated with a shift of the burden of proof ;
  - in worst cases, criminal penalties.
  
- Many fiscal incentives (tax exemptions, tax allowances, tax credits...) depending on compliance with reporting obligations.
  
- When fraud suspected, possibility for the administration to carry out a search and seizure operation at the domicile of the taxpayer or of a third party (authorisation of a judge required) : LPF art. 16 B

## Obtaining evidence/information by the taxpayer (F 3)

### Before the Court

- In any case, full review of the case by the Court.
- “Nemo tenetur se ipsum accusare”-principle ? No significant case in the jurisprudence yet, even though art. 6 ECHR is relevant as far as penalties (including administrative ones) are concerned. Food for thought ! (e.g. “demandes d’éclaircissements et de justifications”, LPF art. L. 16)
- To assess according to the law is the core function of the Court. Hence :
  - Taxpayer allowed to raise new issues at any time, in first instance as well as in appeal ;
  - Principle of estoppel not applied (CE, 1/4/2010, n° 334465) ;
  - Court to order further investigation, e.g. that an expert’s report be obtained if more information is needed ; relatively unusual in practice (role of the “Commission départementale des impôts” ?)

## Obtaining evidence/information by the taxpayer (N 1)

### Obligation to submit relevant information – Section 8-1 of the TAA

Those who are obliged to submit a tax return must provide correct and complete information. Taxpayers are to act diligently, with loyalty and due care, in order for the tax situation to be clarified and decided upon.

A taxpayer may correct the information submitted within three years. If, however, the tax authorities have raised an issue with the taxpayer, new information in that respect will not eliminate the possibility of sanctions.

Where taxpayers submit inadequate, incorrect or insufficient information, the tax authorities may estimate the factual basis for taxation. The objective of the tax authorities is still to raise an assessment that is as correct as possible. To achieve this goal, an adequate factual basis for the assessment must be established. Arbitrary assessments are invalid. Illustration: The Supreme Court's decision May 16 2017 HR-2017-967-A.

The tax authorities may, within five years from the end of the tax year in question, correct an earlier incorrect tax assessment. The time limit is 10 years from when the taxpayer acted willfully or with gross negligence. When a tax assessment has been revised, further revisions must be initiated within four months.

## Obtaining evidence/information by the taxpayer (N 2)

Freedom from self-incrimination.

Article 6 of the ECHR protects the right of the accused to a fair trial. Although article 6 does not explicitly refer to either the right to remain silent or to the right not to give evidence against oneself, the ECtHR has consistently held that this privilege is part of the concept of a fair trial.

How far-reaching this privilege is, in a tax context, is still not altogether clear. ECtHR case law does, however, clarify a number of issues. The accused is protected against improper compulsion by the authorities, for example, by means of accruing disciplinary fines designed to make the accused provide incriminating evidence.

The right not to incriminate oneself is primarily concerned with respecting the desire of an accused person to remain silent and thus does not stop the prosecution from obtaining evidence through searches and seizures of documents in the accused's possession. The privilege against self-incrimination is not a general immunity to actions motivated by the desire to evade investigation by the revenue authorities.

## **Obtaining evidence/information by the taxpayer (N 3)**

Section 14-9 of the new Tax Administration Act contains the following duty to inform a taxpayer of his right against self-incrimination, which was already the practice:

In a case concerning tax surcharges, the tax authorities shall, to the extent necessary for the taxpayer to attend to his interests, inform and guide the taxpayer and a third party about the extent to which they are entitled to remain silent, withhold documents or other evidence, when the answer or the evidence to be submitted may expose him to tax surcharges or criminal prosecution. (author's translation)

This is no small task. Hopefully, some general guidelines will be developed.

In the preparatory works to the new legislation, it is explicitly stated that this provision does not extend any rights to taxpayers that do not follow from article 6 no. 1 of the ECHR. Still, in one respect, perhaps it does.

In 2011, the Supreme Court decided that the privilege against self-incrimination, which is contained in article 6 no. 1 of the ECHR, also applies to legal entities. There is no clear precedent from the ECt.HR.



## Obtaining evidence/information by the taxpayer (N 4)

A question related to self-incrimination is the extent to which, if at all, guilt may be inferred from an accused's silence. Under Norwegian law, the accused will be informed of his right not to testify, but if he chooses to remain silent or his answer is noncommittal, the court may inform him that this may be held against him. This will of course be interpreted in accordance with the case law of the ECtHR.

Confidentiality; of course, and still:

the tax authorities may issue and publish lists, including information about taxpayers and their income, the value of their assets for tax purposes and what they actually pay in taxes,

in addition, the tax authorities may pass on information to other public bodies for use in connection with tax, duties, social security payments or contributions from public funds.

to what extent may confidential information be used in cases concerning other taxpayers

## Obtaining evidence/information by the taxpayer (G 1)

- **Income tax/corporation tax:** Yearly tax returns; name and disclose truthfully and completely all facts relevant for tax assessment; documents to be attached only when required by law; documents to be kept for six years if income higher than 500.000 €
- **Failure to comply with legal obligation:** Criminal penalties; taxation on a discretionary basis; possible shift of burden of proof
- **In court:** Full review of the case; obligation of taxpayer to name the content of his claim; deliver facts at the request of the court within certain time frame

## Obtaining evidence/information by the taxpayer (G 2)

### ➤ Court review/procedure:

- Facts and law (court of first instance); law (court of appeal)
- No time frame for verdict by law; compensation might be claimed if court takes no action for two years
- The same information to be disclosed before the Inland Revenue and at the court > no information to be disclosed only in courts
- Same rights/obligations as with Inland Revenue; parties can ask for inspection of files
- Court has to find facts and figures on its own motion

## Obtaining evidence/information by the taxpayer (G 3)

### ➤ Audits:

- Income from (agricultural) trade and self-employment
- Timing dependant on size of entreprise (large/international enterprises: every taxable period; other enterprises: 3 taxable periods (followed by an interval)
- Report can be challenged in full in administrative procedure and in court; factual agreement possible > binding on both parties

➤ **Nemo tenetur principle:** conflict between criminal procedure and tax procedure; in tax procedure taxpayer obliged to cooperate with Inland Revenue and name all facts relevant to tax assessment even if a tax evasion is revealed; partial protection by § 393 German Fiscal code: No coercive means to obtain information for tax procedure if tax payer is at risk of self-incrimination in a criminal procedure

## **Obtaining evidence/information by the taxpayer (I 1)**

The taxpayer must fill out the tax return completely and truthfully with all the informations and documents requested for the reconstruction of his fiscal position and the subsequent taxation.

If the taxpayer fails to comply with this obligation he runs the risk to be subject to taxation on a discretionary basis (synthetic tax assessment) incurring also in administrative and criminal penalties beyond a certain level of evasion.

However, non-compliant taxpayer is always entitled to have his case fully revised by the Court with one restriction : if he refused to produce relevant documents to the tax Authorities he cannot introduce such documents in the proceeding before the Court.

## **Obtaining evidence/information by the taxpayer (I 2)**

The principle *nemo tenetur se ipsum accusare* does not play a fundamental role in tax assessment procedures.

It should be also noted that the relationship between criminal and fiscal proceedings is becoming more and more problematic following the intervention of the European Court of Human Rights on the prohibition of double condemnation (*ne bis in idem rule*) when the administrative penalty is afflictive such as a criminal penalty.

There is no time limit for reaching a verdict in the proceedings on the merit (generally tax proceedings conclude within one/two years). The precautionary procedure with the set of provisional measures available to the taxpayer to block apparently unjustified tax claims is faster.

## Obtaining evidence/information by the taxpayer (I 3)

Confidential information for the Court are not allowed outside the adversarial rules.

The Court is entitled to investigate itself when it feels that more information are necessary in comparison with those provided by the parties.

The reason is to issue a right decisions but this power *ex officio* may never overcome the burden of proof belonging to such parties.

## Obtaining evidence/information by the taxpayer (Discussion)

- Are there time limits for obtaining/producing evidence / information of/by the taxpayer? If so, does this make sense? (cf. Italy 1)
- Producing evidence and providing information is usually linked with the fact that these information are kept confidential. How far can the taxpayer count on confidentiality?
- factual agreement possible > binding on both parties (Germany 3)
- Importance of the “nemo tenetur“-principle



## Obtaining evidence/information by third parties/ Other (government) authorities (F 1)

### Obligations of the third party, rights of the taxpayer

- Third parties to provide information :
  - either spontaneously : employers (salaries) ; banks (investment income);
  - or upon request (“droit de communication”) : the law (LPF art. L. 81 sq.) designates about twenty categories of persons (social security institutions, telecom operators, notaries...), each of them for specified types of documents ; documents to be kept six years ; 1500 € fine in case of non-compliance (six-month imprisonment if repetition)
  
- Taxpayer has to be informed, before assessment, on origin and content of evidence collected, on pain of nullity.

## Obtaining evidence/information by third parties/ Other (government) authorities (F 2)

### Professional secrets

Need to assess according to the law and principle of adversarial proceedings to be combined with :

- medical secrecy (CE, 7/7/2004, n° 253711) ;
- business confidentiality (CE, 27/7/2012, n° 325436) ;
- client-attorney privilege (LPF art. L. 86 and L. 86-1 ; ECHR 24/7/2008, n° 18603/3, *André c/ France*).

## Obtaining evidence/information by third parties/ Other (government) authorities (F 3)

### Consequences

- Traditionally, Chinese wall between tax procedure and lawfulness of informations on which assessment is based when obtained by a third party : independence of procedures, evidence by all means.
- Recent move in the jurisprudence, in particular concerning search and seizure operations :
  - Cass. com., 31/1/2012, n° 11-13.097
  - CE, 27/7/2015, n° 370443
  - CC, 4/12/2013, n° 2013-679 DC ; CE, 23/11/2016, n° 387485

## **Obtaining evidence/information by third parties/ Other (government) authorities (N 1)**

The Tax Administration Act includes an extensive list of third parties who must pass on to the tax authorities information regarding the correct taxation of individuals and companies. This information, which is generally submitted electronically, is really the basis for the tax administration's entrance into the digital world in recent years.

Everyone who has an obligation to pass information on to the tax authorities, need to keep his books in accordance with regulations and generally in a way which will both enable the company to provide correct information, and which makes it possible for the tax authorities to have adequate controls.

The obligations to provide information are indeed extensive and include all relevant information from employers (including tips from customers), any and all relevant information from banks and other financial institutions, rentals, provisions etc. etc.

The taxpayers are not really involved; they receive copies.

## **Obtaining evidence/information by third parties/ Other (government) authorities (N 2)**

### Attorney-client privilege

Evidence cannot be presented concerning something that has been confided to attorneys or defence counsel, in such capacity.

Attorney-client privilege is a hot topic in Norway in the tax field. The tax authorities' concerns have been enhanced by the greater focus on the role of tax advisors in cases involving tax evasion, or at least overly creative tax avoidance strategies.

In a Supreme Court decision from 2010 it was decided that the lawyers did not have an obligation to disclose to the prosecution to whom certain payments had been made through the law firm's client account, provided that the transfer of funds fell within the scope of the lawyers' ordinary business.

In a case from 2012, the Supreme Court held that whether or not a lawyer represents a taxpayer is, in itself, a secret, and even when representation has been disclosed, the lawyer's timesheets could still not be seized.

## **Obtaining evidence/information by third parties/ Other (government) authorities (N 3)**

In one case The Supreme Court found, without qualification, that the defendant could act as the attorney's agent, and that thus documents and information in his possession that he had obtained with the intent of passing them on to the attorney, were covered by the privilege. This also applies to documents received from a co-defendant.

In their decision in *Tax audit – HR-2017-467-A* (1 March 2017), the Supreme Court considered certain practicalities in respect of attorney-client privilege during tax audits. New problems arise because of the possibility to perform wide searches in electronic data bases. The Court held that the search criteria must be chosen in good faith, but that the tax authorities had some discretion in this respect. Interestingly, the Court added that the choice of search criteria would have to be amended in the future to the extent that searches revealed that privileged documents are disclosed to an unacceptable degree.

## **Obtaining evidence/information by third parties/ Other (government) authorities (G 1)**

### ➤ **Tax at source:**

- Third party acts as agent liable to pay the tax
- Third party to calculate the tax, deduct it at source and make payment to Inland Revenue
- Employer; Bank; recipient of construction works (to combat illegal work)
- Tax payer next to third party liable for tax
- Tax payer and third party granted the same rights to appeal the tax assessment

## Obtaining evidence/information by third parties/ Other (government) authorities (G 2)

### ➤ “Client-attorney” privilege:

- Lawyer: absolute right to refuse to give evidence regarding client-attorney communication; no measures of investigation; evidence found not to be used
- Accountant: relative right to refuse to give evidence regarding client-attorney communication; measures of investigation if reasonable
- Illegally obtained information not to be used

### ➤ **Exchange of information:** § 93 German Fiscal Code:

- Parties to the case first
- Third parties upon request if information cannot be obtained from the parties to the case
- Automatic retrieve of bank account information under specific conditions



## **Obtaining evidence/information by third parties/ Other (government) authorities (G 3)**

- Taxpayer can appeal the administrative decision and its content against the third party
- Third party to join the legal action between the tax payer and the Inland Revenue; third party to deliver information in all conscience
- Tax payer and third party have the same procedural rights and obligations
  - Right to inspect the files
  - Right to appeal
  - Right to grant relevant information

## **Obtaining evidence/information by third parties/ Other (government) authorities (I 1)**

Although witness evidence is not allowed in tax proceedings, statements made by third parties in the tax assessment can be introduced in the proceeding before the Court and assume evidential value.

Tax Administration must obtain evidence investigating – for example – the bank accounts of the tax payer if authorized by President of the Tax Court or by Public Prosecutor.

However, the proof infringing procedural rules imposed by the law to guarantee the regularity of the administrative action (i.e. lack of authorization) if it does not violate fundamental human rights squeezing constitutional freedoms, is in principle allowed prevailing the fiscal interest.

## **Obtaining evidence/information by third parties/ Other (government) authorities (I 2)**

Confidential informations acquired by Tax Administrations – although deriving from theft or other illegal provenience – can be used in the Court as circumstantial evidence provided that are received through official channels by means of international cooperation.

Taxpayer has no right to be heard beforehand during the acquisition of the information (Italian Supreme Court decision 8605/2015)

In any case the required informations must be pertinent to the tax investigation (ECJ 682/15 Berlioz decision 16.5.2017)

## **Obtaining evidence/information by third parties/ Other (government) authorities (I 3)**

The exchange of informations rule is included in many Conventions against the double taxation inspired by the OECD Model continuously updated and is provided also in EU directives in order to improve fiscal collaboration among tax administrations.

The international standard provides for the information exchange on request, automatically, spontaneously where the information is foreseeably relevant for the Administration of the requesting party.

The new EU directive (2015) has established mandatory automatic exchange of information in advance regarding cross bordering ruling and pricing arrangements to prevent tax avoidance, aggressive tax planning and harmful tax competition.

## **Obtaining evidence/information by third parties/ Other (government) authorities (I 4)**

The entire system is managed by the tax Administrations and the Courts are non directly involved in such preliminary investigations.

The Judiciary intervenes in the subsequent litigation stage on tax assessments (on such information based) contested by the taxpayer.

## **Obtaining evidence/information by third parties/ Other (government) authorities (I 5)**

Many bilateral conventions based on the OECD model provide mutual agreement procedures (MAP) in order to resolve cases of double taxation arising from transfer prices rectifications .

A State must so arrange with another State to avoid double taxation.

Similarly, the European member States have adopted the European Convention of Arbitration (90/436 CEE) to solve the conflicts of double taxation in the particular area of transfer pricing.

(T.P. rule requires that the conditions established between associated enterprises located in different States must correspond to those practiced between independent enterprises in the free market)

If the agreement fails within two years, one Commission is established to give an opinion on double taxation.

## **Obtaining evidence/information by third parties/ Other (government) authorities (I 6)**

However, these procedures do not prevent the national litigation before tax Courts to prevent that tax claims become permanent and final.

It is also provided for a judiciary control on the preliminary stage of the procedure evaluating the subjective and objective requirements of admissibility which fall within the national law.

The Italian Supreme Court decision 12579/2015 has given a positive answer on the question whether of the judiciary is competent to rule on a denial by the competent authority to initiate a MAP.

The taxpayer – in fact – assumes here an active role submitting the application for the opening of the procedure to the competent Administration.

## **Obtaining evidence/information by third parties/ Other (government) authorities (I 7)**

Consequently, if the competent Authority refuses to proceed, the denial may be subject to the appeal before tax Courts as any other act expressing a tax claim.

On the contrary, the tax comparison between the competent tax Authorities does not fall under the national jurisdiction .

In this case the tax payer does not play an active role on the merits but limits to cooperate in providing the required informations.



## **Obtaining evidence/information by third parties/ Other (government) authorities (Discussion)**

- If information / evidence is sought after by a third party: is the taxpayer involved / informed and can (s)he appeal / block the involvement of the third parties? What is the role of the Courts? Are there differences between purely domestic and cross-border constellations?
- What about the use of haphazardly found evidence? What about the “tainted fruits of the poisonous tree”?
- How are third parties, having been involved in the assessment procedure, legally protected (right to be heard, right to appeal / to access to Courts)? Are there differences between purely domestic and cross-border constellations?



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It's over – thank you !