International

Report of the Proceedings of the Seventh Assembly of the International Association of Tax Judges Held in Madrid on 30 September and 1 October 2016

Bob Michel[*]

Vol. 71
Issue: Bulletin for International Taxation, 2017 (Volume 71), No. 7 (Next issue)
Published online: 19 June 2017

Citation: B. Michel, *Report of the Proceedings of the Seventh Assembly of the International Association of Tax Judges Held in Madrid on 30 September and 1 October 2016*, 71 Bull. Intl. Taxn. 7 (2017), Journals IBFD

This report summarizes the proceedings of the Seventh Assembly of the International Association of Tax Judges, which was held in Madrid on 30 September and 1 October 2016.

1. Introduction

On 31 September and 1 October 2016, the Seventh Assembly of the International Association of Tax Judges (IATJ) was held in Madrid, Spain. The proceedings took place at the premises of the *Tribunal Supremo*, the Supreme Court of Spain. The assembly was attended by 50 judges from countries of all continents. The assembly was opened by Chief Justice Eugene P. Rossiter (Canada), President of the IATJ and by Justice Luis María Diez Picazo Giménez, President of the administrative division of the Spanish Supreme Court. IATJ PPC Chairman Wim Wijnen presented the agenda of the assembly.

On the agenda were six substantive sessions. The proceedings were closed by a presentation on an "exotic" topic. The following topics were covered:

(1) Results of the OECD BEPS project: impact on tax litigation (*see* section 2.).
(2) Caseload control in tax matters (*see* section 3.).
(3) Tax procedures in Spain (*see* section 4.).
(4) Recent case law: general (*see* section 5.1.).
(5) Recent case law: VAT (*see* section 5.2.).
(6) Human rights and taxation (*see* section 6.).
(7) Exotic topic: tax in the movies (*see* section 7.).

2. Session 1 – Results of the OECD BEPS Project: Impact on Tax Litigation

2.1. Panel composition and agenda

The session was chaired by Justice Philippe Martin, Vice President of the *Conseil d'Etat* (Supreme Administrative Court, CE), of France. The panel was composed of Judge John Owen of the Tax Court of Canada; Justice Tony Pagone of the Federal Court of Australia and two guest speakers representing the OECD: Andrew Dawson (HMRC, United Kingdom and Chair of the OECD Working Party No. 1) and Jacques Sasseville (Head of the Tax Treaty Unit, OECD).

On the agenda were three topics, jointly presented by Dawson and Sasseville. The chairman and the panelists commented on the following specific issues with regard to the topics:

- legal issues dealing with the incorporation of BEPS actions into various legal instruments (*see* section 2.2.);
- interaction between tax litigation and mutual agreement procedures (MAPs), especially when arbitration is involved (*see* section 2.3.); and
- interaction between the proposed treaty GAAR, the domestic GAAR and the EU anti-abuse rules (including the GAAR of the EU Anti-Avoidance Directive of 2016).

2.2. Legal issues dealing with the incorporation of BEPS actions into various legal

instruments

Dawson commenced his presentation by referring to the history of the OECD's work in the field of direct taxation, which was mainly focused on the OECD Model and the Transfer Pricing Guidelines (TPG). Yet, in 2013, the OECD and the G20 recognized that double non-taxation caused by international base erosion and profit shifting (BEPS) had to be tackled. In the BEPS Action Plan of 2013, the OECD identified 15 specific action points. The final results of the work on the actions, which was presented by the OECD in the course of 2016, take the form of (depending on the action) new minimum standards, reinforced international standards, common approaches, best practices and a number of changes to the OECD Model to be reflected in countries' bilateral tax treaties.

Dawson referred to the example of Action 6, which sets out to tackle tax treaty abuse. He noted that a key outcome of the work on the issue was the agreement among states on a minimum level of protection against treaty shopping. This consensus will be reflected in tax treaties in multiple ways. Dawson mentioned the adoption of a clear statement in the preamble of tax treaties providing that these legal instruments were signed with the intention to avoid non-taxation or reduced taxation through tax evasion and avoidance. Other measures are the inclusion in treaties of a general treaty anti-abuse rule (GAAR) targeting arrangements with the principal purpose of obtaining treaty advantages or the adoption of a general limitation of benefits (LOB) rule and the adoption of a number of specific treaty anti-abuse rules. The OECD is also providing further clarification of the interaction between tax treaties and domestic anti-abuse rules.

Dawson noted that many of the BEPS outputs require bilateral treaties to be amended. To this extent, the OECD Model and the Commentary will be updated to introduce and explain new model provisions dealing with anti-abuse, hybrids, PE avoidance and dispute resolution. The update aims to trigger the amendment of existing treaties through protocols and the incorporation of the changes in newly signed treaties. Besides the updated OECD Model and Commentary, the development of a multilateral instrument (MLI) in the form of a multilateral agreement will result in a quick and large-scale amending (without replacing) of the current bilateral treaties of the participating states. This would be technically accomplished by a series of compatibility clauses, optional provisions and possible reservations.[1]

Next, Sasseville gave an overview of the main results of the works on transfer pricing under BEPS Actions 8-10. He noted that the outputs mainly take the form of additional and revised guidance in the TPG with regard to the meaning of the arm's length principle. The new findings are primarily relevant for domestic transfer pricing determination and adjustments because both article 9 of the OECD Model and the relevant articles in tax treaties are rather vague about the actual implementation of the arm's length principle.

With regard to the legal status of the TPG in domestic law, Justice Martin noted that the instrument is not binding but is in any case deemed very useful and heavily relied on for the application of both treaty and domestic transfer pricing law. Judge Owen and Justice Pagone concurred with respect to Canada and Australia, respectively, while emphasizing that transfer pricing controversies generally involve the interpretation of domestic law and not international law, thus limiting the impact of the TPG. Justice Martin noted that the CE had in the past relied on article 9 of the OECD Model and Commentary to interpret the notions of "associated enterprise" and "control" used in article 57 of the French Income Tax Code. Article 57 provides in very vague terms for the basis of the arm's length principle in French domestic law. Since the OECD Commentary on Article 9 refers to the TPG, Justice Martin believed one could argue that the TPG have some relevance also with regard to (French) domestic law.

2.3. Interaction between tax litigation and MAPs, especially when arbitration is involved

Dawson observed that article 25 of the OECD Model currently incorporates the MAP, which includes binding arbitration in article 25(5). With regard to the overlap of the MAP and court litigation, the OECD Commentary provides that the MAP is available to taxpayers without depriving them of ordinary legal remedies.[2] Dawson noted that statistics shows that the number of MAP cases has increased dramatically since 2006. The number of MAP cases per country are, however, very divergent: in 2014, 13 OECD countries were involved in 88% of all MAP cases, whereas in the same year non-OECD countries were involved in less than 9% of all MAPs. BEPS Action 14 was aimed to address the obstacles to MAPs and the lack of binding arbitration. Dawson noted that the output of Action 14 would be reflected in the MLI, which would add MAP arbitration to existing treaties.

With regard to the interaction of MAPs and litigation (i.e. suspension of MAPs pending litigation results or vice versa) Justice Pagone noted that in Australia suspension of litigation pending a MAP process is possible but parties can also agree not to suspend. It is, however, not very clear whether the litigation process would be per se terminated if a MAP agreement is reached. Justice Pagone believes that, in certain cases, the outcome of a MAP cannot be implemented in an appropriate court order, so the court procedure must be continued. Judge

Owen added that suspension is also possible in Canada, but the decision to suspend is part of the discretion of the courts. He added that, if a MAP is successful, litigation is usually terminated in Canada depending on whether the taxpayer found the relief he was seeking. Justice Martin noted that, in France, taxpayers are generally expected to withdraw their court application if they agree with the outcome of the MAP. However, in certain cases, the MAP only solves part of the issue (like the allocation of taxing rights), and the court proceedings must continue to establish the exact amount of taxes due. Also, if the taxpayer does not withdraw his application, the court is obliged to pronounce itself on the issue, regardless of the MAP.

2.4. Interaction between the proposed treaty GAAR, the domestic GAAR and the EU anti-abuse rules (including the GAAR of the EU July 2016 Anti-Avoidance Directive)

Next, Sasseville raised some questions with regard to the interaction between the proposed tax treaty GAAR, domestic law GAARs and the EU anti-abuse rules. Besides the various domestic anti-abuse provisions, there is the new tax treaty GAAR which contains a principle purpose test and, as such, targets arrangements or transactions the principal purpose of which is the obtaining of a treaty benefit. Thirdly, with regard to EU Member States, there are the EU concepts of abuse which have to be taken into account by the national courts. The Court of Justice of the European Union (ECJ) has held in *Cadbury Schweppes* [3] that national anti-abuse rules are EU-compatible if they target "wholly artificial arrangements which do not reflect economic reality". The amended Parent Subsidiary Directive (EU/2015/121) provides that benefits should not be granted to a (series of) arrangement(s) the main purpose of which is a tax advantage that defeats the object and purpose of the Directive and thus is genuine since it is not put into place for valid commercial reasons that reflect economic reality. A notion of abuse similar to Directive EU/2025/121 has also been included in the recent EU Anti-Tax Avoidance Directive (EU/2016/1164).

With regard to the potential dissonance between the different concepts of abuse, Justice Martin noted that subtle differences like "principle purpose", "main purpose or main purposes" or "wholly artificial" will raise many questions in the courts. He also noted that the redaction of national provisions implementing the anti-abuse provisions of the EU Directives has not been without problems in France.

Justice Martin also emphasized the fact that the material scope and impact of the different anti-abuse provisions differs tremendously: the treaty GAAR only affects tax treaty benefits, and the EU Parent Subsidiary Directive anti-abuse rule only affects the benefits of the Directive. The scope of the GAAR in the EU Tax Avoidance Directive has a much larger impact: it applies to all corporate tax liabilities. Justice Martin concluded that courts will thus be faced with simultaneously applying slightly different notions of abuse and with different sanctions to the same set of facts. He wondered whether a more comprehensive approach to anti-abuse would be foreseeable in the future.

3. Session 2 – Caseload Control in Tax Matters

3.1. Panel composition and agenda

The session was chaired by Advocat-General Peter Wattel of the Supreme Court of the Netherlands. The panel was composed of Justice Vineet Kothari of the Rajasthan High Court in India, Judge Anette Kugelmueller-Pugh of the *Bundesfinanzhof* in Germany, Chief Justice Rossiter of the Tax Court of Canada and Justice Salome Zimmerman of the Federal Administrative Court of Switzerland. The session was composed of a presentation by the panelists with regard to caseload control in the courts of India, Germany, Canada and Switzerland.

3.2. India

Justice Kothari started by describing India as the country with the largest pool of pending cases, including tax cases, in the world. In 2013-2014, the Commissioner of Income Tax (CIT) heard 214,174 appeals, the Income Tax Appellate Tribunal (ITAT) heard 31,914 cases, the High Court heard 21,379 cases, and 5865 cases ended up with the Supreme Court. The average time for disposal by the CIT was between three to four years. The tax revenue at stake in those cases totaled approximately USD 4.27 billion. The number of cases was predicted to increase to 300,000 for 2016, with an estimated value exceeding USD 8 billion.

Justice Kothari noted that the average number of cases filed at the ITAT per year (approximately 90,000) is rather low. Yet, with 100 judges, the ITAT functions as a rather effective appellate forum. The large number of cases in proportion to the total population is explained by the fact that only 5% of the 1.25 billion Indian citizens are taxpayers.

Given the sheer quantity of pending tax cases, India is always grappling to introduce measures to control and manage the quantum of litigation and to achieve a timely disposal of cases through the hierarchy of courts. The

most important measures adopted are the following:

(1) Minimum tax revenue in dispute allowing appeal by the tax authorities: Certain monetary thresholds are in place to limit the load of cases. The Indian tax authorities are authorized to file an appeal only if the tax revenue exceeds:
   - about USD 15,000 before the ITAT;
   - about USD 30,000 before the High Court; and
   - about USD 340,000 before the Supreme Court.

(2) Fees and pre-deposit requirements for access to the courts: Although the fee for filing an appeal is nominal and rather low (ranging from about USD 5 to USD 100), the pre-deposit required under the income tax law and excise and customs laws are in the range of 5% to 30% of the demand raised in court and, as such, high enough to screen appeals to the higher courts. Based on administrative guidelines, the tax authorities have the discretionary power to allow a stay of the pre-deposit in certain circumstances and based on administrative guidelines. Furthermore, representation fees charged by chartered accountants and lawyers are generally quite steep, making it difficult and less relevant for smaller cases to be challenged in court. A pre-deposit of between 7.5% and 10% of the demand raised in court is required by the tax authorities to file an appeal.

(3) Other legislative reforms and executive instructions: Certain legislative reforms introduced based on recommendations of the Tax Administration Reform Commission (TARC) have also impacted the caseload of the judiciary. New commercial divisions have been formed in the High Courts. A new voluntary disclosure scheme is also seen as instrumental in reducing tax litigation.

Alternative dispute resolution forums have been made available, such as arbitration, conciliation and mediation, and settlement by means of a settlement commission. With regard to income tax treaties, the MAP has gained importance as a way to settle international tax disputes. Also relevant in reducing international tax litigation is the taxpayer's access to the Authority for Advance Rulings (AAR).

Justice Kothari formulated the following recommendations to further restrict the tax caseload of courts in the future:

- simplification and stability of tax laws;
- use of technology in tax audits and in the dissemination of information (e.g. information access on tax authorities' websites, ruling and case law databases);
- adoption of global best practices;
- increased pre-assessment consultations with the taxpayer; and
- the creation of a database in the public domain of transfer pricing rulings.

3.3. Germany

Judge Kugelmueller-Pugh presented her findings regarding caseload control measures at the German *Bundesfinanzhof* (BFH). The BFH serves as the final judiciary instance in cases dealing with tax and customs matters and is composed of 11 specialized "senates", hosting a total of 57 full-time judges. A grand total of 4,578 cases were pending at the BFH in 2015, and 2,721 final decisions were rendered in the same year. Judge Kugelmueller-Pugh noted that the number of new case entries had been decreasing in the last years: from 3,430 new cases in 2009 to 2,632 in 2015.

The following measures were identified as impacting the BFH's caseload:

(1) Court fees: In order for an appeal to be heard by the BFH, the appellant must pay the court fees. The amount of the fees is proportional to the amount of tax in dispute: the minimum amount in dispute is EUR 1,500 and the corresponding fee is EUR 355. For disputes of EUR 500,000 or above, the fee is set at EUR 17,680. The maximum amount of tax disputed at the BFH is set at EUR 3 million. Once the fees are paid and the appeal is filed, there is no possibility of withdrawal with reimbursement of the fees. The costs of the proceedings, including the fees, are borne by the losing party.

(2) Compulsory legal representation: Legal representation in court by a lawyer or a chartered accountant is compulsory at the BFH, both for submitting a claim and in the hearings. Legal representation is remunerated by a basic (minimum) fee according to the amount of tax in dispute. For disputes of EUR 1,500, the fee is set at about EUR 500. For disputes of EUR 500,000 or above, the fee is set at about EUR 15,000. In practice, parties and their legal representation often agree on higher fees.

(3) Simplified procedures of petty/inadmissible/manifestly (un)founded cases: Cases in which the appellant fails to arrange for legal representation can be rejected as inadmissible. In the case of legal representation, the normal procedure is adopted even for manifestly (un)founded cases. There is, however, a possibility for the court to suggest that parties end the proceedings before the oral hearings for

the purpose of reducing court fees.

A written decision consisting of only a tenor and a short summary of arguments can be adopted to fend off frivolous court cases by civil movements like the *Reichsbürger*, who deny the legitimacy of the modern German state and thus refuse to pay taxes.

(4) Funnel mechanism and leave to appeal: On appeal, rulings by the BFH are on the correct application of the law by the *Finanzgericht*, the Court of First Instance. The BFH only finds on the law and is bound by the facts as determined by the *Finanzgericht*. New facts cannot be heard by the BFH on appeal. The BFH rules only on the assessment of the case by the lower court, for example with regard to the interpretation of declarations of intent, the interpretation of administrative acts and possible infringement of the principles of fairness and logic of these acts, the consideration of evidence or the estimated tax base.

Direct appeal to the BFH is only possible in cases where permission is granted by the lower court. If the lower court does not grant leave to appeal against its judgement, an appeal against the denial of leave to appeal may be lodged, and leave to appeal can be granted by the BFH if the legal issue at stake is of fundamental legal significance or if a BFH decision is necessary to develop the law or to ensure a uniform administration of justice or if the lower court decision contains a substantial procedural error. It should be observed that 75% of the appeals to allow appeal to the BFH are dismissed.

3.4. Canada

Chief Justice Rossiter presented his experiences with regard to caseload control at the Tax Court of Canada (TCC). He described the TCC as being of an itinerant nature, sitting at various cities across the 10 provinces and 3 territories of Canada depending on the case and circumstances and being composed of 22 full-time puisne judges and 4 supernumerary judges.

With regard to the inventory of cases, Chief Justice Rossiter observed that the Canadian tax authorities issue about 50 million tax assessments per year of which about 100,000 assessments are objected to by the taxpayers. About 8% of the objections are eventually brought to the TCC. A large majority of these cases are either resolved by the Department of Justice or withdrawn by the taxpayer, and about 2,600 cases proceed to trial. The current inventory of cases at the TCC is about 10,000 cases, with the yearly turnover rate by the Court (in and out annually) being approximately 5,000 cases. About 40% of these cases are filed in the "informal procedure" (i.e. the disputed tax is less then CAD 25,000); 60% are filed in the "general procedure" (i.e. the disputed tax is more than CAD 25,000).

For cases filed in the informal procedure, statutory time limits oblige the TCC to give its judgement within 90 days of the date it heard the appeal. Administrative guidance provides that the term for general procedure cases is six months. For the purpose of managing the caseload of the TCC, Chief Justice Rossiter identified a number of practical tools available to the Court to manage its large inventory of cases.

First, the employability of supernumerary judges and deputy judges along with puisne judges allows for a flexible composition of the courts. Sittings are rostered in the most efficient way and by relying on individual judges. Assignments are increased and decreased depending on the inventory. The scheduling of sittings sometimes involves double or triple bookings and split sittings to avoid unused capacity.

Second, certain managerial measures (e.g. the adoption of strict litigation schedules, orders and decision time lines, the organization of pre-trial or settlement conferences between parties, and the organization of case status hearings for judges to report on the status of individual cases) provide for the timely advancement of individual cases. Communication with the Department of Justice and the tax authorities with regard to their future policies and focus on certain groups of taxpayers or issues allows for the proper anticipation and management of future spikes in cases in certain areas.

Finally, certain formal procedural elements were also identified as affecting the caseload of the TCC, such as the filing fees (from CAD 250 up to CAD 550 for the general procedure; no fees for the informal procedure) and the requirements of legal representation (self-representation is allowed for individual taxpayers but not for corporations or estates, unless allowed by the Court.)

Taxpayers dissatisfied with a decision of the TCC may appeal to the Federal Court of Appeal within 30 days after issuance of the decision of the TCC.

3.5. Switzerland

Justice Zimmermann presented her findings with regard to the Federal Administrative Court (FAC) of Switzerland. Tax matters are dealt with by the Second Chamber of the First Section of the Court. The FAC serves as a first instance court in tax and customs matters and in cases of administrative assistance in tax matters. It serves as a court of last instance with regard to the issue of deferral and remittal of taxes and customs

duties.

The FAC is composed of 7 judges and 11 court clerks. Court proceedings are generally held in writing, and oral hearings are very exceptional. In the course of 2016, 265 cases were pending, and in the first six months of 2016, the FAC rendered 221 decisions. Justice Zimmermann noted that 267 decisions were rendered in 2015, indicating a tendency of increasing numbers of case entries at the FAC.

The FAC hears objections against all acts by the Swiss tax authorities with regard to federal taxes and provides a complete legal review of the case.

The following measures affecting the caseload of the FAC were identified:

(1) Court fees: Access to the FAC requires taxpayers to pay the court fee, which varies between CHF 200 and CHF 50,000 depending on the amount of tax in dispute. A fee of CHF 300 is due upon withdrawal of the claim. The costs of the proceedings are borne by the unsuccessful party.

(2) Legal representation costs: Legal representation is not mandatory, and the representatives do not have to be lawyers. The representation fee is calculated based on the hours worked and is based on a rule of thumb of 1.5 times the court fee and thus varies, depending on the amount of tax in dispute, between CHF 300 and CHF 75,000.

(3) Simplified procedures: Justice Zimmermann noted that the procedure is the same whether or not the party is represented in court. The procedure does not vary depending on the amount of tax in dispute, and there is no specific procedure for petty cases. Cases before the FAC are generally heard by a bench of three judges, except for cases in which the objection is apparently without ground or for manifestly unfounded cases. In such cases, the case is heard by a single judge.

(4) Minimum financial threshold: Access to the FAC is not restricted by minimum financial interest thresholds.

(5) Funnel mechanisms: The FAC is not bound by facts determined by the tax authorities (i.e. the determination of the relevant facts, the application of the relevant law and the application of its discretionary powers). The parties may submit and can be heard regarding new facts.

The Federal Supreme Court (FSC), which serves as the appellate court regarding decisions of the FAC, is bound by the facts as determined by the latter court, except for manifestly incorrect facts or if there is a violation of federal law, international law, cantonal constitutional law on voting rights or interactional law. At the level of the FSC, the parties cannot submit new facts.

Leave to appeal to the FSC is, in principle, not limited in tax cases, except in cases of administrative assistance in tax matters. In such cases, leave to appeal is only admitted for a limited number of reasons (e.g. if the case presents a legal question with fundamental significance or if the case is especially significant because it contains substantial procedural errors).

With regard to the increased caseload faced by the FAC in the field of mutual assistance in tax matters (including cases involving requests for the exchange of information by third states) Justice Zimmermann noted that the FAC has adopted multiple measures to tackle the explosion of pending cases. First, upon entry a new case is assigned to a clerk (and not to a judge) for a first scrutiny with regard to the formal requirements or the relevant legal questions. If the legal questions are significant, the case is destined as a "leading case" and decided by a bench of judges. Parties of cases with identical legal questions are informed of the outcome of the leading case and have the option to withdraw. Other cases are assigned to a principal judge responsible for the case sitting with two other judges.

Finally, Justice Zimmermann referred to the EQUITAF project, which is set up to come to an equitable attribution of human resources to the different courts of the FAC. An attempt to gather data by means of digitally registering all work done by the courts was not successful for various reasons. A second and on-going initiative is based on analysis of workloads per case (e.g. minimum amount of work, standard amount of work, high amount of work, outlier) and aims to formulate benchmarks to attribute resources.

4. Session 3 – Tax Procedures in Spain

4.1. Panel composition and agenda

The session was chaired by Justice Manuel Vicente Garzón Herrero of the *Tribunal Supremo* (Spain). The panel was composed of María Luisa López-Yuste Padial of the *Tribunal Supremo* (Spain) and Raúl C. Cancio Fernández of the *Tribunal Supremo* (Spain).

On the agenda were three presentations: (i) tax audits, administrative appeals and litigation in Spain in general; (ii) tax litigation in the administrative phase; and (iii) tax litigation before the *Tribunal Supremo*, the Spanish

Supreme Court.

4.2. Tax audits, administrative appeals and court litigation in Spain

López-Yuste Padial started her presentation by referring to the three levels of government levying tax in Spain, i.e. the national, regional and local. At the national level, the Spanish tax authorities are responsible for the administration and collection of national taxes, such as the personal income tax, corporate income tax, income tax for non-residents, VAT and other special taxes. For the regional taxes levied in the 17 regions of Spain (e.g. transfer tax, inheritance tax and wealth tax), tax audits are carried out by specialized regional auditors. Specialized auditors also administer municipal taxes. These are levied by the municipalities on an annual basis on real estate or on business activities or on occasion of a single taxable event, such as the erection of new construction works.

Certain local territories like País Vasco and Navarra enjoy specific taxing powers with regard to the levying and administering of certain taxes. The Canary Islands, as well as the cities of Ceuta and Melilla, enjoy certain tax benefits to compensate for the disadvantages of their remote location, away from the Spanish mainland.

With regard to administering Spanish taxes, López-Yuste Padial noted that there are essentially two systems applied. Certain taxes are actively assessed by the tax authorities. Such is the case of the tax on real estate, which is levied annually. Most taxes, however, are levied based on a system of self-assessment: taxpayers must file a tax return to determine the taxable base. Voluntary payment of the tax due is common and prevents the application of penalties and surcharges.

Taxpayers' obligations are subject to control by the tax authorities. The most important procedure is the general audit procedure. The aim of the audit is to verify the facts declared by the taxpayer in his tax return and to reveal any undeclared or incorrectly declared taxable items.

A tax audit usually covers every kind of tax due by the taxpayer and begins either by a visit to the taxpayer's premises ex officio or by prior notification. During the audit, the tax authorities are entitled to analyse all relevant documents and to inspect all relevant assets. Usually, the tax audit involves several meetings between the tax auditor and the taxpayer in order to resolve any issue of the audit. Each meeting ends up with the signing of a public document called a *diligencia* in which the proceedings of the audit are notarized.

If the tax auditor has gathered sufficient information and the taxpayer has had the possibility to submit additional information, the auditor will submit a proposal of assessment or *acta*. Different types of *acta* exist: an *acta* with agreement refers to an assertion accepted by the taxpayer and the tax authorities about certain facts, estimations and appraisals or legal concepts to be applied; an *acta* with conformity in which the taxpayer agrees with the assessment; and an *acta* with disagreement according to which the taxpayer does not agree with the facts or the assessment proposed by the tax authorities.

After the proposal of assessment, the supplementary report and the taxpayer's allegations have been examined, the tax authorities issue a final assessment which will create the taxpayer's liability to pay the tax or, in certain cases, an acknowledgement by the tax authorities of a tax credit due. In general, the tax audit procedure must be concluded within 18 months from the initial notification of the taxpayer. The period is increased to 27 months for consolidated company returns or returns involving high-turnover companies.

Besides the active audit procedure, other verification procedures exist, such as the data verification procedure or the limited verification, according to which data provided by the taxpayer in his declaration is checked against data available to the tax authorities. If new facts are discovered in the course of the verification procedures which might constitute an administrative contravention, a separate infringement procedure can be initiated. If carried out separately from the audit, it must be initiated within three months after the end of the verification procedure and be concluded within six months.

The collection of the tax due by the taxpayer can happen either by voluntary payment or by coercion. Voluntary payments should be made within the period in which taxpayers must file their tax returns. After this period, coercive collection occurs. Execution of the tax debt takes place by means of seizure of the taxpayer's assets and rights and subsequent public auctioning by direct award or tender. Accrued interest for late payment and the costs incurred by the tax authorities for the collection procedure are added to the tax debt.

Taxpayers who disagree with the decisions by the tax authorities may lodge an appeal with either the same authority or with the administrative courts. Court appeals should be filed within one month of notification of the tax assessment by the tax authorities.

Two types of administrative courts exist: The *Tribunales Económico-Administrativos Regionales y Locales*, which have jurisdiction over tax assessments issued by the regional and local bodies of the tax authorities, and the

Tribunal Económico-Administrativo Central, which deals with assessments by the central bodies of the tax authorities or with decisions issued by the *Tribunales Económico-Administrativos Regionales y Locales*, provided the amount or the taxable base exceeds certain thresholds.

If the administrative appeal is rejected, the taxpayer can bring his case to a court of the judiciary. Generally speaking, the *Audiencia Nacional* (National High Court) receives appeals against decisions by the *Tribunal Económico-Administrativo Central*. The *Tribunal Superior de Justicia* (High Court of Justice) receives appeals against decisions by the *Tribunal Económico-Administrativo Regional*. Adverse rulings by both instances may be challenged before the *Tribunal Supremo* (Supreme Court).

4.3. Spanish tax litigation in numbers

Cancio Fernández presented the outcome of a statistical analysis of the tax cases heard by the Spanish judiciary in 2015. He revealed that individual taxpayers brought significantly more cases to court with regard to the outcome of data verification procedure and limited verification than legal entities. Legal entities were more prone to challenging *acta* by the tax authorities during the physical audit procedure. This corresponds with the assumption that the tax authorities dedicate more means of physical auditing to legal entities than to individual taxpayers, who are mostly taxed by self-assessment and post-hoc data verification. Another consequence of that is the fact that 75% of the second instance appeals are initiated by legal entities.

Other main findings showed that, in the case of individual taxpayers, in 14% of the court cases the disputed tax was less than EUR 23,000, and in 13% of the cases the disputed tax was more than EUR 685,000. With regard to legal entities, 32% of the cases dealt with disputed tax surpassing the latter amount. Legal action by taxpayers in the first instance was upheld in 49.8% of the cases, and 37.5% of the appeals were upheld by the appellate courts.

The research also revealed a significant trend towards a reduced average length of the proceedings in 2015, compared to the period of 2003-2014.

4.4. Tax litigation before the *Tribunal Supremo* (Supreme Court)

Justice Garzón Herrero provided some insights with regard to the organization and operation of the Spanish Supreme Court. The Supreme Court comprises five chambers. Tax cases are heard by the second of seven specialized divisions of the Supreme Court's Third Chamber (the Contentious-Administrative Chamber).

The second division consists of eleven justices and hears cases regarding taxes and other revenue collection by the public authorities or autonomous bodies thereof. The admissibility is restricted to cassation of lower decisions dealing with questions of illegality, appeals against final decision of the contentious-administrative courts and judges, and cases filed for judicial errors.

Admissibility of cassation appeals is decided upon by a dedicated division of the Third Chamber comprising the president and at least one justice of each of the divisions. Cases of cassation appeal are declared admissible if they meet the procedural requirements and in the case of an objective interest for judicial review with regard to the application and interpretation of the law. Second instance review appeals are also admissible in the case of submissions of additional evidence and facts.

Relations between the Supreme Court and the legislative or executive powers are channeled through the Council of the Judiciary. The Supreme Court is assisted by the Technical Cabinet for Information and Documentation, which provides legal and technical assistance to the court.

Decisions of the Supreme Court are compiled and published by the *Centro de Documentación Judicial* (CENDOJ).

5. Session 4 – Recent Case Law

5.1. Income tax cases

5.1.1. Panel composition and agenda

The session was chaired by Judge Randall Bocock (Canada). The panel was composed of Judge Emilie Bokdam-Tognetti (France), Justice Jennifer Davies (Australia), Justice Thomas Stadelmann (Switzerland) and Judge Stefan Wilk (Germany).

The panelists discussed a series of national income tax cases dealing with diverse aspects of international taxation, such as the concept of "resident for tax treaty purposes" (France, *see* section 5.1.2.), the relationship

between permanent establishment (PE) and effectively connected royalties (Australia, *see* section 5.1.3.), information requests based on illegally obtained information and group requests (Switzerland, *see* section 5.1.4.) and the legality of tax treaty overrides (Germany, *see* section 5.1.5.).

5.1.2. France

Judge Emilie Bokdam-Tognetti presented three recent cases of the CE regarding the interpretation of the residence article in French tax treaties. In Santander[4] and LHV,[5] a French company had paid dividends to, respectively, a German and a Spanish pension fund. The court had to assess whether these entities could enjoy the reduced withholding tax on dividends provided in the French tax treaties concluded by France with Germany and Spain. In *Easyvista*,[6] a French company made payments to a Lebanese company that had provided IT services. The Lebanese company was not subject to the standard corporate income tax in Lebanon but to a reduced lump-sum tax under a special regime applicable to offshore companies.

In all three cases, the issue was essentially the same: can a tax-exempt entity be considered a tax resident for tax treaty purposes and may these entities therefore be eligible for tax treaty benefits? In all three cases, the relevant tax treaty contained a provision similar to article 4(1) of the OECD Model, which states that:

> for the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature....

Emilie Bokdam-Tognetti noted that France had not ratified the Vienna Convention on the Law of Treaties (VCLT),[7] but its principles of interpretation are usually respected by the court. In the cases at hand, by focusing mainly on the literal meaning of the terms of the provisions in their context, priority was given by the court to the literal interpretation method. In recent case law, the court has been relying more and more frequently on subsidiary interpretation tools, such as the object and purpose of a provision, and the intention of the signatory parties.

In the cases at hand, the CE observed that terms of the relevant treaty provision defined the scope of the treaty, the object of which is the avoidance of double taxation. The court concluded that persons that are not liable to tax by virtue of their status or their activities are not to be considered residents for treaty purposes. In all cases, this meant that taxpayers were denied treaty benefits; however, in *Easyvista*, the court referred the case back to the Court of Appeal to determine whether the Lebanese offshore tax regime was identical or similar to taxes to which the tax treaty was applicable.

Emilie Bokdam-Tognetti observed that the outcome of the cases had stirred some consternation in France and raised a series of questions, for example with regard to the court's restricted view on the object and purpose of tax treaties (i.e. only avoiding double taxation) and its understanding of the words "liable to tax"/"assujeti á l'impôt" as being connected to the taxpayer's status or activities. One could not but wonder whether the Court's new approach might also impact the tax treaty status of loss-making companies or temporarily tax-exempt companies.

5.1.3. Australia

Justice Jennifer Davis presented her findings regarding the *Tech Mahindra* [8] case. Tech Mahindra was an Indian company with offices in Sydney and Melbourne, Australia. The offices constituted a PE for the purpose of the Australia-Indian Income Tax Treaty[9] ("the Treaty"). The company provided IT services to clients in Australia. Some of these services were provided by employees located in Australia ("the Australian services"), the income of which was attributable to the PE by application of article 7 of the Treaty. Other services were provided by employees located in India ("the Indian services"). This issue was whether Australia could also tax the profits derived from the Indian services.

Jennifer Davis observed that the outcome of the case essentially depended on the interaction of article 7 (Business profits) and article 12 (Royalties) of the Treaty. It was not disputed by the parties that the profits from the Australian services fell within the scope of article 7 and that the payments for the Indian services fell within the scope of article 12. The issue turned on the interpretation of the meaning of "effectively connected" used in article 12(4) of the Treaty, which the taxpayer claimed to be applicable. The royalties were paid to a taxpayer with a PE in the source state, and the rights in respect of which the royalties were paid were effectively connected to that PE; hence, the payments fell within the scope of article 7. However, since the payments were not "attributable" to the PE for the purpose of article 7(1) of the Treaty, the taxpayer argued that Australia could not tax the income. The tax authorities argued that the royalties were not "effectively connected" to the PE, and the terms "effectively connected" in article 12 and "attributable" in article 7 were coextensive: article 12(4) gives priority to article 7 only if the criteria of article 7(1) are met.

The Federal Court of Australia (FCA) did not uphold the taxpayer's interpretation. The FCA ruled that the royalties were not effectively connected to the PE; therefore, article 12(4) did not apply. The income was taxable at the capped rate on royalties pursuant to article 12(2) of the Treaty. The taxpayer appealed to the Full Federal Court (FFCA) and reiterated his argument that article 12(4) of the Treaty meant that article 7 had priority over article 12, and thus that Australia had no right to tax the payments since they were not attributable to the PE.

In anticipation of the decision by the FFCA being made available,[10] Jennifer Davis noted that in *Iveco Spa*,[11] a recent decision by the Indian Income Tax Appellate Tribunal (ITAT) in relation to the India-Italy Income Tax Treaty (1993),[12] held that the royalty income of the Italian taxpayer was not effectively connected to the PE in the absence of any positive and substantive material that services had been rendered to the employees of the PE of the taxpayer. The ITAT decision was, in this sense, more or less consistent with the decision of the FCA.

Justice Martin agreed with the arguments of the Australian tax authorities that there is a clear relationship between articles 7 and 12, and that it makes sense for the latter article to also comprise the concepts employed in the former article. To apply different tests in the two articles ("attributed profits" v. "attributed property") seems unreasonable, even if the different subject matter of each article has prompted the use of different terms. A tax treaty needs to be construed as a whole; hence, "profits attributed" and "effectively connected royalties" need to be interpreted together.

5.1.4. Switzerland

Justice Thomas Stadelmann talked about two cases pending at the Swiss Federal Supreme Court with regard to the exchange of information in tax matters. The first case, docketed under No. 2C_276/2016 and with a public deliberation held on 16 September 2016,[13] dealt with the question of whether a group request sent by the Dutch tax authorities for the purpose of obtaining tax information from the Swiss bank UBS was compatible with Swiss domestic law and with the Netherlands-Switzerland Income Tax Treaty (2010)[14] ("the Treaty"). The Federal Administrative Court (FAC) had held that the request was contrary to article 26 of the Treaty, which required information requests to identify by name each of the affected taxpayers. The article of the Treaty was modelled after article 26 of the OECD Model before its update of 2012, which introduced the facility of group requests. The update was a revision rather than a clarification and could thus not be relied on to interpret the Treaty; hence, the group request was an illegal fishing operation.

The Federal Supreme Court overturned the decision of the lower court, ruling that the names of taxpayers are not necessary if other information provided is sufficient to identify the taxpayers. This interpretation was also said to be in line with the Mutual Agreement signed on the matter between the parties and the domestic Tax Administrative Assistance Decree of 20 August 2014, which provided that identification in requests can be achieved through other data than the name of a taxpayer.

A second case, docketed under No. 2C_893/2015 and currently without a final decision, concerns an information request by the French tax authorities that was based on information the tax authorities had received from the French department of justice after its inquiry of a Swiss bank based on stolen bank data. These facts raise the following issue: in the treaty, Switzerland reserves the right to supply illegally obtained information. It is unclear whether this reservation can be upheld in the case at hand since the information was said to be obtained legally according to French law. This also raises a question regarding the application of the good faith principle amongst states: should the Swiss courts accept the qualification of the information as legal by the French tax authorities, or should they base its qualification on their own assessment of either French law or Swiss law?

5.1.5. Germany

Judge Stefan Wilk reported on a decision by the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) of 15 December 2015 (2 BvL 1/12).[15] The case concerned a German resident taxpayer who earned part of his income from employment in Turkey. He requested for the application of the tax exemption of the Turkish income as provided by the Germany-Turkey Income Tax Treaty (2011)[16] ("the Treaty"). The Treaty exempted income earned in Turkey from German taxation without any requirement for specific proof. However, the tax authorities refused the exemption since the taxpayer had not provided the evidence for the exemption to apply required by Section 50d(8) of the German Income Tax Act, and thus it submitted the income to tax in Germany. Section 50d(8) provided that, notwithstanding provisions to the contrary in an applicable tax treaty, the employment income of a German tax resident must be included in the taxable base unless the taxpayer is able to demonstrate that the tax assessed on the employment income by the other contracting state has been paid or that the other state waived its taxation rights. The question is whether such a tax treaty override ("notwithstanding provisions to the contrary in an applicable tax treaty") is permitted under the German Constitution.

The Federal Constitutional Court held that the domestic law provision did not infringe the Constitution. The Court observed that, in the national context, international agreements have the same rank as federal legislation, unless they fall within the scope of a more specific constitutional provision that expressly accords treaties of that kind a superior rank, which is not the case for tax treaties. Based on the principle of democracy ("*lex posterior derogat legi priori*"), the legislator was thus authorized to issue acts revoking prior legal acts, including an international agreement, which needs to be ratified by the parliament before acquiring legal force in Germany. Neither the constitutional commitment to international law nor the rule of law entails an absolute duty to obey all rules of international law.

Judge Wilk concluded that, after decades of discussion, the court's decision has upheld the German practice of unilateral treaty overrides in domestic tax law. He noted that this decision strengthens the political power and capacity of the legislature to react immediately to unintended developments in international tax matters. Germany does not forsake its legal sovereignty in tax matters when signing tax treaties.

5.2. VAT cases

5.2.1. Panel composition and agenda

The session was chaired by Judge Lars Dobratz (Germany). The panel was composed of Judge Csilla Andrea Heinemann (Hungary) and Mikko Pikkujämsä (Finland).

The panelists discussed two cases decided by the ECJ, namely *WebMindLicences* (C-419/14) (*see* section 5.2.2.) and *Hedqvist* (C-264/14) (*see* section 5.2.3.).

5.2.2. *WebMindLicences* (C-419/14)[17]

Judge Csilla Andrea Heinemann presented the *WebMindLicences* case. WebMindLicences (WML) was a Hungarian software company. It licensed know-how and website operation rights to a Portuguese company called Lalib for the purpose of running an adult content website, accessible to clients all across the world. WML remained responsible for maintenance and further development of the website.

Output VAT on payments received by clients of the website was accounted for in Madeira, where Lalib was established. Since the place of supply of digital services was at that time the place of the supplier, Lalib was charging the Portuguese VAT rate of 13%.

Following a tax investigation of WML in Hungary, the Hungarian tax authorities asserted that the transfer of the intellectual property to Lalib was not a genuine economic transaction and that the relevant supplies of services to Lalib's clients were actually made by WML in Hungary and, thus, the Hungarian VAT rate of 27% was due on the sales.

WML objected to the decision of the tax authorities and brought the case to court. The Court of First Instance referred 17 questions to the ECJ that related to: (1) whether the transaction was fictitious and had no real economic substance; and (2) whether there was an abuse of law.

Advocate General (AG) Melchior H.M.J.F.C. Wathelet observed that, based on the facts, it seemed that the licence agreement had not been put in place solely for the purpose of obtaining a tax advantage. Since there were commercial reasons for appointing Lalib, the transactions could not be considered abusive.

The ECJ, following the same line, held that the arrangement would be abusive only if it were "wholly artificial" and would conceal the fact that the services were not actually supplied in Portugal but in Hungary. Relevant factors to determine the genuine nature of the activities were premises, staff and equipment used in Madeira. The ECJ also considered that Lalib carried out the activities in its own name, on its own behalf and at its own risk. The place of creation of the know-how, i.e. Hungary, was not deemed relevant.

Judge Heinemann observed that this was the second VAT case, after *Paul Newey* (C-653/11), in which the ECJ adopted a "substance over form" approach. The ECJ confirmed that carrying on business in a Member State with a lower VAT rate is not necessarily abusive on its own. Following the ECJ's preliminary ruling, the Hungarian Court annulled the decisions of the tax authorities on the ground that the latter did not make any inquiry to establish whether there was an actual place of business in Portugal.

5.2.3. *Hedqvist* (C-264/14)

In the *Hedqvist* [18] case, presented by Judge Mikko Pikkujämsä, the taxpayer wished to provide currency exchange services involving the virtual Bitcoin currency. The transactions would be carried out electronically

through the taxpayer's website. The taxpayer would purchase Bitcoin units directly from private parties or from international exchange providers and would resell the units or store them for future sale.

The Swedish Supreme Administrative Court requested the ECJ to determine whether the exchange of virtual currency for traditional currency, which was effected for consideration added by the supplier when the exchange rate was determined, constituted the supply of a service and, if so, whether article 135(1) of the VAT Directive had to be interpreted as exempting the aforementioned transaction.

The ECJ held that the transaction was a supply of service for consideration for the purpose of the VAT Directive. With regard to the second issue, article 135(1)(e) of the VAT Directive exempts "transactions [...] concerning currency, bank notes and coins used as legal tender". There are, however, language differences between the various language versions of the VAT Directive and, in the Finnish version, the provision only refers to "bank notes and coins" but not to "currency". The ECJ observed, however, that the terms needed to be interpreted in light of the context and the aims and scheme of the VAT Directive: the exemption is intended to alleviate the difficulties of determining the taxable amount and VAT deduction with financial transactions. The court observed that transactions involving non-traditional currencies, such as Bitcoin, are also financial transactions. The transactions by the taxpayer were thus exempt from VAT.

The panelists observed that national courts are generally open to consulting other language versions of the same international legal instrument. Such has been the case, for example, in Hungary and Germany. It was also noted that equality of languages among the different translations generally does not exist and that to prevent relying on what is essentially a bad translation, it makes the most sense to consult either the original languages or the language in which the negotiations take place.

Finally, Judge Pikkujämsä noted that the use of virtual currency also was the subject of discussion in a recent case in Finland. A company developed games for mobile devices, and players of the game were able to buy game money online which could then be used to purchase various goods in the game. The court held that the taxable income from the sales by the company was deemed not to have accrued when the player bought the game money but only when the latter purchased the in-game goods.

6. Session 5 – Human Rights and Taxation

6.1. Panel composition and agenda

The session was chaired by Juliane Kokott, Advocate General to the ECJ. The panel was composed of Justice Michael Beusch (Switzerland), Judge Emmanuelle Cortot-Boucher (France), Justice Jennifer Davies (Australia), Justice Clement Endresen (Norway), Judge Peter Fortuin (Netherlands), Judge Peter Panuthos (United States) and Judge Bernard Peeters (Belgium)

The session was composed of two parts. The first part dealt with substantive issues on human rights and taxation (*see* section 6.2.), and the second part dealt with procedural issues of human rights and taxation (*see* section 6.3.).

6.2. Human rights and taxation: Substantive issues

6.2.1. The basic dilemma: Protection of taxpayers v. the states' need for tax proceeds

Justice Endresen outlined some of his ideas regarding the relationship of taxation and human rights. His main thesis was that, given the nature of taxation, it is hardly conceivable to achieve any taxpayer protection through reliance on international human rights conventions.

While in a representative democracy the level of taxation and the (re)distribution of tax revenue might be the subject of difficult political choices, the necessity of tax is quite obvious: no tax, no society – no society, no property rights.

Taxation has always been considered central to national sovereignty. The internationalization of the tax domain took place mainly in the last decades. The European Convention of Human Rights (ECHR) predates the international tax era, and it seems reasonable to assume that the attitude of national sovereignty towards tax was even more dominant 60 years ago when the ECHR was agreed. This might explain why, in the ECHR's preparatory works, nothing was mentioned about taxes.

Yet two years after the ECHR was agreed, the parties adopted the First Protocol to the ECHR, which provided for every national or legal person's "right to property". At the time of the adoption of the article, it was felt that the issue of taxation had to be addressed. Eventually, the second paragraph of article 1 of Protocol 1, which secures the right of a state to pass necessary legislation, was amended to also "secure the payment of taxes". Paragraph

2 applies regardless of "the preceding provisions" and could therefore reasonably be understood as generally exempting taxation from the application provisions of the ECHR.

It has been well established that the European Court for Human Rights (ECtHR) deems the ECHR to be a living instrument which must be interpreted in light of present-day conditions. Dynamic interpretation, however, must not lead to an interpretation that falls outside the scope of a wide interpretation of the legal instrument because, unlike judicial interpretation, which is permissible, judicial legislation is not.

It is also generally known that, since the 50s when the ECHR was first adopted, average levels of taxation have drastically been reduced. The highest levels of taxation in the 20th century were achieved in the period after the Second World War, amidst the adoption of the ECHR.

The ECtHR has, due to the wide margin of appreciation enjoyed by states in tax matters, not been willing to strike down a domestic tax law as infringing article 1 of Protocol 1. There are some exceptions, but these cases deal with aspects related to taxation, not taxation itself (e.g. the rule of law, procedural aspects of criminal law, retroactivity of tax legislation or discriminatory taxes). In the jurisprudence of the ECHR, however, there are no clear-cut examples in which the ECtHR struck down a substantive tax provision as being excessive or pronounced itself regarding a certain level of taxation and the threshold set by article 1 of Protocol 1.

Yet, these reflections (the historic context of the ECHR, the limits of dynamic interpretation and the lack of clear jurisprudence) are hardly taken into account in recent doctrinal literature by such authors as Baker and Pistone et al. in which the ECHR is hailed as an important tool for keeping both the material and procedural aspects of taxation in check.

6.2.2. Towards a "charter of taxpayer's rights" in Australia?

Justice Jennifer Davis talked about the prospects of a charter of taxpayer's rights in Australia. She observed that Australia does not have a constitutionally protected charter of human rights because it is believed that basic rights and freedoms are adequately protected by the common law and by statutory law. Australia did ratify the International Covenant on Civil and Political Rights (ICCPR), but the convention is not part of Australiana domestic law with respect to taxation. Australia's constitutional power to make tax laws knows no express restrictions, except for the requirement of federal taxes having to be uniform throughout Australia. Constitutional limits, however, have been implied, guaranteeing taxpayers certain protections (e.g. the requirement that tax laws must be based upon ascertainable criteria by which a tax is imposed) and the possibility to contest the application of those criteria through the legal system. As such, the Australian Constitution invests courts with a jurisdiction to compel the tax authorities to act in compliance with the law and to scrutinize excesses of power. Parliament cannot take this jurisdiction away from the judiciary.

In 1997, a Taxpayer's Charter was introduced, setting out the rights and obligations of taxpayers and the tax authorities. Justice Davis noted that the Charter is not binding, but that the tax authorities are expected to comply with it, and that the Charter is said to have been effective in raising the tax authorities' service standards and relationship with taxpayers. On the other hand, it has also been claimed that the Charter has not been effective in promoting and protecting taxpayers' rights, and calls have been made for the adoption of a binding instrument. Reviews of the impact of the Charter are being conducted by the Inspector General in Taxation, an independent statutory agency charged with reviewing and making recommendations regarding the administration of the tax system.

In *Seymour v. Commissioner of Taxation* (2016),[19] the taxpayer was an overseas resident who requested to give evidence with regard to this tax investigation by video link, partly because of his concern that the tax authorities would serve a departure prohibition if he returned to Australia. The Federal Court held that a reasonably based fear of arrest in the circumstances of that case was not a sufficient reason for making the order for evidence by video link; thus, the Court set aside the order by the Administrative Appeals Tribunal, which would have allowed evidence by video link. The decision contrasts rather strikingly with the decision of the UK House of Lords in *Polanski v. Condé Nast Publications* (2005)[20] in which the Lords held that the taxpayer being a "fugitive from justice" was a valid reason to grant a video link order.

In *Commissioner of Taxation v. Donoghue* (2015),[21] a law student interning with the taxpayer's lawyer provided evidence to the tax authorities regarding the taxpayers' affairs under investigation without knowledge of the lawyer or taxpayer. The Federal Court held that the issuance of a tax assessment was based on privileged documents showing a lack of good faith and consisting in an act of conscious maladministration. On appeal, the Full Court[22] reversed the decision. The Court held that the legal privilege should not be seen as a bar to investigation since the privilege is not a rule of law conferring individual rights the breach of which may be actionable. It grants immunity from the exercise of the tax authorities' powers requiring compulsory production disclosure of information, but no action can be taken against the latter for merely receiving the information that is

privileged. The outcome of *Donoghue* contrasts with *O'Neill Motors* (1998)[23] in which the Federal Court of Appeal of Canada held that a tax assessment by the Canadian tax authorities based on information obtained under a warrant which was later held to be unconstitutional was invalid since the seizure of the information was in violation of the taxpayer's rights under the Canadian Charter of Rights. Similarly, in *R. v. He* (2012),[24] the British Columbia Court of Appeal held that the use of audio evidence obtained without adequate warning that the material could be used for the purpose of a tax audit was not admissible because the conduct of the tax authorities was deemed contrary to the Charter's mandate to be free from an unreasonable search or seizure.

In *Denlay v. Commissioner of Taxation* (2011),[25] a taxpayer had challenged the validity of a tax assessment on the ground that the tax authorities had reason to suspect that the information which had led to the assessment and which had been received from third parties had been obtained illegally by the latter. The Federal Court of Australia (Full Court) held that there was no conscious maladministration by the tax authorities. The tax authorities were not obliged to satisfy that a law had not been infringed in the gathering of available information. The use of information suspected of being tainted with some illegality does not narrow the obligation to make a tax assessment using information from tax returns and other sources.

6.2.3. Taxation and the right to property

Judge Emmanuelle Cortot-Boucher presented her findings with regard to the right to property in taxation. She noted that, from the case law of the ECtHR, it could be understood that article 1 of the First Protocol applies to taxation or at least to certain aspects of taxation (*see* section 6.2.1.) and that the CE generally follows this line of reasoning.

From the case law of the ECtHR, it is generally understood that the concept of "possessions" used in article 1 has an autonomous meaning and encompasses all kinds of property (movable, immovable, intangible, etc.) but not the right to acquire property.[26] It does cover a person's legitimate expectations that a certain state of affairs will apply. With regard to taxation, it should be observed that the ECtHR has established that a sufficient basis in domestic law is required (e.g. clear provisions[27] or settled case law[28]). A simple aspiration[29] or a single favourable court decision without settled jurisprudence is not sufficient.[30]

With regard to the issue whether article 1 could limit the right of a state to change tax law, Judge Cortot-Boucher observed that the CE had held that tax law does not create legitimate expectations as long as the tax year is not closed and, thus, material tax law can be changed until the last day of the tax year (31 December in France). This stance by the court is, however, heavily criticized for leaving taxpayers in a state of uncertainty.

In certain cases, article 1 of the First Protocol has prevented the French Parliament from changing tax provisions. In *Société EPI*,[31] the CE held that the repeal in less than three years of a law providing a tax credit to reward companies creating new jobs for a period of three years was contrary to article 1 of the First Protocol because taxpayers had legitimate expectations for the law to apply for at least three years, and no valid justifications were provided to justify its repeal.

With regard to whether article 1 could pose limits to the level of taxes levied by a state, Judge Cortot-Boucher observed that the French Constitution forbids that taxes are confiscatory, but this requirement is understood to be based on the principle of equality of public charges rather than on the right of property. To this extent, the *Conseil Constitutionnel* (Constitutional Court, CC) has held that a wealth tax may rely on assets from which no income is derived, provided that the amount of tax due is related to the contributory capacity of the taxpayer.[32] To this extent, the CC also held that a supplementary tax raising the effective rate suffered by a taxpayer to 75% is not proportionate to the contributory capacity of the taxpayer if all the income of the members of the latter's household are not taken into account.[33] However, the Constitution does not provide for a "tax shield". The parliament has nevertheless created a statutory tax shield, which creates a right for taxpayers to be reimbursed to the extent their income tax due exceeds 60% (2005)[34] or 50% (2006)[35] of their global income.

Judge Cortot-Boucher noted that the approach regarding the right to property and wealth tax adopted by the CC differs from the one adopted by its German counterpart, which had held that a wealth tax based on assets that did not produce income infringed the right to property because without any yield the tax did not leave the substance of the asset intact.

6.2.4. Practical examples from the Dutch perspective

Judge Peter Fortuin provided some examples from the Dutch perspective. With regard to article 6 of the ECHR ("right to a fair trial"), he observed that the ECtHR has observed that the provision is not applicable with regard to tax assessments, while it does apply to the administering of administrative fines.[36] In the same line, the Dutch Supreme Court (*Hoge Raad*, HR) has held that a payroll tax rate of 60% on wages which have not been identified by the employer was not a punitive sanction, and the administering fell outside the scope of article 6.[37]

With regard to the right to a fair trial within a reasonable time, which is also encompassed by article 6, Judge Fortuin observed that the HR had set the maximum term of six years (two years in first instance, two years on appeal and two years before the HR) in (criminal) litigation.[38] For procedure that would run beyond the term, a reduction of administrative fines and a compensation of damages (EUR 500 per six months delay) is due.

With regard to article 8 of the ECHR ("right to respect for private and family life"), Judge Fortuin observed that a case is currently pending at the HR regarding the use for tax purposes of data on car ownership. The AG concluded that the use of data collected by the police was legal, whereas data collected by the tax authorities was not lawful. It should be noted that the powers of the tax authorities to request information on the basis of tax law are not a violation of article 8 because these are deemed to be an "interference by the public authority necessary in a democratic society in the interest of the economic wellbeing of the country".[39]

With regard to article 1 of the First Protocol ("right to property") Judge Foruin noted that the HR had held that the taxpayer's lack of option to contest the receipt of a notice served by the tax authorities to pay a tax (and to avoid penalties, etc.) violated the right to property.[40] Similarly, the impossibility of taxpayers being able to rely for tax purposes on the real value of assets instead of having to rely on (slightly different) fixed value was seen as violating the right to property.[41] After these decisions by the HR trickled down in a large series of lower court decisions on similar issues, the HR became far more reluctant in applying article 1 of the First Protocol, granting the legislator a much wider (too wide, according to some commentators) margin of appreciation.[42] In a recent case regarding the Dutch "box 3" system, according to which individuals' passive investment income is taxed at 30% on a fictional yield of 4% on the individual's assets, the HR held that a fiction should approach reality, but that the 4% yield fiction was within the margin of appreciation of the legislator and would only violate article 1 if a 4% yield would be unrealistic, which is currently not the case.[43]

6.3. Human rights and taxation: Procedural issues

6.3.1. Taxpayers' access to justice in the United States

Judge Peter Panuthos talked about access to justice and procedural issues of human rights and taxation in the United States. He observed that the US tax authorities (IRS) adopted a Taxpayer Bill of Rights (TBOR) in 2014, which includes, inter alia, the right to challenge the IRS' position and the right to appeal an IRS decision to an independent forum.

The right to challenge decisions by the IRS before formal litigation is commenced is reflected in the taxpayer's right to make an informal protest before the IRS Office of Appeals. The entity is separate from and independent of the IRS office that conducted the tax audit, and the IRS Appeals officer has authority to negotiate and settle the issue on behalf of the IRS. Taxpayers can be self-represented or be represented by a "federal authorized practitioner". The Office of Appeals also provides arbitration and mediation options in limited circumstances. If parties cannot come to an acceptable outcome, the IRS Appeals officer will issue a statutory notice of deficiency, informing the taxpayer that he has the right to appeal to an independent forum, i.e. he may file a petition before the Tax Court.

In many tax cases, taxpayers have the option to appeal to three trial-level courts: the Tax Court (as mentioned in the notice) but also the Court of Federal Claims and the District Courts. However, in practice, most tax cases are filed in the Tax Court since appellants have to pay the deficiency only if their case is unsuccessful, unlike the other courts.

In many cases filed in the Tax Court, taxpayers are self-represented. The Court has taken important measures to safeguard access to justice for these taxpayers by providing them with booklets on the procedural rules, websites, videos and judicial officers to explain procedures.

The right to appeal to independent bodies requires the Tax Court to be fully independent, both politically and structurally. Generally speaking, taxpayers are more often than not unsuccessful in cases before the Tax Court; however, in many instances, the nature of the case is such that the Court has no choice but to hold in favour of the IRS.

To safeguard access to justice, judges are allowed to take a more active role in assisting self-represented taxpayers but only without giving them an unfair advantage. Represented taxpayers generally obtain a better result when dealing with the IRS or before the Tax Court than self-represented taxpayers. To this extent, the Taxpayer Advocate Service (TAS) is an independent organization inside the IRS that helps unrepresented taxpayers resolve issues that are not solved through administrative appeals. The TAS also works on systematic changes required in large-scale problems experienced by groups of taxpayers. Since 1998, qualifying organizations have organized low-income taxpayer clinics (LITC) to provide assistance and legal services to low-income taxpayers and to organize "calendar call" programmes in cooperation with the Tax Court. During a

calendar call, the Court informs the self-represented petitions about their ability to seek free legal assistance and aims to achieve a pre-litigation settlement of the case or a narrowing of the issues for trial.

Finally, the Department of Justice's Office for Access to Justice addresses concerns about rights of individuals in the criminal and civil justice system, including taxpayers. It aims to increase access to counsel and legal assistance by advocating for policies that help deliver legal aid to low-income individuals.

6.3.2. Privacy, secrecy and data protection

Justice Michael Beusch presented his views on the issue of the protection of sensitive data in times of exchange of tax information (EoI). He noted that tax returns contain a high amount of sensitive data (civil status, names of children, religious affiliation, donations, medical reports, etc.) to the extent that "your tax authorities know you best". In cross-border exchanges of tax information, however, there seems to be less attention to the protection of taxpayer rights. For exchange of information on request, the issue is the procedural aspects of the notification of the taxpayer and his right to be informed and challenge the EoI procedure in court. There is a general legislative trend among countries not to grant that right, with Switzerland being a notable exception.[44] In the field of automatic exchange of information, most questions concern the gathering of financial data. Does the taxpayer have the right to access the data bound for delivery in order to correct inaccuracies? Does the taxpayer have the right to challenge the delivery of the data? Does the supplying state have to take into account the level of data protection in the receiving state?

Another issue is the "naming and shaming" of tax evaders. Confidentiality is of high importance in tax law: information supplied to the tax authorities must be kept confidential. Solid encryption helps to safeguard confidentiality and so does control of access to the data. The practice of publicly disclosing the identity of taxpayers and their revenues poses certain questions, depending on whether it happens as part of a general transparency policy of a state or in order to "name and shame" a taxpayer. Similarly, taxpayers might (or might not) suffer reputation risks due to public hearings before courts and because of governments and NGOs requiring the taxpayer to "show some patriotism" and "bear a fair share of tax", even in cases where no taxes are legally due and there is no tax evasion at stake. Judge Beusch concluded by raising the question: at what point might judges (have to) enter the scene and take action?

6.3.3. Interpretation of the same or similar fundamental rights by different courts

Judge Bernard Peeters presented some of his conclusions with regard to the overlap of legal instruments covering identical or similar fundamental rights within the European Union. He noted that article 6 of the TEU provides that the European Union adheres to the Charter of Fundamental Rights of the European Union (the "EU Charter") and that the European Union has or had the intention to accede the ECHR. At the same time, many fundamental rights simultaneously guaranteed by the EU Treaty and the ECHR are also enshrined in the national constitutions of EU Member States. As a consequence, different courts (the ECtHR, the ECJ, national constitutional courts) have jurisdiction with respect to the interpretation of fundamental rights.

Judge Peeters noted that the Belgian Constitutional Court originally had jurisdiction to assess the compatibility of national legislation against fundamental rights enshrined in the Belgian Constitution. The lower courts, on the other hand, can verify national legislation against the Belgian international agreements like the ECHR, which contains similar fundamental rights. This *guerre des juges* has been resolved in 2009 by the introduction of statutory law which obliges lower courts to seek an interlocutory ruling by the Constitutional Court with regard to questions of fundamental rights covered both in the constitution and international agreements.

Judge Peeters observed that, in France, a similar rule exists, although referral to the French Constitutional Court by a lower court is not compulsory. The French rule has been subject of a preliminary question to the ECJ because it obliges the lower court to decide on the referral to the Constitutional Court of issues of fundamental rights which are enshrined in the French Constitution but at the same time are also part of EU Law. In *Melki* and *Abdeli* (C-188/10 and 189/10), it was held that such a domestic rule is contrary to EU law (i.e. article 267 of the TFEU) unless the national courts have the possibility at any stage of the proceedings to refer the question also to the ECJ.

With regard to the Belgian rule, Judge Peeters noted that it requires lower courts to refer the question first to the Constitutional Court. This nuance made most commentators believe that the rule is compatible with EU law since it seems to allow simultaneous referral to both the Constitutional Court and the ECJ. The exact same question was submitted to the ECJ by a lower court in a case involving the retroactive application of a tax provision with regard to the statutory limitation on the recovery of tax debts. The ECJ held, however, that it had no jurisdiction because the fact concerned a purely domestic matter. Nevertheless, Belgium decided to amend the provision in 2014 to expressly clarify that it does not preclude lower courts to refer a preliminary question simultaneously to

both the Constitutional Court and the ECJ.

Interestingly, the main issue of the retroactive application of the tax provision had also been submitted to the ECtHR. In *Optim & Industerre*,[45] the ECtHR held that the expectation that the limitation period would operate to bar the recovery of a tax debt was not a "possession" covered by article 1 of the First Protocol.

7. Exotic Topic: Taxes in the Movies

As tradition requires, the IATJ assembly was concluded by an extraordinary session on an exotic topic. In this year's edition, Cancio Fernández of the *Tribunal Supremo* took the audience on a journey through the history of taxation in Spanish and international cinema, from the Sheriff of Notthingham as the evil tax collector in *Robin Hood* (1938) to Scarlett O'Hara's most famous tax debt in *Gone with the Wind* (1939).

Frankly, my dear, I don't give a damn. Yet, some of these old pictures capture surprisingly present-day sentiments. In Disney's *New Spirit* (1942), Donald (Duck, not Trump) is reminded of his Yankee Doodle duties: "Are you a patriotic American, eager to do your part?" – "Yes, yes" – "Then there is something important that you can do!" – "Ow boy, ow boy, ow boy" – "You won't get a medal for doing it, it may mean a sacrifice on your part but it will be a vital help to your country in this hour of need! Shall I tell you what it is?" – "Yes tell me, tell me!" – "Pay your income tax!"

---

* **Editor of IBFD's Tax Treaty Case Law database. The author can be contacted at b.michel@ibfd.org.**

1. It should be noted that, at the time of the presentation, the text of the MLI was not yet available, at least not to the public. The text of the MLI was officially adopted and released on 24 November 2016. A first group of jurisdictions is expected to sign the MLI in June 2017. The text of the MLI is available at: http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.
2. Paragraph 7 of the OECD Commentary on Article 25 of the OECD Model.
3. ECJ: 12 Sept. 2006, *Cadbury Schweppes*, No. C-196/04.
4. FR: CE, 9 Nov. 2015, *Santander Pensiones SA EGFP*, No. 371132, Tax Treaty Case Law IBFD.
5. FR: CE, 9 Nov. 2015, *Landesarztekammer Hessen Verzorgungswerk (LVH)*, No. 370054, Tax Treaty Case Law IBFD.
6. FR: CE, 20 May 2016, *Sté Easyvista*, No. 389994, Tax Treaty Case Law IBFD.
7. *Vienna Convention on the Law of Treaties* (23 May 1969), Treaties IBFD.
8. AU: FC, 7 Oct. 2015, *Tech Mahindra v. Commissioner of Taxation*, [2015] FCA 1082, Tax Treaty Case Law, IBFD.
9. *Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (25 July 1991), Treaties IBFD.
10. It should be noted that the decision by the FCAFC has been made available in the meantime. The Full Federal Court of Australia unanimously upheld the decision of the FCA. *See*: AU: FC (Full Court), 22 Sept. 2016, *Tech Mahindra v. Commissioner of Taxation*, [2016] FCAFC 130, Tax Treaty Case Law, IBFD.
11. IN: ITAT, 29 July 2016, *Iveco Spa*, No. 5696/2012), Tax Treaty Case Law, IBFD.
12. *Convention between the Government of the Republic of Italy and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (19 Feb. 1993), Treaties IBFD.
13. At the time of writing this report, the decision of 16 September 2016 in case 2C_276/2016 has not been released yet. For a press release by the Court regarding the case, *see* http://www.bger.ch/fr/press-news-2c_276_2016-t.pdf.
14. *Convention between the Kingdom of the Netherlands and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income* (26 Feb. 2010), Treaties IBFD.

15. DE: BVerfG, 12 Feb. 2016, 2 BvL 1/12, Tax Treaty Case Law, IBFD.
16. *Agreement between the Federal Republic of Germany and the Republic of Turkey for the Avoidance of Double Taxation and of Tax Evasion with Respect to Taxes on Income* (19 Sept. 2011), Treaties IBFD.
17. HU: ECJ, 17 Dec. 2015, Case C-415/14, *WebMindLicences Kft. v. Nemzeti Adó és Vámhivatal Kiemelt Adó és Vám Főigazgatóság.*
18. FI: ECJ, 22 Oct. 2015, Case C-264/14, *Skatteverket v. David Hedqvist.*
19. AU: FC (Full Court), 2 Mar. 2016 *Seymour v. Commissioner of Taxation*, [2016] FCAFC 18.
20. UK: House of Lords, *Polanski v. Condé Nast Publications Limited*, 10 Feb. 2005, [2005] UKHL 10.
21. AU: FC, 17 Mar. 2015, *Donoghue v. Commissioner of Taxation*, [2015] FCA 235.
22. AU: FC (Full Court), 17 Dec. 2015, *Donoghue v. Commissioner of Taxation*, [2015] FCAFC 183.
23. CA: Court of Appeal, *O'Neill Motors v. R.*, [1998] DTC 6424.
24. CA: Court of Appeal, *R. v. He*, [2012] BCCA 318.
25. AU: FC (Full Court), 11 May 2011, *Denlay v. Commissioner of Taxation*, [2011] FCAFC 63.
26. ECtHR, 13 June 1979, *Marckx v. Belgium*, No 6833/74.
27. ECtHR, 16 April 2002, *SA Dangeville v. France*, No. 36677/97.
28. ECtHR, 23 July 2009, *Joubert v. France*, No. 30345/05.
29. ECtHR, 28 Sept. 2004, *Kopecky v. Slovakia*, No. 4491/98.
30. ECtHR, 19 Dec. 2004, *Caisse régionale de crédit agricol mutual Nord de France*, No. 58867/00.
31. FR: CE, 9 May 2012, *Ministre du Budget v. Société EPI, the Conseil d'Etat*, No. 308996.
32. FR: CC, 29 Sept. 2010, *Epoux Mathieu*, 2010-44 QPC.
33. FR: CC, 29 Dec. 2012, 2012-662 DC.
34. FR: CC, 29 Dec. 2005, No 2005-530 DC.
35. FR: CC, 16 Aug. 2007, No. 2007-555 DC.
36. ECtHR, 12 July 2001, *Ferrazzini*, No. 44759/98.
37. NL: HR, 28 Jan. 1998, No. 32732.
38. NL: HR, 22 April 2005, No. 37984; and NL: HR, 10 June 2011, No. 09/02639.
39. Art. 8(2) of the ECHR.
40. NL: HR, 10 July 2009, No. 08/01578.
41. NL: HR, 22 Oct. 2010, No. 08/02324.
42. *See*, for instance, NL: HR, 11 July 2014, No. 13/02731.
43. NL: HR, 10 June 2016, No. 14/05020.
44. The Swiss view is meanwhile shared by the AG of the ECJ in the opinion issued in the *Berlioz* case [C-682/2015] on 10 Jan. 2017.
45. ECtHR: 12 Sept. 2012, *Optim & Industerre v. Belgium*, No. 23819/06.

Citation: B. Michel, *Report of the Proceedings of the Seventh Assembly of the International Association of Tax Judges Held in Madrid on 30 September and 1 October 2016*, 71 Bull. Intl. Taxn. 7 (2017), Journals IBFD