



FIELD COURT TAX CHAMBERS

International Association of Tax Judges – 11<sup>th</sup>  
Assembly, 22<sup>nd</sup> October 2021

# Taxpayers and their Rights in the Courtroom

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NB PB Speaking in personal capacity

Focus is on rights under international human rights instruments, and the right to a fair trial

Focus is on those matters under the control of the tax judge



# Agenda

A. The right to a fair trial under international human rights instruments

B. Some aspects of the right to a fair trial in tax cases

Reference to the IATJ Special Issue of the *Bulletin for International Taxation*



A. The right to a fair trial under international human rights instruments



## A. 1. Universal Declaration of Human Rights, 1948, Article 10

- “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”



## A. 2. International Covenant on Civil and Political Rights, 1966, Article 14

- “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”



## A. 3. American Convention on Human Rights, 1969, Article 8

- “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”



## A. 4. European Convention on Human Rights, 1950, Art. 6

- “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial ... where ... the protection of the private life of the parties so require ...”





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## A. 5. Charter of Fundamental Rights of the EU, 2000, Art 47

### **“Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”



## A. 6. The Ferrazzini fallacy

- Ferrazzini v. Italy (44759/98 – case pending for 13 years without hearing): Art. 6 does not apply to ordinary proceedings for the determination of a tax liability (Grand Chamber - 11:6 majority)
  - “the determination of his civil rights and obligations or of any criminal charge”
- Case decided without a hearing; parties may not have been fully represented
- Failure to discuss equivalent protections under other human rights instruments (doctrine of equivalent protection)



## A. 6. The Ferrazzini fallacy

- Social security taxes are covered by Art 6: Schouten & Meldrum v. Netherlands (19005/91)
- Note: the changed jurisprudence on civil servants: Vilho Eskelinen And Others V. Finland (Grand Chamber: 63235/00)
- Taxation (and immigration) remain(s) one of the few areas excluded from Art. 6
- A growing number of courts assume that Ferrazzini is wrongly decided



# Summing up on the right to a fair trial

- Common themes in the international instruments:
- Right to a fair hearing
- In public
- Within a reasonable time
- By a [competent], independent and impartial tribunal



B. Some aspects of the right to a fair trial in tax cases



## B. 1. the right to a hearing

- Is there a right to an oral hearing?
- Practice varies
  - *Bulletin of International Taxation* gives examples – e.g. Mexico (almost all in writing)
  - Lehtinen v. Finland (32993/02) – no right to an oral hearing: BUT issues of credibility of witnesses require an oral hearing – breach of Art 6
  - Chap v Armenia (15485/09) – penalty case – breach of Art 6 by refusal to allow cross-examination of witnesses
  - Pakozdi v Hungary (51269/07) tax surcharge – right to cross-examine witness



## B. 2. a fair and **public** hearing

- Potential conflict between the administration of justice in public, and the right to privacy of personal information
- Danger of deterring taxpayers from challenging a tax assessment for fear of publicity (especially, adverse publicity)
- Possible solutions:
  - General principle of hearings in public, with the taxpayer's option for hearings behind closed doors
  - Or the converse



## B. 2. a fair and **public** hearing

- *Bulletin for International Taxation*
  - Germany – public hearings, but the taxpayer may ask for the public to be excluded (which must be granted)
  - Ireland – 100% of taxpayers have asked for *in camera* hearings
  - Korea – hearings are in public, but personal details may be withheld
  - Netherlands – hearings are behind closed doors unless the court rules that the hearing is to be in public
- Note: court reports may be anonymised







## B.3. the right to a determination **within a reasonable time**

- Possible solutions
  - Fixed timetables for hearings and decisions – e.g. the Netherlands – written decision within 6 weeks of a hearing
  - Netherlands – 2 years allowed for each instance; 500 Euros compensation for each half-year delay
- Courts should be more proactive: If a case has already exceeded a reasonable time frame, every day of delay by the tribunal infringes taxpayers' rights
- Monetary compensation is not an adequate remedy



## B. 4. the right to an independent and impartial tribunal

- The problem of the unrepresented / badly represented taxpayer: should the trial judge step in? Does this risk the appearance of partiality?
- Possible solutions: *Bulletin* article
  - Indicating the relevant statutory rules that need to be satisfied
  - Legal aid in tax matters
  - Pro bono advisory services – e.g. law clinics



## B. 5. ... a competent tribunal

- The growing complexity of tax issues – is anyone competent in all areas?
- Is there a need / right for specialised tax judges to hear certain cases?
- Should the tribunal administration be required to direct cases to judges with specialised expertise in particular areas?
- Possible solutions:
  - The high level of expertise in some tax courts – e.g. Hoge Raad; Bundesfinanzhof; Conseil d'Etat
  - Sitting with specialist assessors in some cases e.g. transfer pricing



## Concluding comments

- The right to a fair trial imposes relatively few, basic requirements
- The *Bulletin* articles display a variety of practices
- Some countries may already comply with all requirements
- Some countries may need to reconsider their practices, especially with respect to delay (often arising from inadequate resources)



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